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Amoco v. Gambell: Aboriginal Rights on the Outer Continental Shelf: Reopening Alaska Native Claims

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**AMOCO v. GAMBELL:
ABORIGINAL RIGHTS ON THE
OUTER CONTINENTAL SHELF:
REOPENING ALASKA NATIVE CLAIMS**

ANCSA—The Alaska Native Claims Settlement Act of 1971 was widely thought to have extinguished all claims of aboriginal right and title to oil-rich Alaskan lands, but the Supreme Court has given new life to aboriginal claims on the outer continental shelf. Amoco Prod. Co. v. Village of Gambell, 107 S. Ct. 1396 (1987).

STATEMENT OF THE CASE

The residents of two Eskimo villages in Alaska, who traditionally hunt and fish in the Bering Sea, sought to enjoin the Secretary of the Interior from proceeding with a scheduled sale of oil and gas leases for outer continental shelf [OCS] land in the Norton Sound. The villages, Gambell on St. Lawrence Island and Stebbins on the southern shore of the Norton Sound, made two claims in *People of the Village of Gambell v. Clark* [*Gambell I*].¹ (See Figure 1) First, they asserted that aboriginal title or right to the OCS had not been extinguished by the Alaska Native Claims Settlement Act [ANCSA];² secondly, they contended that the Secretary failed to satisfy the procedural requirements of the Alaska National Interest Lands Conservation Act [ANILCA].³

In passing ANCSA, Congress extinguished all aboriginal land claims in Alaska in exchange for a payment of \$962,500,000 to authorized Native corporations.⁴ ANCSA also conveyed surface rights to 40 million acres of land to Native village corporations and the sub-surface rights to Native regional corporations.⁵ In 1980, Congress passed ANILCA after it became

1. *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) ("Gambell I"), rev'd, 774 F.2d 1414 (1985) ("Gambell II"), rev'd, 107 S. Ct. 1396 (1987). The United States District Court for the District of Alaska held that aboriginal rights on the OCS were extinguished by ANCSA and that protection of subsistence rights under ANILCA, 16 U.S.C. § 3120 (1982), did not extend to shelf land outside the geographic boundaries of the State of Alaska.

2. 43 U.S.C. §§ 1601-1628 (1982). As part of the division of the vast uninhabited tracts of Alaska's wilderness in Native, state and federal domains, the federal government took full title to the Prudhoe Bay oil field clearing the legal impediments to the development of the oil field. Oil companies are now exploring off-shore for new strikes of black gold.

3. 16 U.S.C. §§ 3101-3233. The Secretary sought a summary judgment, asserting that the lease was made in compliance with the Outer Continental Shelf Lands Act (OCSLA) and the National Environmental Policy Act of 1969 (NEPA), and that ANILCA did not apply to the OCS.

4. 43 U.S.C. § 1605. ANCSA provides for a scheduled appropriation from the U.S. Treasury of \$462,000,000 over ten years, and \$500,000,000 in royalties from mineral leases on Federal lands in Alaska.

5. 43 U.S.C. §§ 1611(c), 1613(h). The total conveyance for all land selections by village and regional corporations is 38 million acres, but an additional 2 million acres is set aside for Alaska Native selection of cemeteries and historical places, and for selection by certain unorganized and urban Alaska Natives.

clear that lands transferred to Native corporations under ANCSA had inadequate wildlife ranges to provide Alaska Natives with traditional supplies of food and fur, and that the state was not giving subsistence uses priority on state lands.⁶ To better protect subsistence rights, Congress required under ANILCA Section 810 an evaluation of the impact on subsistence uses of all federal activities on public lands, including lease sales for oil and gas exploration.⁷

Holding

In *Amoco Prod. Co. v. Village of Gambell* [Amoco] the United States Supreme Court held that ANILCA does not extend subsistence rights to the OCS outside the geographic boundaries of the state of Alaska.⁸ Reading ANILCA's definition of public lands restrictively, the Court found that the words "in Alaska" refer to the precise geographic boundaries of the state of Alaska.⁹ The Submerged Lands Act defines the boundaries of all coastal states as "a line three geographical miles distant from its coast line."¹⁰ Accordingly, the Court held that subsistence protection in ANILCA extends only to the three-mile limit, the coastal zone over which the state of Alaska has jurisdiction, but not to the OCS over which the federal government exercises exclusive jurisdiction.¹¹

Using the same method of analysis, the Court also held that ANCSA does not extinguish aboriginal rights to the OCS, since ANCSA Section 4(b) applies only to aboriginal claims "in Alaska."¹² The Supreme Court vacated the Ninth Circuit's judgment in *People of the Village of Gambell*

6. 16 U.S.C. § 3112. For a discussion of the policy behind ANILCA's subsistence protection, see Note, *The Alaska National Interest Lands Conservation Act: Striking the Balance in Favor of "Customary and Traditional" Subsistence Uses by Alaska Natives*, 27 Nat. Res. J. 421, 425-26 (1987).

7. "In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands," the Secretary must give notice, hold a hearing, and determine that "reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources." 16 U.S.C. § 3120.

8. *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396, 1409 (1987). The Court also lifted the injunction against the oil companies imposed in *Gambell II*, 774 F.2d 1414 (9th Cir. 1985). In balancing the harms, the Court found no presumption of irreparable harm to subsistence users from exploratory oil drilling, but a loss of \$70 million to the oil companies. 107 S. Ct. at 1405 (Justices Stevens and Scalia concurring separately in the result, felt the Court need not reach the issue of the injunction, 107 S. Ct. at 1409).

9. "The term 'public lands' means land situated in Alaska which, after the date of enactment of this Act, are Federal lands. . . ." 16 U.S.C. § 3102.

10. 43 U.S.C. § 1312.

11. "[T]he subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition. . . ." 43 U.S.C. § 1332.

12. ANCSA § 4(b) states that: "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." 43 U.S.C.S. § 1603(b) (emphasis added).

v. *Hodel* [*Gambell II*]¹³ that ANCSA Section 4(b) extinguished aboriginal claims on the OCS, but explicitly refused to decide the scope of ANCSA Section 4(b).¹⁴ This note examines the legal and equitable bases for a renewed claim of aboriginal rights to the oil revenues generated on the OCS. After *Amoco*, the villagers of Gambell and Stebbins may press a claim to aboriginal title and right over the OCS when the oil leasing agreements move beyond the leasing stage to the production stage.

ABORIGINAL RIGHTS IN ALASKA

Aboriginal right, sometimes called Indian title, is a claim by Native Americans to exclusive use and occupancy of lands and waters based on ancestral occupation prior to the assertion of sovereignty over the area by the United States. Although fee title is vested in the United States, Indian title is good against all but the sovereign, and can be terminated only by sovereign act.¹⁵ Aboriginal claims in Alaska, to the extent they are not extinguished by ANCSA, have the same footing as unrecognized tribal claims in the lower forty-eight states.¹⁶ After *Amoco*, the villagers' claim of aboriginal right rests upon ancestral usage of the shelf lands for hunting and fishing extending far beyond the three-mile limit.¹⁷

The federal government owes Alaska Natives the same fiduciary duties it owes to the lower forty-eight tribes. One fiduciary duty is to protect Native lands from trespass and intrusions. The Cherokee Cases in the early 1830s established a guardian/ward relationship between the United States government and Indian tribes in the lower forty-eight, where the federal government assumed an exclusive right to deal with the Indians, particularly in the buying and selling of Indian land.¹⁸ If an aboriginal land claim has not been settled, the federal government has a fiduciary duty to prevent trespass and intrusion by non-Natives.

Aboriginal claims are usually recognized by Congress when the federal government provides benefits in exchange for aboriginal land holdings through treaty or by the creation of a reservation. Alaska Natives did not

13. 774 F.2d 1414 (1985).

14. 107 S. Ct. at 1409.

15. See *Oneida Indian Nation of NY v. County of Oneida, NY*, 414 U.S. 661, 667 (1974).

16. John F. Walsh, *Settling the Alaska Native Claims Settlement Act*, 38 Stanford L. Rev. 227; 243 (1985); see also, Felix Cohen, *Handbook of Federal Indian Law* 739 (1982).

17. *Gambell I*, 746 F.2d at 576.

18. Chief Justice John Marshall insisted on complete federal control over Indian land as an attribute of national security because Indians are "so completely under the sovereignty (sic) and dominion of the United States, that any attempt to acquire their lands, or form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831). A year later, Marshall found that the constitution mandated federal control over Indian lands, preempting state authority, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832).

exchange aboriginal rights for recognition of tribal lands by treaty because the federal policy of signing treaties with Indian tribes ended shortly after Alaska was purchased from Russia. However, Native American tribes without signed treaties have not lost aboriginal claims in the lower forty-eight merely because of the absence of treaties. Eighteen treaties with California tribes, negotiated in 1851 and 1852 by agents of the federal Indian Department, were never ratified by the Senate, and remained a state secret until 1905 when an injunction brought the unratified treaties out of the Senate executive files.¹⁹ Congress, therefore, never formally recognized the aboriginal title of any California tribe through treaty, yet California tribes successfully recovered on a claim for the loss of California lands based on aboriginal title.²⁰

Likewise, the Supreme Court in *United States v. Alcea Band of Tillamooks* upheld the compensation of four Oregon tribes which had also negotiated unratified treaties.²¹ Although Congress did not formally recognize the claim with a treaty, the Court found such recognition by Congress unnecessary after the passage of a jurisdictional act in 1935 to settle Tillamook claims, giving the Court of Claims power to hear and adjudicate "any and all legal and equitable claims arising under or growing out of the original Indian title" related to the Tillamooks land claims.²² Without a jurisdictional statute affecting a specific tribe or region of Alaska, however, the courts will not hear a suit in equity to enforce an Alaska Native aboriginal claim not yet recognized by Congress.

Creating a protected reservation for a particular tribe, though with smaller land areas than that claimed under aboriginal title, is compensation for the aboriginal claim by Congress and another form of congressional recognition. While the federal government did hold some Alaska lands in trust for the benefit of Alaska Natives, Congress did not create a reservation system of tribal lands in exchange for land claimed under aboriginal title.²³ Congress created only one reservation in Alaska, the Annette Island Reserve, and Alaska Natives on that reservation enjoy the same rights to reservation property and the same loss of aboriginal rights as lower forty-eight tribes on reservations. The property of the Annette

19. Ruth C. Dyer, *The Indians' Land Title in California: A Case in Federal Equity, 1851-1942*, University of California Doctoral Thesis (1944) reprinted by R and E Research Associates, San Francisco (1975).

20. *Indians of California v. U.S.*, 98 Ct. Cl. 583 (1942).

21. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946).

22. Act of Aug. 22, 1935, 49 Stat. 801, codified at 7 U.S.C. 610 (1982); *Tillamooks and Indians of California* stand for the proposition that Congress may waive sovereign immunity and expressly direct the Court of Claims to resolve a taking claim on the merits for specific tribes and territories. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 414 (1980).

23. Limited purpose reservations, such as those established by Dr. Sheldon Jackson for education in bush Alaska, were established through executive order. David S. Case, *Alaska Natives and American Laws* 88 (1984).

Island Reserve is specifically exempted from ANCSA and the Metlakatla Indians residing on that reserve are not eligible to participate in the ANCSA-created Native corporations.²⁴

Much like a treaty, ANCSA extinguished aboriginal title in exchange for federally recognized land holdings. In passing ANCSA Congress declared, "There is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims."²⁵ With ANCSA, Congress extinguished all aboriginal claims of Native groups of Alaska to public lands in Alaska. The *Amoco* Court, however, found no congressional intent in ANCSA to extinguish aboriginal title on the OCS.

CLAIMS BASED ON ABORIGINAL RIGHTS REQUIRE CONGRESSIONAL RECOGNITION

Aboriginal rights to the OCS still exist, both because they existed in pre-ANCSA Alaska and because the *Amoco* Court did not find congressional intent to extinguish them, but the claims cannot be enforced with a judicial remedy without recognition by Congress. Although Congress could pass a jurisdictional statute which measures the damage to the Alaska Natives aboriginal right on the OCS as a percentage of the oil royalty the federal government receives from the OCS, the courts will defer to Congress. Before *Amoco* was decided, a similar aboriginal claim to minerals under traditionally used OCS waters was asserted in *Inupiat Community of the Arctic Slope v. United States [Inupiat]*.²⁶ The Ninth Circuit in that case, like *Gambell II*, found the aboriginal claims extinguished by ANCSA. The Inupiat sought royalties for oil produced on shelf lands in the Beaufort and Chukchi Seas of the Arctic Ocean. These Eskimos, who traditionally hunted, fished and actually lived seasonally on the frozen polar ice pack from time immemorial, claimed that aboriginal title penetrated the ice to the water column beneath the ice, to the seabed and to the mineral resources beneath the seabed.

The Inupiat based their claim in large part upon notions of tribal sovereignty. As an unconquered people who have never voluntarily submitted to United States sovereignty and never relinquished aboriginal claims through treaty, the Inupiat claimed to retain some powers of sovereignty and self-determination as an independent nation. The district court rejected the sovereignty claims. The court reasoned that while a domestic, dependent Indian nation does retain some sovereignty over the

24. 43 U.S.C. § 1618.

25. 43 U.S.C. § 1601.

26. *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska, 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984).

internal affairs of the tribe and its members, "it loses all elements of external sovereignty including the capacity to acquire sovereignty over or ownership of unclaimed lands."²⁷ Moreover, the Supreme Court has repeatedly found the interests of the national sovereign dominant on the outer continental shelf over the interests of state sovereigns and other subordinate members of the republic.²⁸

Likewise, claims for damage to usufruct interests in aboriginal lands the OCS, rather than ownership, have been given little support in the courts. The Supreme Court held in *Tee-Hit-Ton Indians v. United States* that Native Americans have no alienable interest in lands claimed solely on the basis of aboriginal title or right.²⁹ The Tee-Hit-Tons, a clan of the Tlingits in southeast Alaska, claimed that a timber sale authorized by federal statute constituted a taking of property interest without compensation, prohibited by the Fifth Amendment. The *Tee-Hit-Ton* Court reasoned that a claim to aboriginal title is merely "a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."³⁰

Where the federal government recognizes a right to the "absolute and undisturbed use and occupation" of reservation land according to the terms of a treaty, the Supreme Court has ruled that the U.S. must compensate the Indians for a taking of property, even though the legal title is held by the United States.³¹ Compensation for taking of aboriginal land without treaty status depends, however, upon whether Congress recognized Indian title.³² If a recognized right under aboriginal title to undisturbed use and occupancy exists, a claim for breach of fiduciary duty by the federal government for permitting third party intrusions is possible.³³

ANALYSIS

The *Amoco* holding is an impetus to Congress to fulfill its federal fiduciary duty to Alaska Natives by designing a revenue sharing procedure for federal OCS royalties which includes Alaska Native institutions.³⁴ The

27. Inupiat Community, 548 F. Supp. at 187, citing *Montana v. United States*, 450 U.S. 544 (1981).

28. *United States v. Maine*, 420 U.S. 515, 521 (1975); *United States v. Texas*, 339 U.S. 707, 719 (1950); *United States v. California*, 332 U.S. 19, 35 (1946).

29. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

30. *Id.* at 279.

31. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

32. A mere mention of tracts of land in a treaty is not enough of itself to show a specific intent by Congress to recognize the the aboriginal holding. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).

33. *Edwardson v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973).

34. G. Kevin Jones, *The Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility to Native Alaskans*, 6 Va. J. Nat. Resources L. 53 (1986).

modern view of the federal trust doctrine, a view that stresses self-determination and tribal autonomy, mandates a funding source for Native American institutions which depends more on equitable principles than on charitable impulses. Tribal governments and Alaska Native corporations need a less dependent place in the federal system, with the economic and political autonomy to "chart their own economic, social, and cultural development."³⁵

The federal fiduciary duty to Native Americans is an evolving concept which has not always been the source of enlightened benevolence. One view, popular at the turn of this century, is that the fiduciary duty of Congress rest upon the general, political duty to care for the well-being of Native Americans, but that the duty creates neither specific nor enforceable rights of the Natives. Sometimes called a "cultural theory of trust responsibility,"³⁶ behind the theory is a deceptively benign world view that peoples of European descent have inherited a self-imposed obligation to protect and shelter non-European cultures, but the beneficiaries have no right to enforce the trust.

A second view, more limited and therefore even less helpful to Native Americans, is that the federal government owes no general trust responsibility to Alaska Natives and that trust responsibility arises only through statute, treaty, and executive order.³⁷ This view has been cast aside by the Supreme Court in *United States v. Mitchell* [*Mitchell II*].³⁸ In *Mitchell II*, the Court acknowledged the "undisputed existence of a general trust relationship between the United States and the Indian people."³⁹ This general trust relationship aided the Court when interpreting statutes and regulations to find an implied duty where none was expressly stated.⁴⁰ More importantly, the Court found the relationship "includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."⁴¹

The modern view, relying on the general law of trusts, exacts from the trustee the highest standard of care to protect the trust corpus for the intended beneficiaries. The *Mitchell II* Court applied trust law to find a

35. Note, Rethinking the Trust Doctrine in Federal Indian Law, 98 Harv. L. Rev. 422, 429-30 (1984).

36. *Id.* at 426.

37. In *Mitchell I*, the Supreme Court held that an Indian allottee may not collect money damages from the United States for mismanagement of trust lands under the General Allotment Act absent specific language in the statute. *United States v. Mitchell*, 445 U.S. 535 (1980) ("Mitchell I"). The court noted that it did not decide on the scope of a general federal fiduciary duty which was not properly pleaded. *Mitchell I*, 445 U.S. at 546, n. 7. The D.C. circuit misapplied *Mitchell I*, holding that "without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980), citing *Mitchell I*.

38. *United States v. Mitchell*, 463 U.S. 206 (1983) ("Mitchell II").

39. *Id.* at 225.

40. *Id.* at 211, 228.

41. *Id.* at 226.

retrospective damage remedy permissible to "deter federal officials from violating their trust duties."⁴² The trust corpus in *Amoco* consists of the subsistence rights of the Alaska Natives to the use of the OCS.⁴³ Under general trust law, the fiduciary's duty is to perform in the best interests of the beneficiary, not the country as a whole or the oil industry in particular. The remedy for a breach of the duty to protect non-economic cultural activities such as subsistence hunting on the OCS from third party intrusion must be measured in economic terms.

Arguably, ANILCA is both the recognition by Congress of a legitimate aboriginal right to engage in subsistence activities on federal lands as well as the source of a stated fiduciary duty to Alaska Natives. However, the *Amoco* Court found that when Congress chose the preposition "in" rather than "of," ANILCA became inapplicable to the OCS.⁴⁴ Subsistence users were guaranteed the highest use on "public lands" in Alaska,⁴⁵ but the *Amoco* Court construed the words "in Alaska" as having a "precise geographic/ political meaning."⁴⁶ "We reject the notion that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of ANILCA as 'Federal lands' 'situated in Alaska,'" wrote Justice White for a seven member majority.⁴⁷

Similarly, the Court reversed the Ninth Circuit's holding in *Inupiat* that ANCSA, in extinguishing claims "in Alaska," also extinguished claims to the OCS. The Ninth Circuit contended that the identical words, "in Alaska," allow the "sister statutes," ANCSA and ANILCA, to reach beyond the three-mile limit to solve the twin problems of Alaska Native aboriginal claims and protection for aboriginal subsistence rights.⁴⁸ The *Amoco* Court agreed there was a necessity for consistency in interpretation of the two statutes, but found that consistency should be satisfied by restricting the territorial reach of both. The Court pointed out that ANCSA permitted the Native corporations to select 40 million acres "in Alaska."⁴⁹ "It is inconceivable that Congress intended to allow either the State of Alaska or Native Alaskans to select portions of the OCS," wrote Justice White.⁵⁰

Failure to extinguish a claim with legislation does not mean the claim of aboriginal right is recognized by Congress, which has plenary authority

42. *Id.* at 227, citing *Mitchell I. J. White's* dissent.

43. Jones, 6 Va. J. Nat. Resources L. 95 (cited in note 34).

44. "The term 'public lands' means land situated in Alaska which, after the date of enactment of this Act, are Federal lands. . . ." (emphasis added). 16 U.S.C. § 3102.

45. "The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the *public lands*" (emphasis added). 16 U.S.C. § 3121.

46. 107 S. Ct. at 1405.

47. *Id.* at 1405-1406.

48. Brief Amicus Curiae of the State of Alaska at 22, *Amoco v. Gambell*, 107 S. Ct. 1396 (1987) (Nos. 85-1239 and 85-1406).

49. 107 S. Ct. at 1408.

50. 107 S. Ct. at 1408, quoting from the Brief for the Petitioner Secretary of the Interior at 33 (No. 85-1406).

to recognize and resolve disputes involving aboriginal claims.⁵¹ Without a recognized claim, the Alaska Natives have no judicial remedy available. The lack of a judicial remedy does not mean, however, that Congress has terminated its fiduciary duty to the Alaska Natives. The Supreme Court in *Amoco* has given Congress the opportunity to reexamine whether its general fiduciary duty to Alaska Natives is best served by recognition of an aboriginal interest in the oil and gas royalties from the OCS. Deferring to Congress to determine the extent of the federal government's fiduciary duty to Alaska Natives' interest in the OCS, the Supreme Court has neither extinguished the aboriginal right, nor imposed a remedy. While it is too soon to tell whether the corporate framework Congress has built for Alaska Natives will provide both economic security and self-determination, the federal fiduciary duty continues into perpetuity.

Toward an Equitable OCS Revenue Sharing Policy

Today, many Alaska Native corporations face bankruptcy or insolvency. Congress has addressed specific problems the Alaska Native corporations face with individualized solutions. The tax laws were amended in 1986 to allow Native corporations to pool their net operating losses with profits of non-Native corporations and share in the tax savings.⁵² Another bill in Congress will permit some ANCSA corporations to obtain sub-surface rights beneath the Arctic National Wildlife Refuge, where exploratory oil and gas drilling is anticipated, in exchange for wildlife habitats in their surface estates sought by the Interior Department for wildlife refuges.⁵³ Recent amendments to ANCSA have eliminated some of the inequities and uncertainty in the structure of the Native corporations,⁵⁴ but the ANCSA corporations still face tough times ahead.⁵⁵

51. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347 (1941).

52. I.R.C. §§ 1501, 1504 (1982). The effective date of a new definition of affiliated groups of corporations filing consolidated returns as groups where the parent corporation owns 80% of each affiliated corporation is delayed for Alaska Native corporations until 1992. Deficit Reduction Act of 1984, § 60(b)(5), Pub. L. No. 98-369, 98 Stat. 948 (1984), as amended by Tax Reform Act of 1986, § 1804(e)(4), Pub. L. No. 99-154, 100 Stat. 2085 (1986). See also, Temp. Treas. Reg. § 1.1502-81T (1987).

53. Native Lands Group Selects ANWR Land, *Tundra Times*, Aug. 3, 1987, at 12.

54. Alaska Native Claims Settlement Act Amendments, H.R. 278, 100th Cong., 1st Sess., 133 Cong. Rec. S18690 (daily ed. Dec. 21, 1987). The new amendments alter the ANCSA provision permitting individual Alaska Native shareholders to sell their shares to non-Natives after 1991. The amendments require collective shareholder action before Native corporation stock can be alienated. The Amendments also permit the shareholders to issue to Natives born after December 18, 1971, a new class of shares, which is non-divisible and reverts to the corporation on death. Previously, Natives born after the enacting date of ANCSA were issued no shares of ANCSA corporation stock. Re-tribalization of the land, a key concern of opponents of the bill in the Alaska Native Coalition, was not included in the amendments, see Kasayulie Explains Opposition to 1991 Bill, *Tundra Times*, Aug. 10, 1987, at 3.

55. Cook Inlet Region Inc. [CIRI], one of the more prosperous of the Native corporations, shares revenue from its subsurface estate with each of the other regional corporations under the terms of ANCSA § 7(i). 43 U.S.C. § 1606(i). CIRI's revenue sharing contribution for 1986 was \$19.4 million, but future payments by CIRI, sorely needed by other Native corporations, are now held in escrow

An unsettled claim that oil development on the OCS interferes with aboriginal rights could give Congress the incentive to consider some form of revenue sharing with Alaska Natives from OCS leasing activities. Most Alaska Native corporations currently need additional capital assets to preserve their financial stability. With revenues generated by the OCS oil and gas royalties, Congress has the means and opportunity to satisfy its general fiduciary duty to Alaska Natives.⁵⁶

The state of Alaska filed an amicus curiae brief in *Amoco* in support of the villagers,⁵⁷ and joined the village of Akutan in litigating a lease sale in the Bristol Bay.⁵⁸ As part of what has been called the "Seaweed Rebellion," Alaska and other coastal states have been delaying OCS leasing and exploration with lawsuits and legislative initiatives designed to force Congress into compensating states for the resulting costs of OCS development.⁵⁹ Several bills to create a revenue sharing scheme with coastal states were introduced during the last decade, but all failed to pass in Congress.⁶⁰ Coastal states argue that OCS leasing burdens coastal states with a disproportionate share of the cost of developing the OCS for the benefit of the entire nation.⁶¹ Coastal states must create an infrastructure of roads, schools and services for new coastal communities to service transient boomtowns in isolated areas around oil leases. The economic and environmental costs of oil spills also fall disproportionately on coastal states.

For the state of Alaska, the costs will be astronomical if there is an oil spill in the federally developed OCS, and if the federal and state compensation schemes prove inadequate.⁶² Even without an oil spill, the socioeconomic costs of OCS development can be great.⁶³ Already the cost of providing social services to isolated Native and non-Native villages throughout Alaska's immense territory places a greater than usual eco-

as the state of Alaska challenges federal royalty payments to the corporation. *Tundra Times*, Feb. 22, 1988, at 1.

56. Lease Sale 57, held on Mar. 15, 1983, brought into the federal treasury \$325 million from fifty-nine accepted bids for exploratory rights to 2.4 million acres of the Norton Sound. Mineral Management Service, U.S. Dep't of the Interior, OCS Report MMS 86-0033, *Geologic Report for the Norton Basin Planning Area, Bering Sea, Alaska* 73 (1986).

57. Brief Amicus Curiae of the State of Alaska, *Amoco v. Gambell*, 107 S. Ct. 1396 (1987) (Nos. 85-1239 and 85-1406).

58. *Tribal Village of Akutan v. Hodel*, 792 F.2d 1376 (9th Cir. 1986), cert. granted, vacated and remanded, 107 S. Ct. 1598 (1987).

59. Edward A. Fitzgerald, *Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion*, 5 J. Envtl. L. 1 (1985).

60. *Id.* at 21-29.

61. *Id.* at 30, 41.

62. David J. Bederman, *High Stakes in the High Arctic: Jurisdiction and Compensation for Oil Pollution From Offshore Operations in the Beaufort Sea*, 4 Alaska L. Rev. 37 (1987). The Beaufort Sea is especially susceptible to oil spills because of abnormally high geostatic pressure, a sensitive ecosystem and Arctic winter conditions which make clean-up efforts difficult.

63. For a more complete discussion of the social costs, see Fitzgerald, 5 J. Envtl. L. at 42 (cited in note 59).

conomic burden on the state. The royalty revenues Alaska has received from her mineral resources, including the giant oil strike at Prudhoe Bay, funded public schools, social services and capital improvement in all Alaskan villages, including Native villages. The economic health of all communities in the state, however, are tied to this dwindling source of revenue.⁶⁴ While leasing oil fields on the Alaska landmass provided over a decade of prosperity for all segments of Alaska's society, including Alaska Natives, OCS leasing contributes nothing to the state's economy.⁶⁵ A state shares in federal lease royalties offshore only if the oil or gas pool lies beneath both the OCS and the coastal zone within the state's jurisdiction.⁶⁶ Even then the state's share is only a percentage of the royalties on the estimated amount of oil produced from fields located within the three-mile limit.⁶⁷ Maps provided by the Secretary of Interior on the OCS lease sales in Norton Bay, litigated in *Amoco*, show an Interior Department assessment that the underground oil and gas pool ends, predictably enough, at the the three-mile limit. (See Figures 1 and 2)

In contrast, oil leases on federal public lands within the geographic boundaries of Alaska, such as the giant oil strike at Prudhoe Bay, send 90 percent of the federal lease royalties back to state of Alaska's treasury, fueling the state's economy.⁶⁸ The Mineral Leasing Act of 1920 provides a 50/50 split of lease royalties between the state and federal governments for natural resources found on federal lands within the geographic boundaries of the state. Another 40 percent from the federal government's share is placed into the reclamation fund to purchase land for public use in 17 Western states. Because Alaska is not one of the 17 states participating in the reclamation fund, and because Alaska has traditionally depended on exploitation of its natural resources for economic survival, Congress allocated to Alaska an additional 40 percent of the federal royalty on lease sales in the Alaska Statehood Act.⁶⁹ The oil and gas royalties for

64. The value of the mineral industry to the Alaska economy declined by \$38.2 million in 1986. Alaska Dept. of Commerce and Economic Development and Dept. of Natural Resources, Alaska's Mineral Industry 1986, Special Report No. 40 (1987).

65. "All rentals, royalties, and other sums paid to the Secretary [of Interior] or the Secretary of the Navy under any lease on the outer Continental Shelf for the period from June 5, 1950 to date, and thereafter shall be deposited in the Treasury of the United States and credited to miscellaneous receipts," 43 U.S.C. § 1338.

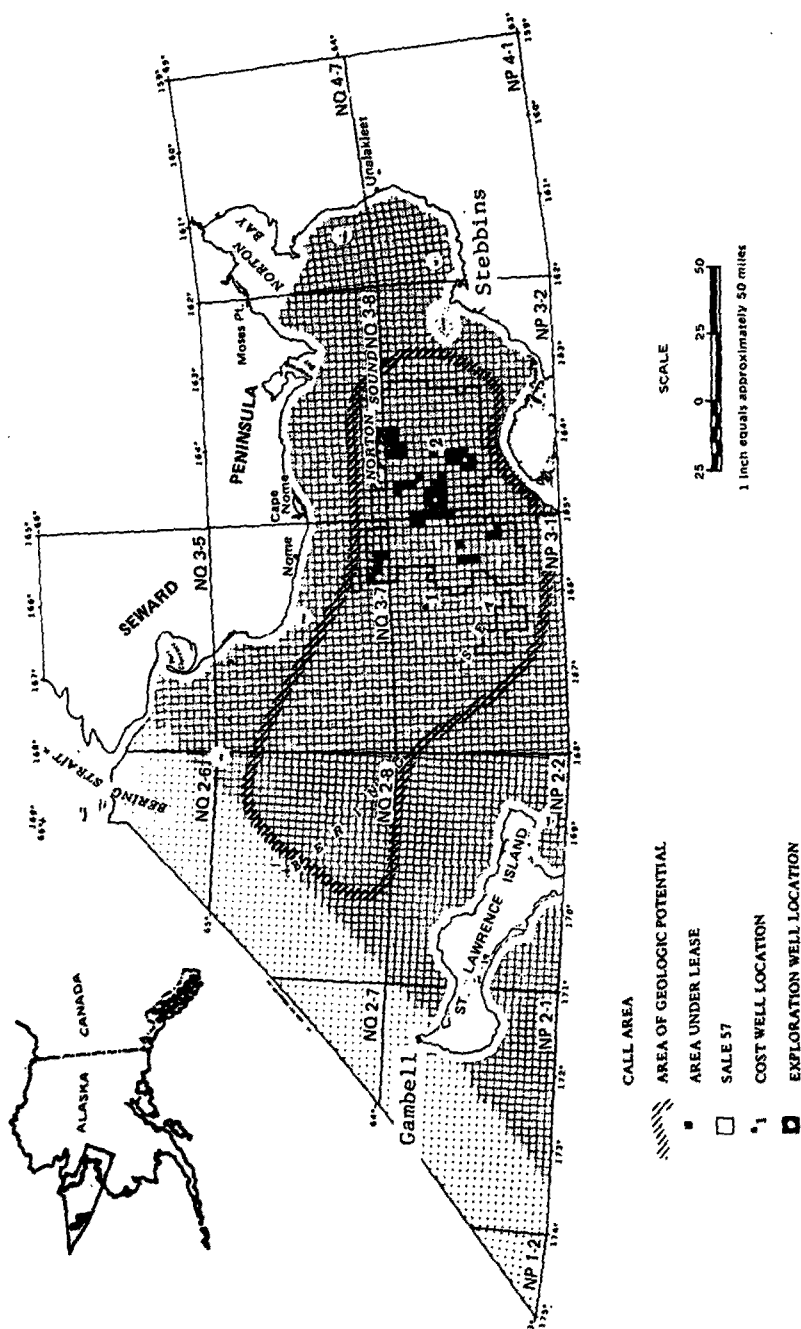
66. OCSLA, 43 U.S.C. § 1337(g).

67. In a settlement to seven coastal states, the federal government offered the state of Alaska \$51 million now and \$134 million over the next fifteen years for royalties from oil and gas pools wholly or partially within Alaska's three mile limit. Outer Continental Shelf Lands Act Amendments of 1985, Pub. L. No. 99-272, 100 Stat. 150 (1986), to be codified at 43 U.S.C. 1337(g).

68. The Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982).

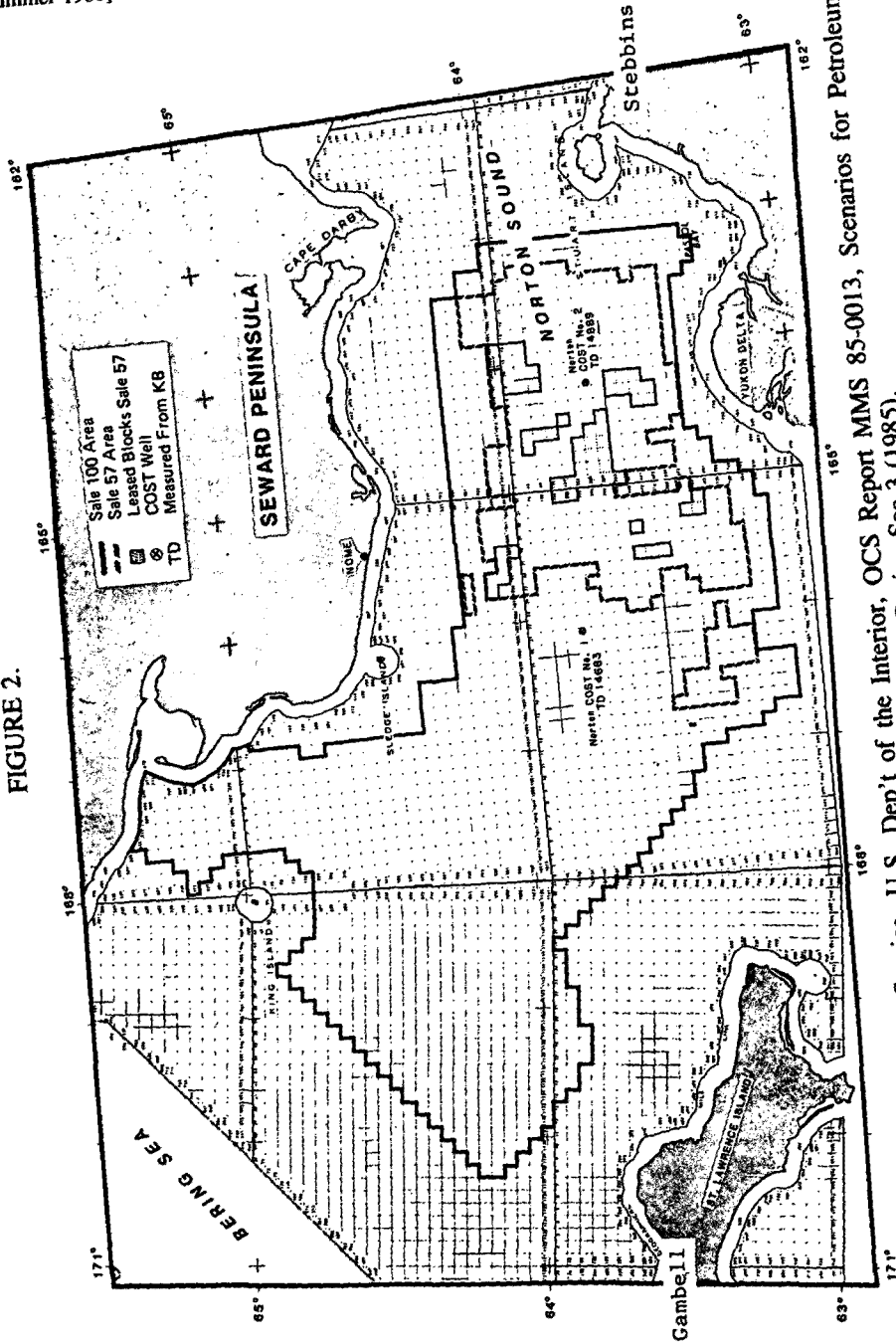
69. Section 28 of the Alaska Statehood Act, 48 U.S.C. note preceeding § 21 (1982), codified at 30 U.S.C. § 191 (1982). The formula is not always appreciated in Congress. The Senate Energy Committee, recently voting to open up the Arctic National Wildlife Refuge for oil and gas drilling, proposed to change the formula for Alaska from 90% of the royalties to 50%, a move certain to draw a constitutional challenge from the state of Alaska if enacted. 46 Cong. Q. 517 (Feb. 27, 1988). See also, 46 Cong. Q. 252 (Feb. 6, 1988).

FIGURE 1.



Source: Mineral Management Service, U.S. Dep't of the Interior, OCS Report MMS 86-0033, Geologic Report for the Norton Basin Planning Area, Bering Sea, Alaska 2 (1986).

FIGURE 2.



Source: Mineral Management Service, U.S. Dep't of the Interior, OCS Report MMS 85-0013, Scenarios for Petroleum Development of the Norton Planning Area, Northeastern Bering Sea 3 (1985).

leases on federal lands inside state territorial boundaries help reimburse the state for costs of providing additional services. The same added costs justify some form of revenue sharing with coastal states for OCS leasing off their shores.

ANCSA itself provides a format for extinguishing aboriginal claims with a revenue sharing plan for federal royalties generated on the disputed land. In settling Alaska Native claims in 1972, Congress funneled 500 million dollars in royalty payments for minerals extracted from Alaska's public lands into the Alaska Native Fund for distribution to Alaska Native corporations as part of the ANCSA settlement.⁷⁰ The Alaska Native Fund received a combination of 2 percent of the gross value extracted each year and 2 percent of the total royalties received by the federal government before the proportionate distribution between state and federal governments occurred.⁷¹ However, ANCSA specifically exempts OCS royalties from inclusion in any payment to the Alaska Native Fund.⁷² Since the *Amoco* Court determined that ANCSA doesn't extinguish Alaska Native claims to the OCS, Congress should equitably apply a percentage of the OCS royalties to extinguish aboriginal claims on the OCS.

CONCLUSION

The Supreme Court in *Amoco* did not extend ANILCA subsistence protection onto the OCS off the coast of Alaska because it interpreted the phrase "in Alaska" literally. Neither did the Court find Congress intended the use of the phrase "in Alaska" in ANCSA to extinguish aboriginal claims on the OCS. The courts, however, have not provided Native Americans with a remedy for trespass and disruption of unrecognized aboriginal claims. The courts have historically deferred to Congress for a determination of whether the government should honor its fiduciary obligation to Native Americans by recognizing unsettled aboriginal claims. The most equitable solution may be for Congress to provide ANCSA-style revenue sharing with both the state and the Alaska Native corporations, using a percentage of the federal OCS royalties.

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70. 43 U.S.C. § 1608(g) (1982).

71. 43 U.S.C. § 1608(d) (1982).

72. 43 U.S.C. § 1608(i) (1982).