IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF EYAK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GARY LOCKE, Secretary of Commerce,	)	
	)	No. 3:98-cv-0365-HRH
Defendant.	)	
	)	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I.

Proceedings up to Trial

Plaintiffs are the Alaska Native Villages of Eyak, Tatitlek, Chenega,[1] Nanwalek,[2] and Port Graham. They claim nonexclusive hunting and fishing rights in the Outer Continental Shelf (OCS).[3] Defendant is Gary Locke,[4] the Secretary of Commerce, who, pursuant to the Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-

[1]The court's docket lists this village as "Chanega," which is another name by which this village is known.

[2]The Native Village of Nanwalek was formerly known as English Bay.

[3]The OCS is "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 [of the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control[.]" 43 U.S.C. § 1331(a).

[4]Gary Locke is substituted for his predecessor, Carlos Gutierrez, pursuant to Rule 25(d), Federal Rules of Civil Procedure.

1891d, manages fisheries in a two-hundred-mile belt of ocean waters known as the Exclusive Economic Zone (EEZ).[5]

Plaintiffs originally filed suit in 1995, asserting exclusive aboriginal hunting and fishing rights in the OCS. That suit was captioned Native Village of Eyak v. Trawler Diane Marie, Inc., Case No. A95-0063-CV (HRH), and was filed against the Secretary of Commerce and others. Plaintiffs alleged that they were entitled to exclusive use and occupancy of their respective areas of the OCS, including exclusive hunting and fishing rights, based upon unextinguished aboriginal title. The Secretary, pursuant to the Magnuson Act and the Northern Pacific Halibut Act of 1982, had promulgated regulations in 1993 limiting access to the sablefish and halibut fisheries in the Gulf of Alaska and Lower Cook Inlet. Plaintiffs challenged these regulations on the ground that they improperly authorized non-tribal members to fish within plaintiffs' exclusive aboriginal territories while prohibiting plaintiffs' members from doing the same, absent an Individual Fishing Quota (IFQ) share. Plaintiffs requested an injunction against the Secretary's regulations and a declaration that they held aboriginal title and exclusive aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters, and to the mineral resources within their traditional use areas of the OCS.

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[5]The EEZ is "[a]n area just beyond the territorial sea, extending up to 200 nautical miles from the baseline of the territorial sea, in which the coastal country enjoys special authority for economic purposes." Black's Law Dictionary 607 (8th ed. 2004).

This court decided the aboriginal title issue on cross-motions for summary judgment, granting the federal defendants' motion and denying plaintiffs' motion. The court held that: (1) federal paramountcy precludes aboriginal title in the OCS, and (2) there is no exclusive aboriginal right to fish in navigable waters based on aboriginal title outside of a treaty or federal statute.

Plaintiffs appealed this court's decision to the Ninth Circuit. See Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998). On appeal, the Ninth Circuit held that "the Native Villages are barred from asserting exclusive rights to the use and occupancy of the OCS based on unextinguished aboriginal title" because of the federal government's paramount interest in the OCS. Id. at 1097.

Plaintiffs subsequently filed the instant suit on November 12, 1998, in which they once again challenge the 1993 halibut and sablefish regulations promulgated by the Secretary. Plaintiffs now assert nonexclusive aboriginal hunting and fishing rights in the OCS. Plaintiffs' complaint contains two counts. In Count I of their complaint, plaintiffs allege that the Secretary's failure to protect their aboriginal rights from the adverse impact of the IFQ regulations and other halibut and sablefish regulations violate plaintiffs' nonexclusive aboriginal rights to hunt, fish, and exploit the natural resources of the OCS. In Count II, plaintiffs allege that the Secretary's failure to protect their aboriginal rights violated the Indian Nonintercourse Act, 25 U.S.C. § 177. Plaintiffs seek a declaration confirming their nonexclusive

aboriginal hunting and fishing rights in the OCS of Alaska, an order prohibiting the Secretary from authorizing or permitting interference with such rights, and an order declaring void any commercial or non-commercial regulations that prevent or restrict plaintiffs' members from exercising their aboriginal rights as violative of federal common law and the Indian Nonintercourse Act.

The parties filed cross-motions for summary judgment. In an order dated September 25, 2002, the court held "that plaintiffs' claim of non-exclusive aboriginal hunting and fishing rights in the OCS cannot exist as a matter of law due to the United States' paramount sovereignty[.]"[6] The court granted the Secretary's motion for summary judgment in part and dismissed Count I of plaintiffs' complaint.[7] The court expressed doubts as to the viability of plaintiffs' Count II, but declined to dismiss Count II because the parties had ignored Count II in their briefing on the cross-motions for summary judgment.[8]

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[6]Order re Cross-Motions for Summary Judgment at 36, Docket No. 42. In the same order, the court rejected the Secretary's arguments that the court did not have subject matter jurisdiction over plaintiffs' challenge to the sablefish regulations and that plaintiffs' challenge to the halibut regulations were barred by the statute of limitations. Id. at 17 and 21. The court also rejected the Secretary's argument that if plaintiffs had nonexclusive aboriginal hunting and fishing rights in the OCS and the EEZ, those rights had been extinguished by the Russians. Id. at 32. Finally, the court rejected plaintiffs' argument that they had acquired non-exclusive hunting and fishing rights in the OCS based on custom and prescription. Id. at 35.

[7]Id. at 36.

[8]Id. at 35-36.

Plaintiffs moved for reconsideration of the court's order granting the Secretary summary judgment and dismissing Count I of their complaint.[9] The court granted plaintiffs' motion for reconsideration.[10] Upon reconsideration, the court readopted its holding as to Count I and dismissed Count II of plaintiffs' complaint.[11] Judgment was entered dismissing plaintiffs' complaint with prejudice.[12]

Plaintiffs appealed. The Ninth Circuit voted to hear the case en banc. The Ninth Circuit determined that it "would be greatly assisted by an initial determination by the district court of what aboriginal rights, if any, the villages have." Eyak Native Village v. Daley, 375 F.3d 1218, 1219 (9th Cir. 2004). The court of appeals vacated this court's "order granting summary judgment for defendant[]" and remanded "with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, the plaintiffs have." Id. The court of appeals instructed that "[f]or purposes of this limited remand, the district court should assume that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." Id.

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[9]Docket No. 43.

[10]Order re Motion for Reconsideration at 8 (Nov. 14, 2002), Docket No. 49.

[11]Id.

[12]Docket No. 50.

On remand, after input from the parties, the court denied the reinstated cross-motions for summary judgment[13] and established a briefing schedule for a new round of summary judgment motions.[14] Although it was contemplated that the parties would again file cross-motions for summary judgment, only the Secretary chose to file a motion for summary judgment.[15]

The court denied the Secretary's motion for summary judgment.[16] The court concluded that there were genuine issues of material fact as to "both the nature and the extent of plaintiffs' aboriginal rights on the OCS in the Gulf of Alaska"[17] and "in the Lower Cook Inlet[.]"[18]

After the denial of the Secretary's motion for summary judgment, this matter was tentatively set for trial in March 2008.[19] The March 2008 trial date was subsequently continued, and trial in this matter commenced on August 18, 2008. At the conclusion of the trial, provisions were made for the filing of written briefs in lieu of closing arguments. At the Secretary's request, provision also was made for separate briefing on the legal issue of whether

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[13]Docket No. 67.

[14]Docket No. 66.

[15]Docket No. 74.

[16]Docket No. 106.

[17]Id. at 11.

[18]Id. at 12.

[19]See Docket No. 111.

aboriginal rights can exist in the OCS. The post-trial briefing is now complete.[20]

II.

Findings of Fact

Having heard the trial evidence, having reviewed a transcript of that evidence, and having reviewed the exhibits admitted into evidence during the trial, the court now makes the following findings of fact. In making these findings, the court has placed the burden of proof (preponderance of the evidence) upon plaintiffs to establish the contentions of their complaint. In making these findings, the court has taken into consideration the opinions of the experts called by the parties. The court finds all of the experts to be qualified to offer opinions in their respective areas of expertise; however, the court has found the opinions of some of the experts more persuasive than those of others. In this process, and by and large without objection from any party, the parties' respective experts have often testified at great length and placed significant reliance upon the opinions of other experts in such disciplines as anthropology and archeology who were not called as witnesses.

[20]The briefing on the primary issue of whether plaintiffs have nonexclusive aboriginal hunting and fishing rights in the OCS is located in the record as follows: Plaintiffs' Opening Brief, Docket No. 224; Defendant's Brief in Response, Docket No. 225; and Plaintiffs' Reply Brief, Docket No. 235. The briefing on the legal issue of whether aboriginal rights can exist in the OCS is located in the record as follows: Defendant's Opening Brief, Docket No. 223; Plaintiffs' Brief in Response, Docket No. 227; and Defendant's Reply Brief, Docket No. 233.

Because of the nature of the plaintiffs' claims (aboriginal hunting and fishing rights), it is the pre-contact culture that is critically important to plaintiffs' claims. Interestingly, the experts on both sides rely substantially upon the same, non-testifying experts who provide the most authoritative analysis of the culture of Native Americans occupying the south and southwest coast of the Lower Kenai Peninsula and Prince William Sound. The testifying experts' opinions are based upon very little independent, new investigation of the culture of the people of Prince William Sound and the Lower Kenai Peninsula at and before contact with Europeans. The seminal work as regards the pre-contact culture of the areas in question was done between 1930 and 1950 by Kaj Birket-Smith and Frederica de Laguna. It is the work and writings of these investigators which is to a large degree the basis for the opinions of the testifying experts and the findings of the court.

The court finds as follows:

A. Geography

The area in which plaintiffs claim hunting and fishing rights is variously referred to by the attorneys and witnesses as the Outer Continental Shelf (OCS) or the Exclusive Economic Zone (EEZ). The terms are used interchangeably to have reference to those navigable, marine waters of the United States that extend beyond the three-mile limit from mean high tide which is the boundary between the EEZ and Alaska territorial waters. In evaluating the plaintiffs' claims of pre-contact, aboriginal rights, the parties discuss the following.

- Kodiak Island: a large, resource rich island lying southwest of the areas of interest to plaintiffs.
- Barren Islands: a small group of islands lying between Kodiak Island and the southwest end of the Kenai Peninsula. The Barren Islands lie within the EEZ and are surrounded by state territorial waters extending out three miles.
- Kayak Island: a small island in the Gulf of Alaska, the easternmost point of the area claimed by plaintiffs. Kayak Island is surrounded by a discrete, three-mile limit on three sides. The eastern end of the island is less than three miles from mainland Alaska. Kayak Island is well east of both the Copper River and Prince William Sound.
- Lower Cook Inlet: a large, marine embayment, bounded on the west by the Alaska Peninsula, on the east by the Kenai Peninsula, and on the north by Kalgin Island. The three-mile limit dividing Upper and Lower Cook Inlet runs from Harriet Point to Cape Ninilchik, just below Kalgin Island. Lower Cook Inlet is and probably was at contact a rich marine resource area.
- Kachemak Bay: an embayment near the southwest end of the Kenai Peninsula. Kachemak Bay is state water.

- Kamishak Bay: an embayment on the west side of Lower Cook Inlet opposite Kachemak Bay. Kamishak Bay is state water.
- Copper River Delta (and flats): these areas lie northeast of Prince William Sound. The Copper River and the delta are, and probably were at contact, a very rich marine resource area.
- Wessels Reef: a shallow area rich in marine resources lying approximately halfway between Hinchinbrook and Middleton Islands.
- Hinchinbrook Island: a large barrier island separating the Gulf of Alaska from Prince William Sound.
- Middleton Island: a small, remote island some 50 miles south of Hinchinbrook Island. A strong, reliable ocean current flows out of Prince William Sound in a southerly direction to Middleton Island. Middleton Island is within the EEZ and is surrounded by state territorial waters extending out three miles.
- Lower Kenai Peninsula: the southwest and southeast coasts of the Kenai Peninsula are very rugged, mountainous, and indented by narrow bays or fjords. Two of the plaintiff villages are located on the coast at the southwest end of the Kenai Peninsula. Archeological work has been done at several other

possible, pre-contact village sites on the south-east coast of the Kenai Peninsula between the extant villages and Resurrection Bay, e.g., Nuka Bay.

- Prince William Sound: a very large, elliptically-shaped, resource rich, marine area having some 2,700 miles[21] of shoreline. Prince William Sound is entirely Alaska territorial waters.
- The Villages: the Native Village of Chenega is located on Chenega Island, west of Knight Island Passage, at the west end of Price William Sound. The villages of Port Graham and Nanwalek are on the southwestern tip of the Lower Kenai Peninsula. The Native Village of Tatitlek is located on the main-land, east of Valdez Arm and east of Bligh Island within Prince William Sound. The Native Village of Eyak is arguably located beyond Prince William Sound, on the mainland east of Orca Inlet and Cordova which are at the far east of Prince William Sound. The once-abandoned Native Village of Nuchek was located on the north side of Port Etches, a harbor at the northwest end of Hinchinbrook Island.

[21]The court believes that this number does not include all small islands nor all embayments of Prince William Sound.

B. Culture / Demography

The critical point in time for purposes of plaintiffs' claims is the first contact between Native Alaskans and Europeans. Our focus is the nature and culture of the plaintiffs' predecessor villages at the time of contact and before. The parties generally agree that first contact took place for purposes of Prince William Sound and the Lower Kenai Peninsula between 1741 and 1778.[22] For purposes of plaintiffs' claims, the court finds that the relevant and substantial first time of contacts occurred between 1778 and 1793.

At contact, Kodiak Island, the southwest corner of the Kenai Peninsula, and Prince William Sound were occupied by two major but distinct subgroups of ethnic Alutiiq people. One subgroup occupying Kodiak Island was recognized by themselves and by others as Koniag; the other subgroup, occupying Prince William Sound and the south and southwest coast of the Kenai Peninsula, was recognized by themselves and others as Chugach. At and before contact, the Eyak were a separate Athabascan subgroup, as were their neighbors to the

[22]Vitus Bering probably landed on Kayak Island in 1741. He had no meaningful contact with the indigenous people. Between 1750 and 1790, there was ever-increasing contact between the indigenous people and the Russians who were exclusively interested in harvesting sea otter; the English, principally Cook and Portlock in the 1780s; the Spanish; and, toward the end of the initial contact period, Americans. The British and Spanish were essentially explorers. The Americans were traders whom the Russians viewed as poaching in their (Russian) territory. While the Bering and Cook expeditions both had with them officers having some scientific background, none of them undertook what would today be considered scientific, anthropological or other similar inquiries. We have only sketchy reports that do extremely little to illuminate the important issues presented by plaintiffs' claims.

east and south, the Tlingit. Another Athabascan subgroup, the Dena'ina, occupied Upper Cook Inlet at contact and were expanding southward down the east and west shores of Cook Inlet.

The Koniag occupied Kodiak Island, nearby smaller islands, and the adjacent coast of the Alaska Peninsula. The Barren Islands were probably unoccupied. The Chugach occupied at various pre-contact times probably five or six sites on the coast and islands of Prince William Sound and two or three sites on the south and southwest coastal areas of the Kenai Peninsula. The Tlingit occupied the North Pacific Coast, east and southward beyond Icy Bay. At or about and after contact, the Eyak were being absorbed by the people of Prince William Sound and the Tlingit. At some point after contact, and certainly by historic times, the ancestral Eyak village had become a Chugach village, culturally and linguistically. Each plaintiff village's pre-contact, predicate community was occupied by people who were ethnologically (racially) the same (or similar in the case of the Eyak).

Anthropologists estimate the Chugach population of Prince William Sound and the Lower Kenai Peninsula at or about the time of contact at between 400 and 1,500 people. In fact, there is very little evidentiary basis for these opinions, but they are the best we have.[23] There is no evidence of there having been "starving

[23]The concern here is that more likely than not, after contact and especially as a consequence of Russian fur traders locating several fur trading posts in Prince William Sound (one near Nuchek), the Native population was severely affected by diseases introduced by these Europeans. As a consequence, the pre-contact population could have been larger than the estimates, which are (continued...)

times" at or before contact. For reasons that are not well known or understood, the pre-contact population of Prince William Sound may in fact have been less than 500 people and (whatever number is used) well below the population that the area and its resources could have supported. The Copper River Delta area, Prince William Sound, some portions of the OCS south of Prince William Sound (e.g., the Wessels Reef area), and the waters surrounding Middleton Island and the Barren Islands and Lower Cook Inlet were all rich resource areas. At contact, the indigenous people of Prince William Sound and the Lower Kenai Peninsula found their sustenance largely in marine waters, relying heavily upon fish and sea mammals, and to a lesser degree upon land mammals.

The marine resources found in Prince William Sound, Lower Cook Inlet, and in the OCS were almost identical. Seal, sea otter, halibut, salmon and other fish were to be found in all of the relevant areas.[24] As a consequence, the limited amount of archeological work that has been done is incapable of informing us as to whether or to what extent occupants of the pre-contact villages fished and hunted in the OCS as opposed to territorial waters. The bones that are found at archeological sites within Prince William Sound and the Lower Kenai Peninsula which evidence the taking of

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[23](...continued)
apparently based in part upon Russian census-taking.

[24]Whales were sometimes present in Prince William Sound. It is very unlikely that whales were taken in the OCS. They were taken, when found, in bays where they could be secured for butchering.

fish and sea mammals could have come from anywhere between the shore of the village(s) and well into the OCS.

At contact, the occupants of the extant Chugach villages were skilled marine hunters and fishermen. With their kayaks[25] and umiaks,[26] plaintiffs' ancestors were entirely capable of navigating anywhere within Prince William Sound, to Prince William Sound from the Lower Kenai Peninsula, and from either of these areas to the Barren Islands, Kodiak Island, Middleton Island, Wessels Reef, and the Copper River flats. Residents of Prince William Sound and the Lower Kenai Peninsula periodically traveled to Kodiak Island for purposes of trading. Middleton Island was visited regularly, probably seasonally to take birds and bird eggs as well as marine resources in the waters surrounding the island. These travelers had the services of people whom the anthropologists call "weathermen" who appear to have been skilled in anticipating weather conditions. They were also knowledgeable of ocean currents. At and before contact, those visiting Middleton Island were aware of the current flowing southward from Prince William Sound to Middleton Island and took advantage of it. They also knew that the current was a substantial impediment to returning directly to the area of Hinchinbrook Island and, as a consequence, when departing

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[25]Often referred to by the Russian name "baidarka" or "bidarka", a kayak is an enclosed vessel made of a light wooden frame entirely covered with mammal skins and traditionally constructed to accommodate two people as well as gear and food.

[26]The umiak, also constructed with a wooden frame and mammal skins, was an open vessel, much larger than a kayak, capable of carrying many people and considerable cargo.

Middleton Island, they sailed in a northeasterly direction toward Kayak Island, and then westerly into Prince William Sound.

At and before contact, there was animosity between plaintiffs' predecessors and the Tlingit, but also to a lesser degree with the Koniag. There were occasional "pitched battles" involving numerous deaths between members of the Chugach villages and the Tlingit or Koniag. Prince William Sound villages sometimes came together to take on the Tlingit. More often, however, there were significant rivalries amongst the Chugach villages themselves. They poached on what were recognized to be the territories of other villages, they raided one another to steal women or carry on feuds. The Chugach never joined together to challenge the presence of Russian traders; however, it is equally true that the Russians never subjugated the Chugach villagers.[27]

C. Nature of Villages

The five plaintiff villages are separate tribal entities recognized by the United States for purposes of the Alaska Native Claims Settlement Act (ANCSA) and Department of the Interior matters.

The plaintiff villages are the cultural successors to Chugach communities located within Prince William Sound and the southwest corner of the Lower Kenai Peninsula at the time of contact. Three

[27]The Russians had virtually enslaved other Alutiiq people as well as the Koniag. Further, the Russians brought their Koniag hunters to Prince William Sound to take sea otter. The Chugach were recognized by the Russians as potentially formidable foes, and apparently chose to work and trade with the Chugach rather than attempting to dominate them.

of the five villages appear to have been more or less stable from the time of contact down to the present. Village locations may have changed somewhat, but Chenega and Tatitlek in Prince William Sound and Nanwalek on the Lower Kenai Peninsula have probably existed since before contact times. The village of Port Graham was established at the site of a fish cannery in 1912, but there is little doubt that the village is presently populated by people who have pre-contact roots in a Chugach culture village. As already mentioned, the Native Village of Eyak came to be a Chugach culture village at some ill-defined time; but many of the post-contact occupants of the Native Village of Eyak have roots in pre-contact Prince William Sound villages, including Nuchek, an established Chugach village at the time of contact.[28]

The court finds that the weight of professional opinion holds that at and before contact, the plaintiffs' predecessor villages were independent, non-political entities — "non-political" because there is no evidence that the villages had any organized governmental structure such as a council of elders. Each community was united largely by reason of family relationships under a headman or chief and probably a sub- or second chief. There is no evidence of there being any sort of "pecking order" amongst village headmen, and the court finds that, although culturally related, the villages of Chenega, Tatitlek, Port Graham, Eyak, and Nanwalek and the earlier villages such as Nuchek were all independent of one

[28]A site at or near Nuchek has recently been redeveloped by Chugach people as a cultural and spiritual site.

another. There was no area-wide organization or grand chief. The best evidence is that each village sustained itself by its own efforts. Joint (by two or more villages) hunting, trading, raiding, etc., probably took place occasionally; but such joint activity was the exception, not the norm. These villages were located so that they could be defended or escaped as a primary consideration, and secondarily for proximity to resources.

Pre-contact, the predecessor villages used and occupied discrete, if loosely-defined, land areas; and each had separate, if ill-defined, hunting and fishing access. Prince William Sound villages were widely separated from one another. Travel between them was necessarily by kayak or umiak across unprotected waters. Travel from the Lower Kenai Peninsula to Prince William Sound was long and dangerous. Some villages at the time of contact had small, nearby subsidiary villages, or more likely seasonal fish camps that were a part of the area used and occupied by a village. There is no evidence of the sharing of fish camps. For lack of archeological work, it is unknown whether multiple villages simultaneously shared Middleton Island or the Barren Islands. There is little or no evidence that at or before contact villages joined together to fish the Copper River flats or Wessels Reef or any other area on a regular basis. The court finds that the predecessor villages at contact were free-standing, self-supporting, independent entities, and more likely than not each of the villages kept all others (Tlingit, Koniag, and other Chugach) at arm's length unless they approached one another in a fashion

that said "we are here to trade" or "we are here to visit someone." That was so because of the clear evidence that at and before contact, villagers could be expected to poach or steal or raid as often as they sought to visit in a friendly fashion or trade.

D. Use of the OCS

At and before contact, the residents of plaintiffs' ancestral villages made irregular use of the OCS. Some likely traveled for purposes of trade to Kodiak Island annually. Some residents of some of the pre-contact villages traveled to Middleton Island, the Barren Islands, Cook Inlet, the Copper River Delta, or Wessels Reef for purposes of hunting and fishing.[29] The pre-contact evidence is based largely upon the informed opinion of experts; and despite counsel's sometimes overzealous efforts to squeeze fine detail from the experts' general understanding of what likely went on in pre-contact times, there is simply no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take.

Travel to and from Kodiak and the Middleton Islands from Prince William Sound took the travelers directly across a portion of the OCS. More probably than not, a limited amount of fishing took place during these travels, but the travelers were likely intent on getting to and from Kodiak or Middleton Island; and therefore, any fishing that was done would have been purely

[29]It is unlikely that residents of the Kenai Peninsula coast fished or hunted Middleton Island, Wessels Reef, or the Copper River Delta. Similarly, it is unlikely that the Eyak fished or hunted in Cook Inlet. Likely there was no need to do so, and the travel would have been long and dangerous.

opportunistic — an easy take that would not long delay the travelers — rather than a combined hunting/fishing/trading trip. While it is likely that some hunting and fishing took place in the near parts of the OCS around the Barren Islands and Middleton Island, on Wessels Reef, and the Copper River flats, there is a dearth of information from pre-contact times as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were. The court finds that there were huge portions of the OCS being claimed by plaintiffs which residents of the ancestral villages seldom if ever visited.

While it is more likely true than not true that residents of the ancestral villages made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands, none of the ancestral villages was in a position to control or dominate access to any part of the OCS. The area was too large; and the number of men of an age who would have been able to defend or control high seas marine areas were too few. Moreover, some of the OCS areas in question (in particular, the Lower Cook Inlet, the area between the Barren Islands and Kodiak Island, and the Copper River Delta and Copper River flats) were on the periphery of the Chugach territory. That is, the foregoing are the areas where the Chugach villagers met up with the Dena'ina, the Koniag, the pre-consolidation Eyak, and the Tlingit. More likely than not, these areas were fished and hunted on a seasonal basis by all of the Koniag, the Chugach, the Eyak, and the Tlingit. None of the ancestral villages was in a position

to dominate or control Lower Cook Inlet, the high seas south of the Barren Islands, the waters of the OCS south of Prince William Sound and the Lower Kenai Peninsula, or waters of the OCS in the vicinity of the mouth of the Copper River. None of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis. Such use and occupancy as probably existed was temporary and seasonal, and more likely than not was carried out by the residents of individual ancient villages as distinguished from any kind of joint effort by multiple villages.

III.

Conclusions of Law

In accordance with the July 12, 2004, order[30] of the Ninth Circuit Court of Appeals, the court's conclusions of law Nos. (1) through (9) are reached on the assumption that plaintiffs' aboriginal rights, if any, have not been abrogated by the federal Paramountcy Doctrine or any other federal law. In these initial conclusions of law, the court concludes that no nonexclusive right to hunt and fish in the OCS has ever existed for any plaintiff village as a matter of federal Indian law given the facts found above. In further conclusions of law, separately stated hereinafter as Nos. (10) through (14), the court will address additional legal issues that remain pending in this court.

[30]Docket No. 57.

The court concludes that:

(1) The plaintiff villages are ethnologically tribes pursuant to Native American common law[31] and by reason of United States Government recognition.

(2) Each of the plaintiff villages once had aboriginal title to the lands upon which the villages were located. Although the plaintiff villages' aboriginal title to the village sites was abrogated by Section 4(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603, aboriginal claims in the OCS were not extinguished by ANCSA. Village of Gambell v. Hodel, 869 F.2d 1273, 1278 (9th Cir. 1989) (hereinafter "Gambell III").

(3) The Ninth Circuit Court of Appeals has never held that villages such as the plaintiffs in fact have aboriginal rights to hunt and fish in the OCS. Native Village of Eyak v. Trawler Diane Marie, 154 F.3d 1090, 1095-97 (9th Cir. 1998); Gambell III, 869 F.2d at 1277. In their complaint in this case, plaintiffs

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[31] See David S. Case, American Natives and American Laws 468 (1984). The existence of an ethnological tribe "can require a complex factual and historical analysis, but the U.S. Supreme Court has defined a tribe as 'a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory....'" Id. (quoting Montoya v. United States, 180 U.S. 261, 266 (1901).

Professor Case observes that tribal status may also "arise[] out of federal recognition of a tribe politically." Id. In this instance, the plaintiffs allege that they are "federally recognized tribes," Complaint at 2, Docket No. 1; and the defendants "admit[] that plaintiffs are federally recognized tribes," Answer at 1, Docket No. 23. Federal recognition does not, of course, answer the question: Do the plaintiffs have nonexclusive aboriginal rights in the OCS?

assert no claim to exclusive hunting or fishing rights based upon pre-contact hunting and fishing activity in the OCS.

(4) The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101, et seq., does not apply in the OCS. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 (1987); Gambell III, 869 F.2d at 1275.

(5) Because ANILCA does not apply in the OCS, rural[32] residents of the State of Alaska have no statutorily created, subsistence hunting or fishing rights in the OCS.

(6) Neither the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1342, nor the Submerged Lands Act (SLA), 43 U.S.C. § 1315, contains a congressional recognition of aboriginal rights in the OCS. No other act of Congress has recognized nonexclusive aboriginal hunting or fishing rights in the OCS. The Ninth Circuit Court in Gambell III, 869 F.2d at 1280, left open the question of whether or not the OCSLA extinguished aboriginal subsistence rights in the OCS as a matter of law. This court concluded in Diane Marie[33] that, based upon 43 U.S.C. § 1332(2), the OCSLA does not extinguish any aboriginal fishing rights that may exist in the OCS. The court reaches the same conclusion here.

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[32]For purposes of these conclusions, the court assumes that the residents of the plaintiff villages live in rural Alaska. 16 U.S.C. §§ 3113 & 3114.

[33]See Order re Federal Defendant's Motion for Summary Judgment; Plaintiff's Motion for Partial Summary Judgment (June 17, 1997) at 41-42, Case No. A95-0063-CV (HRH), attached as Exhibit 1 to Federal Defendant's Motion for Summary Judgment, Docket No. 25.

(7) The plaintiff villages now claim nonexclusive aboriginal rights to fish and hunt in the OCS.[34] Because they are non-treaty tribes, the villages retain the aboriginal rights, if any, which they enjoyed prior to contact with Europeans.

(8) The plaintiff villages do not enjoy a non-statutory, nonexclusive aboriginal right to hunt and fish in the OCS because no such right exists as a matter of Native American law or statute with respect to the OCS. Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778, 785-87 (Cl. Ct. 1968).

(a) Neither the plaintiff villages nor their residents ever had a property right, exclusive or nonexclusive, as to game or fish in navigable waters such as the OCS based upon the aboriginal land title which they once had with respect to village sites. "Since the primordial decision in Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed.793 (1896), it has been uniformly held that there is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters. Fish are ferae naturae, capable of ownership only by possession and control." Tlingit and Haida Indians, 389 F.2d at 785.

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[34]Although the plaintiffs are now federally recognized tribes, they do not claim nonexclusive hunting and fishing rights in the OCS on that basis. Rather, their claim is to "unextinguished aboriginal rights, including non-exclusive rights to hunt, fish and exploit the natural resources within their traditional hunting and fishing grounds on the OCS[.]" Complaint at 2, Docket No. 1.

Although plaintiffs' complaint addresses "natural resources," none of the briefing or proceedings conducted by this court on remand from the Ninth Circuit Court of Appeals have dealt with the claims of the plaintiffs other than hunting and fishing in the OCS.

(b) "Navigable waters" have never been the property of adjacent land owners. Id. at 786.

(c) The right to hunt and fish in the OCS is "not a concomitant of aboriginal title to adjacent land because the fish in a fishing area subject to Indian use can never be possessed." Id.

(d) The United States, as ultimate sovereign, owns the fisheries. Id.

(e) No one owns or possesses fish or game in the navigable waters of the United States until it is reduced to possession.

(f) "All ownership rights [in the OCS] are subject to the paramount ownership of the sovereign [the United States]." Id. Because the United States owns fish and wildlife in the OCS without restriction, the United States is entitled to legislate with respect to such fisheries, unconstrained by aboriginal claims unless the same are based upon treaty.

(9) As set forth in the court's above findings of fact, plaintiffs' members hunted and fished portions of the OCS at and before contact with Europeans, but that activity did not give rise to a nonexclusive, enforceable legal right to hunt and fish the OCS different from or greater than the rights of all United States citizens.

The following additional conclusions of law take up and address legal matters that remain pending in this district court and go beyond the strict limits placed upon the district court by the court of appeals when it vacated the district court's order of

September 25, 2002. The court takes the following action because the mandate of the Ninth Circuit Court[35] "vacated" this court's "judgment." Without a new judgment, proceedings in this court will not be concluded as to all issues for purposes of another appeal.

(10) Because neither plaintiffs nor their members enjoy a nonexclusive right to fish or hunt in the OCS that is different (less restrictive or more extensive because of pre-contact fishing and hunting in the OCS) from other United States citizens, the plaintiff villages and their members are not exempt from current federal legislation which controls fishing and hunting in the OCS.

(11) For the reasons and upon the authorities set out in its order of September 25, 2002, the court again concludes that plaintiffs' claims of nonexclusive aboriginal hunting and fishing rights in the OCS were not extinguished when the Russian American Company was granted its 1821 and 1844 charters. However, the Court of Claims observed in Tlingit and Haida Indians that: "whatever aboriginal rights there may be did not survive our acquisition from Russia." 389 F.2d at 786 (citing Tee-Hit-Ton Indians v. United States, 132 F. Supp. 695, 696 (Cl. Ct. 1955)).

(12) For the reasons and upon the authorities set out in its order of September 25, 2002, the court again concludes that the Secretary's regulations are fatally arbitrary if plaintiffs have nonexclusive aboriginal rights to fish in the OCS and if such rights were not preempted by the Paramountcy Doctrine.

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[35]Docket No. 58.

(13) For the reasons and upon the authorities set out in its order of September 25, 2002, the court again concludes that plaintiffs do not have nonexclusive hunting and fishing rights in the OCS based on custom and prescription.

(14) The court concludes that plaintiffs' Count 2 fails for three reasons:

(a) Indian Nonintercourse Act claims may not be brought against an official of the United States Government; see Fed. Power Comm'n v. Tuscarora Indian Nation, 80 S. Ct. 543, 555 (1960) ("Non-intercourse Act is not applicable to the Sovereign United States.").

(b) Plaintiffs have no nonexclusive aboriginal hunting or fishing rights in the OCS; and

(c) Even if plaintiffs do have nonexclusive aboriginal hunting and fishing rights in the OCS, those rights are preempted by the Paramountcy Doctrine.

The clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice.

DATED at Anchorage, Alaska, this 7th day of August, 2009.

/s/ H. Russel Holland
United States District Court