Construction Work: The Canons of Indian Law (Case Note)

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Case Notes

Construction Work: The Canons of Indian Law


Congressional pronouncements in the area of Indian law have often been both sweeping and contradictory.¹ To clear away some of the resulting confusion, the Supreme Court has adopted canons for construing these acts: Most importantly, ambiguous statutes and treaties are interpreted in favor of the tribes.² In Alaska v. Native Village of Venetie,³ the Ninth Circuit applied this canon in interpreting the Alaska Native Claims Settlement Act (ANCSA),⁴ determining that Alaska’s native villages qualify as “Indian country.”⁵ This Case Note will show that the court’s reliance⁶ on the canon of construction

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3. 101 F.3d 1286 (9th Cir. 1996), cert. granted, 117 S. Ct. 2478 (1997).
4. The ANCSA, 43 U.S.C. §§ 1601-1629e (1994), was designed to open Alaska quickly to oil drilling and to provide a final determination of Indian land claims in the state, transferring millions of acres of land to highly structured native corporations. For a more extensive history of the ANCSA and the structure of the native corporations, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 746-57 (1982).
5. Specifically, the court found that the ANCSA did not strip Venetie of its status as a dependent Indian community and therefore it could tax state activity in the Village. See Alaska v Native Village of Venetie, 101 F.3d at 1302; see also 18 U.S.C. § 1151 (1994) (defining Indian country as reservation land, dependent Indian communities, and Indian allotments). This status grants Venetie and other villages wide-ranging sovereign powers, substantially limiting state authority and significantly expanding tribal control Indian country status is the first-order consideration in Indian law, determining who prosecutes most crimes involving tribal members, see 18 U.S.C. § 1152, who controls child custody proceedings, see 25 U.S.C. § 1911 (1994), and, as in Alaska v. Native Village of Venetie, who can tax various activities, see COHEN, supra note 4, at 406-16. The Ninth Circuit declared that 1.8 million acres in Alaska (an area about the size of Delaware) is Indian country. See Alaska v. Native Village of Venetie, 101 F.3d at 1289, 1302. Alaska estimates that the ruling doubled the amount of Indian country in the nation. See Petitioner’s Brief at 17. Alaska v. Native Village of Venetie, No. 96-1577 (U.S. filed June 23, 1997). In total, the ANCSA lands span 44 million acres, see Alaska v. Native Village of Venetie, 101 F.3d at 1289, and whether these lands are Indian country is now unclear. The Ninth Circuit’s ruling has had political repercussions. Alaskan Senator Ted Stevens began his ongoing efforts to split the Ninth Circuit in part due to this case. See David G. Savage, Debate Rises over Proposal To Break Up Appeals Court, L.A. TIMES, Sept. 21, 1997, at A3.
6. The canon played a key role in the decision. After determining that Indian country once existed in Alaska, the court called upon the canons of construction in considering whether the ANCSA extinguished
was misplaced. The most consistent interpretation of recent Supreme Court precedent involving the canon indicates that it does not apply to the ANCSA.

I

In general, courts can either rely on canons of construction to determine cases or reject them by claiming that legislative intent is unambiguous.7 The Supreme Court has taken both approaches with the canon favoring tribal litigants, producing a body of apparently inconsistent law8 despite dicta asserting that the canon applies equally to all cases involving tribal litigants.9

Most of the major recent Supreme Court cases involving statutory analysis of Indian law, however, can be read consistently if the canon is interpreted to apply only when Congress acted in its role as tribal trustee.10 The rationale for the canon, after all, arises from the trust relationship, as embodied in the conception that the federal government holds lands on behalf of the tribes and must manage these lands on behalf of the tribes' benefit.11
For example, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, Congress had passed the relevant statute in its role as trustee, and the canon was strictly applied. The case involved a provision of the 1887 General Allotment Act (GAA), which provided for the distribution of reservation lands to individual tribal members. Although Congress may not have been acting with the best interests of the tribes at heart, it was still technically acting as trustee, because the federal government held the land in trust and Congress determined its distribution. The Court interpreted a GAA provision stipulating that, after the trust period expired, “all restriction as to sale, incumbrance, or taxation of [the] land shall be removed.” Holding initially that this provision meant what it said, the Court upheld the state’s ad valorem tax on the land. Subsequently, however, it applied the canon in finding that the statute did not allow an excise tax: “[O]ur choice between [two constructions] must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”

Similarly, the Court gave the canon significant weight in construing a statute involving mineral development on tribal lands. Congress acted in its capacity as a trustee when it established rules to open Indian lands to non-Indian mining in 1891, as well as when it modified those rules in 1924 and 1938. The Court accordingly strictly applied the canon in *Montana v. Blackfeet Tribe* when charged with deciding whether the 1924 provision permitting state taxation of the tribal royalties from the mineral leases survived the 1938 revisions. Even though neither the 1938 legislation nor its legislative responsibility is a very important limitation on executive authority and discretion to administer Indian property and affairs...
history mentioned taxation, the Court held that Congress's failure specifically to reauthorize taxation of tribal royalties prevented the state from taxing leases issued under the new statute. In reaching this conclusion, the Court repeatedly emphasized the canon, which appeared to be the determining factor in its decision.

In contrast, when the Court has interpreted statutes passed outside the trust relationship, it has been less solicitous of the canon. The Court virtually ignored the canon, for example, when interpreting the Buy Indian Act in Andrus v. Glover Construction Co. Although Congress intended the statute to benefit tribes, it did not act as their representative; the legislation was primarily a jobs program. The case involved a close and complex reading of the interplay of two statutes, and thus would appear to have offered a perfect opportunity for the Court to use the canon of construction to avoid a knotty analytic problem. The Court dismissed the canon, however, with only a passing reference in the last sentence of its opinion.

Nor was the trust relationship implicated when Congress "simply wished to build a dam." Consequently the canon was not applied when Indian land was taken for that purpose. In this instance, Congress was not acting as a tribal representative; the takings were effected as if the tribe had been a private individual. The Court therefore held that a clause of the statute providing that the land was open to public use abrogated the tribe's right to exclude non-Indians. Although the majority opinion mentioned the canon, strict application of it would have dictated the opposite result.

21. See id. at 769 (White, J., dissenting). The changes did include a general clause repealing all acts "inconsistent" with the 1938 statute. See id. at 763-64 (majority opinion).

22. See id. at 766 ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. When the 1924 and 1938 Acts are considered in light of these principles, it is clear that the 1924 Act does not authorize [the] tax statutes . . . ." (citations omitted)); id. at 767 ("Nor would the State's interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians."); id. at 767-68 ("When the statute is 'liberally construed . . . in favor of the Indians,' it is clear that if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment." (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918))).


26. The Court needed to decide if the Buy Indian Act provided an exception to the requirements in 41 U.S.C. § 252(a) (1994) that government projects be advertised and submitted for public bid.

27. See Andrus, 446 U.S. at 619 ("[A]lthough the 'rule by which legal ambiguities are resolved to the benefit of the Indians' is to be given 'the broadest possible scope,' 'a' canon of construction is not a license to disregard clear expressions of . . . congressional intent.'" (quoting DeCoteau v. District County Court, 420 U.S. 425, 447 (1975)) (alteration in original)).


29. See id. at 683-84 (majority opinion).

30. See id. at 683.

31. See id. at 687.
In sum, the cases illustrate a general, if unacknowledged, trend in recent opinions reinforcing the logic behind the canon's support of interpretations favoring tribes. The canon applies only when Congress acted as trustee.\textsuperscript{32}

II

The canons do not apply to the ANCSA because Congress did not act as trustee for the Alaskan tribes. At the time of the Act, there was no trust relationship between these tribes and the federal government. In the lower forty-eight states, the trust relationship arose through the Court's characterization of the tribes as "domestic dependent nations"\textsuperscript{33} in tension with the states and in need of federal assistance to survive.\textsuperscript{34} Tribes therefore turned over land to the United States in exchange for protection and a promise that the federal government would manage the land for the tribes' benefit.\textsuperscript{35}

This relationship, though, did not involve Alaskan Indians.\textsuperscript{36} Indeed there was almost no federal-tribal relationship for the first ninety years following the cession of Alaska by Russia.\textsuperscript{37} For the initial fifty years of American dominion over Alaska, Congress established only one reservation.\textsuperscript{38} In the 1930s and 1940s, Congress did begin to authorize the creation of Alaskan reservations.\textsuperscript{39} The trust status of these reserves, however, remained quite...
unclear. It was not until the enactment of the ANCSA itself that the United States took any determinative steps to decide the core issue in the trust relationship: native rights to Alaskan land. As Congress itself pointed out in 1971, for one hundred years "[t]he United States ha[d] simply not acted." In the ANCSA, Congress was not acting to manage the land as tribal trustee. Instead, Congress was attempting to resolve all land claims in one fell swoop and open the way for oil development in Alaska. Congress's history of treating Alaskan natives as an afterthought indicates that the trust interaction necessary to apply the canon of construction was absent.

Limiting the canon to cases where Congress truly acted as trustee explains most of the major cases and offers a rule of decision in the instant case. Congress spent more time overlooking than overseeing the status of Alaskan natives. Applying the canon, premised on the existence of a trust relationship, to the ANCSA is thus inconsistent with the canon's purpose and with the general thrust of precedent.

—Max Minzner

40. It was not until 1968, three years before the passage of the ANCSA, that the Interior Department concluded that these Indian Reorganization Act reserves constituted trust properties. See id. The Department nevertheless refused to conclude that older reserves created by executive order were held in trust. See id.

41. See COHEN, supra note 4, at 198.


43. See COHEN, supra note 4, at 742.

44. The Court has previously considered the history of the federal-tribal relationship to determine the extent of the trust responsibility. The Pueblo Indians acquired title to their lands from the Mexican government and were far more independent of the federal government than most tribes in the 19th century. See CANBY, supra note 13, at 235. The Pueblos still hold most of their land in fee, rather than in trust with the federal government. See id. The Court found them to be outside the normal federal-tribal relationship. See United States v. Joseph, 94 U.S. 614, 617-18 (1877). In United States v. Sandoval, 231 U.S. 28, 47 (1913), the Court determined that Congress intended to treat the Pueblos identically to other Indian groups. Absent congressional authorization, however, the Pueblos' status would have remained unclear.

45. See CASE, supra note 37, at 4 ("[T]he Alaska Native Claims Settlement Act, the Federal Government acknowledged a relatively limited and fragmented land-related trust responsibility toward Alaska Natives."). The Ninth Circuit apparently has assumed that the trust relationship between the Federal government and the Alaskan tribes is indistinguishable from that in the lower 48 states. See, e.g., Alaska v. Native Village of Venetie, 101 F.3d at 1296 ("Before the passage of ANCSA, Alaska Natives were thought to be under the guardianship of the United States and were entitled to the benefit of this special relationship."); Alaska Chapter, Associated Gen. Contractors v. Pierce, 694 F.2d 1162, 1168-69 n.10 (9th Cir. 1982) ("[T]he Alaskan Natives are under the guardianship of the federal government and entitled to the benefit of the special relationship."). Yet the Supreme Court opinion cited for this proposition, Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), does not support it. Alaska Pacific Fisheries held only that the Metlakatla Indians of Annette Island were part of the trust relationship. See id. at 86-90. The Metlakatla share neither a common history with the other Alaskan Natives nor a common relationship with the federal government. Emigrating to Alaska in 1887, they were immediately given reservation status by Congress. See id. at 86. As noted above, this distinction was unique in the history of Alaskan natives. See supra note 38 and accompanying text. Significantly, only the Metlakatla were excluded from ANCSA benefits and only the Annette Island reserve was not revoked by the statute. See 43 U.S.C. § 1618 (1994). As Judge Fernandez noted, no other set of Alaskan natives was treated differently. See Alaska v. Native Village of Venetie, 101 F.3d at 1304 n.1 (Fernandez, J., concurring).