Native Village of Eyak
110 Nicholoff Way
P.O. Box 1388
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10,000 years in our Traditional Homeland, Prince William Sound, the Copper River Delta, and the Gulf of Alaska

Chairman Dan Hull
Chairman
North Pacific Fishery Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

Dear Mr. Hull,

My name is Darrel Olsen and I am Chairman of the Native Village of Eyak's Traditional Tribal Council. Our village is located in Cordova, Alaska but, because we are traditionally a seafaring people, our homeland is the greater Prince William Sound and northern Gulf of Alaska from the southeast corner of Kachemak Bay in the west to Cape Yakataga in the east. We have lived, fished, and traveled in these waters for over 10,000 years and our culture, diet and economy has developed around the ocean and the resources it provides. Ocean fish such as salmon, halibut, and cod have been particularly important to our people throughout time, serving as a dietary staple since prehistoric times and developing in to an economic staple post-European contact.[1] While our traditional fishing rights have never been extinguished, our Tribe has spent many years litigating challenges to these rights. The result of this litigation has been that while it was established that our ancestors were "skilled marine hunters and fisherman"[2] and that we had continuously fished in the these waters throughout our history, aboriginal title could not be established because we had not done so exclusively.[3] Despite, incorrectly, finding that we could not satisfy the requirements for aboriginal title, the Court notably could not avoid recognizing our long-established ties to the ocean and to ocean fishing.

Our dependence on fish made us particularly vulnerable to the devastating effects of the 1989 Exxon Valdez Oil Spill. At the time of the spill, Cordova was described as "an isolated community, highly dependent on commercial fishing for an economic base."[4] Exxon Valdez desecrated our fisheries and we consequently suffered a massive decline in our tribal fishing economy. While some of our fisheries have been restored since Exxon Valdez, our tribal fishing economy continues to struggle due to the additional strain placed on it by the IFQ program.

This is because not only was our Tribe not taken into consideration during the initial IFQ distribution, but also many of the Tribe's fishermen were unable to individually qualify for IFQs. In order to qualify an applicant had to have had documentation showing harvest of halibut or sablefish from a vessel during the

[1]Michael R. Yarborogh, *Expert Report* 6 (2008), *Eyak et al v. Gutierrez*, Secretary of Commerce, No. A98-365-CV (D.A.K. 2009); E. Erik Knudsen, Native Am. Rights Fund, *Prehistoric, Historic and Contemporary Chugach Native Marine Fisheries in the South Central Alaska Outer Continental Shelf Area* 4 (2008).
[2]*Native Village of Eyak v. Blank*, 688 F.3d 619,623 (9th Cir. 2012)
[3] *Id.*
[4] Steven Picou, Social Disruption and Psychological Stress in an Alaskan Fishing Community: The Impact of the Exxon Valdez Oil Spill 8 (Boulder: University of Colorado Natural Hazards Center, 1990).

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qualifying years of 1988, 1989 and 1990.[5] Unfortunately, despite being undeniably part of the target population for IFQs, this qualification was difficult for our tribe to meet in the wake of Exxon Valdez as many of our fisherman had used their boats to clean up the Prince William Sound instead of for commercial fishing purposes during those qualifying years.[6] The purpose of this qualification was to "eliminate those who have not been recent participants"[7] and to ensure that "those individuals who have borne the greatest financial risk in developing the harvesting sector [were] rewarded with the initial allocation of Quota Shares."[8] While the rationale behind this limitation was correct, its scope was too narrow to truly fulfill its purpose.

In the NMFS's environmental impact report following the proposed rule for the IFQ program, it mentioned certain rural Alaskan communities in the Bering Strait/ Aleutian Island regions were ineligible for IFQs at the time of implementation because of financial restraints but may wish to participate in the halibut fishery in the future. These communities were later accounted for with the subsequent implementation of the CDQ program intended to provide them with "the opportunity to participate and invest in BSAI fisheries."[9] We commend Council for recognizing and addressing the very real needs of those communities and devoting resources to improving their economic wellbeing by including them in the fishery. That being said, the NMFS's perception that "rural coastal community involvement in the halibut fishery, with relatively few exceptions, [was] not…a problem [at the time of the IFQ program's implementation]" was incorrect. Because our Tribe was wrongly excluded from the initial IFQ distribution we were unable to maintain adequate involvement in the halibut fishery. We should have been included in the scope of the CDQ program instead of being shut out, once more, from benefiting from one of our most important and longstanding resources.

Although we acknowledge and appreciate all that Council has done through the IFQ program to protect a resource as critical and as fragile as the halibut fishery, it is an undeniable fact that the program has negatively impacted our Tribe. Despite having fished in the Prince William Sound since time immemorial, we were not accounted for during either the initial IFQ distribution or the subsequent CDQ distribution. We believe this oversight is not only directly contrary to the underlying purpose of the IFQ program and to the national standards of the Magnuson Stevens Act but also, by depriving us of a valuable federal resource within our homeland, it undermines the Department of Commerce's trust obligations to our Tribe. Therefore, we write this letter to encourage Council to utilize the Halibut and Sablefish Program Review as a means of amending the IFQ policy to properly account for our rights by issuing our Tribe a reasonable

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[5] 50 C.F.R. § 679.40(a)(2)(D).
[6] *Eyak et al v. Locke*, Secretary of Commerce, Defendant-Appellee., 2010 WL 5078973 (C.A.9), 6
[7] N. Pac. Fisheries Mgmt. Council, *Final Supplemental Environmental Impact Statement/ Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries: Gulf of Alaska and Bering Sea/ Aleutian Islands NMFS Report* 2-23 (1992)
[8] *Id.* at 2-22
[9] *The Community Development Program*, Nat'l Oceanic and Atmospheric Admin. 5, https://alaskafisheries.noaa.gov/sites/default/files/cdqprogsummary.pdf.

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number of IFQs. The purpose of the review process is to determine whether the IFQ program is progressing in meeting its goals and the goals of the Magnuson Stevens Act and to make any necessary modifications to the program in order to meet these goals. Redistributing IFQs to account for our Tribe constitutes the kind of "necessary modification" at the heart of the review process.

Section 301(a) of the Magnuson Stevens Act[10] prescribes ten National Standards for fishery conservation and management to guide fishery management programs on how to achieve the Act's underlying policy objectives. Revising the Halibut IFQ program to account for our tribe would not only comply with these standards on its own, but it would also make the IFQ program as a whole more compliant with the Act. For example, Section 304(a)(4) states that "if it becomes necessary" to reallocate IFQs, then such reallocation must be: fair and equitable; reasonably calculated to promote conservation; and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of privileges. The status quo constitutes a "necessary situation" for IFQ reallocation. The fact that our Tribe has been shut out of benefiting from a federal resource within our traditional homeland and that directly relates to our maritime cultural identity is contrary to the Act's purpose of promoting fairness and equality within the fishery's resource distribution. Additionally, because we are requesting a reasonable number of IFQs and are willing to work with Council to devise a specific plan for reallocation, conservation and distribution concerns will be accounted for.

Section 301(a)(8) requires the conservation and management of fisheries to "take into account the importance of fishery resources to fishing communities in order to (a) provide for the sustained participation of such communities, and (b) to the extent practicable minimize adverse economic impacts on such communities."[11] The initial IFQ distribution was contrary to this policy standard. By failing to account for the importance of the fishery to our Tribe both historically and at the time of distribution, the IFQ program neither allowed for our sustained participation in the fishery nor helped to minimize the adverse economic impacts it would have on our community. Reallocating IFQs to account for our Tribe would simultaneously guarantee our sustained future participation in the fishery, minimize further economic harm, and legally recognize our Tribe's historical and cultural tie to the ocean by protecting our traditional maritime economy.

In addition to furthering the objectives of the Magnuson Stevens Act, reallocating IFQs to account for our Tribe furthers the policy objectives specific to the IFQ program identified in its original Supplemental Environmental Impact Statement. These policy objectives aim to "link initial quota share allocations to recent dependence on halibut and sablefish fixed gear fisheries"[12] and to assure that "those directly

[10] 16 U.S.C.A. § 1851(a)
[11] 16 U.S.C.A. § 1851(a)(8)
[12] N. Pac. Fisheries Mgmt. Council, *Final Supplemental Environmental Impact Statement/ Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries: Gulf of Alaska and Bering Sea/ Aleutian Islands NMFS Report* 2-20 (1992)

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involved in the fishery benefit from the IFQ program by assuring that [the fishery is] dominated by owner/operator operations."[13] The rationale behind these policies was to ensure that the initial distribution of IFQs favored those who were directly involved in the fishery and thus "who have borne the greatest financial risk in developing the harvesting sector."[14] In other words, Council aimed to protect those who currently depended on the fishery and could be expected to continue to depend on it. A close reading of these objectives is not required in order to conclude that our Tribe constitutes the exact population type these limitations were intended to protect. The greater Prince William Sound is our homeland and our continuous dependence on and participation in the fishery is an unquestionable fact. Furthermore, another IFQ policy was to "limit [the] concentration of quota share ownership and IFQ usage that will occur over time."[15] Reallocating IFQs to account for our Tribe would diversify share ownership and IFQ usage which would offset some of the concentration that has occurred since the program's implementation.

As our trustee, the federal government is obligated to protect our rights, lands, assets and resources. The current presidential administration has done a great deal to address the federal government's trust responsibility to Tribes by promoting tribal self –governance and implementing pro-tribal policies. As a federal agency, the Department of Commerce carries the same responsibility to Indian tribes.[16] We appreciate the Department's efforts as our trustee to protect and enhance the fisheries of our homeland and recognize that there are certain requirements that must be met in order to maintain the fishery's resources. That being said, the negative impacts our Tribe presently suffers as a result of our exclusion from participation in the IFQ and CDQ programs, both federal programs that regulate one of our trust resources, is counter to both the Department's trust obligations and to the spirit of the current state of federal-Indian Affairs.

In sum, we ask that Council utilize the opportunity presented by the IFQ Program Review to make this necessary modification. Reallocating IFQs to account for our Tribe furthers the policy objectives of both the Magnuson Stevens Act and the IFQ Program as well as addresses the Department of Commerce's trust obligations to our Tribe. We would like to reiterate that we acknowledge that the IFQ program comes with certain necessary requirements that Council must take in to consideration in order to protect the trust resources. All we are asking is for Council to acknowledge our rights and by conveying to us a reasonable number of IFQ shares allowing us the same recognition with thin program as sports fisherman and non-Tribal commercial enterprises. We are a reasonable people and are confident that through meaningful government-to-government consultation our Tribe and Council can agree on what constitutes a reasonable IFQ and bring an end to our decades-long struggle to have a share in one of our oldest and most important resources.

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Frequently asked Questions*, U.S. Dept. of the Interior: Indian Affairs (Aug. 16, 2016), http://www.bia.gov/FAQs/.

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10,000 years in our Traditional Homeland, Prince William Sound, the Copper River Delta, and the Gulf of Alaska

We have provided a separate letter indicating our proposal for the number of shares and a means of distribution, as well as a wealth of background information and reviews of the Tribe's various litigations asserting these traditional fishing rights for your review.

We appreciate your attention to this matter. Please contact me at (907) 424-7738 with any questions or concerns.

Sincerely,

Darrel Olsen

Darrel Olsen
Chairman
Native Village of Eyak
Traditional Tribal Council

2010 WL 5078973 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

NATIVE VILLAGE OF EYAK, Native Village of Tatitlek, Native Village of Chenega, Native Village of Nanwalek, and Native Village of Port Graham, Plaintiffs-Appellants,

v.

Gary LOCKE, Secretary of Commerce, Defendant-Appellee.

Nos. 09-35881, 02-36155.
March 9, 2010.

Appeal from the United States District Court for the District of Alaska, Case No. 98-cv-00365 (HRH), Judge Russel Holland, On Remand from Ninth Circuit Court of Appeals, Appeal No. 02-36155 (en banc)

Appellants' Opening Brief

Natalie A. Landreth, Native American Rights Fund, 801 B Street, Suite 401, Anchorage, Alaska 99501, Telephone: (907) 276-0680; Goriune Dudukgian, Alaska Legal Services Corp., 1016 West 6th Ave., Suite 200, Anchorage, Alaska 99501, Phone: (907) 222-4524; Richard de Bodo, Robin Wechkin, Susan Acquista, Clive McClintock, Hogan & Hartson LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067, Telephone: (310) 785-4600, Attorneys for Plaintiffs-Appellants.

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i *TABLE OF AUTHORITIES

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*1 *JURISDICTIONAL STATEMENT*

This Court accepted jurisdiction over this case when it was first appealed in 2002. *See Eyak Native Village v. Daley*, 375 F.3d 1218 (9th Cir. 2004) (Appeal No. 02-36155). Plaintiffs-Appellants are the Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham, whose inhabitants are descendants of the Chugach people who have populated the region for over 7,000 years (collectively, the "Villages" or "Chugach").

In the 2002 appeal, the Chugach challenged the District Court's summary judgment ruling, in which the court declined to recognize the Chugach's nonexclusive rights to fish and hunt on the Outer Continental Shelf ("OCS") based on

their aboriginal use of that area. [1] The District Court held that paramount federal interests in the OCS precluded any recognition of aboriginal fishing rights.

This Court convened an *en banc* panel to address the conflict between two of its prior decisions on federal paramountcy -- the doctrine under which certain rights in offshore waters are eclipsed by the federal interest in controlling those areas for purposes of foreign affairs, foreign commerce, and national defense. *Gambell v.* ***2** *Hodel*, 869 F.2d 1273, 1277 (9th Cir. 1989) ("*Gambell III*") (aboriginal fishing and hunting rights in the OCS are *not* barred by federal paramountcy) and *Eyak Native Village v. Trawler Diane Marie, Inc.*, 154 F.3d 1090 (9th Cir. 1998) ("*Eyak I*") (*exclusive* aboriginal rights in the OCS are barred by federal paramountcy).

Following oral argument, the *en banc* Court vacated the District Court's order and remanded "with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, the plaintiffs have." *Eyak*, 375 F.3d at 1219. The Court expressly "retain[ed] jurisdiction over all further proceedings in this matter." *Id.*

The proceedings on remand have concluded, and the Chugach now return to challenge the District Court's judgment, which is deficient in multiple respects.

***3** *STATEMENT OF ISSUES PRESENTED FOR REVIEW*

1. Whether the District Court erred as a matter of law when it ruled on issues that fall outside the scope of this Panel's remand and that the parties did not address during remand.

2. Whether the District Court committed legal error when it failed to evaluate the Chugach's claim of aboriginal fishing and hunting rights on the OCS under the established common-law standard for determining whether such rights exist: long-term, exclusive use and occupancy of the area in question.

3. Whether the District Court erred as a matter of law when it held that the Chugach do not have aboriginal fishing and hunting rights on the OCS, despite concluding that the Chugach had fished, hunted in, and occupied these waters for thousands of years, and where there is no evidence that any other Native group similarly fished and hunted in or occupied this territory.

4. Whether the Chugach satisfied the legal standard for establishing aboriginal rights: long-term, exclusive use and occupancy of the claimed portions of the OCS.

***4** *STATEMENT OF THE CASE*

I. *Preliminary Statement*

This is a case about the aboriginal fishing and hunting rights of the Chugach and their effort to continue exercising those rights in common with non-Natives. For thousands of years before European contact, the Chugach Indians regularly -- that is, seasonally -- fished and hunted in and traversed OCS waters in order to sustain their livelihood and culture, Based on this history, the Chugach request access to the sablefish and halibut fisheries in these waters. These fisheriess are now regulated by the Secretary of Commerce ("Secretary"). Without judicial relief, the Chugach will be barred from them.

The doctrine of aboriginal rights is intended to preserve Native property and culture, while reflecting "concerns of humanity and policy":

Humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989) ("*Gambell III*") (quoting *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589-90 (1823)). Under this doctrine, the law recognizes aboriginal rights of Native people who establish long-term, exclusive use and occupancy of a reasonably well-defined territory.

***5** In 1993, the Secretary promulgated regulations limiting access to the OCS fisheries under the Magnuson Fishery Conservation Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801-1882, and the Northern Pacific Halibut Act of 1982 ("Halibut Act"), 16 U.S.C. §§ 773-773k. *See* Fisheries of the Exclusive Economic Zone Off Alaska, 50 C.F.R. § 679 (2009). Under these regulations, any boat fishing commercially for halibut or sablefish in portions of the Gulf of Alaska must have an Individual Fishing Quota ("IFQ") permit specifying the maximum amount of fish that the vessel may take. 50 C.F.R. § 679.4(d)(1)(ii) & Fig. 3.

The regulated area encompasses the Chugach's aboriginal fishing and hunting grounds. But in allocating IFQs, the Secretary failed to take into account the Chugach's aboriginal rights. The Secretary allocated IFQs only to persons or entities who happened to own or lease vessels used to catch halibut or sablefish, and who actually caught those fish, between 1988 and 1990; Chugach members who did not own or lease a fishing vessel and catch those fish between 1988-1990 were ineligible. *See* 50 C.F.R. §§ 679.40(a)(2)(A)-(B) & 679.40(a)(3)(i). Fishermen qualifying for IFQs were allocated a fraction of the total allowable catch (a "quota share") based on their proportion of the total catch in 1984-1990 (for halibut) or 1985-1990 (for sablefish). *See* 50 C.F.R. § 679.40(a)(4)(i)-(ii).

The Secretary's decision to award fishing rights based on a narrow three-year period (1988-1990) disregarded the thousands of years the Chugach fished ***6** and hunted in their aboriginal territory. At the same time, the Secretary failed to take into account the impact of the Exxon-Valdez oil spill, which occurred in Prince William Sound on March 23, 1989. Many Chugach fishermen who owned or leased vessels decided to participate in environmental clean-up after the catastrophic spill and thus did not fish (or fished less) during these years. [2] They had no way of knowing that by engaging in clean-up efforts they were materially damaging their ability ever to fish or hunt in this area again. The Chugach have remained shut out of this area ever since.

What the Chugach request in this case -- recognition of their non-exclusive rights to fish and hunt on the OCS based on aboriginal use -- is consistent with this Court's precedent. In *Gambell III*, the Alaska Native Villages of Gambell and Stebbins claimed that the government's sale of oil and gas exploration leases on the OCS would interfere with their aboriginal right to fish and hunt on the OCS. *See* 869 F.2d at 1275. This Court held that the villages' claims were legally cognizable, notwithstanding federal paramountcy. *Id.* at 1276-77. Here, the Chugach request the same right that this Court recognized in *Gambell III* -- *i.e.*, a *non-exclusive* right to fish in OCS waters that are part of their aboriginal territory.

***7** In asserting non-exclusive rights, the Chugach are not requesting that current IFQ permit-holders be ejected from the fisheries. They request only that the regulations be revised in a way that accommodates their aboriginal rights. The Secretary retains discretion to determine how best to allocate the allowable catch among interested parties -- so long as the Chugach are granted permits consistent with their rights.

II. ***Case History***

The Chugach brought this action for recognition of non-exclusive fishing rights on the OCS based on aboriginal use following the decision in *Eyak Native Village v. Trawler Diane Marie, Inc.*, 154 F.3d 1090 (9th Cir. 1998) ("*Eyak I*"). In

Eyak I, the Chugach challenged the Secretary's failure to take into account aboriginal rights in promulgating the 1993 halibut and sablefish regulations, asserting that they had *exclusive* aboriginal rights to fish and hunt on the OCS. *Id.* at 1092. The Secretary in response invoked the federal paramountcy doctrine, pursuant to which federal regulation of offshore waters preempts state regulation of those areas. *Id.*

In *Eyak I*, the District Court ruled that federal paramountcy precluded aboriginal title in the OCS, and that there is no exclusive right to fish in navigable waters based on aboriginal title outside of a treaty or federal statute. *Id.* This ***8** Court affirmed on federal paramountcy grounds and declined to address the district court's alternative holding. *Id.* at 1097 & n.6.

The Chugach filed this action in November 1998, asserting *non-exclusive* rights to fish and hunt in OCS waters based on aboriginal use. The District Court granted summary judgment for the Secretary, holding that all aboriginal fishing and hunting rights on the OCS (including non-exclusive rights) are precluded by federal paramountcy. Dkt. No. 42. Having concluded that the Chugach's aboriginal rights were barred as a matter of law, the District Court declined to determine whether the Chugach had produced sufficient evidence to support their claim to aboriginal rights.

The Chugach appealed. A three-judge panel of this Court *sua sponte* requested briefing on whether the case should be considered *en banc* in view of the conflicting decisions in *Eyak I* and *Gambell III*. The Chugach argued that *en banc* consideration was warranted. This Court voted to hear the case *en banc*.

After oral argument, the *en banc* panel directed the District Court to develop a full factual record on the scope of the Chugach's aboriginal rights on the OCS. *Eyak Native Village v. Daley*, 375 F.3d 1218, 1219 (2004); *see also* ER328-ER333. The Court explained that before addressing the paramountcy issue, it "would be greatly assisted by an initial determination by the district court of what aboriginal rights, if any, the villages have." 375 F.3d at 1219. The Court accordingly vacated ***9** the District Court's summary judgment order 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 further directed 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.* Finally, the Court stated that "[t]he en banc panel retains jurisdiction over all future proceedings in this matter." *Id.*

III. ***Proceedings on Remand***

The Secretary again moved for summary judgment, but after lengthy briefing and oral argument, the District Court denied the Secretary's motion, holding that genuine issues of material fact existed regarding the Chugach's use of the OCS. Dkt. No. 106.

Four years after the remand, and after more than a decade of litigation, the Chugach finally got their day in court. During a seven-day trial, both parties presented evidence intended to enable the District Court to determine whether the Chugach had *exclusively used and occupied* the OCS for a long period of time -- the legal test for establishing aboriginal rights. The District Court heard testimony from six expert anthropologists, an expert in Native languages, four fisheries biologists, and six Chugach tribal elders whose responsibility it is to maintain and pass on Chugach oral history and culture. The court heard extensive evidence ***10** demonstrating that the Chugach fished and hunted on the OCS waters at issue and that they have had the equipment, know-how, and occasion to fish and hunt on the OCS dating at least back to their first contact with European explorers in the eighteenth century. Through contemporaneous historical documents, five eighteenth-century eyewitness accounts were presented. The court heard no evidence at any point during the trial that any other group besides the Chugach fished or hunted in the claimed OCS waters before European contact.

The District Court entered findings of fact and conclusions of law in August 2009. The court expressly found that the Chugach were a seafaring people who traveled regularly and fished seasonally on the OCS during pre-contact times

and subsequently. ER015-ER016; ER020-ER022. But rather than analyzing these findings under the established legal standard for aboriginal rights -- long-term, exclusive use and occupancy of the area in question -- the court ruled as a matter of law that aboriginal fishing rights simply cannot, by definition, exist on the OCS, or, indeed, in any "navigable waters." ER025-ER026. According to the District Court, "no such right exists as a matter of Native American law or statute with respect to the OCS." ER025. This legal ruling exceeded the scope of this Court's remand -- and as discussed below, is wrong.

As a final matter, the District Court reinstated the legal rulings it made when it granted summary judgment to the Secretary in 2002 -- the judgment this Panel ***11** *vacated* in 2004. *See* ER027-ER028; ER010-ER011. The District Court expressly noted that these conclusions "went beyond the strict limits" of the remand, but stated that unless it exceeded the remand and addressed the issues, the case could not be appealed. ER026-ER027. The parties were not given an opportunity to address this issue. The court entered judgment dismissing the Chugach's complaint with prejudice. ER001.

***12** *STATEMENT OF FACTS*

I. *The District Court Found That The Chugach Fished, Hunted And Traveled On The OCS During Pre-Contact Times*

The District Court found, based on substantial evidence, that the Chugach fished, hunted, and traveled on OCS waters -- 3 miles from shore and further out -- before they had contact with Europeans in the 18th century. The court's factual findings establish that the Chugach satisfy the requirements for aboriginal fishing and hunting rights.

At trial, it was essentially undisputed that the Chugach fished, hunted and traveled on the OCS during pre-contact times, as well as afterwards. The six anthropology experts who testified, including four for the Secretary, all agreed that the Chugach fished and hunted on the OCS. *See* Langdon ER186-ER187 & ER188-ER191 (admitting the Chugach traveled extensively through OCS waters and fished while in transit); Wooley ER204-ER205 (admitting it is "reasonable" to assume Chugach harvested resources on the OCS while traveling between Prince William Sound and Middleton Island); M. Yarborough ER194-ER196 & ER197-ER198 (admitting the Chugach would opportunistically take fish and sea mammals as they crossed the OCS); L. Yarborough ER182 (admitting the possibility that Chugach fished and hunted on the OCS); Partnow ER138 (discussing extensive evidence indicating Chugach fished and hunted on the OCS); ***13** Ganley ER118-ER119 (stating "with a high degree of certainty" that the Chugach hunted and fished on the way to Middleton Island).

Expert anthropologists on both sides also agreed that there is no evidence that any Native group besides the Chugach fished or hunted on the OCS waters at issue during the pre-contact period. Ganley; ER120-ER122; ER123-ER125; Langdon; ER200; Wooley; ER205.

Based on this testimony and other corroborating evidence, the District Court identified several different types of Chugach use of the OCS for fishing and hunting:

• **Fishing and Hunting In OCS Areas Near Ancestral Villages:** "[I]t 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[.]" ER021. *see infra* Fig. 1 (reflecting various Chugach ancestral village sites and other archaeological sites in red, along with line indicating the 3-mile offshore limit where the OCS begins). [3]

• **Fishing and Hunting In OCS Areas Near Certain Key Destinations:** "[I]t is likely that some hunting and fishing took place in the near parts of ***14** the OCS around the Barren Islands and Middleton Island, on Wessels Reef, and the Copper River flats,"; ER021 -- all sites where the Chugach commonly traveled during pre-contact times. ER016. Wessels Reef is "a shallow area rich in marine resources" located in the middle of the OCS. ER011.

• **Fishing And Hunting In The OCS While Traveling:** "Some residents of some of the pre-contact villages traveled to Middleton Island [60 miles from shore], the Barren Islands, Cook Inlet, the Copper River Delta, or Wessels Reef for purposes of fishing and hunting"; while traveling across the OCS, the Chugach fished and hunted "opportunistically" when they encountered fish or animals or needed food. ER020-ER021; *see infra*, Fig. 1 (depicting traditional and historic travel routes).

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TABLE

FIGURE 1 [4]

15 II.** ***Contemporaneous Accounts By Early Explorers Confirm The District Court's Findings That The Chugach Fished On The OCS

The district court's findings concerning the Chugach's aboriginal use of OCS waters were supported at trial by eyewitness accounts of eighteenth-century explorers describing encounters with the Chugach on the OCS. Expert anthropologist Matt Ganley described five of these eighteenth-century accounts, and mapped out approximately where on the OCS each encounter took place. *See,* ***16** *e.g.*, ER089 (discussing methodology for mapping Menzies account). These accounts, taken from journals and other contemporaneous historical documents, demonstrated the Chugach's ability to traverse the OCS, the sophistication and range of their kayaks, and their fishing activities: [5]

• **Commander Igancio Arteaga (July 20, 1779):** Arteaga, a Spaniard, described an encounter "5 leagues" -- *i.e.*, *15 miles* -- from shore (in the middle of the OCS), in which two Chugach men traveled in kayaks from shore to Arteaga's ship. ER306; Ganley ER075-ER078; ER311.

• **Archibald Menzies (May 16, 1794):** Menzies, who was British, described an encounter on the OCS involving 150 Chugach kayaks, with two men in each kayak, in which his party "procure[e]d a supply of very good *Halibut*" from the Chugach. ER254 (emphasis added); Ganley ER088-ER089; ER319.

• **Father Riobó (July 21, 1779):** A Spanish priest with Arteaga's expedition observed the Chugach traveling "three miles out at sea" (*i.e.*, on the OCS) and marveled at the remarkable design and water-tightness of their kayaks. ER307 Ganley ER079-ER080; ER313.

• **Martin Sauer (July 9, 1790):** Sauer, who was part of a Russian expedition, encountered two Chugach natives "three miles from shore" (*i.e.*, on the ***17** OCS) who carried skins of a sea otter, a river otter, and a seal. ER251; Ganley ER083-ER085; ER315.

• **Alejandro Malaspina (August 25, 1791):** Malaspina, a Spaniard, reported seeing a Chugach canoe off the coast of Middleton Island, which is 60 miles from the mainland. ER308; ER086; ER317.

III. ***The District Court Found That The Chugach Had Sophisticated Boats And Navigational Techniques Enabling Them To Fish On The OCS***

The District Court found that the Chugach were skilled navigators and had developed specialized equipment for fishing on the OCS:

• The Chugach "were skilled marine hunters and fishermen," ER016, who "found their sustenance largely in marine waters, relying heavily upon fish and sea mammals." ER015

• With their kayaks and umiaks, they were "entirely capable" of traversing the OCS waters at issue. ER016

• The Chugach were "knowledgeable of ocean currents" and took advantage of those currents when traveling to and from Middleton Island.[6] ER016-ER017. *See* triangular shaped route in Figure 1, *supra* at 15.

***18** • Chugach travelers had the services of specialized "weathermen" who were "skilled in anticipating weather conditions." ER016.

The Chugach navigated the OCS in boats called bidarkas, or kayaks (pictured below), which were specially designed for use in rough and open water. *See* Ganley ER090-ER096 (explaining that the bow of the Chugach bidarka was specifically built to cut through rough water, which one would be more likely to encounter on the OCS); Partnow ER136-ER137 (same). Mr. Makarka, a Chugach elder, testified that his ancestors would tie their kayaks together to make a raft, which created even greater stability when fishing on the OCS or spending long periods out at sea. Makarka ER040-ER047; ER219 (drawing below).

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Mr. Johnson and other tribal historians testified that the Chugach traveled on the OCS based on an intimate knowledge of the winds, currents, stars, and landmarks. *See, e.g.*, Johnson ER148-ER151 (discussing role of weatherman and landmarks like the clouds over Middleton Island); Partnow ER139-ER140; Ganley ER104-ER105; ER207. The Chugach also developed specialized tools for fishing ***19** on the OCS, including a boat bailer, which Mr. Ganley described as a "human-operated sump pump" useful during long-distance travel, Ganley ER092-ER093, and fishing lines made of bullwhip kelp, Johnson ER148, ER170-ER171, ER174-ER176.

The Chugach's development during pre-contact times of sophisticated boats, equipment, and navigational techniques that facilitate fishing and hunting on the OCS supports the court's findings that the Chugach fished and hunted on the OCS during that period. As Mr. Ganley opined, the Chugach would not have designed such sophisticated boats if they were not using them on the OCS: "[W]e don't build airplanes to taxi it down the highway to work, you know. Technology develops for a reason. There are imperatives that drive the technology." ER096.

IV. ***The District Court Found That The Chugach Territory Encompassed Portions Of The OCS***

The District Court found that the Chugach territory was bounded by "the Lower Cook Inlet, the area between the Barren Islands and Kodiak Island, and the Copper River Delta and Copper River flats." ER021. According to the District Court, these areas on the periphery were used in common with neighboring groups, ER021; the court did not find that any other group used the portions of the OCS within those boundaries.

Evidence regarding Native languages and place-names confirms the court's findings. Dr. Jeff Leer, an expert in Alaskan Native languages, testified that when ***20** one examines geographic areas at the periphery of Chugach territory, where the pre-contact Chugach were in contact with other Native groups (*e.g.* areas like the Barren Islands and Kayak Island), there are place-names in each Native language for those locations. ER056; ER309; Leer ER055; Ganley ER113; ER130-ER131. However, when one moves inside the boundaries of Chugach territory, the Chugach are the only Native group to have place-names in their language for the geographic features on the OCS:

• Wessels Reef, originally "Pala'at Nuutqaat," meaning "boat reefs" because the Chugach thought it was shaped like an overturned kayak, Leer ER053; Ganley ER114-ER115; *see also* ER321;

• Seal Rocks, originally "Qikertarraak." Leer ER053; *see also* ER309, ER321.

• Middleton Island, which was originally "Qucuaq" -- a name so old that its meaning has been lost. Leer ER053-ER054; *see also* ER321.

As Dr. Leer and Mr. Ganley testified, the fact that the Chugach had place-names for these locations within or near the OCS indicated that the Chugach were familiar with the locations, visited them, and needed a way to refer to them. Conversely, the fact that *no other Native group* had names for these locations in its language strongly suggests that the other Native groups did not frequent these locations. *See* Leer ER058; Ganley ER111.

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21 V. *Chugach Oral Histories Further Corroborate The Court's Findings About Use Of The OCS

A study conducted by expert anthropologist Matt Ganley provides further confirmation that the Chugach fished and hunted on the OCS beginning in pre-contact times and afterward. Mr. Ganley testified that the Chugach have survived in a harsh environment by passing on necessary information about fishing, hunting, and other survival skills from generation to generation, including the most productive locations for fishing. ER097-ER101; *see also* Partnow ER141-ER143; (discussing reliability of oral traditions). Mr. Ganley testified, based on his knowledge about Alaska Native cultures and the Chugach in particular, that the ***22** locations at which Chugach families fish would not have changed significantly over time and would like be the same locations that their ancestors used. Ganley ER073. Given that Mr. Ganley interviewed 50 Chugach elders and was told that they had been taught by preceding generations to fish and hunt in particular regions of the OCS, this seems to suggest that their ancestors also fished in the OCS. Ganley ER066-ER071, ER074. The interviews also established that the Chugach communicated over generations the need to avoid depleting nearby fish populations -- and hence to fish at least some of the time further from shore, in the OCS. Kvasnikoff ER065.

Taken separately or taken together, these categories of evidence provide more than ample support for the District Court's finding that the Chugach fished and hunted in the OCS before and after European contact.

23 *SUMMARY OF ARGUMENT

The most fundamental error in the proceedings below is that the District Court exceeded its mandate. This Panel remanded so that the District Court could answer a specific factual question: whether historical and prehistoric Chugach activity was sufficient to establish aboriginal fishing and hunting rights on the OCS. The standard for demonstrating such rights is widely accepted: there must be long-term, exclusive use and occupancy of the area in question. Instead of citing or applying that standard, however, the District Court held that, as a legal matter, such rights simply cannot exist on the OCS. In announcing this categorical rule, the District Court reached precisely the issue the Panel reserved for itself when it retained jurisdiction over this action and directed the District Court to *assume* that federal authority over the OCS does not foreclose aboriginal rights. Indeed, with respect to four of its legal conclusions, the District Court stated quite explicitly that it was exceeding the scope of the mandate, but that it needed to do so to enable future appellate jurisdiction. This too was error. The Panel has had jurisdiction over this matter since 2004. The District Court clearly exceeded its jurisdiction when it ruled on issues beyond the specifically delineated question of whether the Chugach established the factual predicate for aboriginal rights in the OCS.

***24** Apart from this fundamental jurisdictional defect, the District Court's categorical ruling is wrong on the merits for three reasons.

First, *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 785 (Cl. Ct. 1968), the Claims Court decision on which the District Court principally relied, dealt with an entirely different issue: whether Natives had a right under Fifth Amendment takings law to receive monetary compensation for fish caught by others based on their ownership of adjacent lands. Furthermore, this case dealt with a specific compensatory issue under a statute unique to the Tlingit & Haida Tribe that cannot simply be extrapolated into broader rules. To the extent one might interpret *Tlingit & Haida* as suggesting that aboriginal rights cannot exist on the OCS, it would be inconsistent with the law of this Circuit and with longstanding law upholding the fishing rights of tribes from Washington to the Great Lakes. This Court recognized such rights explicitly in *Gambell III* and implicitly in *United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984). Conclusions of Law 3, 8 and 11 are erroneous for this reason.

Second, the District Court erred in relying on what it deemed to be Congressional silence on the question of aboriginal rights in the OCS. Congress has in fact recognized (and preserved) such rights through saving clauses in several statutes. In any event, Congressional action cannot create aboriginal rights -- but it ***25** is essential to extinguish them. There has been no such extinguishment here. Conclusion of Law 6 is erroneous for this reason.

Third, the District Court erred in ruling that aboriginal rights in the OCS are foreclosed by the paramountcy doctrine. The Chugach demonstrated when this matter was originally before the Panel that their rights are not eclipsed by federal paramountcy. It is in the nature of aboriginal rights that they co-exist with different and superior rights held by the national sovereign; aboriginal rights exist at the sufferance of the federal government. The paramountcy doctrine deals with *conflicts* between competing sets of rights to offshore waters, such as the rights of states and the federal government. The doctrine does not apply to the relationship between aboriginal and federal rights because by their nature those two sets of rights are complementary. Conclusions of Law 10-14 are erroneous for this reason.

Although the District Court's legal rulings are in error on several bases, the court nevertheless made sufficient factual findings to answer the question that the Panel remanded, *i.e.*, whether the Chugach satisfy the requirements for aboriginal rights on the OCS. The District Court did not cite the controlling legal standard -- whether the Chugach have established long-term exclusive use and occupancy of the area in question -- but the court's findings establish that the standard has been satisfied. Those findings establish *use* over countless generations: The Chugach fished and hunted on portions of the OCS nearest their villages, around certain ***26** commonly visited areas, and during their travels across the OCS. The facts also establish *exclusivity*: There is no finding that any other Native group made such use of the OCS waters at issue.

At times, the District Court appeared to analyze some facts under concepts comparable to the elements of use and exclusivity. To the extent the court did so, its analysis is contrary to the established legal meaning of those terms. "Use" means "use" within the context of a given culture; use may be seasonal. "Exclusivity" is not defeated by the fact that more than one village uses an area, so long as the villages are related in a socio-cultural manner. The court's factual findings demonstrate that the Chugach satisfied these elements when properly applied.

***27** *ARGUMENT*

I. *De Novo Standard of Review*

Whether the District Court applied the wrong legal standard is a question of law reviewed *de novo*. *David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1168 (9th Cir. 1996). Likewise, this Court reviews *de novo* whether the District Court exceeded the scope of its jurisdiction on remand. *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 2052 (2008).

II. ***The District Court's Judgment Exceeds The Scope Of The Remand And Is Void For Lack Of Jurisdiction***

The District Court's judgment falls outside the bounds of the limited mandate issued by the Panel. Because that judgment was made without jurisdiction, it should be vacated.

A. The District Court Lacked Jurisdiction To Consider Any Matter Outside The Scope Of This Panel's Limited Remand

In ruling that the Chugach could not, as a matter of law, establish aboriginal rights on the OCS, the District Court did precisely the opposite of what this Panel directed it to do on remand: determine the scope (if any) of the Chugach's aboriginal rights and assume that those rights are not trumped by other federal law.

It is axiomatic that when an appellate court remands for a specific purpose, the trial court may not exceed the scope of the remand. Countless authorities ***28** support this rule; many are collected in *Litman v. Mass. Mutual Life Ins. Co.*, 825 F.2d 1506, 1508 (11th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). In that case, plaintiff prevailed in the trial court on all three claims he asserted. The Eleventh Circuit reversed as to one of the three, which necessarily had an impact on the damages award. *Id.* at 1512-13. The appellate court accordingly remanded for a new trial on damages. Back in the district court, defendant waived its right to a new trial and asked that the original jury verdict be reinstated. *Id.* at 1513. The district court concluded that a new trial was not necessary and re-entered the original damages award, plus interest. *Id.* On appeal, the court again reversed and remanded:

> When an appellate court issues a specific mandate it is not subject to interpretation; the district court has an obligation to carry out the order. A different result would encourage and invite district courts to engage in *ad hoc* analysis of the propriety of appellate court rulings. Post mandate maneuvering in the district courts would undermine the great authority of the appellate courts and create a great deal of uncertainty in the judicial process. It would also eliminate any hope of finality.

Id. at 1511-1512. The court noted that "[a]ll circuits are in accord," and cited cases from eleven other circuits, including the Ninth. *Id.* at 1511; *see also United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006), *cert. denied*, 549 U.S. 935 (2006) ("The rule of the mandate requires a lower court to act on the mandate of an ***29** appellate court, without variance or examination, only execution.") (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).

The appellate courts have strictly enforced the rule that district courts are bound by the terms of remand. This Court has gone so far as to reverse and remand an award of prejudgment interest because the original remand order made no specific provision for it. *Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436, 441-42 (9th Cir. 1983). In the rare case in which this Court permits deviation from a remand order, it does so only because the ruling below "adhere [s] to the spirit" of the remand. *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1404-05 (9th Cir. 1993), *cert. denied*, 510 U.S. 815 (1993). The district court's legal conclusions here adhered to neither the letter nor the spirit of the mandate. Because the district court exceeded the scope of the mandate, it lacked jurisdiction when it held that aboriginal rights cannot exist on the OCS. *Thrasher*, 483 F.3d at 982 ("if a district court errs by violating the rule of the mandate, the error is a jurisdictional one" (citing *United States v. Pimental*, 34 F.3d 799, 800 (9th Cir. 1994))).

B. The District Court's Conclusions Are Outside Of The Scope Of The Remand Order.

The remand in this case was very narrow. The Panel remanded so that the district court could make factual findings. The Panel reserved for itself the issue of ***30** whether the aboriginal rights claimed by the Chugach are inconsistent with other federal law:

> We REMAND with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, the plaintiffs have. For 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*.

375 F.3d at 1219 (emphasis added).

Rather than determining whether aboriginal rights had been established on the facts presented, the District Court ruled, as a legal matter, that aboriginal rights do not extend to navigable waters:

> 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.

ER025 (Conclusion No. 8, citing *Tlingit & Haida*, 389 F.2d at 785-87) (emphasis in original). In making this ruling, the District Court resolved precisely the question the Panel reserved.

Indeed, with respect to five of its legal conclusions (Nos. 10-14), the District Court explicitly stated it was exceeding its mandate:

> The following additional conclusions of law . . . 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.

***31** ER026-ER027. The court then proceeded to reinstate the same holdings this Panel vacated in 2004, claiming it needed to do so in order to permit the parties to appeal. *Id.* The Chugach are frankly perplexed by this. The Panel *retained jurisdiction* over this matter. It is not clear why the District Court believed it needed to render a new judgment in order to enable appellate jurisdiction. The Chugach had no notice below that the District Court intended to decide the paramountcy issue and no opportunity to address that portions of the court's decision.

The Panel remanded this case so the District Court could make fact-findings. The Panel's order and the questioning at oral argument demonstrate that this Court wanted to know whether the Chugach could prove they used and occupied the areas in question. If the Chugach *could not* establish long-term exclusive use, then the Panel could avoid deciding what Judge Kozinski called "mega questions" -- such as whether federal paramountcy precludes recognition of aboriginal rights. ER330; *see also* ER328-ER329. If the Chugach made the necessary showing, then the Panel could address the issue of paramountcy in a concrete manner, since it would know the extent or scope of the aboriginal rights. [7]

***32** In its fact-findings, as discussed below, the District Court established that the Chugach have made the necessary showing. But in its legal conclusions, unaccountably, the District Court took on the issue the Panel had reserved: The court reinstated its earlier conclusion that the Chugach's claims are precluded by federal paramountcy. The Panel should accordingly vacate the judgment below.

III. *The District Court Erred As A Matter Of Law By Ruling Categorically That Aboriginal Rights Cannot Exist On The OCS.*

Instead of addressing the factual issue as to which this case was remanded -- whether the Chugach demonstrated long-term exclusive use and occupancy of the OCS -- the District Court simply declared that, as a matter of law, aboriginal

rights cannot exist in this area. The District Court stated that the Chugach "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." ER025 (citing *Tlingit & Haida*, 389 F.2d at 785-87) (emphasis in original).

Even if that ruling had been within the District Court's jurisdiction on remand, it should be reversed. The ruling is premised on three distinct legal errors.

First, the District Court relied primarily on a single case from the Claims Court, *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778 (1968). But *Tlingit & Haida* does not apply here. The issue in *Tlingit & Haida* was ***33** whether claimants who had used and occupied land were entitled to monetary compensation for fish extracted from adjacent waters by other persons. That is clearly not the issue in this case.

Second, the District Court's ruling that aboriginal rights do not exist on the OCS is premised on a misunderstanding of the relationship between aboriginal rights and statutory law. The District Court stated that no legislation recognizes aboriginal rights in the OCS. Even if this were correct -- and it is not -- it would be irrelevant. No act of Congress is required to establish aboriginal rights. Legislation is necessary to extinguish those rights, but not to create them.

Third, the District Court erred in holding that aboriginal rights are abrogated by the paramountcy doctrine. This was the clearest instance in which the court ruled outside its mandate. The Panel explicitly reserved this issue; the District Court's resolution of it threatens to render the entirety of the proceedings below superfluous. This Panel would not have remanded this case for a determination of the extent of aboriginal rights on the OCS, if there were an established *per se* rule against aboriginal rights on the OCS. The Panel would have made that ruling as a matter of law and affirmed the District Court's original decision in 2004.

But beyond this, the District Court erred on the merits. The paramountcy doctrine does not apply here because the very premise of aboriginal rights -- unlike the states' rights at issue in the Supreme Court's paramountcy cases -- is that they ***34** can co-exist with federal sovereignty. There is no role for -- indeed, no need for -- the paramountcy doctrine in the area of aboriginal rights.

A. The Trial Court's Reliance On *Tlingit & Haida* Was Error

In asserting that aboriginal hunting and fishing rights cannot exist in the OCS, the district court relied on the Claims Court's decision in *Tlingit & Haida*. ER025-ER026. But the *Tlingit & Haida* decision does not apply to the issues in this case.

The issue in *Tlingit & Haida* was the amount of monetary compensation Natives there should receive for a taking of their aboriginal territory. The Natives' aboriginal right to land had already been established, as had the fact of the taking. The tribe claimed that, in addition, it exclusively owned all of the fish in the waters adjacent to its lands and was entitled to compensation for fish caught by others. The lower court agreed with the tribe. 389 F.2d at 784-85. The Claims Court reversed, holding that there was no "compensable property right to extract all fish in a fishery." *Id.* at 787. In reaching this result, the court relied on a statute specifically governing the rights of the Tlingit & Haida Tribe. *Id.* at 787-88.

The present case is clearly not governed by *Tlingit & Haida*. The Chugach do not seek monetary compensation for the loss of fish -- or, indeed, for anything else. Ultimately, the Chugach seek limited relief from the regulations promulgated under the Magnuson Act and Halibut Act, on the ground that those regulations ***35** interfere with their aboriginal fishing rights. The Chugach's claim to those fishing rights, in turn, is based on the well-established federal common law test of long-term, exclusive use -- in this case, use of the OCS itself. *Tlingit & Haida*, by contrast, held that Natives who have established use and occupancy of *land* do not for that reason have a right to *exclusive possession* of and *monetary compensation* for fish in *adjacent waters*. That holding, quite simply, has nothing to do with the question in this case.

In any event, to the limited extent the District Court asserts that there are no aboriginal fishing rights in navigable waters, such an assertion is inconsistent with the precedent of this Circuit and with long-established law upholding fishing rights in the Pacific Northwest and Great Lakes regions.[8] The District Court concluded that "the Ninth Circuit Court of Appeals has never held that villages such as plaintiffs in fact have aboriginal rights to hunt and fish in the OCS." ER023. This is incorrect. The Ninth Circuit has recognized both explicitly and implicitly that Native peoples can have non-exclusive aboriginal rights on the OCS.

In *Gambell III*, the Ninth Circuit squarely addressed the question of whether the law recognizes non-exclusive rights on the OCS based on aboriginal use -- and held that it does. 869 F.2d 1273 (1989). In that case, the Native Villages of Gambell and Stebbins sought to enjoin the sale of oil and gas leases for the OCS ***36** on the ground that drilling and other activities by the oil companies would interfere significantly with the villages' non-exclusive aboriginal hunting and fishing right on the OCS. *See id.* at 1275. The court below had held that the villages' aboriginal rights did not extend to the OCS. *See Gambell v. Clark*, 746 F.2d 572, 573 (9th Cir. 1984). The Ninth Circuit reversed this holding in *Gambell III* and remanded the case to the district court to determine whether the villages could establish the factual predicate for aboriginal rights in the OCS -- just as the trial court was asked to do in this case. 869 F.2d at 1280.

This Court also recognized aboriginal fishing rights in the OCS in *Washington*, 730 F.2d 1314 (1984), where it held that the Makah tribes of Washington have the right to hunt and fish on the OCS up to forty miles from shore. In making its decision, the *Washington* court relied on evidence very much like that presented by the Chugach.[9] Based on that evidence, this Court concluded that the Makahs' traditional fishing grounds extended 40 miles from shore -- that is, 37 miles into the OCS. *Id.* at 1317-18.

The Secretary previously argued that *Washington* does not apply because the claimants there had entered into a treaty with the United States. Under Indian law ***37** principles, this is a distinction without a difference. Treaties like the Makahs' do not create or grant aboriginal rights; rather, they *reserve* the Natives' pre-existing rights. *United States v. Winans*, 198 U.S. 371, 381 (1905) (treaties reserving hunting and fishing rights do not constitute a "grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted"); F. Cohen, Handbook of Federal Indian Law 1123 (2005 ed.); *see also United States v. Adair*, 723 F.2d 1394, 1411 & n.19 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (recognizing "reserved rights doctrine"). Because treaties merely reserve pre-existing aboriginal rights, the Makah could have no treaty rights in the OCS if they did not already have aboriginal rights under federal common law. *Washington* is therefore fully applicable here.

Gambell III and *Washington* demonstrate that aboriginal rights can in fact be established on the OCS. There is no case holding that aboriginal rights cannot exist in a particular landscape. The District Court's categorical ruling that there are no aboriginal rights on the OCS is contrary to law.

B. Congress Has Recognized Non-Exclusive Rights On The OCS Based On Aboriginal Use

The District Court also attempted to support its categorical ruling on the ground that Congress has failed to expressly recognize non-exclusive rights on the OCS based on aboriginal use. The court made the following conclusion of law:

> ***38** 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 and fishing rights in the OCS.

ER024.

This statement is both incorrect and irrelevant. It is incorrect because Congress has recognized -- and reserved -- aboriginal rights on the OCS. The statement is irrelevant because no legislative action is required to establish aboriginal rights; legislative action is required only to extinguish them.

Congress has recognized and preserved aboriginal rights in the OCS. When Congress enacted OCSLA in 1953, it explicitly provided that the newly acquired sovereignty of the United States would be subject to pre-existing rights in the OCS. *See* 43 U.S.C. § 1331-1356(a). Section 14 of the OCSLA provides that the statute should not be interpreted so as to "affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to" its provisions. 43 U.S.C. § 1342. The SLA, also enacted in 1953, contains an identical savings clause. *See* 43 U.S.C. § 1315.

The legislative histories of the OCLSA and SLA confirm that Congress intended to protect all pre-existing rights in the OCS, *including aboriginal rights*, ***39** when it extended the United States' sovereignty over the OCS. The House Report on the OCSLA explains:

> [The Act] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus brining [sic] the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; *in the alternative, such lands and resources are subject to the doctrine of discovery*. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be recognized and confirmed.

H.R. Rep. No. 83-215, at 1411 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1395, 1411 (emphasis added); *see also* S. Rep. No. 83-411, at 14 (1953) ("Section 14 is a 'savings clause,' in that it protects any rights in the Outer Continental Shelf area that may have been acquired prior to the effective date of the act."). The Senate Report on the SLA similarly explains that the statute's savings clause "follows the historic congressional practice of exempting from the operation of statutes of this character existing third party rights, if any there be." S. Rep. No. 83-133, at 21 (1953).

These Congressional reports on the OCSLA and SLA acknowledge and affirm the United States' longstanding policy protecting aboriginal rights. In *Johnson*, 21 U.S. at 573 (1823), Chief Justice Marshall incorporated into American law the "discovery" doctrine, which was the basis on which European nations had ***40** staked their sovereign title to the lands of this continent. At the same time, Justice Marshall recognized the counterpart to the discovery doctrine -- the doctrine of aboriginal rights, pursuant to which the European nations respected certain preexisting rights of those newly brought under their sovereignty. *Id.* at 574. Following *Johnson*, the Supreme Court has recognized aboriginal rights in every territory that the United States has acquired by "cession or annexation," including Alaska. *See, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). The House Report's specific invocation of the "doctrine of discovery" -- the legal rationale upon which both national sovereignty and aboriginal rights have been based for nearly two centuries -- incorporates the longstanding policy of recognizing and protecting those rights. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (holding that the Oneidas' right of possession based on federal common law is enforceable).

Congress also expressed its intent to preserve pre-existing aboriginal rights in the OCS in the Magnuson Act, the statute authorizing the promulgation of the regulations at issue in this case. Sections 1853(a)(1)(C) and 1854(c)(1) of the Magnuson Act prohibit the Secretary from implementing the Act in a manner that is inconsistent with "any other applicable law" -- which includes aboriginal rights. *See Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) (holding that two executive orders reserving tribal fishing rights ***41** constituted "other applicable law" under the Magnuson Act); S. Rep. No. 94-416, at 36 (1975) (legislative history of the Magnuson Act

emphasizes that the Act "should not be construed, in any way, to affect or change the . . . *rights of Indians*" whether established by treaty or other law) (emphasis added).

The trial court's conclusion that Congress has failed to recognize nonexclusive aboriginal fishing rights in the OCS is therefore incorrect. As significantly, it is irrelevant. Legislative action is not required to establish aboriginal rights; it is required only to extinguish them. [10] Even if Congress had been silent on the matter -- and it has not -- this would in no manner support the District Court's categorical conclusion that aboriginal rights cannot exist in the OCS. That conclusion was wrong as a matter of law.

C. Federal Paramountcy Does Not Foreclose Aboriginal Rights In The OCS

In the 2002 appeal, the Chugach explained to this Panel why the paramountcy doctrine does not apply here. Rather the repeating those arguments, the Chugach summarize them very briefly.

***42** Aboriginal rights cannot offend federal paramountcy because by definition such rights exist at the sufferance of Congress. *See, e.g. Tee-Hit-Ton*, 348 U.S. at 289 (holding that Congress can modify or extinguish aboriginal rights at will and without compensation, unlike the property of States or private citizens). Aboriginal rights are subordinate to federal rights; they are also an embodiment of the federal interest in protecting Native peoples. The complementary nature of federal and aboriginal rights reflects, among other things, the trust relationship between Native Americans and the United States, in which the role of the government is to protect aboriginal property from intrusion by third parties. *Id.* at 279 (holding that an aboriginal right "is a right of occupancy which the sovereign . . .protects against intrusion by third parties"). Given this relationship, aboriginal rights are limited in important ways.

Because of the unique nature of aboriginal rights, there is no room for -- and there is no need for -- the paramountcy doctrine in this area. There are no conflicting rights here, as there have been in the cases of dispute between federal and state power that gave rise to the paramountcy doctrine. The Supreme Court has articulated the reason for that doctrine: to protect the federal government's authority over foreign affairs, foreign commerce and national defense. *United States v. California*, 332 U.S. 19, 29, 35 (1947). None of those concerns is even remotely implicated by the Chugach's request to be allowed to participate in an ***43** existing fisheries management scheme. To rule otherwise would be a dramatic and unwarranted extension of the paramountcy doctrine

IV. *Under The Correct Legal Standard, The District Court's Factual Findings Establish That The Villages Have Non-Exclusive Aboriginal Rights To Fish In The OCS*

The law has been plain for more than a century that Native people establish aboriginal rights when they can demonstrate *long--term exclusive use and occupancy* of the area in question. *See, e.g., Alabama-Coushatta Tribe of Tex. v. United States*, 2000 WL 1013532 at *10 (Fed. Cl. 2000) (collecting authorities); *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607, 607 (1987); *United States v. Seminole Indians*, 180 Ct. Cl. 375, 1967 WL 8871 at *5 (1967). The legal meaning of each of the elements of this test -- *i.e.*, that the area be used and occupied, that it be used exclusively, and that it be used for a "long time" -- has also been clearly established, most notably through decades of application by the Claims Court and the Indian Claims Commission, the tribunals that previously handled aboriginal rights cases.

Inexplicably, the District Court did not cite this test. Nor did it make any conclusions of law based on this legal standard. However -- and this is crucial -- the factual findings the District Court made are sufficient as a matter of law to establish that the Chugach possess aboriginal rights in the OCS.

***44** The court found that: (1) the Chugach fished and hunted in various parts of the OCS; (2) the Chugach were a maritime subsistence-based culture with the capacity and technology to travel significant distances in the OCS; (3) the

Chugach were one people culturally, ethnically and linguistically; (4) the Chugach had resided in the same area for a long time and members of the appellant Villages are heirs to these same Chugach people; and (5) their territory was reasonably well-defined in that it had a clear periphery. These findings alone are sufficient to establish that the Chugach have aboriginal rights in the claimed OCS waters. The court could and should have stopped there.

Instead, the court concluded that, as a matter of law, the Chugach *cannot* have aboriginal rights in OCS waters. *See supra*, Section III. We discuss here why, under the relevant legal standard, the court's findings establish aboriginal rights as a matter of law.

A. The Chugach Established Long-Term Use And Occupancy Of The OCS.

In hundreds of cases over the past century, tribunals such as the Indian Claims Commission have refined what "long-term use and occupancy" means. The result of that development can be crystallized in two fundamental principles. First, "use and occupancy" means use and occupancy within the context of a particular tribe and its culture. Second, use is measured in historical time; it is not the product of a single act. Under these well-established principles, there is no ***45** question but that the Chugach demonstrated -- and the District Court found -- the facts necessary to establish aboriginal rights.

1. The court found that the Chugach were a maritime culture with the technology and capacity to hunt and fish up to 60 miles from shore.

Under the first principle, a court must understand and define a Native people's customs and lifeways in order to determine whether the area in question was "used" by the people. "Use and occupancy" means "use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 900 (1967). The necessary interplay between culture and use is illustrated most clearly in *Seminole Indians*, where the court rejected the government's argument that "use and occupancy" were limited to the villages where claimants' ancestors actually resided:

> Had the Seminoles chosen to live by food-raising alone, we would regard the "village" evidence . . . as a persuasive consideration in limiting the Seminoles' "title" to the land falling within the compass of their permanent homesites . . . But the Seminoles -- as was the case with many other Indian groups -- survived not simply through farming, but by food-gathering and hunting as well. In other words, Seminole land-use clearly encompassed more than the soil they actually "possessed." Therefore, other aspects of the Seminole pattern of life demand consideration.

***46** 1967 WL 8871 at *6. Given this standard, the court went on to conclude that a population of just several thousand Seminoles "used" the entire Florida peninsula. *Id.*

In accordance with this law, Chugach use and occupancy must also be viewed through the lens of Chugach culture. The Chugach demonstrated -- and the District Court found -- that the Chugach were a maritime culture who depended on fish and sea mammals and accordingly developed the technology and social adaptations necessary to make such hunting strategies successful. The critical findings here are detailed in bullet point format on *supra* 13-14. Based on these findings about the customs and lifeways of the Chugach, "use" -- as a legal matter -- means use of the OCS for maritime fishing, hunting and gathering. And the District Court's factual findings demonstrate that the Chugach *did* in fact use the OCS in precisely this way.

2. The court found that the Chugach used and occupied the OCS, at least seasonally, and that is sufficient to establish aboriginal rights.

Like all hunting and gathering cultures, the Chugach fished and hunted with the seasons, based on what was available at the time. Stated differently, their use and occupancy of land and water fluctuated seasonally. *See* Wilkins ER178-ER181 (describing how in winter halibut is ten times more abundant and cod five times ***47** more abundant in the OCS than in near-shore State waters); *see also* ER063-ER064.

It has long been the law that seasonal or intermittent use -- which the District Court found here -- satisfies the element of "use" necessary to establish aboriginal rights. Courts have repeatedly held that aboriginal rights can extend over "seasonal or hunting areas over which the Indians had control even though those areas were used only intermittently." *Confederated Tribe of Warm Springs Reservation in Or.*, 177 Ct. Cl. 184, 1966 WL 8893 at *5 (1966); *see also Spokane Tribe of Indians v. United States*, 163 Ct. Cl. 58, 1963 WL 8583, at *5 (1963) ("intermittent or seasonal use has been accepted as showing Indian title"); *Del. Tribe of Indians v. United States*, 128 F. Supp. 391, 395 (Ct. Cl. 1955) (rejecting argument that certain outlet was "only a passageway or road" where Delaware's had no rights, noting that they could fish, hunt, gather, and otherwise use this outlet and that these uses were "the only things [Indians] have done on lands for which they have obtained compensation in numerous cases").

The District Court specifically found that the Chugach fished and traveled the OCS. Under the authorities above, the fact that this use may have been less than continuous does not matter. The relevant findings are these:
• "At and before contact, the residents of plaintiffs' ancestral villages made irregular use of the OCS." ER020

***48** • "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." ER020

• "Travel to and from Kodiak and the Middleton Islands [sic] 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 . . . [and] any fishing that was done would have been purely opportunistic." ER020-ER021

• "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 . . ." ER021

• "Such use and occupancy as probably existed was temporary and seasonal." ER022

• "Joint (by two or more villages) hunting, trading, [and] raiding, etc., probably took place occasionally." ER019

These findings were supported by the testimony of the expert witnesses for both sides, all of whom agreed the Chugach fished and hunted on the OCS at least seasonally. *See, supra* at 12-13.

***49** Because the Villages demonstrated -- and the District Court found -- that the Chugach used and occupied the OCS for seasonal fishing and hunting activities, the Chugach have, as a legal matter, satisfied the "use" prong of the test.

B. The Chugach Established Exclusivity

The same is true of the "exclusivity" prong. The meaning of "exclusive," like the meaning of "use," has been developed and defined in a long line of cases. For present purposes, there are two relevant principles. First, the fact that multiple villages use an area does not defeat exclusivity; the relevant entity is the tribe or culture as a whole, not a particular village. Second, exclusivity does not mean the ability to keep out all trespassers. Consequently, exclusivity is not defeated simply because the population of a tribe is small and the area claimed may be vast. Indeed, courts have repeatedly rebuffed attempts to defeat exclusivity by reference to population density.

As with the element of "use," the findings the District Court made, when stripped of the legal errors in which they are wrapped, establish that the Chugach satisfied the "exclusivity" prong. We discuss the findings first and then the court's two errors: the court's improper reliance on population density, and the court's improper use of the village, rather than the Chugach people, as the relevant landowning entity.

***50 1. There was no evidence that any other tribe or group used and occupied the area.**

One fact alone is sufficient to establish exclusivity: There was simply *no* finding that any other group hunted and fished in the claimed area. [11] Indeed, all six anthropologists who testified in this case, *including the Secretary's witnesses*, agreed that they were aware of no evidence of any other group fishing in the OCS in prehistoric or early historic times. *See, supra* at 12-13. The District Court should have stopped there.

2. Exclusivity cannot be defeated by the lack of population density.

Instead, the District Court strayed into legal error when it suggested that exclusivity was defeated by population density. The District Court stated that the Chugach were not in a position to occupy or exercise "exclusive control" over any part of the OCS "on a sustained basis" because the area was too large and the Chugach population too small. ER021-ER022.

The law expressly rejects such reasoning. The Claims Court stated the matter succinctly in the *Seminole Indians* decision, in which it recognized ***51** aboriginal title to most of the Florida peninsula based on exclusive historical use by Indians numbering in the thousands:

> Nor does the Government's reference to "population thinness" compel a different result. In stressing this consideration, the Government leans far too heavily in the direction of equating "occupancy" (or capacity to occupy) with *actual* possession, whereas the key to Indian title lies in evaluating the manner of land use over a period of time.

1967 WL 8871 at *6 (emphasis in original); *see also, e.g., Zuni Tribe*, 12 Cl. Ct. at 608 n.2 (rejecting government's claim that between 1,500 and 2,500 Indians could not have exclusively used and occupied 5 million acres of land; "the matter could not be resolved solely by noting the Zuni population and acreage but rather would require examination of the patterns of all populations of all similar areas at that time"). The law is clear that population density does not defeat either use and occupancy or exclusivity.

3. Exclusivity is not defeated by multi-village use because the Chugach were a single land-owning entity.

The fact that the OCS was used by more than one Chugach village does not defeat exclusivity. The law is plain that the relevant unit is not a village nor even necessarily one tribe. Rather, the relevant unit -- the "landowning entity" -- is a socio-cultural group that uses and occupies a generally definable territory in common. There is no requirement that the tribe or tribes form a single governing unit. In fact, courts have expressly rejected this.

***52 (a) The court found that the Chugach were one people culturally, ethnically and linguistically.**

Here, as in other areas, the District Court's factual findings, when examined apart from the court's legal reasoning, show that the Chugach satisfied the requirements for aboriginal rights. The District Court, together with the scholars and historians on whom it relied, consistently referred to the five plaintiff villages as one group, Chugach:

• "[T]he other subgroup, occupying Prince William Sound and the south and southwest coast of the Kenai Peninsula, was recognized by themselves and others as Chugach." ER013.

• "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." ER014

• "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)." ER014.

• "The plaintiff villages are the cultural successors to Chugach communities located within Prince William Sound and the southwest corner of the Lower Kenai Peninsula." ER017.

***53** • "[A]lthough culturally related, the villages . . . were all independent of one another." ER018-ER019.

These findings demonstrate that the Chugach were one cultural group who used the claimed area in common. This is sufficient to establish aboriginal rights.

(b) It does not matter that the Chugach resided in different villages, each with its own chief.

After making these findings, the District Court departed from the law: It suggested that because the villages were "independent" or each had their own chief, they could not hold aboriginal rights. ER018-ER019. The court concluded that "although culturally related, the villages ... were all independent of one another. There was no area-wide organization or grand chief." ER018-ER019. This is erroneous. The law is clear that villages united in precisely the way the Chugach villages were linked constitute a single land-owning entity.

What is significant is cultural unity and common land use, not political organization. The problem of defining the relevant land-owning unit is not new in Indian law and its solution is well-established:

> There have been a great number of cases before this Commission in which complex issues have been raised concerning the identity of the tribe or group which actually comprised the land owning entity. *Actually there have been few instances of clear-cut, politically unified, tribal land using entity*. Often land use areas have been utilized by tribelets, or bands, or other autonomous small groupings or villages. But this Commission has tried to apply a common sense approach ***54** to each individual case. . . . *We have not used the argument of separate autonomous villages or groups to defeat a claim based on Indian title*. . . . But, in general, whenever we have found an overall group of Indians, possessing some unifying linguistic and cultural ties and where such Indians joined in a common use and occupation of a definable area of land, we have found that such a land owning entity possessed Indian title.

Hualapai Tribe v. United States, 18 Ind. Cl. Comm. 382, 394 (1967) (emphasis added).

Based on this common sense approach, socio-cultural unity is the touchstone, and it is a broad and liberal standard. *Id.*; *Warm Springs*, 1966 WL 8893, at *14 n.21. [12]

Because socio-cultural unity is the relevant test, multiple villages united by culture are a landowning entity -- and hence can use an area "exclusively" -- regardless of the fact that each has some land of its own. Autonomous villages may simultaneously own separate lands and jointly possess aboriginal lands. *Muckleshoot Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 659, 674-5 (1955) (three "separate, distinct, and autonomous" villages established aboriginal rights held by the Muckleshoot people; the villages were separate but were also part of the larger Muckleshoot culture); see also ***55** *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1395 (Ct. Cl. 1975) ("There are no holdings of this court

which say that two Indian tribes or groups, each a separate 'entity' and *each with its own separate lands,* can never assert joint ownership to other lands which are commonly used and occupied in addition to the common areas"). Under this well-established law, the division of the Chugach into villages does not defeat aboriginal rights. [13]

C. The Chugach Established Their Aboriginal Area With Reasonable Boundaries

A final requirement remains after claimants of aboriginal rights have established use and exclusivity: They must demarcate their claim area with general boundaries. *Quapaw Tribe of Indians v. United States*, 1 Ind. Cl. Comm. 469, 481 (1951) (holding that claimants do not have to demarcate the claim area with surveyor-like precision, but "some general boundary lines of the occupied territory must be shown"). Because the territory at issue here is comprised of water, boundaries can only be described by the limited landmarks available, namely the islands in the Gulf of Alaska. The District Court described the ***56** periphery of Chugach territory, necessarily implying that inside the periphery is Chugach traditional territory: [14]

Note: Text of footnote 14 missing in original document
• "[S]ome 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." ER021. [15]

Note: Text of footnote 15 missing in original document
• Kayak Island is "the easternmost point of the area claimed by plaintiffs." ER010.

In other words, Chugach territory extended from Nanwalek and Port Graham in the waters south to the Barren Islands, southeast to Middleton Island and then northeast to Kayak Island. [16] This comports with known Chugach travel routes which can be seen on Exhibit 11, and as depicted in Figure 1:

Note: Text of footnote 16 missing in original document

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
TABLE

***57** The District Court's description of Chugach territory is amply supported by the evidence, including Dr. Leer's opinion that based on Native placenames, the Barren Islands and Kayak Island formed the Chugach's northwestern and south eastern boundaries respectively. Leer ER056, ER059; ER309; ER026-026. Indeed, even the Defendant's experts testified that Chugach territory extended to Middleton Island. L. Yarborough ER183-ER184 M. Yarborough ER202.

It is no coincidence that the court's description of Chugach territorial periphery also matches almost exactly the territory claimed by the Chugach Native

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
TABLE

***58** It is also telling that, 30 years before this case began, the Chugach claimed very little land in their "land selections" and instead chose to describe their territory in terms of water. [17]

This description of the periphery of the Chugach's territory, supported by a wide variety of evidence all pointing to the same conclusion, satisfies the requirement that aboriginal territories be defined with general boundaries. [18]

V. ***The District Court's Ruling Contravenes The Policies Embodied In The Doctrine Of Aboriginal Rights***

As a final matter, the Chugach wish to emphasize that the principle of aboriginal rights itself embodies important policies concerning the relationship between Native people and the federal government, and that these policies fully support the finding of aboriginal rights here.

As touched on briefly above, the concept of aboriginal rights entered this nation's jurisprudence as the counterpart of what is known as the "discovery" ***59** doctrine. From the beginning, federal law has recognized that the European countries that owned the lands of North America before the United States came into being obtained their rights to that land at the expense of its original inhabitants. Early in the nineteenth century, Chief Justice Marshall characterized the situation thus:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all . . . . The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

Johnson, 21 U.S. at 572-73. The Supreme Court recognized that this arrangement might fairly be labeled both "extravagant" and "opposed to [natural] right, and to the usages of civilized nations." *Id.* at 591. But the Supreme Court also concluded that it was entirely without power to undo the arrangement. *Id.* at 592.

What both the courts and Congress have consistently done, however, is to temper the consequences of European discovery with "humanity" and "wise policy." *Id.* at 589; *Gambell III*, 869 F.2d at 1277 (discussing and quoting *Johnson*). It is this policy that stands behind the doctrine of aboriginal rights -- the recognition that alongside the rights of discovering nations to land and natural resources, aboriginal peoples continue to hold a quantum of rights of their own.

> ***60** [T]he right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land. This right of use and occupancy by Indians came to be known as "Indian title." It is sometimes called "original title" or "aboriginal title." . . . This system of right of discovery and its inclusion of sovereign title subject to Indian title held by Indians living on the land was accepted by the United States and became part of its laws. It has been observed and applied through the years by the Government . . . .

Sac & Fox Tribe, 383 F.2d at 997-98 (citations omitted).

The doctrine of aboriginal rights has remained a bedrock of Indian law. It has not been eroded in the nearly 200 years since it was adopted. On the contrary: The Supreme Court has subsequently explained that *all* territories acquired by the United States were acquired subject to pre-existing aboriginal rights -- rights that permit tribes to exploit natural resources both on land and in the water. *Santa Fe*, 314 U.S. 338; *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111 (1938); *Passenger Fishing Vessel*, 443 U.S. 658; *see also* Andrew P. Richards, Comment, *Aboriginal Title or the Paramountcy Doctrine? Johnson v. McIntosh Flounders in Federal Waters Off Alaska in Native Village of Eyak v. Trawler Diane Marie, Inc.*, 78 Wash. L. Rev. 939, 944-45 (Aug. 2003) (collecting and discussing authorities).

Congress, for its part, has also employed the concept of aboriginal rights in a remedial fashion, most notably with the Indian Claims Commission Act. The ***61** purpose of that legislation, which was enacted in 1946, was to "deal fairly and justly with Indian groups." *Snake or Paiute Indians of Former Malheur Reservation in Or. v. United States*, 112 F. Supp. 543, 555 (Ct. Cl. 1953). As the primary mechanism for achieving that end, Congress created the Indian Claims Commission as a subsidiary of the Claims Court. For the next 30 years, both the Commission and the reviewing court considered claims by tribes for the loss of aboriginal rights and paid hundreds of millions of dollars in compensation for those losses. *See, e.g., United States v. Dann*, 470 U.S. 39, 41-42 (1985).

The specific historical and factual question presented here concerns the relationship of the Chugach people with the OCS waters they traditionally fished and hunted on long before Alaska became part of the United States -- indeed, at times before the United States even came into existence. The evidence at trial established -- and the District Court found -- that the Chugach traveled and fished on the OCS, that these activities were a substantial part of their culture, and that no other Native group similarly used these waters. The District Court's disposition of this case is incompatible with the court's own fact-findings and with the doctrine of aboriginal rights. The District Court's ruling can only be the product of error. This Court should once again vacate the order below.

***62** *CONCLUSION*

The Chugach are entitled to declaratory relief stating that they have aboriginal fishing and hunting rights on the OCS and that the Secretary must revise the challenged regulations in a way that accommodates those rights. The Panel should remand this matter to the District Court with instructions that the court enter a declaratory judgment granting such relief.

***63** *STATEMENT OF RELATED CASE*

This case was previously appealed to the Ninth Circuit in 2002. *See Eyak Native Village v. Daley*, 375 F.3d 1218, 1219 (9th Cir. 2004) (No. 02-36155).

Footnotes

1 The OCS includes U.S. territorial waters from 3 to 200 miles offshore. The term "EEZ" -- Exclusive Economic Zone -- has sometimes been used in this litigation to describe the same area. In this case, the Chugach claim rights in an area that extends from three miles to up to 60 miles into the waters surrounding Prince William Sound and the Lower Kenai Peninsula in southwestern Alaska. This area is described at pages 13-15 below and maps showing the area at issue appear on pages 15 and 21 below.

2 The Minerals Management Service has published a report on how the spill dramatically reduced Native participation in the fisheries and caused reluctance to eat the resources. Impact Assessment, Inc., *Exxon Valdez* Oil Spill, Clean-Up, and Litigation: A Collection of Social-Impacts Information and Analysis 27-29, 31 (2001), http:// www.mms.gov/alaska/ reports/2001rpts/2001_ 058/volume2.pdf.

3 As the District Court observed, Chugach villages "had small, nearby subsidiary villages, or more likely seasonal fish camps that were part of the area used and occupied by a village." ER019

4 Figure 1 is a copy of Plaintiff's Trial Exhibit 11 (ER244) to which arrows and place names have been added indicating significant locations for the Court's reference.

5 Plaintiffs' expert created maps based on these accounts. The maps show the probable locations of these encounters. ER310.

6 At trial, Mr. Ganley summarized a study conducted by a Bureau of Indian Affairs employee, Bill Mitchell, in the 1970s, concluding that the Chugach traveled to Middleton Island using their knowledge of the currents. Ganley ER102-ER103; ER220.

7 Once the geographical scope of a claimant's aboriginal fishing and hunting rights has been determined, aboriginal rights are not restricted to particular methods of fishing and hunting, or to particular species. *See United States ex rel. Chunie v.*

Ringrose, 788 F.2d 638, 642 (9th Cir. 1986), *cert. denied*, 479 U.S. 1009 (1986) (aboriginal rights entitled tribes to "full use and enjoyment" of the resources).

8 *See, e.g.*, Cohen's Handbook of Federal Indian Law (2005 ed.) at 1128-9 (describing off-reservation fishing as based on pre-existing rights).

9 The Makah tribes presented extensive evidence, through anthropologists and tribal elders, demonstrating their seafaring technology, their fishing practices, and their traditional dependence on ocean resources. *Id.* at 1315-16. That evidence established that the Makahs were "expert seamen" with an "extraordinary ability to handle canoes which were seaworthy, sturdy, and fast, designed for ocean fishing, whaling, and seal hunting." *Id.* at 1315.

10 As the Chugach argued when this action was originally before this Panel, Congress alone has the power to extinguish aboriginal rights and Congress has not done so here. Congressional intent to extinguish aboriginal rights must be "plain and unambiguous." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346 (1991); *see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). There has been no "plain and unambiguous" expression of Congressional intent to extinguish non-exclusive aboriginal hunting and fishing rights in the OCS.

11 Some may have traveled through the area for purposes of trade, but this alone does not defeat aboriginal rights. *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1385 (Fed. Cir. 1983). ("If Comanches and Kiowas entered Wichita territory mainly to trade with them and considered this land to be that of the Wichitas, these visiting tribes should be considered guests of the Wichitas, and their presence would not affect the Wichitas' aboriginal title.")

12 Indeed, opponents of aboriginal claims must produce *substantial evidence* that the group at issue lacks ethnic or cultural unity. *Warm Springs*, 1966 WL 8893, at *13. There was no such evidence or fact-finding here.

13 The district court noted briefly that the members of the villages may at times have poached goods or kidnapped women from members of other villages but this does not defeat aboriginal rights. A rule that a society must be universally harmonious in order to use a resource in common is obviously unworkable; it would defeat aboriginal rights in every case because a conflict-free society does not exist. The existence of conflict among Native people does not mean that they lose aboriginal rights, and more than the existence of crime in any society robs that society of rights held in common.

17 This is explained best by Henry Makarka at ER049-ER050 and Mr. Ganley at ER126-ER127.

18 The District Court at one point faulted the Chugach for not being able to prove "*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." ER020 (emphasis added). But such exactitude is not required, particularly in light of the liberal standard of proof that applies in aboriginal rights cases. *Muckleshoot Tribe*, 3 Ind. Cl. Comm. at 677 (noting that courts must take "common sense approach" to weighing evidence because "it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation"); *Quapaw Tribe*, 1 Ind. Cl. Comm. at 481; *Nooksack Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 492, 499 (1955) (liberal standard of proof applies in aboriginal rights cases because of the inherent difficulty in proving what occurred at times before written records existed).

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court may proceed even though the employee filed and then withdrew an administrative appeal. As Bullock filed suit within 90 days of receiving notice of final agency action on her complaint, we have no occasion to decide whether an employee's lawsuit could proceed if the employee prematurely withdrew from an administrative appeal and filed suit *more than* 90 days after receiving notice of final agency action on her complaint. *See* 42 U.S.C. § 2000e–16(c).

Bullock did not fail to exhaust administrative remedies by withdrawing her optional administrative appeal to the Commission within 180 days after filing a notice of appeal. We reverse the district court's dismissal of her suit and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

NATIVE VILLAGE OF EYAK; Native Village of Tatitlek; Native Village of Chenega; Native Village of Nanwalek; Native Village of Port Graham, Plaintiffs–Appellants,

v.

Rebecca BLANK, Acting Secretary of Commerce, Defendant–Appellee.

No. 09–35881.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 21, 2011.

Filed July 31, 2012.

Background: Several Alaskan Native villages brought action against Secretary of Commerce, seeking to enforce claimed non–exclusive aboriginal hunting and fishing rights in certain parts of outer continental shelf (OCS) of Gulf of Alaska. Following remand, 375 F.3d 1218, with instructions to determine what aboriginal rights, if any, were held by villages, the United States District Court for the District of Alaska, H. Russel Holland, Senior District Judge, conducted bench trial and found that villages had no non–exclusive right to hunt and fish in OCS. Villages appealed.

Holdings: The Court of Appeals held that:

(1) villages satisfied continuous use and occupancy requirement for establishing aboriginal rights, and

(2) villages did not have exclusive use of claimed portions of OCS.

Affirmed.

W. Fletcher, Circuit Judge, filed dissenting opinion in which Pregerson, Thomas, and Rawlinson, Circuit Judges, concurred, and in which Hawkins, Circuit Judge, concurred in part.

1. Indians ⇦151, 249

Aboriginal rights do not depend on a treaty or an act of Congress for their existence; rather, to demonstrate the existence of such rights, an Indian group has the burden of proving actual, exclusive, and continuous use and occupancy for a long time of the claimed area.

2. Indians ⇦151

Continuous use and occupancy requirement for an Indian group to demonstrate the existence of an aboriginal right is measured in accordance with the way of life, habits, customs, and usages of the Indians who are its users and occupiers.

3. Indians ⚿249

Difficulty of obtaining the essential proof necessary to establish Indian title during ancient times requires the court to adopt a liberal approach in weighing evidence regarding aboriginal title claims.

4. Indians ⚿350, 361

Alaskan Native villages satisfied continuous use and occupancy requirement for establishing claimed aboriginal hunting and fishing rights in portions of outer continental shelf (OCS) of Gulf of Alaska, even if ancestors used those areas in seasonal manner, where such use was consistent with seasonal nature of ancestors' way of life as marine hunters and fishermen.

5. Indians ⚿350, 361, 364

Alaskan native villages did not have exclusive use of claimed portions of outer continental shelf (OCS) of Gulf of Alaska, precluding villages' claim for aboriginal hunting and fishing rights in those areas, where other tribes had fished and hunted on periphery of villages' claimed territory, and, even in absence of evidence that other tribal groups inhabited, controlled, or wandered over claimed area, that area was too large, and there were too few people, for villages' ancestors to control it, occasional battles fought over area did not establish villages' control, and large portions of claimed area were seldom if ever visited.

6. Indians ⚿151

Exclusivity to support a claim of aboriginal title is established when a tribe or a group shows that it used and occupied the land to the exclusion of other Indian groups; the tribe or group asserting title must exercise full dominion and control over the area, such that it possesses the right to expel intruders, as well as the power to do so.

7. Indians ⚿151

Tribe must have an exclusive and unchallenged claim to the disputed areas to be entitled to aboriginal rights; areas that are continuously traversed by other tribes without permission of the claiming tribes cannot be deemed exclusive.

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Ignacio S. Moreno, Assistant Attorney General, Environment & Natl. Resources Div.; Brian McLachlan, E. Ann Peterson, David C. Shilton (argued), United States Department of Justice, Washington, D.C.; Demian C. Schane, NOAA Office of General Counsel, Juneau, AK, for the appellees.

Appeal from the United States District Court for the District of Alaska, H. Russel Holland, Senior District Judge, Presiding. D.C. No. 3:98–cv–00365–HRH.

Before: ALEX KOZINSKI, Chief Judge, MARY M. SCHROEDER, HARRY PREGERSON, ANDREW J. KLEINFELD, MICHAEL DALY HAWKINS, SIDNEY R. THOMAS, WILLIAM A. FLETCHER, RICHARD A. PAEZ, RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, and RICHARD R. CLIFTON, Circuit Judges.

PER CURIAM Opinion; Dissent by Judge W. FLETCHER.

OPINION

PER CURIAM:

The Alaskan Native Villages of Eyak, Tatitlek, Chenega, Nanwalek and Port

Graham ("Villages") assert that, beginning thousands of years before European contact and continuing through modern times, their members fished, hunted and otherwise exploited portions of the Outer Continental Shelf ("OCS") in the Gulf of Alaska. Based on this history, the Villages claim they possess non-exclusive aboriginal hunting and fishing rights in the areas of the OCS they've traditionally used.

The OCS fisheries are regulated by the Secretary of Commerce. In 1993, the Secretary promulgated regulations limiting access to the halibut and sablefish fisheries after a "race for fish" led to conservation and management problems. *See* 16 U.S.C. §§ 1801–83; 16 U.S.C. §§ 773–773k; 57 Fed.Reg. 57130, 57130–32 (Dec. 3, 1992); *Alliance Against IFQS v. Brown,* 84 F.3d 343, 344–45 (9th Cir.1996) (holding that Individual Fishing Quota regulations were a permissible exercise of agency authority to prevent fishery depletion). Prior to the regulations, there was no limit on the number of vessels that could engage in the commercial harvest of halibut or sablefish. Under the regulations, any boat fishing commercially for halibut or sablefish must have an Individual Fishing Quota ("IFQ") permit that caps how many fish the vessel may take. 50 C.F.R. § 679.4(d)(1).

The Secretary allocated IFQs only to persons or entities that owned or leased vessels used to catch halibut or sablefish, and who actually caught those fish, between 1988 and 1990. 50 C.F.R. § 679.40(a)(3)(i). As of 2003, however, the regulations allow Alaska Natives and other subsistence fishers to catch up to twenty halibut per person per day, and two halibut per person per day for sport fishing. 68 Fed.Reg. 18,145, 18,153 & 18,159(g)(2) (Apr. 15, 2003) (codified at 50 C.F.R. § 300.65(h) & 50 C.F.R. § 300.64(f)). The regulations don't govern subsistence fishing of mature sablefish because sablefish live too deep to catch without commercial gear. If the Villages meet IFQ requirements, they can commercially fish for halibut and sablefish.

The Villages claim that the Secretary's regulations fail to account for the Villages' non-exclusive aboriginal hunting and fishing rights, without Congress's consent in violation of the federal common law and the Indian Non–Intercourse Act, 25 U.S.C. § 177. The district court dismissed their complaint with prejudice. The Villages timely appealed.

At the heart of this dispute are the competing federal interests of honoring Native rights and preserving national fisheries. When this case was previously before us, we held that the Villages' claim to *exclusive* rights to hunt and fish on the OCS was barred by federal paramountcy. *Native Village of Eyak v. Trawler Diane Marie, Inc. (Eyak I),* 154 F.3d 1090, 1096–97 (9th Cir.1998). The paramountcy doctrine, as applied here, stands for the proposition that the national government has a paramount interest in ocean waters and submerged lands below the low-water mark. *See N. Mariana Islands v. United States,* 399 F.3d 1057, 1060–61 (9th Cir. 2005). But the Villages point to *Village of Gambell v. Hodel (Gambell III),* 869 F.2d 1273 (9th Cir.1989), where we held that "aboriginal rights may exist concurrently with a paramount federal interest." *Id.* at 1277.

Gambell III holds that aboriginal rights and the doctrine of federal paramountcy can coexist, whereas *Eyak I* holds that the paramountcy doctrine trumps Native claims based on aboriginal title. We took this case en banc to resolve any conflict between *Gambell III* and *Eyak I. See Eyak Native Village v. Daley,* 364 F.3d 1057, 1057 (9th Cir.2004). But we do not reach that question because the Villages

have failed to demonstrate the existence of aboriginal rights in the claimed area.

We previously remanded to the district court for the limited purpose of determining "what aboriginal rights, if any, the villages have" on the OCS, and instructed the district court to "assume that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Eyak Native Village v. Daley,* 375 F.3d 1218, 1219 (9th Cir.2004) (en banc).

After trial, the district court held that, given the facts it found, "no nonexclusive right to hunt and fish in the OCS has ever existed for any plaintiff village as a matter of federal Indian law. . . ." The Villages challenge this ruling on the ground that the facts found by the district court were sufficient to establish aboriginal rights. The Villages also argue that the district court exceeded the remand order by concluding that their claims to aboriginal rights were "preempted by the Paramountcy Doctrine." But this makes no difference to the outcome here because the Villages don't challenge the district court's factual findings, which are dispositive.

Even though the Villages don't contest those findings, the dissent goes on a fishing expedition through the trial record and testimony to make its own factual findings. Dissent at 629–31. The district court considered the opinions of the experts called by the parties and "found the opinions of some of the experts more persuasive than those of others" when making its findings. It is inappropriate for the dissent to usurp the factfinder's role and reweigh the evidence. *See Inwood Labs., Inc. v. Ives Labs., Inc.,* 456 U.S. 844, 857–58, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982) ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." (internal citation and quotation marks omitted)). We now determine only whether the facts found by the district court support the Villages' claim to aboriginal rights.

[1, 2] Aboriginal rights don't depend on a treaty or an act of Congress for their existence. *See United States v. Santa Fe Pac. R.R.,* 314 U.S. 339, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Rather, the Villages have the burden of proving "actual, exclusive, and continuous use and occupancy 'for a long time'" of the claimed area. *Sac & Fox Tribe of Indians of Okla. v. United States,* 383 F.2d 991, 998 (Ct.Cl.1967). This use and occupancy requirement is measured "in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." *Id.*

Historically, the Court of Claims was charged with reviewing the decisions of the Indian Claims Commission, and it was statutorily limited to reviewing whether "the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law . . . are valid and supported by the Commission's findings of fact." *See* Indian Claims Commission Act of 1946 § 20(b), 60 Stat. 1049, 1054, 25 U.S.C. § 70 *et seq.* (1976 ed.). We are not similarly bound. The district court concluded that the Villages were unable to prove aboriginal rights because they did not show by a preponderance of the evidence that they were in a position to occupy or exercise exclusive control of the claimed areas. *See* 2 McCormick on Evid. § 339 (6th ed.) ("[A] party who has the burden of persuasion of a fact must prove it . . . on the general run of issues in civil cases 'by a preponderance of the evi-

dence.'"); *see also Iowa Tribe v. United States,* 22 Ind. Cl. Comm. 232, 237–38 (1969) ("To establish Indian title under the Indian Claims Commission Act, the Iowa plaintiffs and the Sac and Fox plaintiffs each must prove by a preponderance of the evidence that their forebearers had actual exclusive and continuous use and occupancy of their respectively claimed areas for a 'long time' [prior to the loss of the property]."). We adopt the district court's uncontested factual findings and conclude that the Villages have failed to prove their entitlement to aboriginal rights on the OCS.

[3] The "difficulty of obtaining the essential proof necessary to establish Indian title" during ancient times requires the court to adopt a "liberal approach" in weighing evidence regarding aboriginal title claims. *Nooksack Tribe of Indians v. United States,* 3 Ind. Cl. Comm. 492, 499 (1955). Nevertheless, we conclude that the district court properly found that the Villages failed to show, by a preponderance of the evidence, that they exclusively used the claimed areas.

[4] The district court found that the Villages "made irregular use of the OCS," and that "[s]uch use and occupancy as probably existed was temporary and seasonal." The Secretary argues that the Villages' use of the OCS was "too sporadic" to support a claim for aboriginal rights. This "use and occupancy" requirement is measured in accordance with the "way of life, habits, customs and usages of the Indians who are its users and occupiers." *Sac & Fox Tribe of Indians of Okla.,* 383 F.2d at 998. Because the district court determined that the ancestral residents of the Villages "found their sustenance largely in marine waters," and were "skilled marine hunters and fishermen," we analyze their use of the OCS in accordance with their way of life as marine hunters and fishermen. *See Confed. Tribes of the Warm Springs Reservation of Or. v. United States,* 177 Ct.Cl. 184, 194 (1966).

There's evidence that the Villages' ancestors traveled to Middleton Island, the Barren Islands, Cook Inlet, the Copper River Delta and Wessels Reef to hunt and fish. When traveling between Kodiak and the Middleton Islands, their ancestors traversed portions of the OCS and engaged in opportunistic fishing during the course of these travels. The record supports the finding that the Villages' ancestors made seasonal use of "portions of the OCS nearest their respective villages and when traveling to the outlying islands." Intermittent or seasonal use is sufficient to support aboriginal title because it's consistent with the seasonal nature of the ancestors' way of life as marine hunters and fishermen. *See id.* The Villages thus satisfy the "continuous use and occupancy" requirement.

[5, 6] But the Villages haven't proven exclusivity. Exclusivity is established when a tribe or a group shows that it used and occupied the land to the *exclusion* of other Indian groups. *See United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1394 (Ct.Cl.1975). Use of the OCS alone isn't sufficient to prove exclusive possession. *See Osage Nation of Indians v. United States,* 19 Ind. Cl. Comm. 447, 489 (1968). The tribe or group must exercise full dominion and control over the area, such that it "possesses the right to expel intruders," *id.,* as well as the power to do so. The district court properly found that the Villages failed to show by a preponderance of evidence that they exercised exclusive control, collectively or individually, over the areas of the OCS they now claim.

The Villages (and the dissent) argue that a lack of evidence that any other tribe hunted or fished in the claimed area is

enough to establish exclusive control. But the district court found that:

> [S]ome 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 [Villages'] territory. That is, the foregoing are the areas where the [Villages' ancestors] 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.

[7] A tribe must have "an exclusive and unchallenged claim to the disputed areas" to be entitled to aboriginal rights. *Sac & Fox Tribe of Indians of Okla.,* 315 F.2d 896, 906 (Ct.Cl.1963). Areas that are continuously traversed by other tribes without permission of the claiming tribes cannot be deemed exclusive. *See Wichita Indian Tribe v. United States,* 696 F.2d 1378, 1385 (Fed.Cir.1983).

The dissent argues that there's no evidence in the record to suggest that other tribes "inhabited, controlled or wandered over" the claimed area. Dissent at 631. But the district court found that other tribes fished and hunted on the periphery of the Villages' claimed territory. Despite that finding, the dissent asserts, "In the case before us, there is no evidence of use or occupancy by other groups *within* Chugach territory." Dissent at 632 (emphasis added). The dissent adopts an understanding of the word "periphery" that's contrary to both common usage and the dictionary. Perhaps the most common use of the word "periphery" is in the phrase "peripheral vision." What's in your peripheral vision is what you *can* see, not what you can't; the periphery is something at the limits of, but within, your vision. Here, as well, the "periphery" cited by the district court *includes* the outer boundary of the claimed area. The revered Webster's Second defines "periphery" as, among other things, "the outward bounds of a thing as distinguished from its internal regions or center; encompassing limits; confines; borderland; as, only the *periphery* of Greenland has been explored." *Webster's New International Dictionary* 1822 (2d ed.1939). The dissent's interpretation of "periphery" was outdated even in the 1930s when Webster's Second was published. *Id.* (offering an alternate definition of "periphery" as a "[s]urrounding space; the area lying beyond the boundaries of a thing. *Now Rare.*"). Fish is best rare; language, not so much. As the district court clearly found, "some of the OCS areas in question" *were* exploited by other groups.

Even if the dissent were right, it wouldn't change the outcome because the Villages still failed to present sufficient evidence of exclusivity. The district court found that the Villages' claimed area was too large and there were too few people who could control it. The Villages' low population, which was estimated to have been between 400 and 1500, suggests that the Villages were incapable of controlling any part of the OCS. *See Osage Nation of Indians,* 19 Ind. Cl. Comm. at 490 (finding the Osages didn't have exclusive control given their low population and evidence

tending to prove that other parties used the claimed territory); *Strong v. United States,* 518 F.2d 556, 561 (Ct.Cl.1975) ("[O]ne of the primary characteristics of ownership is the desire and ability to exclude others from the area over which ownership is claimed."). The Villages claim that low population density can't defeat exclusivity. *See, e.g., Zuni Tribe of N.M. v. United States,* 12 Cl.Ct. 607, 608 n. 2 (1987); *United States v. Seminole Indians of the State of Fla.,* 180 Ct.Cl. 375, 385–86 (1967). But *Zuni* and *Seminole* held only that a low population density wasn't enough to defeat aboriginal title, especially where there was other evidence that the tribes involved had dominion and control of their claimed lands. *See, e.g., Zuni,* 12 Cl.Ct. at 608 n.2; *Seminole,* 180 Ct.Cl. at 383. *Zuni* and *Seminole* don't foreclose reliance on population density where there is no evidence that the tribes exercised full dominion and control of the claimed area.

The Villages point to the occasional pitched battles involving numerous deaths between their members and other tribes, and to their "recogni[tion] by the Russians as potentially formidable foes." This falls far short of establishing exclusive control. *See Confed. Tribes of the Warm Springs Reservation of Or.,* 177 Ct.Cl. at 196 ("The fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole." (internal citation and quotation marks omitted)). The Villages failed to demonstrate that they controlled the claimed areas.

The district court found that "none of the ancestral villages was in a position to control or dominate access to any part of the OCS." This finding is supported by the record. *See Caddo Tribe of Okla. v. United States,* 4 Ind. Cl. Comm. 214, 221 (1956) (finding no aboriginal title where the evidence demonstrated that the tribes were incapable of using, occupying and controlling their aboriginal claimed holdings). The district court found that "some hunting and fishing took place in the near parts of the OCS," but the record also suggests that the Villages neither collectively nor individually controlled the OCS.

In addition, huge portions of the OCS being claimed were "seldom if ever visited." The material factor is the "unity of land use and occupation—the collective use by the entire group of the entire area." *Hualapai Tribe v. United States,* 18 Ind. Cl. Comm. 382, 394–95 (1967); *Muckleshoot Tribe v. United States,* 3 Ind. Cl. Comm. 669, 674–75 (1955) (recognizing aboriginal rights for autonomous villages where territories outside of their respective settlement areas were used "in common by the occupants of all the villages"). Contrary to the dissent's assertion that the Villages found their sustenance in the same areas, Dissent at 636–37, the district court made it clear that the Villages did not use hunting and fishing areas in common: "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." Moreover, the district court's findings describe joint land-use as the "exception, not the norm" and there was "little or no evidence" to suggest joint-fishing on the OCS. *See Hualapai,* 18 Ind. Cl. Comm. at 394 (finding aboriginal title where a "group of Indians . . . *joined* in a common use and occupation of a definable area"). The district court found that the Villages "used and occupied discrete . . . land areas" with "separate . . . hunting

and fishing access." And there was no evidence of the sharing of fishing camps. Instead, the district court found that the Villages kept all, including each other, at arm's length. The factual findings do not support a finding of collective use by the entire group of the entire area. More likely, each of the Villages stuck to its discrete area of the OCS.

There is not enough evidence in the record to persuade us that the Villages used and occupied the claimed areas to the exclusion of other tribes. Accordingly, we conclude that the Villages did not satisfy their burden of showing they exclusively controlled the claimed areas on the OCS.

* * *

Based on the uncontested factual findings of the district court, we affirm the district court's conclusion that the Villages failed to establish an entitlement to nonexclusive aboriginal rights on the OCS. Because the Villages haven't established aboriginal rights on the OCS, we have no occasion to consider whether there's a conflict with the federal paramountcy doctrine. We also need not consider whether the Secretary's actions violated the Indian Non–Intercourse Act.

AFFIRMED.

W. FLETCHER, Circuit Judge, with whom PREGERSON, THOMAS, and RAWLINSON, Circuit Judges, join, and with whom HAWKINS, Circuit Judge, joins as to Part I, dissenting:

I respectfully dissent.

In an unsigned opinion, the majority concludes that Alaskan Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham ("the Chugach") failed to establish aboriginal hunting and fishing rights on part of the Outer Continental Shelf ("OCS") in the Gulf of Alaska because they did not show exclusive use and occupancy of any part of the claimed area. In so doing, the majority misstates the law and misreads plain English.

I would hold, based on the district court's findings, that the Chugach have established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS, and that these rights are consistent with federal paramountcy. I would reverse and remand with instructions to the district court to find, under the proper legal test, precisely where within the claimed area the Chugach have aboriginal rights.

I. Aboriginal Rights

The Chugach claim that they have the right to exercise nonexclusive hunting and fishing rights in part of the Gulf of Alaska south of Prince William Sound and the Kenai Peninsula, based on their exclusive use of their traditional hunting and fishing grounds prior to contact with Europeans. The Chugach seek an order requiring that the Secretary of Commerce revise the challenged Individual Fishing Quota ("IFQ") regulations to accommodate their aboriginal rights. They ask that the revised regulations provide one IFQ permit or its equivalent to each plaintiff Village. Whether the Chugach's aboriginal rights, if established, would require the Secretary to provide one IFQ or its equivalent per Village is not before us. The only question now before us is whether the Chugach have aboriginal rights that the Secretary must accommodate in some fashion.

To establish aboriginal rights, the Chugach must demonstrate by a preponderance of the evidence "actual, exclusive, and continuous use and occupancy" of the claimed area for a long period of time before contact with Europeans. *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct.Cl.1967). I agree with the majority and the parties

that the test articulated in *Sac & Fox* applies here.

When this case was previously before our en banc panel, we remanded to the district court for a determination whether the Chugach had aboriginal fishing rights in the claimed area of the OCS. *Eyak Native Village v. Daley,* 375 F.3d 1218, 1219 (9th Cir.2004) (en banc). We instructed the district court to assume, for purposes of the limited remand, that the federal paramountcy doctrine did not abrogate the Chugach's aboriginal rights. *Id.* After taking evidence, the district court held that the Chugach hunted and fished in portions of the OCS before contact with Europeans, but that such activities "did not give rise" to a right to hunt and fish "different from or greater than the rights of all United States citizens." The district court did not apply the *Sac & Fox* test.

The Chugach contend, and I agree, that the facts found by the district court are sufficient to establish their aboriginal rights under the *Sac & Fox* test. Based on the district court's findings, I conclude that the Chugach have established aboriginal rights in at least part of the claimed area of the OCS. I would remand to the district court for a determination, under the proper legal test, of precisely where within the claimed area they have aboriginal rights.

A. Continuous Use and Occupancy

The majority concludes that the Chugach have satisfied the "continuous use and occupancy" requirement of the *Sac & Fox* test. I agree.

Continuous use and occupancy are measured in accordance with the "way of life, habits, customs and usages of the Indians who are its users and occupiers." *Sac & Fox,* 383 F.2d at 998. The district court found that the Chugach were "skilled marine hunters and fishermen" who "found their sustenance largely in marine waters." They were "knowledgeable of ocean currents" and "entirely capable" of traversing the OCS in their boats. The Chugach navigated to Middleton Island, the Barren Islands, Cook Inlet, the Copper River Delta, and Wessels Reef to hunt and fish. They crossed portions of the OCS when traveling between these locations and fished along the way.

The district court found that such use and occupancy was "temporary and seasonal." The Chugach's seasonal use qualifies as "continuous" given their way of life as marine hunters and fishermen. *See Confed. Tribes of the Warm Springs Reservation of Or. v. United States,* 1966 WL 8893, at *5 (Ct.Cl.1966); *Spokane Tribe of Indians v. United States,* 1963 WL 8583, at *5 (Ct.Cl.1963) ("[I]ntermittent or seasonal use has been accepted as showing Indian title." (collecting cases)).

B. Exclusive Use and Occupancy

The majority concludes that the Chugach have failed to satisfy the "exclusive . . . use and occupancy" requirement of the *Sac & Fox* test. I strongly disagree.

1. Governing Law

To carry its burden in establishing aboriginal rights, a plaintiff tribe "must show that it used and occupied the [claimed area] to the exclusion of other Indian groups." *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1394 (Ct.Cl.1975). Where there is no evidence of use or occupancy by others within the claimed area, the claimant tribe need only show its own use and occupancy. In such a case, a court "must conclude," without more, that the plaintiff tribe used and occupied the area exclusively. *Zuni Tribe of N.M. v. United States,* 12 Cl.Ct. 607, 617–20 & nn. 13–15 (1987); *see also Caddo Tribe of*

Okla. v. United States, 35 Ind. Cl. Comm. 321, 358–60 (1975) (finding exclusivity where "[t]here is no evidence indicating that other tribes of Indians were using and occupying this [claimed] area at the same time").

Where there is evidence of use or occupancy by others within the claimed area, a claimant tribe must show that it had the ability to exclude those other groups, such that the use by the others was temporary or permissive. *See Alabama–Coushatta Tribe of Tex. v. United States*, 2000 WL 1013532, at *13 (Fed.Cl.2000) ("[W]here another tribe commonly uses the land with the claimant tribe, proof of the claimant tribe's dominance over the other tribe preserves its exclusive use of the land."). A tribe's exclusive use and occupancy "is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups." *Pueblo of San Ildefonso*, 513 F.2d at 1394; *see also Strong v. United States*, 518 F.2d 556, 561 (Ct.Cl.1975) (" 'Exclusiveness' becomes a problem to plaintiffs simply because the historical record ... demonstrates clearly that ... the area as a whole was 'inhabited, controlled or wandered over by many tribes or groups.' "). Evidence of use and occupancy by other groups "must be specific" to defeat a claim of exclusivity. *Alabama–Coushatta Tribe*, 2000 WL 1013532, at *17; *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1385 (Fed.Cir.1983).

Evidence of use by others at the periphery of the claimed territory does not defeat a tribe's exclusivity within the claimed area. *See Caddo Tribe*, 35 Ind. Cl. Comm. at 360–62 (finding exclusive use and occupancy of claimed area even though members of another tribe "were found on the western periphery of Caddo territory" during the relevant period); *Zuni*, 12 Cl. Ct. at 608 n. 3 (finding exclusive use and occupancy of claimed area, despite evidence of use by another tribe near shared borders, because "such boundaries are the limit of the Zuni claim area, with Zuni use and occupancy within its boundaries"). "[A] claimant tribe's non-exclusive use of one segment of the claim area is not automatically imputed to the whole claim area." *Alabama–Coushatta*, 2000 WL 1013532, at *14. In such circumstances, a court must conclude "that a claimant tribe had exclusive use of certain portions of the claim area, but failed to prove exclusive use of other portions." *Id.; see also Wichita*, 696 F.2d at 1385 ("While we agree with the trial judge that the Wichitas could not have had exclusive use of the greater part of the [claimed] hunting grounds in Kansas, Oklahoma, or Texas, we cannot affirm his holding that the Wichitas failed to establish exclusive use of any [portion] of the hunting grounds in Oklahoma and Texas."); *Muckleshoot Tribe v. United States*, 3 Ind. Cl. Comm. 669, 677 (1955) ("[C]laimant's ancestors did not exclusively use and occupy the [entire] area claimed in their petition ..., however, they did use and occupy a part of the area claimed and based upon the record in this case the Commission feels that the occupancy of that part was exclusive.").

Because of the "difficulty of obtaining the essential proof necessary to establish Indian title," courts take a "liberal approach" in weighing the limited historical evidence regarding exclusive use and occupancy. *Nooksack Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 492, 499 (1955); *see also Muckleshoot*, 3 Ind. Cl. Comm. at 677 (because "it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation," courts must "take a common sense approach" when evaluating exclusivity); *Snake or Piute Indians v. United States*, 112 F.Supp. 543, 552 (Ct.Cl.1953) (exclusivity "can only be *inferred*" because it is

difficult to prove "as of a date too remote to admit of testimony of living witnesses").

In sum, the *Sac & Fox* test requires that the Chugach show that they used and occupied the claimed area exclusively. It does not require that the Chugach show that they could have repelled hypothetical intruders from the area. In the absence of evidence of use by others, the case law requires only that the Chugach show that they were the only group that used and occupied the area.

2. District Court Factual Findings

The factual findings of the district court establish that the Chugach used and occupied some areas exclusively, with no use or occupancy of those areas by others. The court found:

> 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. . . .
>
> . . . 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. . . .
>
> 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. . . .
>
> . . . At contact, the indigenous people of Prince William Sound and the Lower Kenai Peninsula found their sustenance largely in marine waters, relying heavily on fish and sea mammals, and to a lesser degree upon land mammals.
>
> . . . .
>
> At contact, the occupants of the extant Chugach villages were skilled marine hunters and fishermen. With their kayaks and umiaks, 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. . . .
>
> 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. . . .
>
> The Russians had virtually enslaved other Alutiiq people as well as the Koniag. . . . 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.
>
> . . . .
>
> While it is more likely true than not 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 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.

(Emphasis added.)

Nowhere in the district court's twenty-seven-page order is there any finding that another group used or occupied some of the area claimed by the Chugach. The district court specifically found that "more likely than not" there was shared use "on the periphery of the Chugach territory," but it made no such finding about shared use *within* the Chugach territory.

The district court noted that the opinions of the parties' experts sometimes differed, but that the experts based their opinions on the same body of historical evidence. The court wrote:

> [T]he 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 Chugach's experts testified without contradiction that geographic features at the periphery of Chugach territory had place names in more than one native language, but that features within Chugach territory had place names in only the Chugach language. For example, the Barren Islands and Kayak Island, which are located at the western and eastern periphery of the claimed Chugach territory, had place names in the languages of the Koniag, Tlingit, and Chugach. By contrast, Seal Rocks, Wessels Reef, and Middleton Island, which are located within the claimed area, had place names in only the Chugach language (respectively: "Qikertarraak," or "two small islands"; "Pala't Nuutqaat," or "boat reefs"; and "Qucuaq," the meaning of which has been lost).

Both parties' experts agreed that there is no evidence that other groups used or occupied Chugach territory. At trial, the Chugach introduced records of five eyewitness accounts from 18th-century explorers describing encounters with seafaring Chugach on the OCS more than three miles from shore. The Chugach's expert anthropologist, Matt Ganley, testified, "We don't see anybody else in the OCS when the first Russians come into that area. We don't see anybody else on Middleton Island. There's no mention of other groups, and from the descriptions that the people provided, these were clearly Chugach people." The Secretary's expert anthropologists gave similar testimony. Michael Yarborough and Christopher Wooley both testi-

fied that they were unaware of any evidence that groups other than the Chugach fished or hunted in the claimed area during the pre-contact period.

3. Majority's Fundamental Mistakes

The unsigned majority opinion concludes that the Chugach have not shown exclusive use and occupancy within any part of the claimed area. Its conclusion is based on two fundamental mistakes. First, it misstates the applicable law. Second, it misreads the word "periphery." I take its two mistakes in turn.

a. Misstatements of Law

The majority's test for exclusivity is that a claimant must show not only that it was the only tribe or group that used and occupied the claimed area, but also that it had the power to exclude other groups. This is an incorrect statement of law. If there is no evidence of use or occupancy by another group, a claimant need only make the first showing—that it was the only tribe or group to use and occupy the area. In such a case, a showing of use and occupancy by a claimant tribe, without more, is enough. Only if there is evidence of use or occupancy by another tribe or group must the claimant show, in order to establish its own exclusive use and occupancy, that it had the power to exclude that tribe or group.

The majority writes:

> [T]he Villages haven't proven exclusivity. Exclusivity is established when a tribe or group shows that it used and occupied the land to the *exclusion* of other Indian groups. *See United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1394 (Ct.Cl.1975). Use of the OCS alone isn't sufficient to prove exclusive possession. *See Osage Nation of Indians v. United States,* 19 Ind. Cl. Comm. 447, 489 (1968). The tribe or groups must exercise full dominion and control over the area, such that it "possesses the right to expel intruders," *id.,* as well as the power to do so. The district court properly found that the Villages failed to show by a preponderance of the evidence that they exercised exclusive control, collectively or individually, over the areas of the OCS they now claim.

Maj. Op. at 623 (emphasis in original).

The majority cites two cases, *San Ildefonso* and *Osage Nation,* in support of its statement of the law. Neither case supports the majority.

The relevant passage of *San Ildefonso* is:

> Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups. *True ownership of land is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes and groups.*

513 F.2d at 1394 (emphasis added).

The italicized last sentence is key: Aboriginal title is "called in question" only when there is evidence that the claimed area was "inhabited, controlled or wandered over by many tribes and groups." *See also United States v. Santa Fe Pac. R.R. Co.,* 314 U.S. 339, 345, 62 S.Ct. 248, 86 L.Ed. 260 (1941) (distinguishing between "territory occupied exclusively" and "lands wandered over by many tribes"). Where there is no evidence that the area was "inhabited, controlled or wandered over" by others, the exclusive ownership of

the tribe using and occupying the land is not "called in question." In the case before us, there is no evidence of use or occupancy by other groups within Chugach territory.

The relevant passage of *Osage Nation* is:

> Petitioner's [*i.e.,* the *Osage Nation's*] evidence tends to show an aboriginal territory extending to the Red River on the south and the 100th meridian on the west. It is quite clear from the evidence of both parties that war parties and occasional hunting parties did travel that far, but that fact in itself does not mean that the Osage had exclusive possession of the territory. The best estimate of the Osage population from 1808 to 1825 is between five and six thousand. Petitioner would have us believe that with a population of that size the Osage were able to exclusively use and occupy this huge territory. While petitioner does bring forth some evidence tending to buttress this conclusion, *the defendant, on the other hand, produced historical evidence tending to prove that other war and hunting parties did tend to use parts of the territory claimed by petitioner.* Faced with conflicting evidence and expert opinion, and moreover with evidence which is at best vague and uncertain, the Commission holds that the preponderance of the evidence indicates that with a population of five to six thousand, of which about 1500 would be warriors, the Osages could not have exclusively controlled and occupied all of the territory claimed here.

19 Ind. Cl. Comm. at 489–90 (emphasis added). In *Osage Nation*, as in *San Ildefonso,* there was evidence of use by other tribes within part of the claimed territory. In that circumstance, the Osage Nation was required to show it had the ability to exclude those tribes from that part of the territory.

The Indian Claims Commission held that, notwithstanding its small population, the Osage Nation did establish "exclusive use and occupancy" of another part of the claimed territory. As to this part, there was "no substantial evidence that the area . . . was used by tribes other than the Osage." *Osage Nation,* 19 Ind. Cl. Comm. at 492; *see also Zuni Tribe,* 12 Cl.Ct. at 617 & nn. 13–15 (a court "must conclude" that the plaintiff tribe used and occupied the area exclusively "in the absence of any evidence of occupation by any other group"); *Caddo Tribe,* 35 Ind. Cl. Comm. at 358–60 (finding exclusivity where "[t]here is no evidence indicating that other tribes of Indians were using and occupying this [claimed] area at the same time"). The holding in *Osage Nation* is based on the uniform case law that, where there is no evidence of use by others, a claimant tribe establishes exclusivity over a given area simply by showing its own use and occupancy.

In the case before us, the district court made extensive findings of use and occupancy by the Chugach in the claimed area of the OCS. The district court found no use or occupancy by others in Chugach territory. Because the Chugach claim aboriginal rights only in areas where there is no evidence of use by others, it is sufficient to show exclusivity that they were the only tribe to use and occupy these areas.

b. Misreading of "Periphery"

To evade the established case law, the majority purports to misunderstand the word "periphery." As I recount above, the district court found:

> [S]ome of the OCS 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.

(Emphasis added.)

The common meaning of "periphery" is "edge" or "boundary." The plain meaning of the district court's finding is that other groups used areas at the edge or boundary of Chugach territory. The district court made no finding that other groups used areas within Chugach territory.

The district court's usage of "periphery" is the standard usage in ordinary English. It is also the standard usage in the case law applying the test for establishing aboriginal rights. The cases clearly recognize a distinction between shared use on the periphery of a claimed territory and shared use inside the territory. *See, e.g., Caddo Tribe,* 35 Ind. Cl. Comm. at 360–62 (referring to Caddo confederacies that "lived within the area of Caddo use and occupancy," as opposed to other tribes that were found "on the western boundary" or "on the western *periphery* of Caddo territory" (emphasis added)); *Hualapai Tribe v. United States,* 18 Ind. Cl. Comm. 382, 395 (1967) (finding exclusive use and occupancy, but declining to enlarge the area of aboriginal title to include "*peripheral* areas" that were "used and occupied at the same time by other neighboring Indians" (emphasis added)); *Zuni Tribe,* 12 Cl.Ct. at 608 n. 3 (finding exclusive use of claimed area, despite evidence of use by another tribe near shared borders, because "such boundaries are the limit of the Zuni claim area, with Zuni use and occupancy within its boundaries").

The majority reads "periphery" to mean not only the edge, but also the interior, of a territory. The majority's misreading of the word transforms the district court's finding of use by others at the edge of the Chugach territory into a finding of use within that territory. The majority writes:

> The dissent adopts an understanding of the word "periphery" that's contrary to both common usage and the dictionary. Perhaps the most common use of the word "periphery" is in the phrase "peripheral vision." What's in your peripheral vision is what you *can* see, not what you can't; the periphery is something at the limits of, but within, your vision. Here, as well, the "periphery" cited by the district court *includes* the outer boundary of the claimed area. The revered Webster's Second defines "periphery" as, among other things, "the outward bounds of a thing as distinguished from its internal regions or center; encompassing limits; confines; borderland; as, only the *periphery* of Greenland has been explored." *Webster's New International Dictionary* 1822 (2d ed.1939). The dissent's interpretation of "periphery" was outdated even in the 1930s when Webster's Second was published. *Id.* (offering an alternate definition of "periphery" as a "[s]urrounding space; the area lying beyond the boundaries of a thing. *Now Rare.*"). Fish is best rare; language, not so much. As the district court clearly found, "some of the OCS areas in question" *were* exploited by other groups.

Maj. Op. at 624 (emphases in original).

The majority's misreading of "periphery" is baffling. I understand why the majority is misreading the word: If periphery is read, as it should be, to mean edge or boundary, a rationale for the ma-

jority's decision disappears. But I do not understand how the majority can, with a straight face, maintain that its reading is correct. Indeed, the majority quotes a Webster's definition of the word that squarely contradicts its reading. The plain meaning of the district court's finding that other groups likely used areas "on the periphery of the Chugach territory" is that they used areas on the edge or boundary of Chugach territory. The plain meaning is not that they used areas within Chugach territory.

4. Summary

Based on the case law and the district court's factual findings, I would hold that the Chugach have established aboriginal hunting and fishing rights within at least part of the claimed area of the OCS. There is no evidence, and no finding by the district court, that other groups hunted or fished within the territory used and occupied by the Chugach. Evidence of use or occupancy by other tribes or groups "must be specific" to defeat a claim of exclusivity. *Alabama–Coushatta Tribe,* 2000 WL 1013532, at *17; *Wichita Indian Tribe,* 696 F.2d at 1385. As in *Alabama–Coushatta Tribe,* "we do not even have evidence that is too general" to defeat the claim of exclusivity. 2000 WL 1013532, at *17. In the case before us, there is no evidence whatsoever of use or occupancy by others.

II. Federal Paramountcy

Because I conclude that the Chugach have established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS, I would reach the question whether aboriginal rights are consistent with federal paramountcy.

The Supreme Court articulated the federal paramountcy doctrine in a series of cases involving disputes between coastal states and the federal government over ownership and control of ocean resources. The Court repeatedly held that the federal government's paramount interest in "foreign commerce, foreign affairs and national defense" required that its control over the seabed be paramount to that of the states, regardless of the circumstances in which a state joined the Union. *United States v. Maine,* 420 U.S. 515, 522, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975); *United States v. Texas,* 339 U.S. 707, 718–19, 70 S.Ct. 918, 94 L.Ed. 1221 (1950); *United States v. Louisiana,* 339 U.S. 699, 704, 70 S.Ct. 914, 94 L.Ed. 1216 (1950); *United States v. California,* 332 U.S. 19, 38–39, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). The federal government could grant ownership or control to the states to the degree that it wished, but control of the seabed belonged, "in the first instance," to the federal government. *Maine,* 420 U.S. at 522, 95 S.Ct. 1155; *California,* 332 U.S. at 29, 67 S.Ct. 1658. The Court explained:

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

Louisiana, 339 U.S. at 704, 70 S.Ct. 914.

In *Village of Gambell v. Hodel ("Gambell III"),* 869 F.2d 1273, 1277 (9th Cir. 1989), we held that federal paramountcy was consistent with aboriginal rights on the OCS because such rights "may exist concurrently with a paramount federal interest, without undermining that interest." However, nine years later in *Native Village of Eyak v. Trawler Diane Marie, Inc. ("Eyak I"),* 154 F.3d 1090, 1095–97 (9th Cir.1998), a different panel of this court held that the paramountcy doctrine barred plaintiff Villages from asserting exclusive rights on the OCS based on aboriginal

title. We took this case en banc to reconcile our conflicting precedents.

Relying on *Eyak I,* the Secretary argues that the paramountcy doctrine automatically extinguishes aboriginal rights on the OCS. According to the Secretary, aboriginal rights exist on the OCS *only after they have been affirmatively recognized* by the federal government in a statute or treaty. The Secretary is correct that the federal government has ultimate control over aboriginal rights, but he has the doctrine backwards. Under long-established law, aboriginal rights exist *until affirmatively extinguished* by Congress. *See, e.g., Santa Fe Pac. R.R. Co.,* 314 U.S. at 347, 62 S.Ct. 248 (aboriginal rights need not "be based upon a treaty, statute, or other formal government action"). "[C]ongressional intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied." *Cnty. of Oneida v. Oneida Indian Nation of N.Y. ("Oneida II"),* 470 U.S. 226, 247–48, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (internal quotation and citations omitted). Here, neither the district court nor the Secretary has identified any plain and unambiguous intent by Congress to extinguish aboriginal rights of the Chugach on the OCS. *See Gambell III,* 869 F.2d at 1280 (finding it "clear" that the settlement provisions of the Alaska Native Claims Settlement Act "do not extinguish aboriginal subsistence rights that may exist in the OCS").

We manifestly erred in *Eyak I* by ignoring the "great difference" between asserted state ownership of the seabed, at issue in the federal paramountcy cases, and aboriginal use and occupancy rights, at issue in that case. *Sac & Fox,* 383 F.2d at 997 (aboriginal rights are "not the same as sovereign or legal title"); *see also* FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 998 (2005 ed.) ("[*Eyak I*] seems to be wrongly decided, given the differences between state title and Indian title."). In the paramountcy cases, states sought to lease the seabeds off their shores for oil and gas exploitation without the consent of, and to the exclusion of, the federal government. *See, e.g., California,* 332 U.S. at 23, 38, 67 S.Ct. 1658; *Louisiana,* 339 U.S. at 701, 70 S.Ct. 914. State control of the seabed posed a threat to national interests because the states, if they were owners of fee simple title, could sell or convey those rights without the federal government's consent. *California,* 332 U.S. at 29, 35, 67 S.Ct. 1658; *see also N. Mariana Islands v. United States,* 399 F.3d 1057, 1062–63 (9th Cir.2005) (applying paramountcy doctrine to Commonwealth of the Northern Mariana Islands' claimed ownership of submerged lands off its coast).

In stark contrast to the states' asserted title as against the federal government in the paramountcy cases, aboriginal rights presume ultimate federal sovereignty and control. *See Tee–Hit–Ton Indians v. United States,* 348 U.S. 272, 279, 75 S.Ct. 313, 99 L.Ed. 314 (1955) ("[Aboriginal title] is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties . . . ."). Whereas the states sought to establish ownership exclusive of the federal government in the paramountcy cases, aboriginal rights prevail only against parties other than the federal government. *See Oneida Indian Nation of N.Y. v. Oneida Cnty. ("Oneida I"),* 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (describing aboriginal title as "good against all but the sovereign"); *Village of Gambell v. Clark ("Gambell I"),* 746 F.2d 572, 574 (9th Cir.1984) ("[Aboriginal] rights are superior to those of third parties, including the states, but are subject to the paramount powers of Congress."). Unlike fee simple rights, aboriginal rights cannot be sold or leased to third parties

without the federal government's consent. *See Oneida II,* 470 U.S. at 234, 105 S.Ct. 1245; 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."). If aboriginal rights conflict with the national interest, Congress may extinguish those rights, even without paying compensation, so long as its intent is plain and unambiguous. *Tee–Hit–Ton,* 348 U.S. at 284–85, 75 S.Ct. 313; *Oneida II,* 470 U.S. at 247–48, 105 S.Ct. 1245.

In *Eyak I,* we misconstrued the Chugach's claim as seeking "complete control over the OCS." 154 F.3d at 1096. The Chugach do not claim fee simple ownership in the OCS or a concomitant power to convey their interest to third parties. Rather, the Chugach seek only recognition of their aboriginal rights of use and occupancy in part of the OCS. We erred in *Eyak I* by stating that there was no "practical difference" between the relief sought by the Chugach and the relief sought by states in the paramountcy cases. *Id.* at 1095–96. The Chugach's asserted aboriginal rights are in no way comparable to the states' asserted right to fee simple ownership of offshore submerged land and a concomitant right to lease those lands to third parties without the consent of the federal government. As we wrote in *Gambell III,* the Chugach "are not asserting a claim of sovereign rights. Rather, they contend that they possess rights of occupancy and use that are subordinate to and consistent with national interests. This argument is persuasive." 869 F.2d at 1276.

I would overrule *Eyak I* insofar as it held that the paramountcy doctrine is inconsistent with the existence of aboriginal rights. I would reaffirm our holding in *Gambell III* that aboriginal rights may exist on the OCS without undermining the paramount federal interest.

III. Remand

The district court on remand from our en banc panel did not apply the test for aboriginal rights articulated in *Sac & Fox.* The court's conclusion that the Chugach's pre-contact hunting and fishing activities "did not give rise" to aboriginal rights on the OCS was premised on legal errors.

First, the district court assumed incorrectly that the law required the Chugach to show an ability to exclude others from the claimed area, even in the absence of evidence of use by others. It wrote:

> [N]one 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.... 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.

The district court did not understand that, in the absence of evidence of use by other groups within the claimed area, the Chugach could establish exclusivity simply by showing their own use and occupancy. The Chugach did not need to show that they were able to exclude hypothetical intruders.

Second, as the singular "none" and "was" in the above passage illustrate, the court mistakenly analyzed the aboriginal rights of individual plaintiff Villages, as opposed to the Chugach as a whole. The district court found that the Chugach were culturally, ethnically, and linguistically related, and were "recognized by themselves and others as Chugach." The court's separate finding that the Villages were politi-

cally independent is immaterial. *See Northern Paiute Nation v. United States*, 7 Ind. Cl. Comm. 322, 416 (1959) (recognizing aboriginal rights for tribal group that lacked "political unity" but shared "similarities of language and culture"). The court's finding that the Villages had separate hunting and fishing "access" and did not regularly engage in joint hunting or fishing trips is similarly immaterial, so long as the Chugach commonly used hunting and fishing areas. Here, the Chugach "found their sustenance largely in marine waters" and traveled to the same areas of the OCS to hunt and fish. These findings are analogous to other cases that recognized aboriginal rights where autonomous villages shared hunting and fishing areas. *See, e.g., Upper Skagit Tribe v. United States*, 8 Ind. Cl. Comm. 492, 497 (1960) (recognizing aboriginal rights where villages "extracted their principal sustenance from the same areas"); *Suquamish Tribe v. United States*, 5 Ind. Cl. Comm. 158, 164 (1957) (recognizing aboriginal rights where villages "shared gathering, fishing and hunting areas"); *Muckleshoot*, 3 Ind. Cl. Comm. at 674–75 (recognizing aboriginal rights where "fishing waters were used in common by the occupants of all the villages"). Accordingly, the district court should have analyzed the claimed aboriginal rights of the Chugach as a whole.

Because the district court concluded that the Chugach's pre-contact activities "did not give rise" to any aboriginal rights on the OCS, it did not make findings identifying the precise areas that the Chugach used and occupied exclusively. I would remand to allow the district court to make such findings.

Conclusion

The district court acknowledged that the Secretary's challenged regulations are "fatally arbitrary" if the Chugach have aboriginal fishing rights in the OCS that have not been preempted under the paramountcy doctrine. Because I would hold that the Chugach have established aboriginal rights in at least part of the claimed area of the OCS and that these rights do not conflict with federal paramountcy, I would reverse and remand with instructions to the district court to find precisely where within the claimed area the Chugach have such rights. Once it makes those findings, the district court would be in a position to deal appropriately with the challenged regulations.

UNITED STATES of America, Plaintiff–Appellee,

v.

Matthew Wayne HENRY, Defendant–Appellant.

No. 11–30181.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 26, 2012.

Filed Aug. 9, 2012.

Background: Defendant was convicted in the United States District Court for the District of Alaska, H. Russel Holland, Senior District Judge, of illegal possession of a homemade machine gun. Defendant appealed.

Holdings: The Court of Appeals, Milan D. Smith, Jr., Circuit Judge, held that:

(1) Second Amendment right to bear arms did not extend to the defendant's possession of a homemade machine gun, and

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Native Village of Eyak v. Blank: Fish is Best Rare; Justice, Not So Much

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NOTE

NATIVE VILLAGE OF EYAK V. BLANK:[1] FISH IS BEST RARE; JUSTICE,NOT SO MUCH

WILLIAM H. HOWERY III[*]

Treat the earth well: it was not given to you by your parents; it was loaned to you by your children.[2]

INTRODUCTION

Archaeological evidence shows the Chugach people began inhabiting the Copper River Delta and coastal lands along the Prince William Sound inlet of the Gulf of Alaska when the glaciers of the last ice age receded.[3] The Chugach have always been seafarers who rely upon the waters of the Outer Continental Shelf (OCS) for their

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[1] Native Vill. of Eyak v. Blank, 688 F.3d 619, 630 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (holding non-exclusive rights to natural resources from aboriginal title never arose because the Villages did not meet their burden of proof for exclusive use and occupancy; although the Chugach exclusively used all but the periphery of the claimed areas, they failed to present sufficient evidence of the ability to occupy those areas to the exclusion of other tribes).

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[2] Old Cherokee Proverb.

[3] *See generally Who We Are: History & Culture*, CHUGACH ALASKA CORP. (2012), http://www.chugach-ak.com/whoweare/cultural/Pages/default.aspx.

livelihood.[4] First contact[5] with a major European imperial power came when Russian explorers met the Chugach in Umiaks several miles from land.[6] Regular contact came when the Russian American Company established a trading post at Nuchek to supply European and Asian fur markets.[7] The furs of the area's sea mammals were commercially in high demand, but the Russians recognized the Chugach as formidable foes.[8] Consequently, the Russians did not subjugate the Chugach, as they had done to other, larger tribes in Alaska, but traded for the prized natural resources found in their waters.[9]

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[4] "Indeed, their very occupancy on the shore and immemorial enjoyment of sea and seabed are testament to the variety of marine mammals, fish, and sea birds in that area. These resources ensured a more certain livelihood than the inland hunt of moose and caribou could provide. The villages formed at the water's edge." David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 5-6 (2004).

[5] The district court noted, "Vitus Bering probably landed on Kayak Island in 1741. He had no meaningful contact with the indigenous people." Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 12 n.22 (D. Alaska August 7, 2009).

[6] The district court also found the Chugach were capable of navigating anywhere within the Prince William Sound and past, from the Lower Kenai Peninsula to the Copper River Flats, out to Kodiak, Middleton, and the Barren Islands, and past Wessels Reef in kayaks and umiaks. A kayak was 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[,]" and an 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." *Id.* at 15. The earliest European sources cited by anthropologists testifying in this case at the trial level stated groups of the Chugach Sugpiat "traveled immense distances across open water in their skin-covered boats. Sauer 1802 specifically stated that two kayakers paddled three miles out to his ship." Patricia H. Partnow, Ph.D., Comments on Anthropological Source Documents, Expert Report Affidavit, Eyak v. Locke, No. 3:98-cv-0365-HRH (D. Alaska August 7, 2009). Further, "the Chugach introduced records of five eyewitness accounts from 18th-century explorers describing encounters with seafaring Chugach on the OCS more than three miles from shore." Native Vill. of Eyak v. Blank, 688 F.3d 619, 630 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (Fletcher, J., dissenting).

[7] The Company forced males between the ages of eighteen and fifty to work for three years. *The Chugach People*, CORDOVA HISTORICAL MUSEUM, http://cordovamuseum.org/history/people-of-the-region (last visited March 1, 2014).

[8] "The Russians had virtually enslaved other Alutiiq people as well as the Koniag. . . . 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." *Eyak v. Locke*, at 16 n.27.

[9] Bloch, *supra* note 5, at 6 ("Historically, whales were prized by tribal members for their blubber, meat, and oil. Sea lions, porpoises, smaller whales, and seals would be harpooned in open water from skin-covered kayaks. Seal hunting additionally required the use of decoys, nets, and ambuscade. The furs of sea otters were highly valued. Bottom fish like cod, halibut, and rockfish, harvested from deep water with baited hooks and lures, were a staple of subsistence commensurate to the mammals. As travel between villages was frequent and typically by water (in umiaks as well as kayaks), extensive trade and ceremonial exchange of the sea's riches developed. . . . [T]he traditions associated with life, love, religion, and death came to depend on the ocean and its

The Chugach continued trade with the Russian Empire until Alaska was purchased by the United States in 1867.[10] The Klondike Gold Strike in 1896 brought a significant population of mineral prospectors into the area. The Chugach population declined as each natural resource was exploited.[11] Direct American subjugation began with Bureau of Indian Affairs school policies against Chugach language and culture. Acculturation peaked with the Alaska Native Claims Settlement Act (ANCSA) of 1971, which altered the very entity of an Indian tribe in order to extinguish land claims and protect America's most expensive and indispensable resource, oil.[12] Subsequently, other natural resources within Chugach territory at times became cause for controversy.[13] Thus the Chugach, like most other Alaskan natives, are

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resources. A majority of village members today continue the subsistence lifestyle of their forbears. . . .").

[10] Following the Civil War, Secretary of State William H. Seward's "folly" eventually provided the United States with an abundance of minerals, petroleum, and natural resources (at issue in this case) for the purchase price of $7.2 million, or roughly 2 cents per acre. For an account of the deal, see generally *Univ. of Rochester Library Bulletin: Spring 1967*, SEWARD'S FOLLY: A SON'S VIEW, http://www.lib.rochester.edu/index.cfm?PAGE=487 (reprinting a speech given many times by Seward's sons Frederick Seward and William H. Seward, Jr., Address at the Alaska-Yukon Exposition in Seattle (Sept. 10, 1909)) (last visited March 1, 2014).

[11] "The wider territory of the Alutiiq, or Chugach Eskimo people—historically also called Aleut and Sugpiaq—includes the Alaska Peninsula, parts of the Kenai Peninsula, and Kodiak Island. . . [which] were hit especially hard by events of the early 20th century. They were displaced from their lands and nearly destroyed by the discovery of oil at Katalla, the settlement of Cordova in 1909, and the building of the Copper River & Northwestern Railroad between Cordova and the Kennecott copper mines (completed in 1911). The Eyak population, estimated at 300-400 in the late 19th century, dwindled to fewer than 40 by the 1930s." LaRue Barnes, *Eyak and Alutiiq (Chugach Eskimo): Indigenous Peoples of the Copper River Delta and Prince William Sound*, ALASKA NATIVE COLLECTIONS: SMITHSONIAN INSTITUTION, http://alaska.si.edu/culture_eyak.asp?continue=1 (last visited March 1, 2014).

[12] The Alaska Native Claims Settlement Act (ANCSA) establishes the Alaska Native Fund, more than $962,500,000 from appropriations and mineral lease payments, for the Natives' aboriginal land claims as well as forty million acres of land as compensation. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 398 (2004). "To administer the property and money, the Act authorizes the creation of twelve regional corporations which are to correspond to the areas inhabited by the various Native groups. . . . The statute . . . sets forth the procedure for determining the boundaries of the twelve regions. 'For purposes of this chapter, the State of Alaska shall be divided by the Secretary of the Interior within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. . . .'" Cent. Council of Tlingit & Haida Indians of Alaska v. Chugach Native Ass'n, 502 F.2d 1323, 1324 (9th Cir. 1974) (quoting 43 U.S.C. § 1606(a)). More than two hundred village corporations were also created. For an overview of these "tribes of shareholders," *see* GARY C. ANDERS & KATHLEEN ANDERS, INCOMPATIBLE GOALS IN UNCONVENTIONAL ORGANIZATIONS: THE POLITICS OF ALASKA NATIVE CORPORATIONS (1986), *reprinted in* DEVELOPING AMERICA'S NORTHERN FRONTIER 133 (Theodore Lane ed., 1987) *available at* www.alaskool.org/projects/ancsa/t_lane/IncompatibleGoals.htm.

[13] The Chugach corporations are no strangers to litigation, especially in the Ninth Circuit. *See* Chugach Alaska Corp. v. United States, 34 F.3d 1462 (9th Cir. 1994) (holding that Native

now an impoverished group with limited economic resources or commercial enterprises.[14]

For the purposes of the litigation discussed in this Note, the Chugach peoples comprise five native villages in the State of Alaska: Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham ("the Villages").[15] The Villages must fight for a right to the natural resource they depend upon most for survival, fish. At the end of the twentieth century, the Villages sued the federal government to assert claims of aboriginal title, and along with it, exclusive rights to the resources of their ancestral fishing grounds on the OCS. A panel of the United States Court of Appeals for the Ninth Circuit held the federal paramountcy doctrine[16] barred any exclusive claim based upon aboriginal title.[17] Thus, the United States exclusively controls access to the Villages' ancestral fishing grounds.

This Note discusses the recent decision of the Ninth Circuit in *Native Village of Eyak v. Blank*, in which the five native Villages sued to assert *non-exclusive* rights to resources under aboriginal title claims; the Villages lost. [18] Part I explains the legal background, from the

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American corporation could retain sufficient quantity of assigned income in order to avoid paying any alternative minimum tax); Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (holding that members enrolled in another village do not qualify as members of the group regardless of residence for conveyance of public land); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978) (holding that sand and gravel are part of the subsurface estate, and therefore revenues from extraction belong to regional corporation).

[14] "Today, approximately one fifth of the inhabitants of Alaska are Natives. Many Natives continue to live a traditional lifestyle. As a group, Alaska Natives have the lowest incomes in the state, and a Native family is three times more likely to live under the federal poverty line than a non-Native family. A report issued in 2009 found that the unemployment rate for Alaska Natives was five times higher than the national average." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 261 (2012).

[15] Chenega is also known as Chanega, while Nanwalek was formerly known as English Bay. Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 1 n.1 (D. Alaska August 7, 2009).

[16] The federal paramountcy doctrine states: "The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea." Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1096 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

[17] "They seek *exclusive* use of the ocean resources and regulatory power over third parties, including officials of our executive branch of government, subject only to the laws of Congress. . . . [Insofar as the] Native Villages' claim to complete control over the OCS is contrary to these national interests and inconsistent with their position as a subordinate entity within our constitutional scheme . . . the Native Villages are barred from asserting exclusive rights to the use and occupancy of the OCS based on unextinguished aboriginal title." *Id.* at 1096-97.

[18] Native Vill. of Eyak v. Blank, 688 F.3d 619, 626 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (holding that native villages did not satisfy their burden to prove exclusive use and occupancy of claimed areas of the OCS to establish aboriginal title).

underpinnings of American Indian sovereignty and claims of aboriginal title, to the federal paramountcy doctrine. Part II explains the litigious path discussing the holdings of the Chugach cases from the first Ninth Circuit decision of *Native Village of Eyak v. Trawler Diane Marie* to the current decision of *Eyak v. Blank*. It describes the findings of the district court in *Native Village of Eyak v. Locke* following the *en banc* remand ordering those findings in *Native Village of Eyak v. Daley*. Then it contrasts the majority holding of the Ninth Circuit with Judge Fletcher's dissent and the language debate amidst the panel. The Ninth Circuit refused to acknowledge the existence of aboriginal title over the fishing grounds used by the Villages since time immemorial. Part III argues that the Ninth Circuit en banc added a new prerequisite that a tribe must establish before the courts will acknowledge rights claimed under aboriginal title. In doing so, the Ninth Circuit created a split between circuits.[19] The majority avoided the greater legal question of whether these non-exclusive rights to the natural resources of the OCS conflict with the federal paramountcy doctrine, a question that the dissent analyzed correctly. By denying commercial rights, this holding guarantees Indian tribes only subsistence fishing, attacking tribal sovereignty.

I. LEGAL BACKGROUND

The Constitution of the United States grants Congress the sole power to regulate affairs with Indian tribes.[20] Using the doctrine of discovery as Chief Justice John Marshall announced in *Johnson v. M'Intosh*, the established legal principle of American conquest remains:

> Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, that that their condition shall remain as eligible as is compatible with the objects of conquest. . . . [*H*]*umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired*; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish

[19] *See* Wichita Indian Tribe v. United States, 696 F.2d 1378, 1385 (Fed. Cir. 1983) (holding that evidence must be "specific enough to justify a finding of a lack of exclusive use").

[20] "The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

> the painful sense of being separated from their ancient connexions, and united by force to strangers.[21]

The original tribal inhabitants' right to title under American law was restricted only to that of an occupier by their status as domestic dependent nations.[22] Tribes may claim only aboriginal title under the jurisdiction of the United States, which asserts ultimate sovereignty.

A. ABORIGINAL TITLE

Aboriginal title, a possessory interest otherwise known as original title, Indian title, or the Indian right of occupancy,[23] is a specific land-use right possessed by a tribe[24] or an individual tribal member.[25] Many countries today with a judiciary descending from the English common-law tradition apply Chief Justice Marshall's American aboriginal title doctrine to claims regarding title to lands occupied by native peoples.[26]

The first Congress of the United States passed the Indian Non-Intercourse Act. This legislation protects Indian lands by establishing that only the federal government, but neither states nor private citizens, could acquire land from an Indian tribe.[27] It was up to the Supreme Court to define the legal rights and title Indian tribes held, [28] as well as

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[21] Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 589 (1823) (emphasis added).

[22] Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 2 (1831) (finding Indian nations to be domestic dependent nations with limited sovereignty).

[23] The original inhabitants of the United States have the right to continue to *occupy* and *use* their ancestral land until Congress decides to extinguish this possessory interest for another purpose. PEVAR, *supra* note 15, at 24.

[24] Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974).

[25] United States v. Dann, 873 F.2d 1189, 1195-96 (9th Cir. 1989).

[26] Originally, Blackstone's *Commentaries on the Laws of England* divided colonial lands into two categories: (1) Unoccupied land, or vacant and uncultivated lands that could be acquired by mere occupancy, and (2) Occupied land, or lands cultivated and populated by native peoples that could be acquired by conquest, cession, or purchase by a sovereign. By the time Chief Justice John Marshall established the aboriginal title doctrine, while authoring *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, and the *Cherokee Cases,* most notably *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, and Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832), inconsistent holdings across the common-law world were in conflict over whether property rights remained intact following a change in sovereignty bringing about the new Anglo legal system. BRIAN SLATTERY, ANCESTRAL LANDS, ALIEN LAWS: JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE 4-5, 8, 10, 15 (1983).

[27] "[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (1790) (current version at 25 U.S.C. § 1753 (1983)).

[28] CANBY, *supra* note 13, at 368.

the status of the tribes living within the expanding borders of the United States.

The "doctrine of discovery"[29] was articulated in the seminal case *Johnson v. M'Intosh.* In 1773, Johnson purchased land from the Piankeshaw Indians in what is today the State of Illinois. In 1818, M'Intosh purchased the same land from the United States.[30] A unanimous Court decided that discovery necessarily limited tribal sovereignty, removing the property right of alienation, and giving exclusive title to the discovering sovereign, subject only to the Indian right of occupancy.[31] However, only the United States could eliminate the Indian right of occupancy by purchase or conquest.[32] Thus, the title Johnson purchased, and consequently the title his successors claimed, was Indian title with no ownership right, only a possessory right akin to that of the Indians. This title was inferior to fee simple title issued by the United States.[33] Chief Justice Marshall later clarified the legal status of Indian tribes as "domestic dependent nations" that continued to retain a limited sovereignty subservient only to that of the United States, but not subject to the sovereignty to the several states.[34]

Successive courts affirmed that only the federal government can extinguish aboriginal title, which need not be based upon treaty, statute, or formal government action in order to exist.[35] Only Congress may extinguish such title and must do so explicitly.[36] Because aboriginal title

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[29] The "Doctrine of Discovery" continues to be criticized across the common-law world as religious zealotry and racism. "During the fifteenth and sixteenth centuries, the Christian nations of Europe espoused the view that non-Christian lands throughout the world could be claimed by Christians as a matter of divine right, and they used the Doctrine of Discovery to dominate indigenous peoples and to dispossess them of their lands and assets. The Doctrine of Discovery is the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. Indigenous people around the world, including those in the United States, Canada, New Zealand, and Australia, had their lands confiscated based on this theory." PEVAR, *supra* note 15, at 24 (internal quotation marks and citations omitted).

[30] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 560-62.

[31] *Id.* at 574.

[32] *Id.* at 587.

[33] ,*Id.* at 584, 603-04.

[34] As Domestic Dependent Nations, or wards of the guardian United States, and not foreign nations, tribes like the Cherokee had no standing to sue states in the Supreme Court, which lacked original jurisdiction. Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 12–13, 17 (1831).

[35] The federal government's policy is to respect the Indian right of occupancy, "considered as sacred as the fee simple of the whites." Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 669 (1974) (quoting Mitchel v. United States, 34 U.S. (9 Peters) 711, 746 (1835)).

[36] The United States must prove title was extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise," Congress having the supreme power to do so. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 347 (1941).

is not a property right, but a tribal possessory interest, the Fifth Amendment's Takings Clause does not protect it.[37] The United States retains the fee under aboriginal title; however, the occupied land and all connected resources are rightful tribal possessions.[38]

For the first century and a half of United States existence, tribes were substantially disadvantaged in dealings, treaties, and court proceedings. Following the Second World War, and the inception of citizenship for Indians, came a renaissance of rights. From 1946 to 1978, Congress established the Indian Claims Commission, waiving sovereign immunity to settle aboriginal title, takings, and treaty claims; jurisdiction to review Commission decisions was vested in the Court of Claims.[39] The principle was established that aboriginal title continues until extinguishment; furthermore, the intent to extinguish aboriginal title must be plain and unambiguous.[40] Explicit statutory action is not necessary to extinguish aboriginal title for an individual tribe or even an entire state.[41]

B. EXTINGUISHMENT OF ABORIGINAL TITLE IN ALASKA

Alaskan tribes are at a disadvantage because the practice of entering into formal treaties with Indian tribes ended shortly after Alaska's purchase from Russia in 1867.[42] Courts have held that tribes retain sovereignty with or without a treaty. Alaska Natives, unlike other Indian tribes, have been placed in a unique system. Under the Commerce Clause, only Congress may legislate for the Indian tribes,

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[37] Aboriginal title may be extinguished without right of just compensation. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284-85 (1955).

[38] United States v. Shoshone Tribe of Indians of Wind River Reservation, 304 U.S. 111, 117-18 (1938).

[39] CANBY, *supra* note 13, at 378-81 (explaining the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v.).

[40] Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 492-93 (1967).

[41] Several actions of the United States, absent congressional statute, can result in the extinguishment of aboriginal title, including treaty or agreement, *see* Otoe & Missouria Tribe v. United States, 131 Ct. Cl. 593 (1955); the creation of a reservation, *see* Gila River Pima-Maricopa Indian Cmty. v. United States, 204 Ct. Cl. 137 (1974); settlement, *see* Marsh v. Brooks, 55 U.S. 513 (1852); adverse governmental action, *see* Tlingit & Haida Indians v. United States, 147 Ct. Cl. 315 (1959); or intent to use the area and resources otherwise, *see* United States v. Gemmill, 535 F2d 1145 (9th Cir. 1976).

[42] "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." 25 U.S.C.A. § 71 (Westlaw 2014).

which are domestic dependent nations that still retain sovereignty greater than that of the several states.[43] Congress extinguished all claims of aboriginal title within the State of Alaska in 1971.[44] As a result, village and regional corporations now hold assets unlike the tribal entities recognized in other states.[45] All Alaskan natives alive on December 18, 1971, became shareholders of their respective corporations and were prohibited from selling their shares for twenty years.[46] Coincidentally, at the same time shareholders were able to sell shares, the Chugach Corporation filed Chapter Eleven bankruptcy; the extinguishment of aboriginal title and entity of tribe came with such consequences.

C. CURRENT LEGAL PRINCIPLES CONCERNING ABORIGINAL TITLE

Today, Indian tribes continue a government-to-government relationship of general trust with the United States, which owes something akin to a fiduciary duty toward its dependent nations.[47] Under the Constitution of the United States, Congress has plenary authority over all tribes pursuant to the Commerce Clause.[48] Sovereignty of tribes is reserved, much like the Tenth Amendment for the states, under the

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[43] Upon admission to the Union, later states recognized the "establishment and sanctity of the nation-to-nation relationship between tribes and the federal government," DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 202 (2001), as Alaska did pursuant to the Alaska Statehood Act, "forever disclaim[ing] all right and title to any lands or other property . . . the right and title to which may be held by any Indians, Eskimos, or Aleuts . . . under the absolute jurisdiction and control of the United States." Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

[44] 43 U.S.C.A. § 1603(b) (Westlaw 2014); Amoco Production Co. v. Vill. of Gambell, 480 U.S. 531, 536-37 (1987).

[45] Alaska v. Native Vill. of Venetie, 522 U.S. 520, 533 (1998) (holding that corporations can transfer land out of Native ownership without restrictions on alienation negating independent sovereignty).

[46] 43 U.S.C.A. § 1601 et seq. (Westlaw 2014); ANCSA defines "Native" as a citizen of the United States who is a person of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof. 43 U.S.C.A. § 1602(b) (Westlaw 2014). Shareholders may now sell their interests to anyone at any time. Unlike in other tribes, children of shareholders may never receive any interest in their native corporations. *See* PEVAR, *supra* note 15, at 261.

[47] "This Court has recognized the distinctive obligation of trust incumbent upon the Government and its dealings with these dependent and sometimes exploited people. . . . [T]he Government is something more than a contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress, and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

[48] WILKINS & LOMAWAIMA, *supra* note 44, at 115 (stating the Supreme Court recognizes Congress as having "full, entire, complete, absolute, perfect, and unqualified authority over tribes and individual Indians" (citing *Mashunkashey v. Mashunhashey*, 134 P.2d 976, 979 (Okla. 1943))).

Supremacy Clause.[49] Because of the government's superior position, federal courts apply three canons of construction to interpret treaties: 1) to resolve ambiguities in favor of Indians, 2) to interpret treaties as the Indians would have understood them, and 3) to liberally construe any treaty in favor of the tribe.[50] Treaty rights to hunt, fish, and gather on lands tribes ceded to the United States have been consistently upheld when treaties are present. These rights have also been found to exist without treaties when aboriginal title has not clearly been extinguished.[51]

Other legal standards have been created in order to assist tribes litigating against the awesome power of the United States. Because of the difficulty in obtaining evidence clearly establishing aboriginal title, courts must adopt a liberal approach in favor of tribal claimants.[52] When establishing aboriginal title, ambiguities in a treaty between a tribe and the United States should be construed in favor of the tribe, because the tribe itself is a ward of the United States.[53] The *Sac & Fox* test is used (as it was in *Eyak v. Blank*) to determine the existence of aboriginal title.[54] This test defines aboriginal title as actual, exclusive, and continuous use and occupancy for a long time,[55] with use and occupancy determined by the way of life, habits, customs and usage of the users and occupiers.[56]

More recently, the Ninth Circuit upheld aboriginal title for an Alaskan tribe in *People of the Village of Gambell v. Hodel.* In *Gambell v. Hodel*, the Secretary of the Interior issued leases to explore parts of the OCS off the coast of Alaska to explore the possibility of oil and gas

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[49] WILKINS & LOMAWAIMA, *supra* note 44, at 122 ("treaty in truth and in fact merely *reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed*" (emphasis added) (quoting Makah Indian Tribe v. McCauly, 39 F. Supp. 75 (W.D. Wash. 1941), *rev'd on other grounds sub nom.* McCauley v. Makah Indian Tribe, 128 F.2d 867 (9th Cir. 1942))).

[50] WILKINS & LOMAWAIMA, *supra* note 44, at 141.

[51] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 182-86 (1999).

[52] Native Vill. of Eyak v. Blank, 688 F.3d 619, 627-29 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (Fletcher, J., dissenting) (stating that courts must take a common-sense approach when evaluating exclusivity, because it is extremely difficult to establish facts after the lapse of time, and exclusivity can be inferred from a date too remote to admit testimony of a living witness (citing Muckleshoot Tribe v. United States, 3 Ind. Cl. Comm. 669, 677 (1955); Snake or Piute Indians v. United States, 112 F. Supp. 543, 552 (Ct. Cl. 1953))).

[53] Because a tribe is a ward of the nation, dependent upon the protection and good faith of the federal government, doubtful expressions in a treaty with the tribe must be resolved in favor of the weak and defenseless people of the tribe. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 354 (1941).

[54] *Eyak v. Blank*, 688 F.3d at 622.

[55] Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967).

[56] *Id.*

extraction.[57] In order to preserve their subsistence fishing rights, the Villages of Gambell and Stebbins sought an injunction to prevent named defendants Amoco, Arco, Exxon, Shell, Mobil, Texaco, Sohio Alaska Petroleum, and Union Oil Company of California from executing the leases.[58] The district court held there were no aboriginal rights in the OCS, based upon the holding of *Inupiat Community of the Arctic Slope v. United States.*[59] The Ninth Circuit overturned that decision. In doing so, the court of appeals acknowledged the Villages had aboriginal subsistence rights to fish and prevented the execution of the leases in order to prevent depletion of the fishery the tribe relied upon for survival. Specifically, the Ninth Circuit determined that ANCSA does not extinguish aboriginal subsistence rights in the OCS, as it is not part of the State of Alaska,[60] and the federal paramountcy doctrine does not extinguish aboriginal rights but merely subordinates them.[61]

In addition, subsistence rights of all rural Alaskans, native and non-native, are protected within state boundaries. Passed in 1980, the Alaska National Interest Lands Conservation Act (ANILCA) prioritizes hunting and fishing on public lands in the State of Alaska to guarantee subsistence rights to inhabitants of rural areas.[62] "ANILCA creates a board that determines for each village (based on that village's 'customary and traditional' hunting and fishing practices) the number of fish and wildlife the village may take within its assigned hunting area."[63]

D. FEDERAL PARAMOUNTCY DOCTRINE

In this country, rights over ocean resources belong to the supreme sovereign, the United States of America. These rights stand paramount

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[57] People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1275 (9th Cir. 1989).

[58] *Id.*

[59] In Inupiat Cmty. of the Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), the Natives sought to enjoin similar leases, but also claimed sovereignty over adjacent waters, rejecting recognition of any and all federal and state jurisdiction over the tribe. *See also Gambell v. Hodel*, 869 F.2d at 1275-77.

[60] *Id.* at 1280.

[61] "That aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest, is clearly expressed in Cnty, of Oneida N.Y. v. Oneida Indian Nation, 470 U.S. at 233-36. It has been settled United States policy that federal sovereignty is 'subject to' the Indians' right of occupancy. *See* Cramer v. United States, 261 U.S. 219, 227 (1923); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823)." *Gambell v. Hodel*, 869 F.2d at 1277.

[62] 16 U.S.C.A. § 3101 et seq. (Westlaw 2014). Under ANILCA, Alaska regulates hunting and fishing with federal oversight, providing a preference for subsistence use, which restricts competing uses when natural resources are insufficient. CANBY, *supra* note 13, at 422-23.

[63] PEVAR, *supra* note 15, at 263.

over the rights of all other sovereigns.[64] The Federal Paramountcy Doctrine was created as a result of four cases in which states asserted ownership of petroleum resources found under the sea adjacent to their territories.[65] Under the Constitution, the federal government has paramount rights to the natural resources of, and exerts jurisdiction over, the marginal sea surrounding the country.[66]

In 1947, the United States Supreme Court held that California could not authorize leases for petroleum, gas, and mineral deposits in the Pacific Ocean; the Court rejected California's argument that it possessed title to submerged lands under a three-mile belt of navigable waters, as it was admitted to the Union on equal footing as the original thirteen states.[67] Three years later, the Court held that Louisiana could not assert title to the seabed under a twenty-seven-mile belt into the Gulf of Mexico, although it exercised dominion over that area before admission into the Union.[68] In the very next case, the Supreme Court stated that upon admission into the Union, Texas as a republic ceded both imperium, or sovereignty, and dominium, or ownership, to the United States in order to become the State of Texas.[69] By the time Maine asserted sovereign rights over the seabed, the Supreme Court clearly established the rule: "[T]he Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense and . . . the federal government has paramount rights in the marginal sea."[70] Coastal states today retain sovereignty for a three-mile belt along the coast only because Congress has ceded jurisdiction.[71]

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[64] California is not the owner of the three-mile marginal belt along its coast, and the federal government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil. United States v. California, 332 U.S. 19, 38-39 (1947).

[65] Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1092 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

[66] *Id.* at 1094.

[67] California claimed a three-mile zone from the low water mark extending outward from the coast into the Pacific Ocean. United States v. California, 332 U.S. 19 (1947).

[68] Louisiana claimed a twenty-seven-mile boundary extending from the coast into the Gulf of Mexico. United States v. Louisiana, 339 U.S. 699 (1950).

[69] Texas claimed the entire continental shelf underneath the Gulf of Mexico. United States v. Texas, 339 U.S. 707, 717-20 (1950).

[70] United States v. Maine, 420 U.S. 515, 522-23 (1975) (internal quotation marks omitted). Maine was joined by several states on the Eastern Seaboard to clarify the extent of state jurisdiction. *Id.* at 516.

[71] Following the previous paramountcy rulings, Congress passed the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, and Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1356, which together provide state jurisdiction from the low water mark to three miles from shore and federal jurisdiction from three to two hundred miles from the coast. Coincidentally, due to

II. LEGAL FRAMEWORK OF THE CURRENT LITIGATION

The natural resources of all submerged lands lying seaward of state waters, from three to 200 miles off the coast, are subject to the exclusive jurisdiction of the United States.[72] Exclusive authority to regulate management of fisheries of an Exclusive Economic Zone (EEZ) for two hundred miles off the coastline was established under the Magnuson Act.[73] Power to regulate fisheries located within the established Exclusive Economic Zone (EEZ) in the Outer Continental Shelf (OCS) is delegated to the Secretary of the Department of Commerce.[74] In 1982, Congress passed the Northern Pacific Halibut Act;[75] thereafter the Secretary regulated fisheries, limiting fishing of both halibut and sablefish (black cod).[76] The Secretary issues Individual Fishing Quota (IFQ) permits to commercial fishers under the authority granted by Congress to promulgate regulations pursuant to these acts.[77] In 1993, commercial fishing was defined as "fishing the resulting catch of which either is, or is intended to be, sold or bartered."[78] Commercial fishers were issued IFQ permits stating a bag limit showing total allowable catch for each fishing vessel.[79] Also sport fishing, the category under which subsistence fishing now fell, was defined as "anything other than commercial fishing."[80] Sport fishing was limited to use of a single line with two hooks for a bag limit of no more than two fish per person per

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the curvature of the Earth, three miles outward is the farthest linear point on the horizon that a person of average height can see while standing on the beach at the low water mark.

[72] 43 U.S.C.A. § 1331(a) (Westlaw 2014). With the Outer Continental Shelf Lands Act of 1953 (OSCLA), 43 U.S.C. 1331 et seq., Congress affirmed the 1945 Truman Proclamation claiming sovereign rights over the resources of the continental shelf adjacent to the United States for the purpose of creating a national underwater buffer zone at the advent of the Cold War.

[73] 16 U.S.C.A. § 1811(a) (Westlaw 2014). The Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq., creates a fishery conservation zone. The harvest of sablefish, or black cod, within the EEZ is regulated solely by this act.

[74] 16 U.S.C.A. §§ 1801-1882 (Westlaw 2014).

[75] 16 U.S.C.A. §§ 773-773k (Westlaw 2014).

[76] Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

[77] 16 U.S.C.A. § 773 et seq. (Westlaw 2014). In order to implement the Convention between the United States and Canada for the Preservation of Halibut in the North Pacific, a joint International Pacific Halibut Commission was established to recommend regulations to each country.

[78] *See former* 50 C.F.R. § 301.2.

[79] *See former* 50 C.F.R. § 676.10.

[80] *See former* 50 C.F.R. § 301.17. Today, sport fishing means, "all fishing other than commercial fishing and treaty Indian ceremonial and subsistence fishing; and (2) In waters in and off Alaska, all fishing other than commercial fishing and subsistence fishing." 50 C.F.R. § 300.61 (Westlaw 2014).

day during halibut season, running from February 1 to December 31 each year.[81] Commercial fishing for sablefish is divided between 80% deep hook and line gear and 20% trawler gear. The Department of Commerce found no significant sustenance fishing or sports fishing existed at the depth sablefish swim and classified sablefish as a prohibited species.[82]

A. THE BEGINNING OF THE CURRENT CONTROVERSY

This controversy began in 1995 when the Native Village of Eyak sued the operator of the fishing vessel "MISTER BIG" and the Secretary, seeking an injunction against trespassers within their traditional native fishing grounds on the OCS.[83] When the Secretary promulgated regulations for the management of halibut and sablefish fisheries, pursuant to the Halibut Act, Magnuson Act, and Convention between the United States and Canada for the Preservation of Halibut in the North Pacific, the call for conservation necessitated limited fishing in the Gulf of Alaska, to control the "race for fish."[84] The Villages claimed that for over seven thousand years the Chugach had fished and hunted marine animals in areas of the OCS now regulated by the Secretary of Commerce.[85] In addition, the Villages argued that many of their fishermen used their boats to clean up Prince William Sound following the 1989 Exxon Valdez oil spill, which prevented them from qualifying for IFQ permits issued by the Secretary.[86] IFQ permits were issued only to qualified applicants with sufficient documentation to calculate IFQ allocation.[87] Therefore, vessels without catch information for the years

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[81] *See former* 50 C.F.R. § 301.21.

[82] *See* 50 C.F.R. § 679.21 (Westlaw 2014).

[83] Opening Brief of Appellants at 10, Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999), 1998 WL 34103666.

[84] Opening Brief of Appellee at 8, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 1997 WL 33550165.

[85] Andrew P. Richards, Case Comment, *Aboriginal Title or the Paramountcy Doctrine? Johnson v. McIntosh Flounders in Federal Waters off Alaska in* Native Village of Eyak v. Trawler Diane Marie, Inc., 78 WASH. L. REV. 939, 939 (2003).

[86] Opening Brief of Appellants at 9, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 1998 WL 34103666. Further, on "March 24, 1989, the *Exxon Valdez*, a tanker sailing across Prince William Sound from the Trans-Alaska Pipeline System terminus in Valdez, Alaska, and bound for Long Beach, California, struck Bligh Reef fewer than 20 miles from Cordova, spilling almost 11 million gallons of crude." D.S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10366, 10368 (Apr. 2012).

[87] IFQ Permits were initially allocated following October 18, 1994, to qualified persons. Qualified persons needed to submit documentation showing harvest of halibut or sablefish with fixed gear from a vessel during the qualifying years of 1988, 1989, and 1990. Applicants with insufficient

1988, 1989, and 1990 were not qualified to receive IFQ permits to commercially fish halibut or sablefish.

Shortly after filing, the Secretary moved for summary judgment arguing, inter alia, that 1) the Villages' claims conflicted with federal paramountcy in the OCS, 2) no treaty or statute recognized an exclusive right to the OCS, and 3) the statute of limitations for claims barred suit. On June 17, 1997, the district court granted summary judgment and dismissed the Villages' claims, holding that exclusive rights to OCS resources cannot be based on aboriginal title alone and that the federal paramountcy doctrine barred claims of exclusive aboriginal right.[88]

B. *NATIVE VILLAGE OF EYAK V. TRAWLER DIANE MARIE, INC.*, 154 F.3D 1090 (9TH CIR. 1998).

The Villages appealed, arguing that only Congress, with its exclusive plenary power over Indian affairs, not the executive or the judiciary, could interfere with aboriginal rights. The academic community supported the Villages' argument, pointing out that fee simple title is unlike aboriginal title: the United States asserts dominion and retains the fee, which includes the right to alienate lands held in aboriginal title. However, federal dominion remains subject to the use and occupancy by the tribes.[89] Further, aboriginal title is not precluded by federal paramountcy, but relies upon federal sovereignty in order to exist.[90] The Villages relied upon Ninth Circuit precedent that aboriginal rights may exist concurrently with paramount federal interests, without undermining those interests, because it is "settled United States policy that federal sovereignty is 'subject to' the Indians' right of occupancy."[91]

On September 9, 1998, a panel of the Ninth Circuit released the *Eyak v. Trawler Diane Marie* decision, which held that any claims of

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information were allowed one opportunity to provide corroborating information within ninety days of notification. 50 C.F.R. 679.40 (Westlaw 2014).

[88] Opening Brief of Appellee at 5, *Eyak v. Trawler Diane Marie*, 154 F.3d, 1997 WL 33550165.

[89] "While the Native Villages retain their age-old right to hunt and fish in the waters that have sustained their people and their culture from time immemorial, the United States has broad authority to manage and even extinguish these tribal rights." Brief of Amici Curiae Indian Law Academics in Support of Plaintiffs-Appellants at 3, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 2003 WL 23650258.

[90] Reply Brief of Appellants at 7, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 1998 WL 34103665.

[91] People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989) (quoting Cramer v. United States, 261 U.S. 219, 227 (1923), *superseded by statute*, Taylor Grazing Act of 1934, Pub. L. No. 73-482. 48 Stat. 1271, *as recognized in* United States v. Dann, 865 F.2d 1528 (9th Cir. 1989)).

aboriginal title asserting exclusive hunting and fishing rights to the OCS would automatically be barred by the federal paramountcy doctrine.[92] The court likened the Villages' claim to those of the states in the federal paramountcy cases.[93] As separate sovereigns, the states relinquished interests in the sea upon statehood to the federal government, allotting the United States jurisdiction over the use, disposition, management, and control of all property lying seaward of the low water mark.[94] "Even though Indian tribes existed and governed North America before the United States came into existence, the same is true of the original states."[95]

The Villages argued that federal sovereignty is subject to Indian right of occupancy until unequivocally extinguished by Congress.[96] However, the court agreed with the Secretary's argument that any exclusive claim of right or title, even aboriginal title, by any sovereign other than the United States, including an Indian tribe, is repugnant to the federal paramountcy doctrine.[97] The court reasoned that the Villages' claim for exclusive use of the OCS included predominant power over officials of the executive branch, to which Congress delegated the power to regulate fisheries in the OCS.[98] "The Native Villages' claim to complete control over the OCS is contrary to these [paramount] national interests and inconsistent with their position as a subordinate entity within our constitutional scheme."[99] The Supreme Court denied the Villages' petition for writ of certiorari on June 14, 1999.[100] Held afterward, the federal paramountcy doctrine barred claims of aboriginal title to *exclusive rights* to use and occupancy of the OCS. Thus, the Villages tried to assert *non-exclusive rights*.

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[92] *Eyak v. Trawler Diane Marie*, 154 F.3d 1090 (9th Cir. 1998).

[93] The four federal paramountcy cases cited by the Court are United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); and United States v. Maine, 420 U.S. 515 (1975).

[94] *Eyak v. Trawler Diane Marie*, 154 F.3d at 1094.

[95] *Id.*

[96] *Id.* at 1095.

[97] *Id.*

[98] *Id.* at 1096.

[99] "The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea." *Id.* at 1096-97.

[100] Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

C. *EYAK NATIVE VILLAGE V. DALEY*, 375 F.3D 1218 (9TH CIR. 2004) (EN BANC).

On November 12, 1998, the Villages filed the current suit, asserting non-exclusive aboriginal hunting and fishing rights in the OCS while challenging the Secretary's 1993 halibut and sablefish regulations for IFQ permits.[101] The Villages prayed for an order requiring the Secretary to recognize non-exclusive rights arising under aboriginal title by promulgating a new regulation issuing each native village an IFQ permit.[102] The United States District Court for the District of Alaska promptly granted the Secretary's motion for summary judgment; the court dismissed the Villages' claims, holding that the federal paramountcy doctrine barred claims to aboriginal title as a matter of law.[103] The Ninth Circuit, sitting en banc, vacated the district court's judgment and remanded the case for an initial determination of what aboriginal rights the Villages possessed.[104] Until this point, the Villages had not been allowed to bring forth evidence in support of their claims to aboriginal title.

In 2003, while the case was pending, the Secretary relaxed the regulations for subsistence fishing, but not commercial fishing.[105] The Secretary promulgated new regulations for Alaska Natives and other subsistence fishermen, increasing the bag limit to twenty fish per day for halibut from a single line with thirty hooks throughout a yearlong season.[106] In light of the new regulations, the Villages argued for commercial fishing rights, contending that Chugach fishers should obtain commercial IFQ permits based upon aboriginal title, which included both

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[101] Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 3 (D. Alaska August 7, 2009).

[102] Oral Argument at 19:10, Native Vill. of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013). Responding to a question asked by Judge Pregerson, both the Villages and the Secretary stated the specific number of IFQ permits owned by a Chugach native is unknown, but the number is "maybe a handful." *Id.* at 21:25, 40:40.

[103] The district court summarily dismissed Count I of the plaintiffs' complaint, which alleged that the adverse impact of the regulations violated non-exclusive aboriginal rights to hunt, fish, and exploit the natural resources of the OCS. The courts have ignored Count II, which alleged that the regulations violated the Indian Non-Intercourse Act, 25 U.S.C. § 177, because those suits cannot be brought against a public official. Likewise, the district court summarily dismissed the defendant's contentions that (1) the statute of limitations to challenge the regulations had passed and (2) aboriginal rights were extinguished by the Russians. *Eyak v. Locke*, at 3-4.

[104] *Eyak v. Daley*, 375 F.3d at 1219.

[105] Pacific Halibut Fisheries: Subsistence Fishing, 68 Fed. Reg. 18145-01 (April 15, 2003) (codified at 50 C.F.R. pts. 300, 600, and 679).

[106] *See former* 50 C.F.R. 301.21.

commercial and subsistence rights.[107] The limited number of IFQ permits were issued only to vessels that actually caught sablefish or halibut in the OCS during the years 1988-1991, during which the Exxon Valdez oil spill annihilated the fisheries.[108] IFQ permit requirements continue to place the Villages at an extreme disadvantage compared to other commercial fishers within their ancestral fishing waters on the OCS.

D. *NATIVE VILLAGE OF EYAK V. LOCKE*, NO. 3:98-CV-0365-HRH (D. ALASKA AUGUST 7, 2009).

In 2008, four years after the remand order, the Villages finally had their proverbial day in court with a weeklong bench trial. Senior District Judge H. Russel Holland went beyond the remand order[109] and decided that the federal paramountcy doctrine would still trump non-exclusive claims.[110] He concluded as follows, based on his findings of fact:

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[107] Both parties agreed it is possible for Chugach fishers to obtain an IFQ permit, but as Judge Pregerson noted, the Chugach would need the money to purchase a permit on the market. Oral Argument at 41:30, *Eyak v. Blank*. The limited number of IFQ permits issued makes each permit fairly expensive. As counsel for the Secretary, David C. Shilton, stated, "[The Chugach] can commercially fish now on the same basis as everyone else." Oral Argument at 41:50, *Id.* After purchasing an IFQ permit, expenses would continue to mount because the IFQ standard prices and fee percentages would apply as revised each year. For the current prices, *see* Fisheries of the Exclusive Economic Zone Off Alaska: North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Programs, 78 Fed. Reg. 72869 (Dec. 4, 2013) *available at* http://federalregister.gov/a/2013-29023.

[108] Trial Brief of Plantiff at 1, *Eyak v. Locke*, at 26-27.

[109] The remand order instructed the district court to "assume that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Eyak v. Daley*, 375 F.3d at 1219. Judge Holland stated in his opinion that his "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 . . . because the mandate of the Ninth Circuit Court '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." *Eyak v. Locke*, at 25-26.

[110] *Id.* at 24. During oral argument, Secretary's counsel was questioned about Judge Holland's conclusions of law, because the scope of the remand was limited only to the question of what rights may exist under aboriginal title. Judge Hawkins stated, "It was Judge Holland's view prior to the en banc proceedings that irrespective of historical pre-contact use that federal paramountcy and the application of these statutes we've been talking about meant that the tribes could never establish aboriginal rights." Oral Argument at 23:56, 51:08, *Eyak v. Blank*. Counsel was also asked by Judges Pregerson and Kleinfeld whether the government indeed wrote the conclusions of law for Judge Holland, to which counsel stated he did not. Oral Argument at 53:00, *Id.* However, the Villages did not challenge the district court's findings of fact; those findings were adopted by the court of appeals, which then engaged in de novo application of the law to those facts. *Eyak v. Blank*, 688 F.3d at 622.

> [P]laintiffs' 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.[111]

Judge Holland went on to conclude (1) the Villages' aboriginal rights did not survive upon Alaska's acquisition from Russia; (2) their claims must be preempted to prevent the regulations from becoming fatally arbitrary; (3) there are no rights based on custom and prescription; and (4) Indian Non-Intercourse Act claims cannot be brought against officials of the U.S. Government.[112] Judge Holland concluded again that non-exclusive aboriginal hunting and fishing rights in the OCS are automatically preempted by the federal paramountcy doctrine.[113]

E. *NATIVE VILLAGE OF EYAK V. BLANK*, 688 F.3D 619 (9TH CIR. 2012) (EN BANC) (PER CURIAM).

When the case returned to the Ninth Circuit's en banc panel, the Villages' claims of aboriginal title were denied by a six to five per curiam decision issued July 31, 2012.[114] The majority affirmed the ruling of the district court that the Villages had failed to establish entitlement to non-exclusive aboriginal hunting and fishing rights to claimed areas of the OCS.[115] After describing the case and accepting the unchallenged findings of fact,[116] the opinion reviewed the Indian claims law regarding aboriginal title. Under the *Sac and Fox* test for aboriginal title, the Villages were required to prove "'actual, exclusive, and continuous use and occupancy for a long time' of the claimed area . . . measured 'in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers.'"[117] The majority decided that although the Villages satisfied the continuous use and occupancy requirements,[118] they "failed to show by a preponderance

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[111] *Eyak v. Locke*, at 25.

[112] *Id.* at 26-27.

[113] *Id.* at 27.

[114] *Eyak v. Blank*, 688 F.3d 619 (2012).

[115] *Id.* at 623.

[116] The majority noted the dissent went on a "fishing expedition through the trial record," which is an inappropriate role for an appellate body when the trial court's factual findings are not challenged. *Id.* at 622.

[117] *Id.* at 626 (quoting Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967)).

[118] *Eyak v. Blank*, 688 F.3d at 621.

of evidence that they exercised exclusive control, collectively or individually, over the areas of the OCS they now claim."[119]

In deciding the Villages did not prove the exclusivity prong of the test, the majority expanded the test for exclusivity.[120] Formerly, exclusivity was met upon a showing that the tribe asserting aboriginal title was the dominant force in the region.[121] "Exclusivity is established when a tribe or a group shows that it used and occupied the land to the *exclusion* of other Indian groups."[122] The majority relied upon the phrase "the district court found that other tribes fished and hunted on the periphery of the Villages' claimed territory."[123] However, permissive use of a region's resources, unlike abandonment, should not defeat exclusivity.[124]

The majority reasoned that the low population of the Villages made them incapable of dominating or controlling any area of the OCS.[125] The evidence of occasional unity when battling other tribes and "recognition by the Russians as potentially formidable foes" was not enough to establish exclusive control.[126] The majority further stated the "tribe or group must exercise full dominion and control over the area, such that it 'possesses the right to expel intruders,' as well as the power to do so."[127] According to the majority, population density becomes the determinative factor of the exclusivity prong where there is no evidence of full dominion and control.[128] Thus, the Villages were never numerous enough to be entitled to rights under aboriginal title.

Relying upon the finding of the district court that on a seasonal basis "other tribes fished and hunted on the periphery of the Villages' claimed territory,"[129] the majority concluded, by applying the common

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[119] *Id.* at 622.

[120] *Id.* at 623 ("Use of the OCS alone isn't sufficient to prove exclusive possession.").

[121] Absent evidence contradicting a tribe's domination, the issue turns upon "whether they availed themselves of their exclusive position." United States v. Seminole Indians, 180 Ct. Cl. 375, 383 (Ct. Cl. 1967).

[122] *Eyak v. Blank*, 688 F.3d at 623 (citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975)).

[123] *Id.* at 624.

[124] *See* Wichita Indian Tribe v. United States, 696 F.2d 1378 (Fed. Cir. 1983) (holding presence of other Indians in a region is not abandonment sufficient to defeat aboriginal title claim).

[125] *Eyak v. Blank*, 688 F.3d at 624-25.

[126] *Id.* at 625.

[127] *Id.* at 623 (quoting Osage Nation of Indians v. United States, 19 Ind. Cl. Comm. 447, 489 (Ind. Cl. Comm. 1968).

[128] "The Villages' low population, which was estimated to have been between 400 and 1500, suggests that the Villages were incapable of controlling any part of the OCS." *Eyak v. Blank*, 688 F.3d at 624-25.

[129] *Id.* at 623.

usage of the term "peripheral vision," that other groups had exploited some claimed areas within the OCS, negating the exclusivity prong.[130] Further, the majority held that the low population of the Villages made them incapable of controlling the claimed areas because they would not be able to expel an invasion, especially since "the Villages kept all, including each other, at arm's length."[131] Having found that the Villages failed to establish aboriginal title, the majority avoided the need to decide whether aboriginal title would conflict with the federal paramountcy doctrine.[132] The case is now viewed as adding a new prerequisite for establishing aboriginal title—that the tribe must somehow prove the capability of excluding hypothetical intruders—because a "lack of evidence other tribes hunting and fishing in the claimed area is not enough to establish exclusive control," anymore.[133] Accordingly, the majority decision adds a new element that will be difficult to meet for tribes claiming aboriginal title.[134]

E. DISSENTING OPINION

Judge Fletcher's dissent explains the flawed analysis of the majority and incorrect scrutiny applied by the district court. The dissent first examined the *Sac and Fox* test, determining the continuous use and occupancy prong was easily met.[135] The dissent then reviewed the caselaw stating what a tribe must prove to meet the exclusivity prong, and concluded that the Villages need only show they were the sole tribe continuously using the claimed area.[136] The dissent next reviewed the district court's factual findings and the majority's fundamental mistakes. The first fundamental mistake was that the majority used two cases in which there was evidence other tribes used territory claimed by the tribe

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[130] *Id.* at 626.

[131] *Id.* at 623.

[132] *Id.*

[133] Danielle Dellerson, *Alaskan Natives' Aboriginal Rights Bid Fails; Villages' Hunting, Fishing Use Not 'Exclusive,'* U.S.L.W, Aug. 7, 2012.

[134] As Judge Pregerson asked, "Who is in a better position to prove non-exclusivity, the government or the tribes?" Oral Argument at 33:40, *Eyak v. Blank.* Nevertheless, the entire evidentiary burden falls upon the tribe asserting aboriginal title rights.

[135] *Eyak v. Blank*, 688 F.3d at 626-27 (Fletcher, J., dissenting).

[136] "In sum, the *Sac & Fox* test requires that the Chugach show that they used and occupied the claimed area exclusively. It does not require that the Chugach show that they could have repelled hypothetical intruders from the area. In the absence of evidence of use by others, the case law requires only that the Chugach show that they were the only group that used and occupied the area." *Id.* at 629-31 (Fletcher, J., dissenting).

asserting aboriginal title.[137] The second fundamental mistake was the majority's use of the word "periphery" to mean within the area instead of at the outer "edge" or "boundary" of an area.[138]

The dissent in *Eyak v. Blank* went on to consider the federal paramountcy controversy for which the Ninth Circuit took up the case. Although in *Eyak v. Trawler Diane Marie*, the Ninth Circuit held that federal paramountcy bars exclusive fishing rights arising under aboriginal title, *Gambell v. Hodel* held that aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest.[139] The dissent in *Eyak v. Blank* "would reaffirm our holding in *Gambell* [*v. Hodel*] that aboriginal rights may exist on the OCS without undermining the paramount federal interest."[140]

The dissent would have remanded the case, instructing the district court to determine which parts of the claimed areas of the OCS the Villages had occupied exclusively. The dissent explained that, the district court had not understood that, in the absence of evidence of use by other groups within the claimed area, the Chugach could establish exclusivity simply by showing their own use and occupancy where no other tribe's use and occupancy existed. "The Chugach did not need to show that they were able to exclude hypothetical intruders."[141] Congruently, the dissent would have instructed the district court to make findings considering the Chugach as a whole, rather than judging each village separately.[142] The dissent would have allowed the district court discretion to remedy the Secretary's regulations.[143]

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[137] The dissent quoted *United States v. Pueblo of San Ildefonso*: "*True ownership of land is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes and groups.*" United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975), *quoted in Eyak v. Blank*, 688 F.3d at 631 (Fletcher, J., dissenting). The dissent also cited *Osage Nation of Indians v. United States*, noting that in that case "there was evidence of use by other tribes within part of the claimed territory. In that circumstance, the Osage Nation was required to show it had the ability to exclude those tribes from that part of the territory." *Eyak v. Blank*, 688 F.3d at 631–32 (Fletcher, J., dissenting) (describing Osage Nation of Indians v. United States, 19 Ind. Cl. Comm. 447, 489–90 (Ind. Cl. Comm. 1968). Here, there was no such evidence, except for parts of the periphery of the claimed area.

[138] *Eyak v. Blank*, 688 F.3d at 633 (Fletcher, J., dissenting).

[139] *Compare* Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999), *with* People of the Vill. of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989).

[140] *Eyak v. Blank*, 688 F.3d at 636 (Fletcher, J., dissenting).

[141] *Id.* at 636-37 (Fletcher, J., dissenting).

[142] *Id.* at 637.

[143] *Id.*

III. ARGUMENT

Instead of being at odds with federal paramountcy, aboriginal title must necessarily be protected by the ultimate sovereignty of the United States in order for tribes to survive. As domestic dependent nations, tribes require the protection of federal law in order to continue their existence and retain any sovereign rights. The majority's conclusions of law incorrectly require a tribe to prove a nearly impossible condition in order to establish aboriginal title. The majority should have taken a liberal approach and viewed the Villages' position historically, rather than against the present situational backdrop. The dispute over the word "periphery" evidenced the case's contentiousness. The Ninth Circuit should have remanded the case for the district court to determine the extent of territory over which the Villages should be entitled to exert non-exclusive fishing rights under aboriginal title. Further, these Villages should have been guaranteed, at the very least, non-exclusive use of the natural resources of their ancestral fishing grounds claimed via aboriginal title, because *no other tribe* claims their waters. The Ninth Circuit should have restated the United States' commitment to preserving rights of indigenous peoples. Further, commercial rights arising under aboriginal title necessitate the Secretary promulgate regulations taking tribal sovereignty into account.

A. THE DISTRICT COURT'S FINDINGS OF FACT SHOW ABORIGINAL TITLE EXISTS TO PORTIONS OF THE CLAIMED AREA UNDER CURRENT LAW; HOWEVER THE MAJORITY OPINION INCORRECTLY ADDED AN ADDITIONAL REQUIREMENT TO BE PROVEN

On appeal, the Villages did not challenge the factual findings of the district court.[144] Instead, they argued that even based on the facts as found by Judge Holland, they still had proven aboriginal title exists under applicable precedent.[145] The majority failed to correctly apply the established legal standards used to determine aboriginal rights. Instead, the majority affirmed the decision of the district court and, in doing so, literally argued semantics with the dissent. Accordingly, tribes claiming aboriginal title now must prove not just exclusive possession, but also the ability to exclude hypothetical intruders, although such evidence seldom exists. The majority refused to follow the established principle that if

[144] *Id.* at 622 (majority opinion).
[145] *Id.*

there is no evidence of use or occupancy by any other group, a tribe need only show it was the only group to use or occupy an area.[146]

1. The Common Law of Aboriginal Title that Developed in Order to Place Indian Tribes in a Unique Situation Should Not Be Judged According to Current Social Standards

The Chugach proved under current law that aboriginal title exists at the very least for parts of the claimed areas of the OCS. The *Eyak v. Blank* court easily determined that intermittent use of the OCS was "consistent with the seasonal nature of the ancestors' way of life as marine hunters and fisherman."[147] However, the majority and dissent perceived Chugach culture differently when it comes to exclusivity.[148] Both cited the *Sac and Fox* standard to measure use and occupancy "in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers."[149]

The majority portrayed the Villages as separate and independent entities, historically isolated to discrete areas of the OCS, who rarely cooperated and did not use hunting or fishing areas collectively.[150] "The factual findings do not support a finding of collective use by the *entire*

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[146] Instead, the majority quoted the district court's finding that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis" and adopted a prevailing land-use presumption: "Areas that are continuously traversed by other tribes without permission of the claiming tribes cannot be deemed exclusive." *Id.* at 624 (*citing* Wichita Indian Tribe v. United States, 696 F.2d 1378, 1385 (Fed. Cir. 1983)). The majority then used the Villages' low population density to suggest the claimed areas of the OCS would be beyond the Villages' capability to control and concluded that the Villages failed to meet their burden to show exclusivity, because "[t]here is not enough evidence in the record to persuade us that the Villages used and occupied the claimed areas to the exclusion of other tribes." *Eyak v. Blank.* 688 F.3d at 626. There was no evidence that other tribes continuously traversed the area, merely that other tribes sporadically used the periphery. As stated by the dissent, "Evidence of use and occupancy by other groups 'must be specific' to defeat a claim of exclusivity. Evidence of use by others at the periphery of the claimed territory does not defeat a tribe's exclusivity within the claimed area." *Id.* at 628 (Fletcher, J., dissenting) (citations omitted).

[147] *Id.* at 623 (majority opinion).

[148] Judge Kleinfeld, who joined the majority, asked whether the only way to find aboriginal title was to treat the Chugach as "analogous for Europe: if we treated the Danes, the English, the Germans, and the Swedes as all one people." Oral Argument at 4:20, *Eyak v. Blank.* Perhaps a more appropriate analogy, considering that the Chugach share a common history, language, and culture, would be to consider the Neapolitans, Romans, Venetians, and Florentians as one people: the Italians. Later, Judge Kleinfeld erroneously concluded "the Chugach [are] a broad designation of a people, like the European people." Oral Argument at 56:50, *Eyak v. Blank.*

[149] *Id.* at 622 (majority opinion), 627 (Fletcher, J., dissenting) (both citing *Sac & Fox*, 383 F.2d at 998).

[150] *Id.* at 625-26 (majority opinion).

group of the *entire* area."[151] The district court found "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."[152] Accepting the district court's findings, the majority did not apply then-established law. Under established law, in the absence of evidence of use of the claimed area by other tribes, a tribe could establish aboriginal title by showing its own use and occupancy.[153] The majority here required that the Villages to prove not just the tribe's exclusive use, but also the tribe's ability to exclude others.

In contrast, the dissent viewed the Chugach as a distinct cultural group consisting of one tribe, and the dissent thoroughly explained the proper application of the *Sac and Fox* standard to the district court's factual findings.[154] The dissent pointed out that there was no finding that another group used or occupied some area claimed by the Chugach, although the district court found there was shared use on the periphery, not within.[155] "[G]eographic features at the periphery of Chugach territory had place names in more than one native language, but [those] features within Chugach territory had place names in only the Chugach language."[156] As explained by the dissent, aboriginal title is "called into question only" when other groups wandered, inhabited, or controlled the claimed area, not determined automatically by such use.[157]

First, the majority opinion, in passing cultural judgment upon the Villages' use of the OCS, was anthropologically unsound.[158] Each

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[151] *Id.* at 626 (emphasis added).

[152] "[T]here 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." Native Vill. of Eyak v. Lockc, No. 3:98-cv-0365-HRH, at 19 (D. Alaska August 7, 2009).

[153] "The district court found no use or occupancy by others in Chugach territory. Because the Chugach claim aboriginal rights only in areas where there is no evidence of use by others, it is sufficient to show exclusivity that they were the only tribe to use and occupy these areas." *Eyak v. Blank*, 688 F.3d at 632 (Fletcher, J., dissenting).

[154] *Id.* at 628-29.

[155] *Id.* at 630.

[156] *Id.*

[157] *Id.* at 631 (citing United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941).

[158] For an interesting anthropological prospective on the evidence presented during the trial phase of this case, see Rita A. Miraglia, *Did I Hear That Right? One Anthropologist's Reaction to Colleague's Testimony in a Court Case Involving Alaska Native Aboriginal Hunting and Fishing Rights on the Outer Continental Shelf*, 22 INDIGENOUS POL'Y J., no. 4, Spring 2012, *available at* http://indigenouspolicy.org/index.php/ipj/article/view/49 (analyzing defense challenge to Chugach pre-contact cultural identity as a single tribe and attacking evidence used to support assertion that each village was independent because there was no unified Chugach). The article concluded, "My problem with some of the testimony presented for the government's case is that unsupported opinions were presented as fact. In some cases, things that can not be known were presented as being

Chugach village operated independently. There was no overarching authority binding the Chugach together. There are still no roads connecting the Villages. Trade across Prince William Sound coincided with raids. Raids conducted to acquire property and women were an accepted custom of the villagers.[159] Visits between the Villages and from outsiders were seldom. There is no evidence the Villages ever attempted to obliterate one another; they merely established violent rivalries in an environment where survival necessitated such competition. The Villages to the present day maintain a common language, customs, diet, and religion. There are common words for locations of the OCS for the Chugach that no other tribe identifies. The mere fact that the collective use was competitive, rather than cooperative, does not negate that the use was exclusive to the Villages. Moreover, because that competitive use was exclusive to the Villages, and other tribes were limited to merely the periphery, some rights to continued use should exist under aboriginal title. This competitive use was the Chugach way of life.[160]

Second, the Villages' population density should have weighed in favor of aboriginal title in this case. The shores of the Gulf of Alaska encompass a hostile environment limiting population growth. The resources found there are limited. To this day, Alaska remains one of the least densely populated states in the United States. To factor in a limited population and assume that population could not fend off hypothetical invaders is a logical stretch. Rather than imagine the ability to exclude in theory, judges should have observed the fact that the fierce Chugach were not invaded and in fact did not need to exclude other tribes. There were no armies conquering the area; surrounding tribes had similar

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known with absolute certainty." *Id.* at 16. *Contra* Christopher B. Wooley, *Response to Rita Miraglia's Did I Hear That Right? One Anthropologist's Reaction to Colleague's Testimony in a Court Case Involving Alaska Native Aboriginal Hunting and Fishing Rights on the Outer Continental Shelf*, 22 INDIGENOUS POL'Y J., no. 4, Spring 2012, *available at* indigenouspolicy.org/index.php/ipj/article/view/50/88 (arguing pan-Chugach regional identity is recent and did not exist before contact).

[159] "Among the complex societies of the north Pacific rim, women were important war trophies. For the Chugach of Prince William Sound, warfare was formalized but enemy men were killed and women and children were captured. There is a great deal of evidence for stealing women on the Aleut-Alutiiq frontier before the arrival of Russian hunters. The early explorers witnessed some of the last cases of this in the context of war raids." RICHARD J. CACHON & DAVID H. DYE, THE TAKING AND DISPLAYING OF HUMAN BODY PARTS AS TROPHIES BY AMERINDIANS 36 (2007).

[160] Constant tension competing for the limited resources available in a harsh climate created a culture accepting of certain types of violence, which was both fascinating and shocking to Western anthropologists in the twentieth century. *See generally* E. Adamson Hoebel, *Law-Ways of the Primative Eskimos*, 31 J. CRIM. L. & CRIMINOLOGY 663 (1941); KAJ BIRKET-SMITH, THE CHUGACH ESKIMO (1953); WEDNELL H. OSWALT, ALASKAN ESKIMOS (1967).

population densities and were raided often by the Chugach. It is outrageous that low population density was the determinative factor in deciding the Villages could not have asserted exclusive control and could not defend the area.[161] There is no evidence any other tribe had encroached upon their territory, except at the periphery. The Villages continued to control the area after the Russians landed. The Russians traded for furs, rather than conquer these Villages. They continued limited control under the United States until commercial enterprises began exploiting the natural resources. The Villages could not stop the massive American encroachment, but they should now be allowed to profit from their ancestral fishing grounds because of aboriginal title.

Third, the fact that other groups did not venture past the boundaries of the claimed area proves exclusive use. The largest tribe in proximity was the Tlingit, who respected the Chugach territory enough to limit themselves to intrusion only upon the periphery. The respected boundaries evidence the exclusive use of the OCS by the Villages. As wards of Congress, tribes must receive protection of their recognizable hunting and fishing grounds with aboriginal title. Thus, until explicit extinguishment of aboriginal title, the Ninth Circuit should protect claims of aboriginal title within the boundaries of our nation and allow non-exclusive use to continue where respected tribal boundaries were so acknowledged.

2. *The Linguistic Dispute Between the Majority and Dissent Evidences the Semantic Nature of the Denial of Clearly Established Aboriginal Title*

The majority and the dissent argued over the use of the word "periphery" within the district court's findings.[162] According to the majority, "periphery" must mean inside the territory, simply because the most common modern usage of the word is in the phrase "peripheral vision."[163] This reading did not take into account that only some of the territory at the boundary claimed by the Chugach was used by other

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[161] Villages' counsel cited United States v. Seminole Indians, 180 Ct. Cl. 375 (Ct. Cl. 1967), in which the government argued population thinness defeated exclusivity, but the court found that "2500 people, as many as are probably in a shopping mall on any given day, held aboriginal title to the entire state of Florida." Oral Argument at 57:45, *Eyak v. Blank*.

[162] *Eyak v. Blank*, 688 F.3d at 624; *id.* at 631-33 (Fletcher, J., dissenting).

[163] "What's in your peripheral vision you *can* see, not what you can't; the periphery is something at the limits of, but within, your vision." *Id.* at 624 (majority opinion) (citing *Webster's New International Dictionary* 1822 (2d ed. 1939). The majority stated, "The dissent's interpretation of 'periphery' was outdated even in the 1930s . . . as a 'surrounding space; the area lying beyond the boundaries of a thing. *Now Rare.*'). *Id.*

tribes, while the vast majority of Chugach ancestral waters was continuously used and occupied solely by the Villages. In its decision, the majority imputed the occurrences at the borders into the whole of the claimed territory.

Interpreting the common usage with "peripheral vision" and applying such an interpretation to judicial findings in such a contested case should not be the practice of a federal court of appeals. Peripheral vision is not the same concept as periphery. Periphery was used in this context to explain the location of trespassers at the boundary of claimed territory. Further, examining even the common usage of the word as understood by the majority, would confirm the existence of aboriginal title. Although objects within one's peripheral vision fall within the line of sight, those objects still exist only at the boundaries of vision. Objects seen using peripheral vision are unclear, blurry, and remain at the edge of sight. These objects do not lie clearly within one's line of sight, or throughout the field of vision, but exist in a blur at edge of observation. Thus, even if the Villages could not prove exclusive control at the edge of the claimed areas of the OCS, they did prove exclusive control of the vast interior. Even using the majority's interpretation of the word periphery, aboriginal title exists for all of the areas inside that boundary of the claimed territory.

As the dissent argued, the use of "periphery" for aboriginal title claims denotes the edge or boundary of a territory.[164] "The cases clearly recognize a distinction between shared use on the periphery of a claimed territory and shared use inside the territory. . . . The majority reads 'periphery' to mean not only the edge, but also the interior, of a territory."[165] Accordingly, the dissent "would reverse and remand with instructions to the district court to find precisely where within the claimed area the Chugach have such rights [to aboriginal title]."[166] Unmentioned by the dissent, the district court's findings did not fully explain the nature of the concurrent use at the periphery or the relationships between the Chugach and those other tribes.[167] Tribes

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[164] *Id.* at 633 (Fletcher, J., dissenting).

[165] *Id.* (citing Caddo Tribe v. United States, 35 Ind. Cl. Comm. 321, 360-62 (1975); Hualapai Tribe v. United States, 18 Ind. Cl. Comm. 382, 395 (1967); Zuni Tribe v. United States, 12 Cl. Ct. 607, 608 n.3 (Ct. Cl. 1975)).

[166] *Eyak v. Blank*, 688 F.3d at 637 (Fletcher, J., dissenting).

[167] Judge Holland wrote that travel was too long and dangerous throughout such a large area that, "[s]uch 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." Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 20-21 (D. Alaska August 7, 2009); *Eyak v. Blank*, 688 F.3d at 625 (majority opinion).

continue to retain aboriginal title to territories where joint and amicable use and occupancy is found.[168] Because the district court found other tribes used only parts of the periphery of the claimed territory, the Villages should be able to assert non-exclusive rights derived from aboriginal title to the vast amount of the OCS on the interior of the claims.

The periphery of the claimed territory here should constitute the limit of the non-exclusive right to fish. The Ninth Circuit should have held that, based on the district court's factual findings, the Villages had non-exclusive rights to the interior of the claimed territory, although not at the periphery in those locations where other tribes also fished. The periphery would denote the extent of the Villages' exclusive use.[169] Perhaps aboriginal title should extend to that periphery, which is after all, "the outward bounds of [the claimed area] as distinguished from its internal regions or center; encompassing limits; confines; borderland."[170]

B. THE DISSENT CORRECTLY STATED THE CURRENT LAW REGARDING FEDERAL PARAMOUNTCY OVER ABORIGINAL TITLE TO FISHING RIGHTS IN FEDERAL WATERS, A QUESTION ON WHICH THE DISTRICT COURT RULED INCORRECTLY

Aboriginal title is not pre-empted by the paramountcy doctrine, at least in regard to natural resources tribes are dependent upon for survival.[171] The Secretary's regulation of the fishing industry maintains the existence of a vital natural resource. However, the restrictions placed upon IFQ permits deny the Villages commercial access to their ancestral fishing grounds. The Secretary was incorrect in assuming that without an explicit acknowledgement of rights, federal paramountcy automatically trumps aboriginal title.[172] The Villages assert non-

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[168] It appears the judges here could not fathom the competing consumption of natural resources as the "collective use by the entire group of the entire area." *See id.*, at 626. An exception to the exclusivity prong exists where two or more tribes inhabiting the same area can prove "joint and amicable" possession. Strong v. United States, 518 F.2d 556, 561 (Ct. Cl. 1975) (*citing* Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967); United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct. Cl. 1974)).

[169] The periphery debate did not surface during oral argument until rebuttal, when the Villages' counsel argued that the periphery of the Chugach territory is where the Chugach territory ends and another tribe's territory begins. Oral Argument at 55.15, *Eyak v. Blank*.

[170] *Eyak v. Blank*, 688 F.3d at 624 (internal quotation marks and citations omitted).

[171] *See* People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1280 (9th Cir. 1989).

[172] Judge Fletcher stated the Secretary's argument that the paramountcy doctrine automatically extinguishes aboriginal rights without any expression by Congress showing an intent to abrogate, and that those rights do not exist unless explicitly expressed by Congress in a treaty,

exclusive rights under aboriginal title in order to assert commercial fishing rights, not subsistence rights. Refusing to acknowledge the existence of commercial rights under aboriginal title demonstrates the continuation of an idealistic stereotype. This stereotype of Indian subsistence must be challenged for these Villages to prosper in the current, and especially in future, economies.

1. The Secretary Necessarily Regulates All Fishing on the OCS as a Means of Protecting a Vital Natural Resource of Paramount Importance

By holding that the Villages did not establish aboriginal title, the majority avoided the larger question regarding the federal paramountcy doctrine.[173] "In stark contrast to the states' asserted title against the federal government in the paramountcy cases, aboriginal rights presume ultimate federal sovereignty and control."[174] Aboriginal title does not conflict with federal paramountcy; rights derived from aboriginal title are necessarily dependent upon federal sovereignty in order to exist. The Villages sought governmental acknowledgement of their non-exclusive rights in order to be included in the harvest of the resource they have always depended upon for survival.

Again, state claims of sovereignty over the federal government in the paramountcy cases are based upon sovereign state rights over the federal government. This is not the same as rights claimed under aboriginal title subservient to the federal government. The Villages do not assert that regulations should fail to apply to fishers. The Villages are merely asking to compete in the industry exploiting their ancestral fishing grounds. By asserting non-exclusive rights, the Villages seek a piece of the pie, not the entire pastry. Only commercial fishers that existed for the limited three years stated in the regulation were issued permits. The Secretary contended that the Villages are now free to purchase those original permits. However, the Secretary failed to acknowledge that original permits were not issued to the Villages, ignoring a commercial right to the natural resources. The Villages remain at this disadvantage decades following their cleanup efforts

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"stands Indian Law on its head." Oral Argument at 45:00, *Eyak v. Blank.* Affirmation is not needed to recognize rights that have always existed and have not been destroyed.

[173] *Eyak v. Blank*, 688 F.3d at 626.

[174] "Whereas the states sought to establish ownership exclusive of the federal government in the paramountcy cases, aboriginal rights prevail only against parties other than the federal government." *Id.* at 635 (Fletcher, J., dissenting) (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974)).

subsequent the Exxon Valdez spill. Although initially seeking to oust other commercial fishers, the Villages now seek only for a right to compete. However, the Secretary bars access, and by doing so is preventing the Villages from profiting from their ancestral fishing grounds, and instead allows other, established commercial fishing vessels to do so.

2. *In Order to Equitably Uphold the Sound Reasoning Underlying Aboriginal Title, Commercial Rights of Indian Tribes to Ancestral Fishing Grounds within the OCS Must Be Recognized*

It should be the policy of the United States to provide these impoverished Villages with an avenue of economic activity. The United States has, as trustee of Indian tribes, has previously asserted treaty-based fishing rights to apportion commercial fishing allowances between Indians and non-Indians over the same waters.[175] Although Alaskan tribes cannot assert sovereignty over any part of that state following ANCSA, they may claim aboriginal title to lands and seas under the jurisdiction of the United States.[176] As in *Gambell v. Hodel*, subsistence rights for the Villages to fish in the OCS in *Eyak v. Blank* are now protected, primarily because the Secretary relaxed regulations following *Eyak v. Trawler Diane Marie*. However, the denial of commercial rights arising under aboriginal title continues acculturation of native tribes into a mainstream American citizenry. This is the destruction of the nation-to-nation relationship. The majority upheld the district court's decision to equalize the rights of all United States citizens, rather than acknowledge the rights of a different entity, the tribe, with a history and status unlike that of citizens of immigrant descent. In effect, this holding creates a policy authorizing any agency the United States to assume complete title of natural resources under its jurisdiction, regulate that resource, and then sell permission to exploit that resource for commercial use, regardless of native claims even where rights have never been abrogated. The use of the natural resources of the OCS should be subject to the right of native use and occupancy that aboriginal title guarantees. Instead, tribal litigants must now meet a revised test that effectively

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[175] *See* United States v. Washington, 520 F.2d 676 (9th Cir. 1975) (upholding Makah fishing rights guaranteed by treaty and limiting regulation of fishing to the extent necessary to preserve a species of fish); *see also* United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) (holding that states may regulate treaty fishing but must use least restrictive alternative to accord tribes fair opportunity to take portion).

[176] ANCSA bars claims to aboriginal title within the jurisdictional limits of the State of Alaska, but it does not implicate federal jurisdiction of the OCS. *Gambell v. Hodel*, 869 F.2d 1273.

requires them to demonstrate a population large enough to fend off any hypothetical invasion force summoned by a judge's imagination.[177]

Regulations promulgated under the Magnuson and Halibut acts exclude the Villages from establishing commercial fishing operations in the Gulf of Alaska while guaranteeing subsistence rights.[178] The Ninth Circuit thus denied the Villages their rightful commercial opportunity to fish their ancestral fishing grounds by refusing to declare recognition of aboriginal title and inclusion into the Secretary's IFQ permit system.

The Secretary did relax regulations for native subsistence fishing. However, having subsistence rights without commercial rights guarantees only that Indian tribes retain their "Indianness" and do not progress with the rest of the nation.[179] Engaging in commercial activity while exploiting the resources nature provides was once the hallmark interaction among America's tribes and with outsiders. It was this trade that brought the Russians, and then the Americans, to Alaska. This decision allows the Villages a right to survive, but neither a right to compete nor a right to prosper. It is difficult to perceive such action as justice. It seems ironic that by denying recognition of non-exclusive rights, the Villages are excluded from any commercial use of their ancestral fishing grounds.[180] Expanding the requirements for establishing the element of exclusive use to claim ancestral fishing grounds relegates aboriginal title to a distant past, making it harder for tribes to claim rights to natural resources. The future of the Indian is as

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[177]"Indian Law: To properly claim aboriginal fishing rights, a group of Native Americans must show by a preponderance of the evidence that for the area claimed, the group maintained exclusive use of the territory and successfully prevented other individuals or groups from exploiting the benefits of the exclusive territory. Failure to demonstrate a population size reasonably necessary to enforce the exclusivity, in the absence of other evidence of dominion and control of the claimed area, will prevent the court from finding that the Native Americans had the necessary exclusive control of the claimed area." John D. Adams, *Summary: Native Village of Eyak v. Blank*, Willamette Law Online, WILLAMETTE UNIVERSITY COLLEGE OF LAW (2012), *available at* http://www.willamette.edu/wucl/resources/journals/wlo/9thcir/2012/07/native-village-of-eyak-v-blank.html.

[178] Interestingly, Warren G. Magnuson, coauthor of the Magnuson-Stevens Fishery Conservation and Management Act, was defeated in the 1980 U.S. Senate race in the State of Washington by Slade Gorton, following *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), cited *supra* note 176. Gorton fought for years against treaty-based and aboriginal fishing rights, characterized Indians as "super-citizens," and used the national platform to promote the abolition of tribal governments. WILKINS & LOMAWAIMA, *supra* note 44, at 238-39.

[179] *See* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011) (arguing the Supreme Court uses implicit divestiture only to remain faithful to the Indian canons of construction to protect tribal rights of traditional Indian activities, thus keeping all Indians Indian).

[180] Put another way, failure to prove exclusivity excludes the Villages from non-exclusive commercial activity.

an ordinary citizen of the United States; a tribe is now just another minority.

CONCLUSION

"Fish is best rare; language, not so much."[181] Most rare is the granting of a writ of certiorari by the ultimate Court of last resort, yet the Villages petitioned. These Villages have no tribe because they have been statutorily transformed into corporations. The people that reside within these Villages, however, have existed and fished in the claimed part of the OCS since long before the creation of the United States. The Chugach should retain non-exclusive rights to fish based on aboriginal title to their ancestral fishing grounds. Commercial exploitation of all natural resources must necessarily be limited. However, the businesses allowed to profit should not have been based upon an arbitrarily regulated three-year period. Regulation should not deny the descendants of those who have used a fishery since time immemorial a commercial share of that very fishery. Aboriginal title was once a sovereign right of every conquered tribe. This abrogation of Chugach rights will make future claims for recognition of aboriginal title less likely to succeed.

Gulf of Alaska waters present the best opportunity for these Villages to develop an industry beneficial to the tribe. The majority avoided a question of federal paramountcy over tribal rights to natural resources in the OCS. Had they determined that paramountcy question, the extent of non-exclusive commercial rights would have been a contentious issue. The real heart of this dispute was the competing interests of preserving the fisheries, the means of which restricted access by awarding a limited number of commercial IFQ permits, and allowing advancement of the Chugach people by establishing commercial tribal fishing enterprise.[182]

Even accepting the facts as found by the district court, the Villages proved actual and continuous use and occupancy over parts of the claimed area for a long time, and exclusive use as measured using tribal standards, but not under the twenty-first-century standards used by

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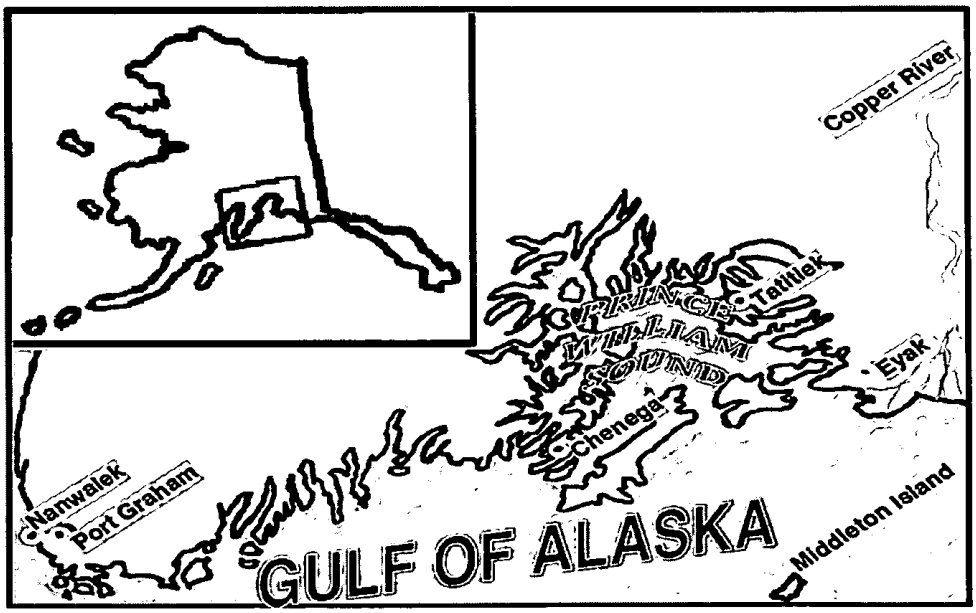
[181] Native Vill. of Eyak v. Blank, 688 F.3d 619, 624 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013). With tones reflecting the voice of the Ninth Circuit's Chief Judge Alex Kozinski, the included pun regarding the use of different definitions in the English language reflected well the underlying controversy. There was something about this opinion that smelled fishy, prompting this research, because under our system of laws, justice, as compared to language, should never be rare.

[182] "At the heart of this dispute are the competing federal interests of honoring Native rights and preserving national fisheries." *Eyak v. Blank*, 688 F.3d at 621.

the majority. The Ninth Circuit failed to apply the *Sac and Fox* test correctly to the findings of fact finally issued after years of litigation. Acculturation is complete when the rights of conquered people, once demanded by humanity, eventually vanish; tribes are now united with their conquerors as ordinary citizens. This ruling attacks tribal sovereignty, purposefully limiting Chugach rights to those of all citizens of the United States. Unfortunately, in the end, on October 7, 2013, the Supreme Court of the United States denied certiorari,[183] effectively affirming the Ninth Circuit decision to expand the requirements for a showing of exclusive use and occupancy for any native tribe that wishes to assert claims arising under aboriginal title. The Villages of the Chugach are denied the right to make a living fishing in their ancestral fishing grounds based on aboriginal title. The North American acculturation that began in 1492 is now complete. From the fringe of our nation, in the frontier State of Alaska, our law now declares that Indians retain only the rights of every other citizen of the United States of America; tribal sovereignty and aboriginal title will soon be obsolete relics from our legal past.



[1] This hand drawn map shows the location of the plaintiff Chugach villages between Cook Inlet and the Copper River Delta along the Gulf of Alaska. Note the location of Middleton Island, to which Chugach from each village travelled, fishing and hunting along the way. During oral argument, counsel for the Villages, Natalie A. Landreth, stated, "Middleton Island was visited regularly, probably seasonally. . . . [It] is 60 miles from shore, and this is a round trip that was so fascinating to the National Parks Service that they undertook a detailed study to figure out if this was humanly possible and how people did it. . . . [T]his took 48 hours, a round trip of 250 miles," following the tides and ocean currents. Oral Argument at 12:20, 36:30, Native Vill. of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012) (No. 09-35881) (en banc) (per curiam), *available at* http://www.youtube.com/watch?v=8J3agvV8B5k.

[183] Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013).

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ABSTRACT

Technological accidents such as the Exxon Valdez oil spill in 1989 create man-made disaster situations that threaten community survival and the well-being and quality of life of community residents. This paper focuses on the social and psychological impact of the 1989 oil spill on Cordova, an isolated Alaskan community with high economic dependence on commercial fishing and a native Alaskan cultural heritage of subsistence practices. Random samples of 118 households and 32 Native Alaskans in Cordova and a matched control community were surveyed 5 months after the spill to assess patterns of social disruption and post-traumatic stress. Data analysis revealed that Cordova experienced significantly more social disruption than the control community, particularly in the areas of work activities and future plans. Cordova residents also displayed significantly higher post-traumatic stress on 15 of 16 indicators; they had more intrusive recollections of the spill, more behaviors reflecting avoidance of stimuli associated with the spill, and a general diminished responsiveness or "numbness" to activities associated with the spill. Post-traumatic stress was most acute for persons experiencing disruption of family cohesion and uncertainty about future plans. This report contains 41 references and includes tabulations of responses to survey questions. (SV)

Not for release until 11:45 a.m.,
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SOCIAL DISRUPTION AND PSYCHOLOGICAL STRESS IN AN ALASKAN FISHING COMMUNITY: THE IMPACT OF THE EXXON VALDEZ OIL SPILL*

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Social Disruption and Psychological Stress in an Alaskan Fishing Community: The Impact of the Exxon Valdez Oil Spill

J.S. Picou, D. Gill, C.L. Dyer, E.W. Curry

ABSTRACT

The study of the social impacts of technological accidents is fast becoming an area of interdisciplinary research for both basic and applied social scientists. Technological accidents such as the Exxon Valdez spill create man-made disaster situations which threaten community survival and the well-being and quality of life of community residents. The most severe social impacts of man-made disasters occur in communities which not only depend upon the integrity and safety of their local environment for existence, but also follow a life-style which is directly supported by the use of renewable resources from the ecosystem.

The broad concept of "social impact" is conceptualized in this research in terms of three components - 1) economic impacts; 2) psychosocial impacts and; 3) cultural impacts. More specifically, this research report focuses on cultural and psychological impacts identified through comparisons of "control" and "impact community" data. Two general post-traumatic stress areas are contrasted for sixteen separate indicators - 1) intrusive recollections; and 2) avoidance behavior (Diagnostic and Statistical manual of Mental Disorders, 1987). In addition, patterns of social disruption were contrasted for both communities. A disaster impact assessment design was developed which included: 1) a random sample of Cordova households (impact community, n=118); 2) an ethnographic network sample of Native Alaskans, (n=32) and; 3) a random sample of Petersburg residents (control community, n=73).

The data analysis revealed that significantly more social disruption was experienced in the impact community from comparisons to the control community. Specifically, social disruption of future plans and work activities were more pronounced in the impact community. In terms of patterns of post-traumatic stress, impact community residents experienced more trauma in terms of having more recollections of the spill, behaviors that reflected the avoidance of stimuli associated with the spill and a general diminished responsiveness or "numbness" to activities associated with the spill. Only one out of sixteen comparisons was found not to be statistically significant in the analysis. These findings suggest a maximum amount of social disruption resulted from the Exxon Valdez oil spill in the impact community. This disruption and continuing observance of extreme ecosystem stress produced high-levels of post-traumatic stress existing five to eight months after the spill. Given that previous research indicates that man-made disasters manifest long-term social psychological impacts on communities, continued monitoring and programmatic responses to these findings are needed.

Social Disruption and Psychological Stress in an Alaskan Fishing Community: The Impact of the Exxon Valdez Oil Spill

Introduction

The primary objective of this research is an analysis of social disruption and post-traumatic stress experienced in an Alaskan fishing community five months following the largest oil spill in United States history. Conceptually, the Exxon Valdez oil spill is defined as a technological disaster (Baum, et al, 1982; 1983; Omohundro, 1982; Gill and Picou, 1989) and our research design includes data collected in both a "control community" and the "impact community". The analysis contrasts differences in our indicators in both "item-by-item" iterations, as well as for aggregate indicators of types of post-traumatic stress disorder (Diagnostic and Statistical Manual of Mental Disorders, 1987).

Disasters and Social Disruption

Disasters are situations which are socially defined in the context of human communities and their physical environment. An occasion is typically defined as a disaster if the social system's ability to reasonable ensure biological survival, social order, social meanings and social interaction are disrupted (Fritz, 1961; Barton, 1969; Dynes, 1970; Quarantelli and Dynes, 1970). Disasters possess a variety of characteristics, e.g., source, speed of onset, scope of impact, duration of impact, etc., which identify unique structural components (Dynes, 1970; Barton, 1969). Disasters also have direct consequences for the disruption of a wide variety of community activities (Dynes, 1970; Erickson, et al, 1976; Drabek and Key, 1976; Mileti, et al, 1975). Most recently in the disaster literature, increased attention has been accorded to "man-made", or "technological disasters" in terms of their possessing both unique characteristics and consequences for human communities (Turner, 1978; Baum, et al, 1983; Omohundro, 1982; Gill and Picou, 1989; Bogard, 1989). A brief discussion of this literature will be presented below.

Technological Disasters

The twentieth century has been the setting for the emergence of technological disasters. Massive disasters at Bhopal (India, 1986), Chernobyl (USSR, 1986), Three Mile Island (USA, 1979), Love Canal (USA, 1978-1980) and Buffalo Creek (USA, 1972) were unique because a technological malfunction, not nature, was defined as the cause. This qualitative distinction calls into question accepted notions of liability and responsibility for social, economic and political costs associated with technological accidents and forces a reevaluation of applied disaster research (Shirvastava, 1987; Bogard, 1989; Edelstein, 1989).

Technological disasters are abrupt disturbances to both the ecosystem and social system, which result in high degrees of uncertainty and stress at all levels of effected communities. The "increasing hazardousness of our everyday environment" has resulted in increased "rates" and "vulnerability" to technological accidents (Bogard, 1989). Research had documented a variety of consequences which are characteristic of technological disasters.

First, technological disasters have the potential to permanently eliminate communities. Although one could argue that the same potential consequence could result from a natural disaster, evidence from Love Canal and Chernoybal point to this realistic possibility in terms of toxic and technological malfunctions (Brown and Harris, 1979). Furthermore, community survival can be directly threatened by severe pollution to the environment in areas where ecosystem resources are utilized to support both physical and cultural structures (Robbins and McNabb, 1987). In short, technological disasters may permanently eliminate communities through contamination (Oliver-Smith, 1986). In some cases, especially in oil spills, no initial loss of life or physical destruction need take place (Omohundro, 1987). Nonetheless the threat posed by technological disasters often directly challenges community survival.

Secondly, technological accidents result in a "...loss of control over something that was once perceived as controllable, while... natural disasters highlights a perceived lack of control over something that either never was perceived as controllable or for which controllability was not particularly salient" (Baum, et al., 1983:120). This concept of loss of control is directly linked to the issue of liability, which, in turn, directly involves litigation. Class-action lawsuits and out-of-court settlements between communities and liable organizations have become an increasing long-term characteristic of technological accidents (Gleser, et al., 1978; Edelstein, 1989; Rosebrook and Picou, 1990). The litigation process may have a variety of secondary impacts on a community which prolong long-term, negative consequences stemming from the original technological malfunction (Erikson, 1976). In sum, technological disasters are more likely to spawn a number of "secondary disasters" which prolong community impacts.

Finally, technological accidents produce survivors who exhibit more "...anger, hostility, and rage than...victims of natural disasters" (Ahearn, 1981; Baum, et al., 1983). In addition, long-term social psychological impacts have been documented from a wide-variety of studies (Erikson, 1976; Bromet, 1980; Gleser, Green and Wingate, 1981; Gill and Picou, 1990). Indeed, prolonged psychological impacts may characterize technological disasters when they are defined as a particular type of stressor (Elliott and Eisdorfer, 1982; Ahearn and Cohen, 1984; Green, Lindy and Grace, 1985). Technological disasters

have produced long-term stress and disruption in effected communities.

From this brief discussion it is evident that technological disasters increasingly pose a risk to communities throughout the world. The existence of a technological disaster may actually go unnoticed by the community (toxic waste disposal sites), threaten the economic viability of a community (oil spills) or effectively eliminate communities (nuclear meltdown). All of the technological disasters noted above may potentially disrupt community structure and produce post-traumatic stress patterns for extensive periods of time. A conceptual approach for studying these impacts is presented below.

Technological Disaster Impacts: A Conceptual Approach

Technological disasters are complex social events which can be understood in terms of disaster structure and disaster consequences. This research focuses on the "consequences" or "impact" of a specific technological disaster (the Exxon Valdez oil spill) on a small Alaskan fishing community (Cordova). Figure 1 presents a comprehensive conceptual framework for evaluating the social impacts of technological disasters. Hazards are viewed as resulting from the mass introduction of chemical industrial technologies which have the potential to cause harm to both the environment and people (Bogard, 1989). The existence of an increasingly hazardous environment increases the potential for technological accidents stemming from various combinations of human error and technological malfunctions. The severity of the technological accident, in turn, leads to a "definition of the situation" of the accident as being a technological disaster. Research on the social impacts of any technological disaster should minimally include economic, cultural and psychological dimensions (Picou, 1984).

[Figure 1 about here]

The assessment of economic impacts include "quantifying and assigning monetary values to the damages to the natural resources of the impactal region" (Freeman and Kopp, 1989). Based on the idea of compensation, economic assessments involve research activities ranging from the calculation of direct loss of dollars lost to the quantification of estimates of dollar losses for various resources of the ecosystem, e.g., the salmon fishery in Prince William Sound.

Cultural impacts involve identifying types of disruption of the day-to-day activities of members of a community, as well as their changing perceptions of the "quality of life" available. Cultural impacts include changes in community values, social activities, perceived risks and out-migration desires. Essentially cultural impacts are disruptive to various social groupings of community members in that patterned behavior is altered drastically.

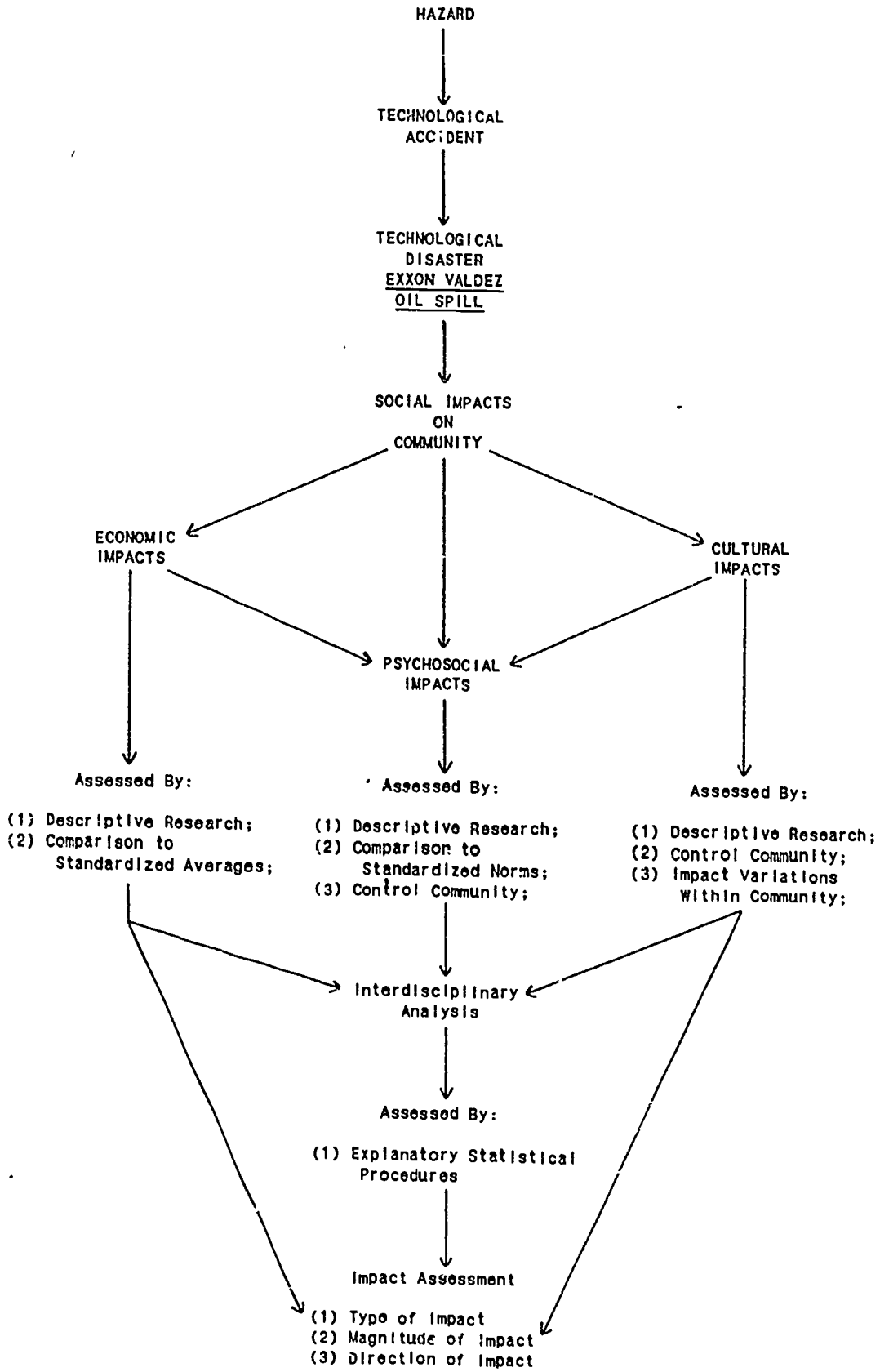


FIGURE 1: A Conceptual Model for Disaster Impact Assessment

Psychosocial impacts include a wide variety of individual-level consequences which result in increased stress, fear and attitudes of vulnerability, which, in turn, contributes to illness and personal dysfunction (Ahearn and Cohen, 1984). Social psychological stress may be measured in terms of post-traumatic stress disorder patterns.

Figure 2 identifies the conceptual focus of the present study. Our research focuses on social disruption and post-traumatic stress existing five months after the spill in the fishing community of Cordova, Alaska. As such, Figure 2 identifies the impacts of the spill as being disruptive and producing types of post-traumatic stress disorders (Diagnostic and Statistical Manual of Mental Disorders, 1987). Returning to Figure 1, this research is an interdisciplinary analysis of cultural and psychosocial impacts determined through a comparative analysis of differences observed between control and impact communities.

[Figure 2 about here]

The Exxon Valdez Oil Spill

On March 24, 1989 at 12:04 a.m. the supertanker Exxon Valdez ran aground on Bligh Reef, resulting in the largest oil spill in United States history. Within five hours of the accident, ten million gallons of Prudhoe Bay (North Slope) crude escaped into the pristine waters of Prince William Sound. Over the next two weeks Exxon offloading operations resulted in the transfer of over 950,000 barrels of oil from the Exxon Valdez to other tankers. During this time period additional oil was released into Prince William Sound (National Response Team, 1989). This oil spill of eleven million gallons would be too large for any response plan or technology to contain.

The immediate impact of the spill on the local ecosystem was devastating. Figure 3 identifies the location of the Exxon Valdez spill in terms of bird, marine and mammal concentrations in the Prince William Sound area. The environmental conditions characterizing this spill actually increased the severity of the environmental impact (National Response Team, 1989). For example, the type of oil spilled and the lower temperatures resulted in a much slower rate of biodegradation, physical weathering and evaporation of the oil. In addition, considerably more coastline (350 miles) was impacted from the Exxon Valdez spill than the 68 million gallon Amoco Cadiz (240 miles) spill off the coast of Northwest France.

[Figure 3 about here]

Six months following the spill the death toll for birds and marine mammals in the Prince William Sound area was staggering. Conservative estimates had over 33,000 birds, 980 sea otters, 30 harbor seals, 17 gray whales and 14 sealions documented in the

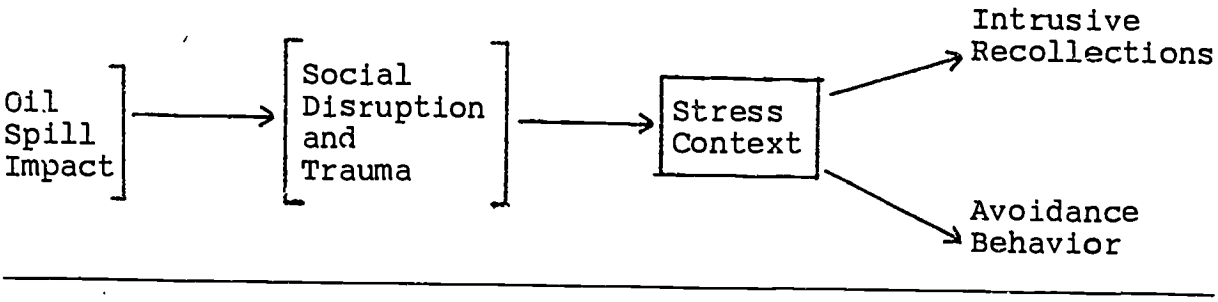


FIGURE 2: Conceptual model of social disruption and post-traumatic stress.

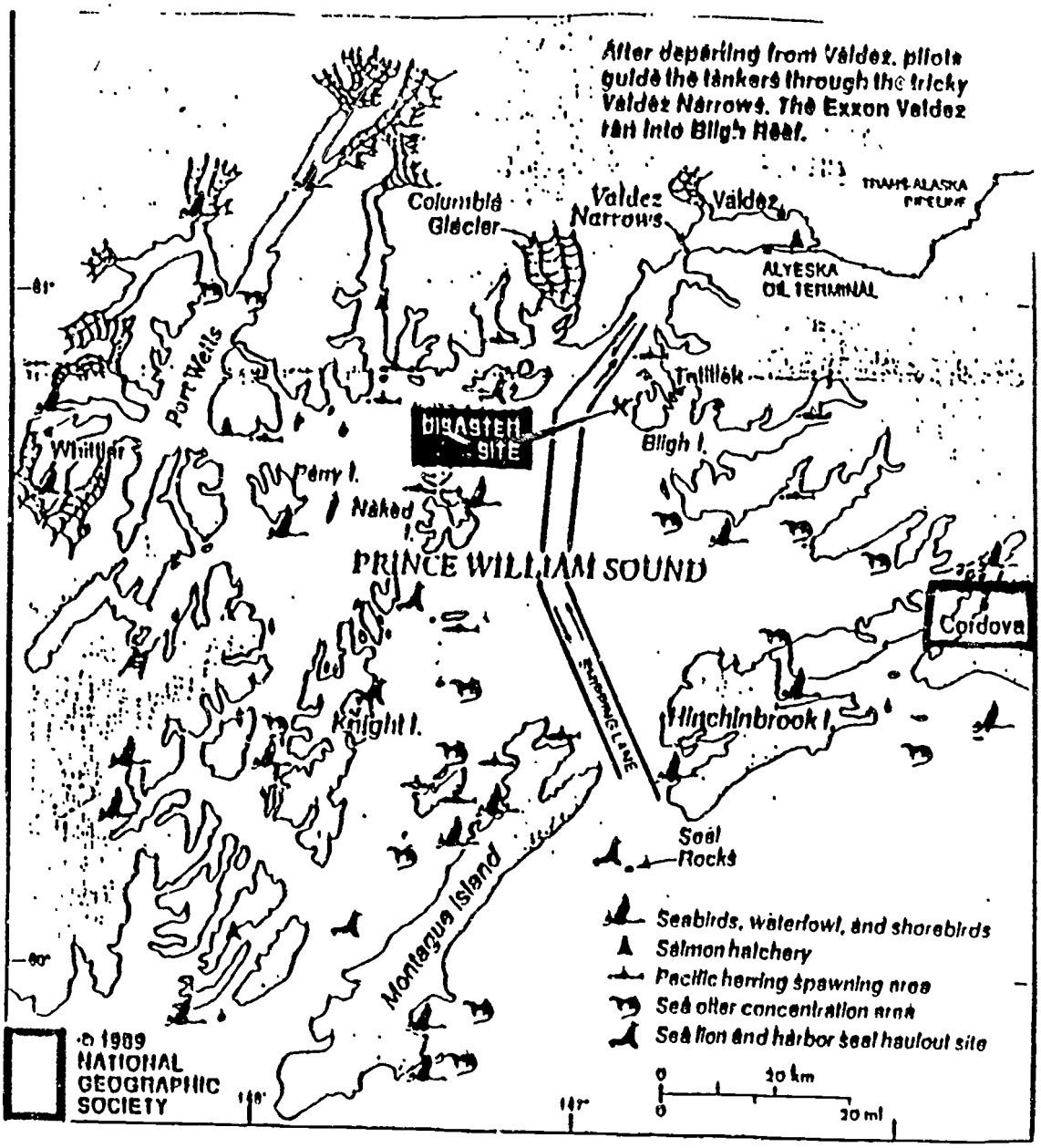


FIGURE 3: Location of spill, wildlife concentrations and Community of Cordova.

death toll (Nichols, 1989). However, fears of food chain contamination and the observation of aberrant bird behavior (75 per cent of all bald eagles failed to nest) portends continued contamination risks for birds and marine mammals well into the future.

The impact of the spill on microbiotic life in intertiddal zones and for the various fisheries in Prince William Sound is highly uncertain. The 1989 Herring season was closed following the spill. Long-term impacts on the large salmon fishery in Prince William Sound will not be accurately known until fry released this year begin to return (National Response Team, 1989). Therefore, salmon, halibut, herring, crab and clam fishermen will not understand the full economic consequences of the spill for local fisheries until the 1992 to 1994 fishing seasons.

The Research Setting

Cordova is a small, picturesque fishing community located in Prince William Sound in southcentral Alaska. Cordova is isolated from other communities by mountains, glaciers, rivers and the sea. No roads have connected Cordova to other communities since the earthquake of 1964. A maritime climate of heavy percipitation and moderate temperatures characterizes this region.

The economy of Cordova is dominated by commercial fishing. Cordova fishermen hold 44 percent of all Prince William Sound herring fishery permits and 55 percent of all Prince William Sound salmon fishery permits (Stratton, 1989). Subsistence activities characterize most of the residents of Cordova. Harvesting, receiving and giving away fish, moose, deer, berries, etc. are activities common to the vast majority of the residents in Cordova.

Historically, the community of Cordova can be traced to four Eyak Indian Villages and the territories of the Chugach Eskimos. Early documents identify the 1898 Alaska gold rush as a reason for growth in Cordova's population. The city was officially incorporated in 1909 and quickly became the export center of copper being mined in the Wrangell mountains north of Cordova (Stratton, 1989). Following the closing of these mining operations and the railroad in 1939, Cordova residents became involved in the growing salmon industry. Cordova's population remained around 1000 residents until the 1970's found the population to almost double. This decade of growth stemmed from a diversification of the commercial fishing industry in the area and increased in-migration trends to Alaska in general.

At the time of Exxon Valdez oil spill Cordova could be described as an isolated community, highly dependent on commercial fishing for an economic base, and having a cultural history of subsistence practices stemming directly from a Native-

Alaskan heritage. Approximately 20 percent of the residents of Cordova are Native-Alaskans. Due to the community's location (see Figure 3), no oil from the Exxon Valdez reached the shores or immediate vicinity of Cordova. However, the spill directly impacted critical fishing grounds of Prince William Sound which are used by local fishermen.

Research Design

A disaster impact assessment research design guided the methodological procedures for this study (Picou and Gill, 1989). This design includes all assessment procedures noted in Figure 1 for a comprehensive social impact assessment of technological disasters. Cordova was selected as the impact community of interest because of its economic dependency on commercial fishing and its cultural heritage of subsistence activities. The overall research design is presented in Figure 4. Data were collected from: (1) a stratified, random sample of households in Cordova; (2) an ethnographic network sample of Native-Alaskans; (3) a random telephone survey of Petersburg, Alaska residents (see below) and (4) a random telephone survey of Cordova residents. This research report does not include data on Native-Alaskans. Separate studies on this population are in progress (see: Dyer, Picou, Gill and Curry, 1990).

[Figure 4 about here]

The logic of these data-collection procedures relates to unique research problems associated with identifying and evaluating the impacts of disasters (Picou and Gill, 1989). Minimally, such an assessment should include: proper sampling procedures, control community comparisons, appropriate methodologies for special populations and standardized indicators of impacts used in previous disaster research (Solomon, 1989; Picou and Gill, 1989).

Control Community Selection: After an evaluation of demographic characteristics of Alaskan communities from census and cultural information, the city of Petersburg, Alaska was selected as a control community for this research. Like Cordova, Petersburg is isolated by not having roads linked directly to it and is dependent economically on commercial fishing. Petersburg has a population of 3,137 people and has an Alaskan Native population which comprises approximately 20 percent of the community (Smythe, 1988). A 29.5 million dollar salmon fishery exists in Petersburg, while a 36 million dollar salmon fishery characterizes Cordova's economy (Smythe, 1988; Stratton, 1989). Petersburg residents share subsistence harvests in a manner similar to Cordova residents. For example, in terms of salmon subsistence activities 72 percent of Cordova residents harvest salmon, while 63 percent of Petersburg residents engage in salmon harvesting. In Cordova, 58 percent of the residents receive salmon while 61 percent receive salmon in Petersburg. Percentages of residents who give away salmon are also similar

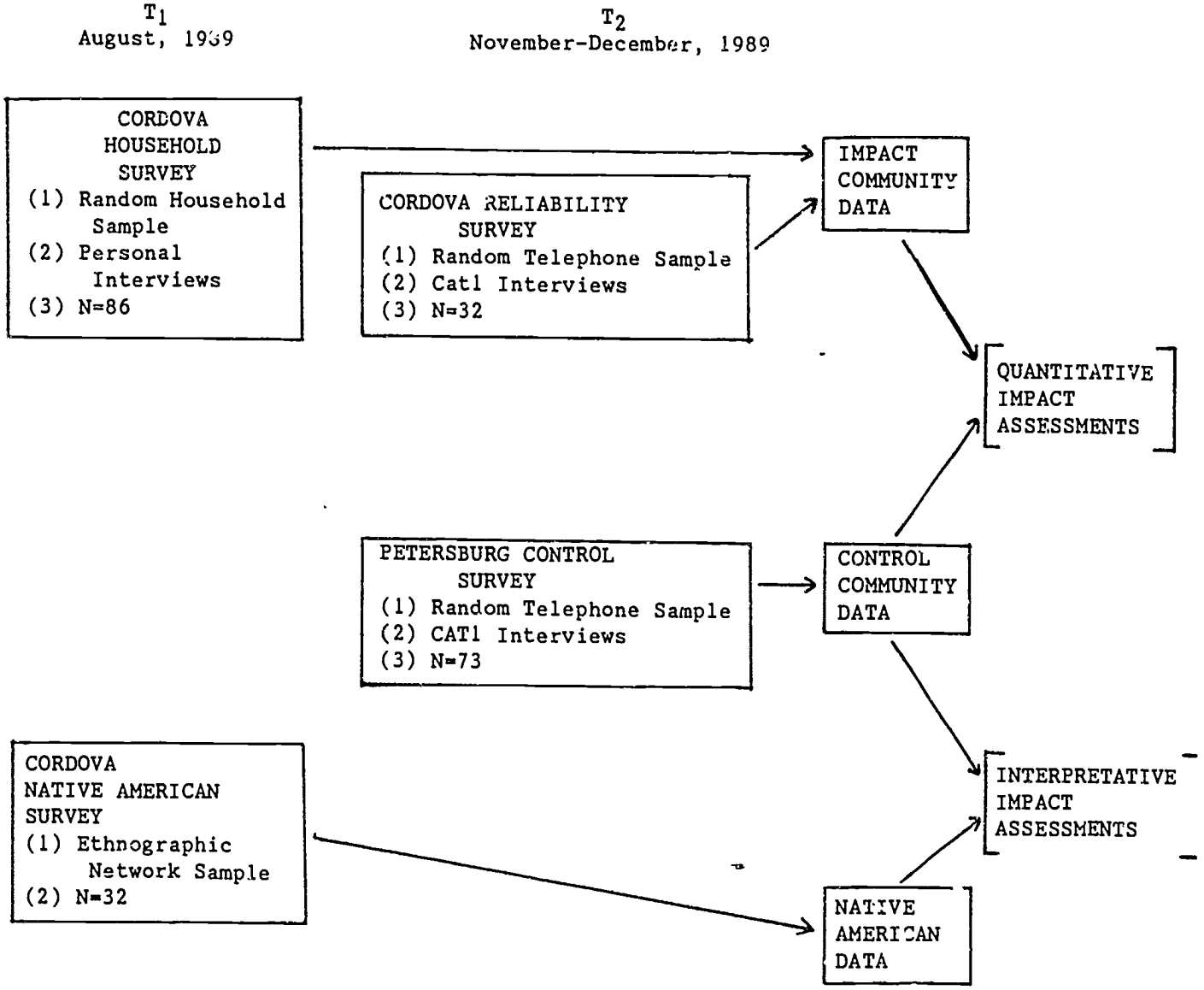


FIGURE 4: Research Design for Disaster Impact Assessment

(61% Cordova; 55% Petersburg. For more information, see: Smythe, 1988 and Garrett, 1989).

Given the demographic and cultural information discussed above, it was further decided that Petersburg received minimal direct impacts from the Exxon Valdez spill. Fishing seasons were not directly effected, although some limited leasing of boats by Exxon for the clean up did occur. It should be noted that it is highly probable that some Petersburg residents were impacted upon negatively by the spill. It is obvious that all Alaskan communities are sensitive to environmental stress and related political issues involving the oil industry and state government. Because of this fact, the use of Petersburg should provide a very conservative estimate of the magnitude of any impacts observed.

The data for the control community were collected by telephone interviews by the Survey Research Unit of the Social Science Research Center, Mississippi State University. In addition, telephone interviews were also collected in Cordova during the same time period data were collected for the control community. The households to be interviewed were randomly selected from a list of all possible telephone numbers in both communities (people interviewed in the household survey were excluded). Once a household was reached by the telephone interviewer, interviewers randomly asked to talk to: 1) the oldest male; 2) youngest male; 3) the oldest female; and 4) youngest female (over 17 years of age). This procedure reflects a modified version of the Throldahl-Carter approach for random household sampling for telephone interviews (for more information, see: Frey 1983). The interviews were conducted in early to mid-December, 1989.

Household Sample Selection: A research team of two sociologists and one anthropologist arrived in Cordova, Alaska on August 19, 1989. Upon arrival and throughout the first day, the researchers identified seven (7) residential areas in the town of approximately 2,300 residents (see map 1). Once these seven residential areas were identified, households were identified and assigned numbers for random selection. Tables of random numbers were utilized for selection of households. A stratified, random household sample was obtained. Data were collected in approximately seventy (70) households, resulting in a final sample of eighty-six (86) residents of the community. Households members present in selected locations were interviewed by members of the research team. During the morning of the first day of interviewing, the researchers conducted a field pre-test of the interview instrument. These pre-testing activities identified a number of questionnaire indicators which were inappropriate for use. Indicators were eliminated, added and several items were modified. These activities resulted in a final questionnaire which contained items judged to be communicable, relevant, accurate and appropriate for collecting in-depth data on the economic, psychological, cultural and community impacts of the Exxon Valdez oil spill.

[Map 1 about here]

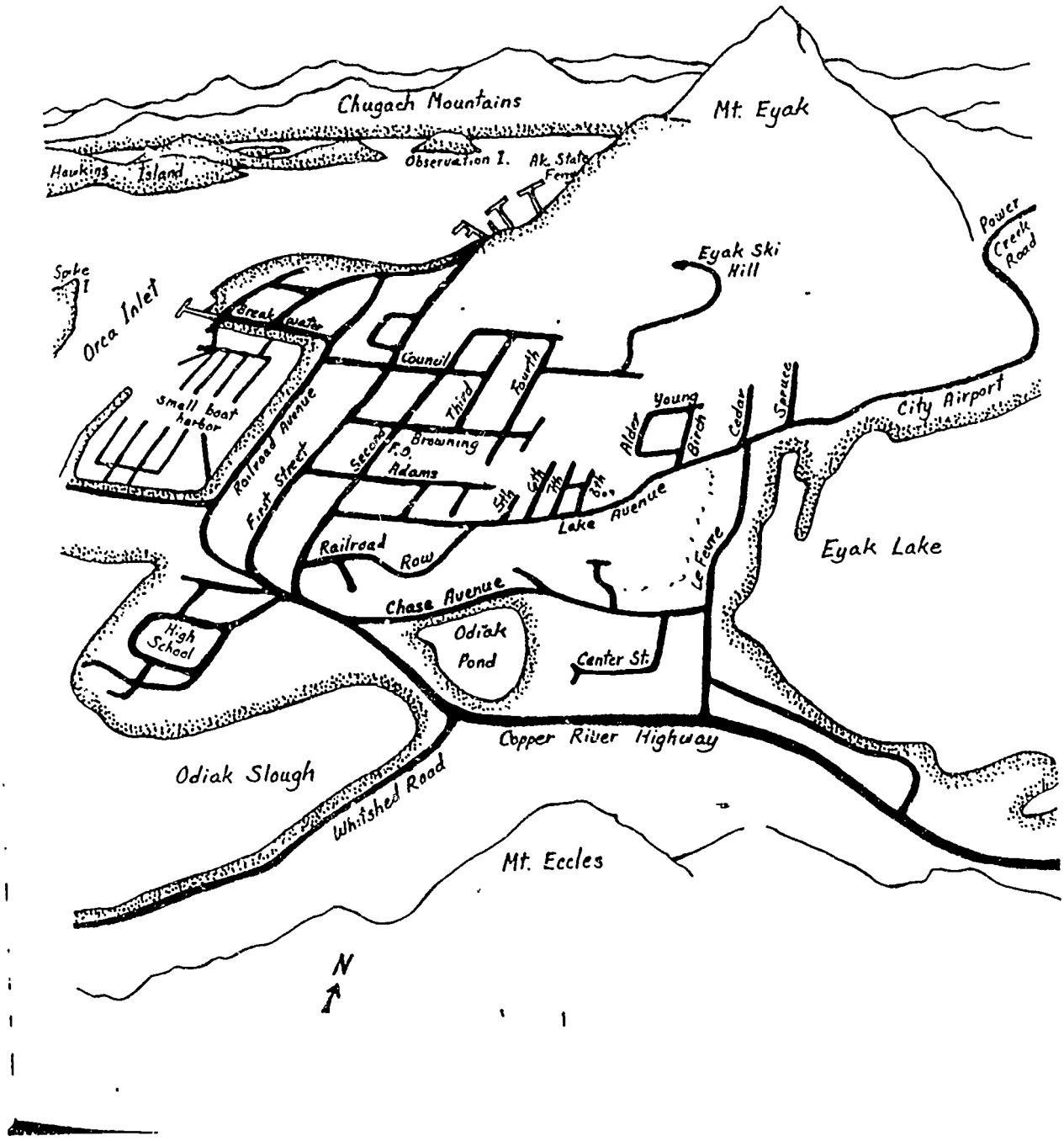
Indicators and Measures: Questionnaires containing similar indicators were used for both telephone and personal interviews. The instruments included on the questionnaire were selected because of their use in previous disaster research, their acceptance in previous toxic tort litigation and their documented relevance to the actual disaster experience (Siegel, et al, 1984; Picou, 1984; Solomon, 1989). Four indicators of perceived social disruption are analyzed in this research. The specific items were operationalized in terms of changes in the way family members get along, making changes in future plans, having relatives make changes in future plans, and having made changes in the work place setting (see Table 1). These items provide a indicator of general social disruption for community groups (families and work groups).

Psychological stress was operationalized in terms of the "Impact of Events Scale (IES)" which provides a basis for determining and measuring Post-Traumatic Stress Disorder, a clinically recognized stress disorder which has been documented as often having delayed symptoms (2 years) resulting from traumatic events (Horowitz, Wilner and Alvarez, 1979; Diagnostic and Statistical Manual of Mental Disorders, 1987; Glesner, Green and Winget, 1981; Green, Lindy and Grace, 1985; Solomon, 1989). The logic of the IES scale suggests that very stressful, traumatic events, such as a disaster, result in a high-incidence of recurring, distressing thoughts about the event and attempts to avoid thought and behavior associated with the disaster or traumatic event (Horowitz, Wilner and Alverez, 1979; Diagnostic and Statistical Manual of Mental Disorders, 1987; Solomon, 1989). These two PTSD Components will be comparatively analyzed below.

Data Analysis

The data analysis will be conducted in the following manner. First an item-by-item comparison of control and impact community responses will be conducted for indicators of both social disruption and post-traumatic stress disorder. A chi-square test of differences was conducted for each response comparison (Yeomans, 1968). Second, the post-traumatic stress indicators were divided into scale indicators for intrusive recollections and avoidance behavior (Seigel, et al, 1984). These scale items were summated and comparisons of mean scores were conducted by t-tests of differences (Yeomans, 1968). Comparisons of mean scores were made for the control community and impact community, as well as for the various sources of data identified in Figure 4. Finally, correlation coefficients were calculated between the disruption indicators and the two forms of PTSD within the impact community.

Table 1 presents the four social disruption items for both control and impact communities. All four chi-square comparisons were found to be statistically significant, indicating from an



MAP 1: Cordova Community

inspection of the response patterns that considerably more social disruption was reported in the impact community. Almost forty percent of the respondents in the impact community reported that as a result of the spill they had experienced changes in their family relations. Approximately nine percent of the control community respondents gave a similar response (Table 1).

[Table 1 about here]

The uncertainty generated from the spill is apparent in that fifty-one percent of the impact community respondents reported that they had made changes in their future plans. Only 14 percent of the control community respondents had similar responses. Thirty percent of the impact community also reported that other family members and made changes in their future plans, suggesting a broad impact in terms of the creation of an uncertain future.

The focus of this uncertainty for the future may be the workplace, or immediate economic uncertainty, generated by the spill. Table 1 reveals that almost seven of every ten respondents reported "things had changed for them at work. The nature of these work-based changes reflect the dependency of the impact community's economic base on Prince William Sound's resources. Commercial fishing activities were directly disrupted by the spill, resulting in a corresponding series of mixed impacts on the canneries and the entire business community in Cordova. In some instances work was stopped or slowed down, while in other situations work loads increased as a result of rapid job shifts (e.g., clean-up, influx of media, technical and political representatives, etc.).

The results presented in Table 1 can be summarized as follows. Significantly more social disruption is apparent in the impact community as a result of the spill. The nature of this disruptive impact can be described as including family relations and future plans of community members. We suggest that this "general uncertainty" that characterizes Cordova directly relates to threats posed by the spill for the future economic viability of the community. The vast majority of all respondents interviewed in the impact community reported disruption and changes in their work role, further suggesting an immediate social impact on traditional day-to-day work activities.

Table 2 provides the item-by-item comparisons of the sixteen post-traumatic stress disorder items for control and impact communities. Chi-square tests were applied for all sixteen items. Fifteen of the sixteen chi-square applications were found to be statistically significant ($Pr \leq .05$), indicating the existence of a stronger symptomology of PTSD in the impact community.

[Table 2 about here]

TABLE 1: Patterns of Social Disruption for Control and Impact communities.

As a result of the spill...	(Control) % Yes	% No	(Impact) % Yes	% No
1) Have you noticed any changes in the way your family gets along together?	9	91	39	61
		*Pr ≤ .0001		
2) Have you made any changes in your plans for the future?	14	86	51	49
		*Pr ≤ .0001		
3) Have other family members changed their future plans?	17	83	30	70
		*Pr ≤ .029		
4) Have things changed for you at work?	19	81	68	32
		*Pr ≤ .0001		

*Chi-Square Analysis

TABLE 2: Control and Impact Community Responses to Post-raumatic Stress Items*

		Not at All	Rarely	Some-Times	Often	
I thought about it when I didn't mean to. (The thought of it just popped into my head).	(control)	36	19	24	21	*Pr ≤ .0001
	(Impact)	14	9	29	48	
Pictures about it popped into my mind.	(Control)	29	26	26	19	*Pr ≤ .031
	(Impact)	17	17	32	34	
Other things kept making me have thoughts about it it (even when I didn't want to)	(Control)	26	22	30	22	*Pr ≤ .005
	(Impact)	15	12	27	46	
I had to stop myself from getting upset when I thought about it or was reminded of it.	(Control)	45	14	22	19	*Pr ≤ .001
	(Impact)	18	19	28	35	
I tried to remove it from my memory. (To make it as though it never happened)	(Control)	82	9	5	4	*Pr ≤ .001
	(Impact)	55	17	10	18	
I had trouble falling asleep or staying asleep because of pictures or thoughts about it that came into my mind.	(Control)	82	11	4	3	*Pr ≤ .050
	(Impact)	58	16	17	9	
I had waves of strong feelings about the spill. (Feelings about it just seemed to wash over me).	(Control)	26	15	33	26	*Pr ≤ .036
	(Impact)	12	20	33	35	

		Not at All	Rarely	Some-Times	Often	
I didn't feel upset. My feelings about it were Kind of numb. (I really don't have any feelings about it.)	(Control)	70	12	13	5	*Pr ≤ .037
	(Impact)	60	19	15	6	
I had a lot of feelings about it that I didn't deal with (or didn't didn't know how to handle.	(Control)	69	14	10	7	*Pr ≤ .005
	(Impact)	46	16	17	21	
I had dreams about it.	(Control)	85	8	4	3	*Pr ≤ .017
	(Impact)	64	20	8	8	
I stayed away from reminders of it (e.g., like the road by the tracks.	(Control)	90	7	2	1	*Pr ≤ .0001
	(Impact)	63	20	9	8	
I felt as if it hadn't really happened (or as if it wasn't real).	(Control)	88	3	5	4	*Pr ≤ .007
	(Impact)	70	16	10	4	
I tried not to talk about it.	(Control)	85	4	6	5	*Pr ≤ .001
	(Impact)	61	16	19	13	
I tried not to think about it. (tried to force my attention away from it - perhaps to other things).	(Control)	79	8	7	6	*Pr ≤ .002
	(Impact)	54	13	20	13	
Any reminder brought back the way I felt about it.	(Control)	43	14	22	21	*Pr ≤ .275
	(Impact)	30	15	28	27	

		Not at All	Rarely	Some-Times	Often	
I suddenly felt like it was happening all over gain.	(Control)	79	8	8	5	*Pr ≤ .023
	(Impact)	49	18	15	8	

*Probability estimates derived from chi-square analysis.

The first four indicators of PTSD were found to reveal that majority of the respondents in the impact community had intrusive recollections of the spill (i.e., they inadvertently thought about, experienced pictures of the spill or had to prevent themselves from getting upset). Other contrasts of intrusive recollection and avoidance behavior items also reveal proportionately more reports of experiences of stress behavior (i.e., avoidance, numbing and recollections of the trauma) in the impact community. The item "any reminder brought back the way I felt about it" manifested no statistically significant difference between the two communities. However, the response pattern for this question revealed that the trend observed for other item comparisons also held. That is, proportionately more impact community respondents had experienced such thoughts than respondents in the control community.

At this stage of the analysis it is apparent that more disruption and post-traumatic stress experiences characterize the impact community (Cordova) than the control community (Petersburg). In an attempt to further clarify this observed impact of the Exxon Valdez spill, summated scores were calculated for the PTSD items, reflecting experiences of intrusive recollections and avoidance behavior (Siegel, Blanchard-Fields, Gottfried and Lowe, 1984). Table 3 presents means and standard deviations for these scales and results from the calculation of t-tests. Several sets of comparisons were made in order to evaluate the validity of the research design, as well as to evaluate differences between control and impact communities.

[Table 3 about here]

Table 3 presents PTSD scores for three sets of comparisons for both the intrusive recollections and avoidance behavior scales. The first comparison involved the control community and the impact community. Scores for both scales were found to be statistically significantly higher in the control community from the results of t-test applications.

The second set of comparisons of these scales involved desegregating the impact community data into the household survey data (Impact 1) and telephone interview data (Impact 2) and comparing differences in mean scale scores between these groups. A visual inspection of the mean scale scores, as well as t-test results, revealed no difference between the two impact community samples. These findings further validate the disaster impact design employed in this research and suggest that the PTSD patterns originally observed in August for the impact community remained relatively constant through December. The final comparison between the telephone interview data gathered in our research design further validates both the direction and continuing pattern of experiencing significantly more PTSD by respondents from the impact community.

TABLE 3: Independent Samples T-Tests for Post Traumatic Stress Disorder Components.

	$\bar{X}$	S.D.	
Intrusive Recollections			
Impact (N=118)	61.07	19.14	*T-Test = 4.275; Pr $\leq$ .0001
Control (N=73)	49.70	17.02	
Impact 1 (N=86)	61.08	19.20	*T-Test N.S.
Impact 2 (N=32)	61.04	19.28	
Impact 2 (N=32)	61.04	19.28	*T-Test = 2.871; Pr $\leq$ .006
Control (N=73)	49.70	17.02	
Avoidance Behavior			
Impact (N=118)	47.80	16.75	*T-Test = 5.306; Pr $\leq$ .0001
Control (N=73)	36.73	12.01	
Impact 1 (N=86)	48.55	16.38	*T-Test N.S.
Impact 2 (N=32)	45.80	17.83	
Impact 2 (N=32)	45.80	17.83	*T-Test = 2.628; Pr $\leq$ .012
Control (N=73)	36.73	12.01	

In order to clarify the patterns of PTSD observed, Pearson correlation coefficients were calculated between the four sources of social disruption (see Table 1) and the two PTSD indicators (see Table 3) for the control community data. Table 4 provides the results of these calculations.

[Table 4 about here]

Interestingly, the strongest coefficients were observed for the association between "disruption of family relations" and PTSD components and "disruption of future plans" and PTSD components. These results point to an important relationship between sources of social disruption and experiencing perceptions and behaviors characteristic of PTSD. The fact that uncertainty and family dysfunction is associated with high-levels of PTSD clearly identifies a pattern characteristic of the short-term social impact of the Exxon Valdez oil spill.

Summary and Conclusions

This research provides initial empirical data which documents the social impacts of the Exxon Valdez oil spill on an Alaskan fishing community in Prince William Sound. The Exxon Valdez spill was conceptually approached as a technological disaster, resulting from human and technological malfunctions of an ecosystem hazard (oil transportation activities in Prince William Sound). The study of these social impacts requires an interdisciplinary research design which minimally evaluates economic, cultural and psychosocial impacts. The present research provides data on patterns of social disruption and post-traumatic stress disorder derived from a comparison to control community data.

The empirical analysis clearly documented the existence of significantly more social disruption and post-traumatic stress disorder in Cordova. All but one of the twenty individual-item contrasts of data from Cordova and Petersburg were found to be statistically significant, documenting the existence of higher-levels of disruption and stress in the impact community. The existence of higher levels of both forms of PTSD, i.e., intrusive recollections and avoidance behavior, was documented through community and sample comparisons of mean scale scores. This analysis further revealed that there was no significant decline of PTSD in the Cordova community from August to December of last year. A correlation analysis further documented that PTSD was most acute for community residents who, as a result of the spill, had experienced family relations problems and were forced to change their plans. This disruption of family cohesion and an uncertain future provide the most important contexts for experiencing high-levels of PTSD. In short, the initial social impact of the Exxon Valdez spill on Cordova has been negative. Significantly more social disruption and stress has been experienced by Cordova residents. The implications of findings will be briefly discussed below.

TABLE 4: Correlation Coefficients Between Types of Social Disruption and PTSD Components Within Impact Community (N=118)

Source of Social Disruption	PTSD Intrusive Recollections Scale	PTSD Avoidance Behavior Scale
As a result of the spill:		
1. Have you noticed changes in the way your family gets along together?	.31*	.37*
2. Have you made changes in your future plans?	.33*	.33*
3. Have other family members changed their future plans?	.24*	.27*
4. Have things changed for you at work?	.10	.13

*Pr $\leq$ .01

The results of this study are relevant to the growing body of interdisciplining research on technological disasters. Although all disasters provide a context for having negative impacts on communities, the impacts of technological disasters can be more long-term and invclve a host of "secondary disasters", which, in turn, produce additional negative consequences. A sense of continued uncertainty often characterizes communities effected by technological disasters. The documentation of perceptions of uncertainty, deteriorating family relations and PTSD five months following the Exxon Valdez spill establishes an understanding of the initial pattern of technological disaster impacts.

This study also provides data relevant to class-action litigation associated with compensation claims of Prince William Sound residents against Exxon and other parties. Increasingly social science data is being used by plaintiffs, defendants and the courts to mitigate settlements and provide data for court judgments (Picou, 1984; Edelstein, 1989; Rosebrook and Picou, 1990). Although the results of this research may only be directly applicable to the Cordova community, we suggest that similar, short-term negative impacts exist for all Prince William Sound communities which have an economy based on commercial fishing. It is apparent that appropriately designed research on communities in Prince William Sound will be needed over the next four years to adequately understand the continuing social impacts of the Exxon Valdez oil spill.

Finally, the results of this research are important for identifying the program and service needs of all communities in Prince William Sound. This study clearly documents the need for the delivery of counseling and mental health services by local, state and federal agencies to Cordova. The timely delivery of appropriate services involves a variety of issues associated with organizational activities and outreach programs (Baisden and Quarantelli, 1981; Lindy, Jacob, Grace and Green, 1981). Carefully designed, innovative programs have been found to mitigate negative disaster impacts (Heffron, 1977; Dohrenwend, 1978; Lindy, Jacob, Grace and Green, 1981). The identification of specific program needs for the Cordova community goes beyond the scope of the data analyzed in the present research.

In summary, the negative impacts of the Exxon Valdez oil spill go beyond the direct destruction of ecosystem resources in Prince William Sound. This research has documented the existence of negative social impacts reflected in terms high-levels of social disruption and post-traumatic stress disorder. These impacts characterized the Cordova community from late summer through early winter. Future longitudinal research is needed to monitor these and other social impacts of the largest oil spill in United States history. Such information is critical for understanding the threats to community viability and survival posed by technological disasters.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF EYAK, *et al.*, Plaintiffs, v. CARLOS GUTIERREZ, Secretary of Commerce, Defendant.	Case No. A98-365 CV (HRH) DECLARATION OF ERIC KNUDSEN, Ph. D.

I, Eric Knudsen, hereby declare as follows:

1. Plaintiffs have asked me to provide an expert opinion in this case on the relative abundance and size of halibut, cod, and sablefish inside and outside of the 3-mile territorial limit of South Central Alaska and whether the Chugach Tribes (Chenega, Tatitlek, Eyak, Nanwalek and Port Graham) are likely to have fished 3 miles or more from shore in what is referred to as the Outer Continental Shelf of the Lower Cook Inlet and Gulf of Alaska.

2. I have prepared the attached report which sets forth the expert opinions to which I intend to testify and the contents of the report are true and accurate to the best of my knowledge at this time. I requested certain migration and trawl data sets from NOAA on April 2, 2008. I received part of these data sets from NOAA on Monday, May 12, 2008, and I have not had a reasonable amount of time to review and analyze this information. I reserve the right to supplement my expert report upon reviewing both the data received thus far and upon receiving the remaining requested information.

3. I have not served as an expert witness in a case in the previous four years.

4. A copy of my updated CV is attached as Exhibit A.

5. I have been compensated in this case at the rate of $120 per hour.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 2008 at Anchorage, Alaska.

Eric Knudsen

Eric Knudsen, Ph.D.
Consulting Fisheries Scientist

Halibut Abundance and Halibut, Cod, and Sablefish Size Inside and Outside of the 3-Mile Territorial Limit of South Central Alaska

and

Rebuttal to Defendants' Expert Witness Reports

A Report for the Native American Rights Fund

E. Eric Knudsen, Ph.D.
Consulting Fisheries Scientist
13033 Sunrise Dr.
Mt. Vernon, WA 98273

May 15, 2008

Introduction

Knudsen (2008) summarized data and a number of rationale that demonstrated the likelihood that South Central Alaska coastal native Chugach people traditionally fished in the offshore area of South Central Alaska, beyond the 3-mile territorial limit. This report explores additional evidence that the Chugach people fished beyond three miles because one of their primary target species, Pacific halibut (*Hippoglossus stenolepis*), were more abundant and larger offshore than they were closer inshore, and because Pacific cod (*Gadus macrocephalus*)and sablefish (*Anoplopoma fimbria*) were also larger on average outside the 3-mile line. The area of concern includes the waters of the Outer Continental Shelf (OCS), defined as federal waters outside the three-mile state limit, from roughly Kayak Island west to Cape Douglas on the Aleutian Peninsula and into Cook Inlet to south of Kalgin Island (Figure 1).

The overall purpose of this analysis was to test hypotheses about whether halibut are more numerous and whether halibut, Pacific cod, and sablefish are larger outside the 3-mile limit than inside. The analysis therefore included two specific hypotheses that addressed the questions:

1) Is fish abundance different inside and outside of the 3-mile line?
2) Is average fish size different inside and outside of the 3-mile line?

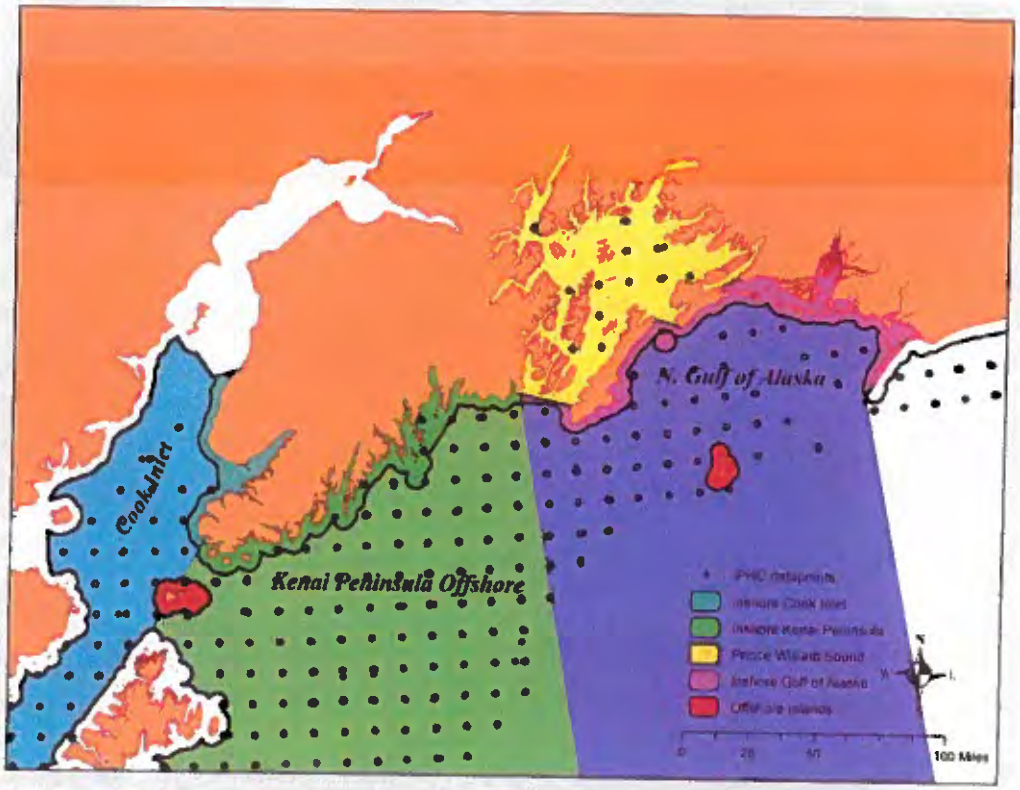


Figure 1. Map of study area showing the 3-mile territorial boundary, the five zones used for analysis, and the IPHC longline sampling stations.

Methods

Fisheries Data

The analysis was based on relatively contemporary fisheries-independent sampling data from two sources.

1. International Pacific Halibut Commission (IPHC) halibut longline surveys, as obtained from the IPHC web site (http://www.iphc.washington.edu/halcom/survey/ssadata/ssadata.htm) and illustrated in Figure 1. Prior to analysis, the IPHC longline data was manipulated by:
    a. Deleting records that were missing the number of skates hauled,
    b. Standardizing samples to catch per unit of effort (CPUE) by dividing catch values of halibut pounds and numbers by the skates hauled for each sample, and
    c. Calculating the average size (weight) of legal-sized halibut by dividing the pounds caught by the numbers caught.
2. NOAA RACE Division groundfish trawl survey data obtained from NOAA during the discovery process, for many but not all years from 1953 through 2007 (Figure 2). This dataset contained only positive records (i.e., only data when the species of interest were caught, but no records for samples when the target species were not caught) for halibut, cod, and sablefish (Figure 2). Therefore, the data could be used to compare average weight of halibut, cod, and sablefish among locations, but not abundance (since an important aspect of abundance is measured when no fish are caught).

Data in both datasets that occurred outside the boundaries of the study area (the colored areas in figures 1 and 2) were deleted prior to analysis. Likewise, data from areas within 3 miles of the offshore islands was also excluded, because those areas were outside the mainland territorial limit, but technically considered inside the 3-mile limit. Furthermore, for the IPHC data set, there was too little data around the offshore islands for realistic analyses. Records that had a performance value of less than 1 were deleted form the NOAA trawl survey dataset.

Mapping and Geospatial Data

Map Creation.- Investigating the hypotheses required bringing all data into a Geographical Information Systems (GIS) cartographic environment. All mapping and editing took place in an ESRI ArcGIS Desktop 9.0 environment. The maps utilize a 1:63,360 resolution Alaska state coastline obtained from the Alaska Department of Natural Resources, Land Records Information Section (http://fox.dnr.state.ak.us/SpatialUtility/SUC?cmd=vmd&layerid=56). Additionally, the maps utilize a 3-mile line dataset along the Alaska coastline. These data are included in NOAA's "Approved Maritime Limits for Alaska, USA" dataset, and are available from NOAA's National Ocean Service, Office of Coast Survey (http://nauticalcharts.noaa.gov/csdl/MB_data/metadata/MB_AKmet.htm).

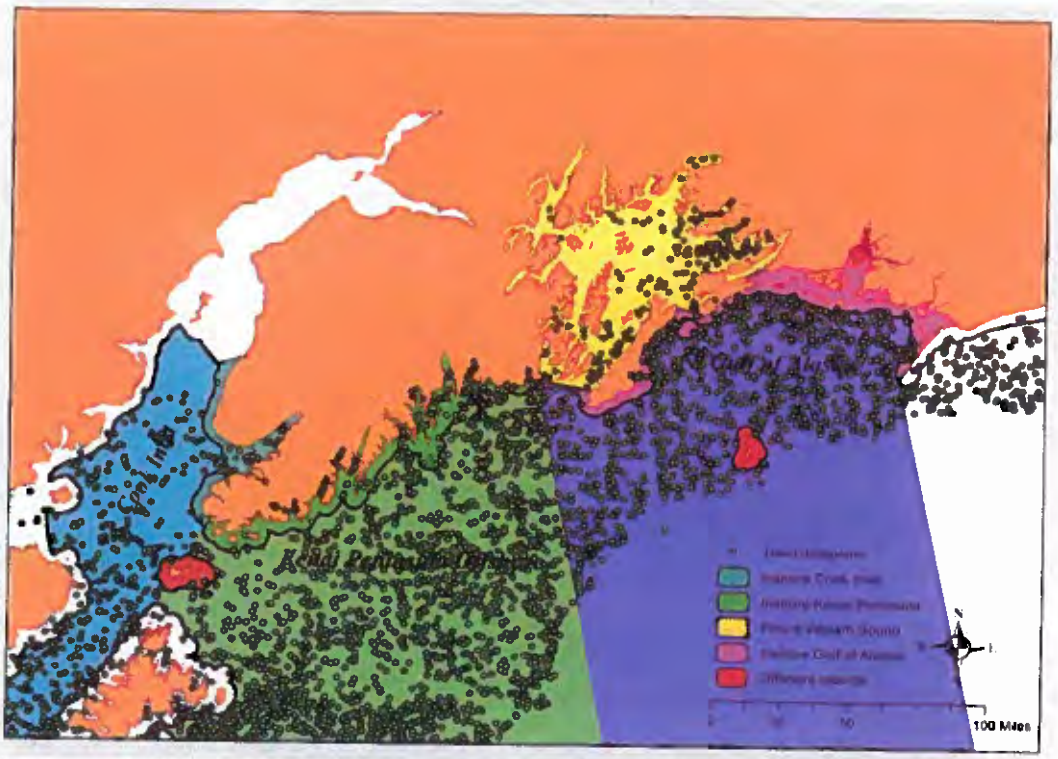


Figure 2. Map of study area showing the 3-mile territorial limit, the seven zones used for comparison, and the NOAA trawl survey sampling locations.

Polygon Creation.- The maps also included polygon data that were created specifically for this project to define the boundaries of certain geographical areas so that comparisons could be made among areas. Inshore polygons were created by using the Alaska Coastline 1:63,360 dataset and the 3-mile line data from the Approved Maritime Limits for Alaska, USA dataset, mentioned above, as edge boundaries. One inshore polygon representing the complete extent of the analysis area was created first. This inshore polygon was subsequently subdivided into four smaller polygons representing specific inshore regions: Inshore Cook Inlet; Inshore Kenai Peninsula; Inshore Gulf of Alaska; Prince William Sound (Figures 1 and 2).

Additionally, several offshore polygons were created for the analysis. The 3-mile line data from the Approved Maritime Limits for Alaska, USA dataset was used to produce the landward edge of the offshore polygons. Similar to the inshore polygons, initially one polygon was created covering the entire extent of the analysis area, for a basic comparison of inside vs. outside the 3-mile line. That polygon was then subdivided into several smaller polygons for more regionally oriented comparisons (Figures 1 and 2). Lastly, Figure 3 illustrates a third set of polygons that was created following Ganley and Wheeler's (2000) descriptions of traditional fishing areas (see their Figures 15-19), based on a GIS dataset obtained from Matt Ganley (personal communication).

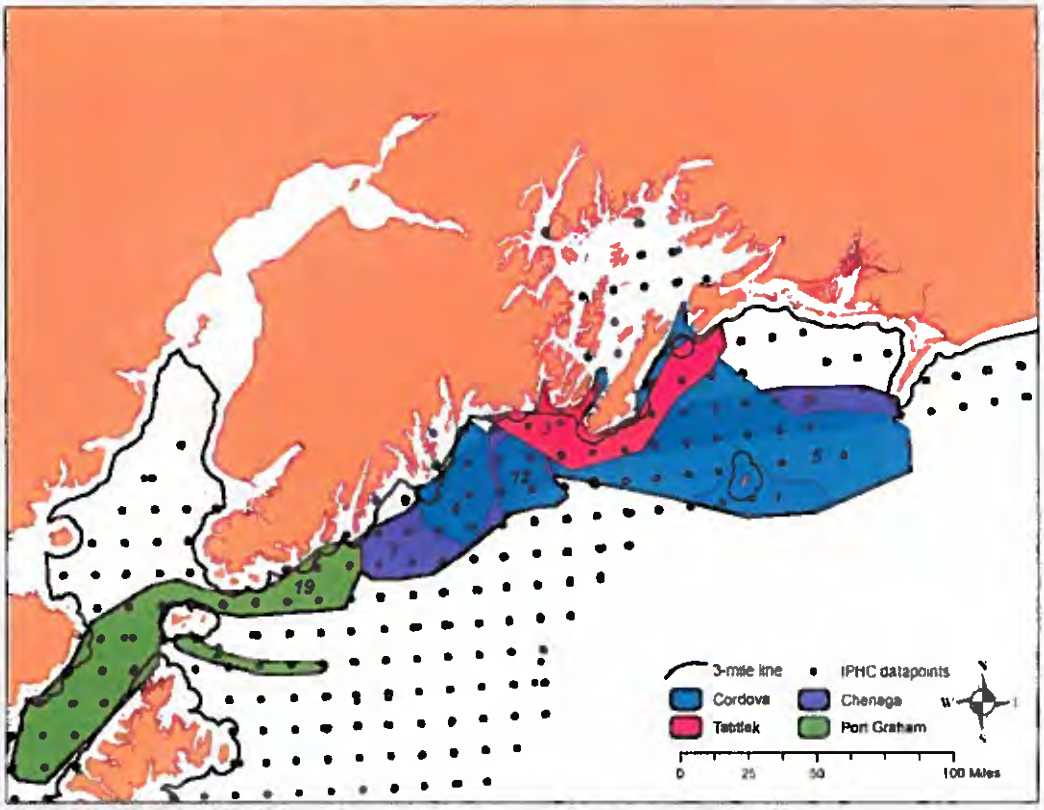


Figure 3. Map showing some of the traditional fishing areas described by Ganley (2000) plus the IPHC longline sampling locations.

Linking Sampling Locations to Polygons.- Point data representing fishing locations were created from Lat / Long coordinates included in the original data tables obtained from IPHC and NOAA. The original data tables were updated with information by creating a new variable naming each location regarding datapoint location as it pertains to the polygons (inshore, offshore, and traditional fishing areas) described above. Data table updates were performed by selecting points within a given polygon and updating the records accordingly. For the traditional fishing areas, a variable specific to each traditional polygon was created in the data tables. The data tables were updated in the ArcGIS environment and exported for the analysis.

Geographical Comparisons

The various areas inside and outside the 3-mile line were statistically compared to test the hypotheses at three independent levels: all inside vs. all outside the 3-mile line; regional inside vs. adjacent regional outside; and traditional (outside) fishing areas vs. the closest inside zone.

Fish attributes in offshore traditional fishing areas were compared to the nearest zones inside the 3-mile line. When sampling data within a traditional fishing area polygon occurred inside the 3-mile line (see Figure 3), that data was included in the inshore area for the analysis. Data was only compared among traditional areas and inshore areas that

were accessible to the particular village (see Figure 3) and when there was sufficient data from both the traditional area and the relevant inshore area to support a comparison.

Statistical Methods

The dependent variables from the IPHC dataset included halibut pounds CPUE, halibut numbers CPUE, and average halibut weight. The dependent variables from the NOAA dataset included average weight (kg) of halibut, cod, and sablefish.

Statistical analyses were conducted with Systat version 12 in a Windows PC environment. All dependent catch and size variables in both datasets were first tested for normal distribution and all were found to be non-normally distributed using a Shapiro-Wilks test for normality ($p < 0.0001$) (Appendices 1 and 2). Therefore, all comparisons between geographical areas were conducted using the non-parametric Kruskal-Wallis test when the comparison was among more than two groups, and the Mann-Whitney test when the comparison was between only two groups, which was usually the case in this study. The significance level for all tests was set at $\alpha = 0.05$.

Assumptions

A basic assumption of the analysis is that patterns of fish distribution and abundance revealed by these datasets generally reflects the patterns in those attributes without the effects of fishing. It must be remembered that contemporary fishing has a strong influence on the observed abundance and sizes of fishes. That is, areas that are conducive to high fish densities are also the areas targeted by the fisheries. Therefore, standing stock abundance and observed size often do not reflect the actual ability of a given area to produce and hold fish.

Results

IPHC Halibut Data

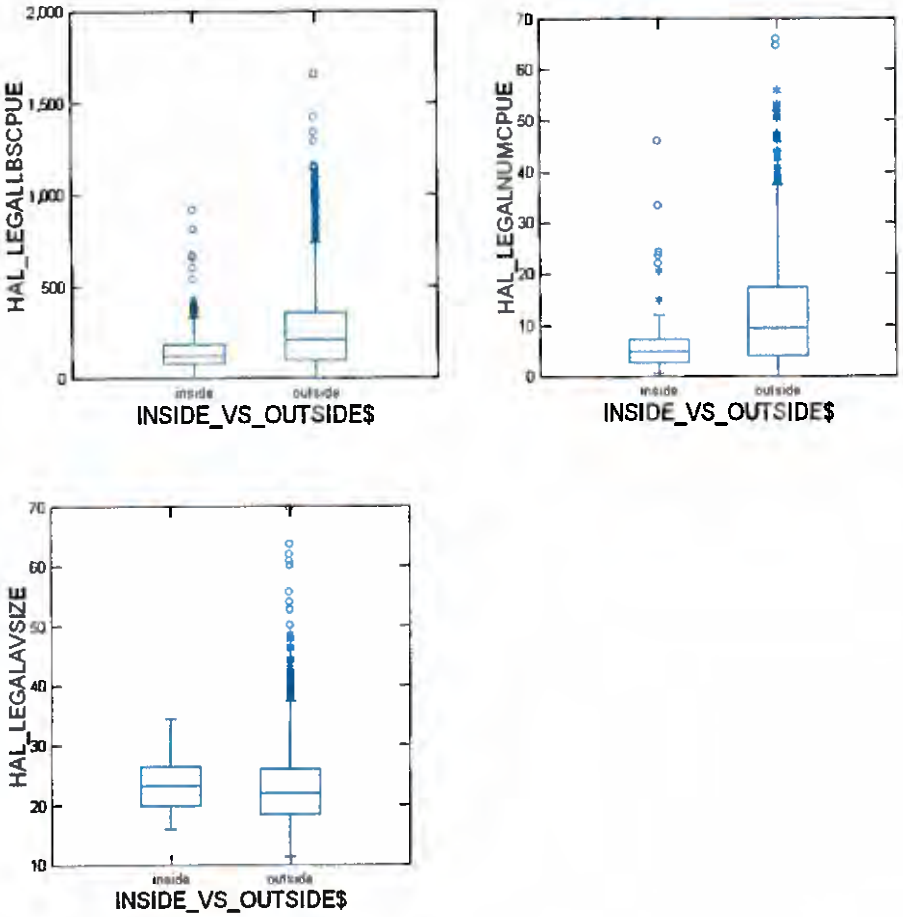
Inside vs Outside

Basic summary statistics for the IPHC data from inside and outside the 3-mile line are shown in Appendix 3. When tested for relative abundance and size for all IPHC data inside compared to all data outside the 3-mile limit, halibut were significantly much more abundant outside the 3-mile line than inside, both in total weight and numbers caught (Table 1, Figure 4). The average size was significantly less in the outside waters than inside, but only by about 1.3 pounds (Table 1, Figure 4).

Table 1. Comparison of IPHC abundance and size between inside and outside the 3-mile limit.

	Inside		Outside			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	159.4	120.4	263.6	208.1	111,413.5	<0.0001
HAL_LEGALNUMCPUE	6.3	4.9	12.4	9.6	36,268.5	<0.0001
HAL_LEGALAVSIZE	23.6	23.3	23.2	22.0	63,535.0	0.0222

Figure 4. Box plot comparisons of halibut weight CPU, numbers CPUE, and average weight inside and outside the 3-mile line.



Inside vs Outside by Zone

Basic summary statistics for the IPHC data from the five zones having IPHC longline data are shown in Appendix 4. When IPHC data for all five zones (Figure 1) were considered together, there was a significant effect of zone on halibut weight CPUE, numbers CPUE and average size (all $p < 0.0001$) (Figure 5).

Direct comparison between adjacent zones revealed that halibut were significantly more abundant, both in weight and numbers, in the outside Kenai Peninsula zone than in the inside Kenai Peninsula zone and in the outside Cook Inlet Zone than in the inside Kenai Peninsula zone (there was no IPHC longline data for the inside Cook Inlet zone) (Table 2, Figure 5). There was no significant difference in weight or numbers between the outside Gulf of Alaska zone and the inside Prince William Sound Zone. The average halibut weight was significantly greater in the outside Gulf of Alaska zone than in the Prince William Sound zone; the reverse was true for the inside Kenai peninsula zone compared

to the outside Cook Inlet zone. There was no difference in average weight between the outside Kenai Peninsula and inside Kenai Peninsula zones (Table 2, Figure 5).

Figure 5. Box plot comparisons of halibut weight CPU, numbers CPUE, and average weight among all five zones.

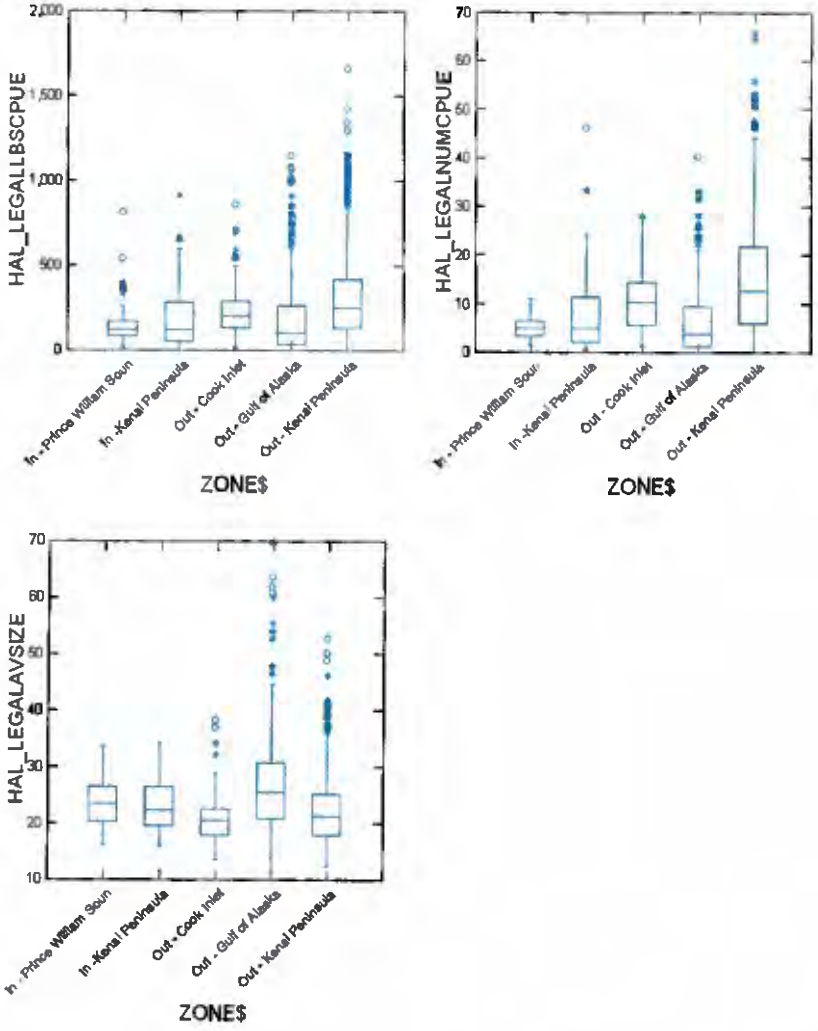


Table 2. Comparisons of IPHC abundance and size between inside and outside the 3-mile limit among adjacent zones.

	In-Kenai Peninsula		Out-Kenai Peninsula			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
HAL_LEGALLBSCPUE	**186.3**	**120.4**	**309.8**	**252.6**	**21454.5**	**<0.0001**
HAL_LEGALNUMCPUE	**8.4**	**5.0**	**15.5**	**12.8**	**7077.5**	**<0.0001**
HAL_LEGALAVSIZE	23.1	23.4	22.2	21.3	14141.0	0.0973

	In-Prince William Sound		Out-Gulf of Alaska			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	143.1	120.1	192.0	105.4	27866	0.3748
HAL_LEGALNUMCPUE	5.1	4.9	6.7	3.9	9953.0	0.3059
HAL_LEGALAVSIZE	23.9	23.5	26.8	25.5	7566.0	0.0359

	In-Kenai Peninsula		Out-Cook Inlet			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	186.3	120.4	223.6	203.5	7192.0	0.0004
HAL_LEGALNUMCPUE	8.4	5.0	10.8	10.3	2342.0	0.0001
HAL_LEGALAVSIZE	23.1	23.4	20.7	20.6	4898.0	0.0023

Inside vs Outside by Traditional Areas

Basic summary statistics for the IPHC data from the traditional fishing areas is shown in Appendix 5. Specific results for the comparison of weight, numbers, and average size between traditional outside fishing areas and their adjacent inside zones are too voluminous to be shown here and instead are shown in Appendix 6. Table 3 summarizes those results.

Of the eight traditional areas (Figure 3) that were compared to the inside Kenai Peninsula zone, halibut weight CPUE was greater in four, was no different in one, and was less in three than in the inside zone (Table 3). Of the six traditional outside areas that were compared to the inside Prince William Sound zone, halibut weight CPUE was greater in two, was no different in one, and was less in three than in the inside zone (Table 3).

Of the eight traditional areas (Figure 3) that were compared to the inside Kenai Peninsula zone, halibut numbers CPUE was greater in two, was no different in four, and was less in two than in the inside zone (Table 3). Of the six traditional outside areas that were compared to the inside Prince William Sound zone, halibut numbers CPUE was greater in two, was no different in four, and was less in one than in the inside zone (Table 3).

On the other hand, of the eight traditional areas (Figure 3) that were compared to the inside Kenai Peninsula zone, halibut average size CPUE was greater in four, was no different in three, and was less in one than in the inside zone (Table 3). Of the six traditional outside areas that were compared to the inside Prince William Sound zone, halibut average size was greater in four and was no different in two than in the inside zone (Table 3).

Table 3. Summary of results of IPHC longline halibut weight CPUE, numbers CPUE, and average weight comparisons between traditional fishing areas and adjacent inside zones (complete results are shown in Appendices 6 and 7). Plus sign indicates that the traditional area was significantly greater, minus sign indicates traditional area was significantly less, and ND indicates non-significance.

	Inshore Kenai			Prince William Sound		
Traditional Area	CPUE Weight	CPUE Numbers	Average size	CPUE Weight	CPUE Numbers	Average size
Chenega 7	ND	ND	+	ND	ND	+
Chenega 9	-	ND	ND	-	ND	ND
Cordova 1	+	ND	+	+	ND	+
Cordova 4	+	ND	+	+	+	+
Cordova 12	-	-	+	-	-	+
P Graham 2	+	+	ND			
P Graham 19	+	+	-			
Tatitlek 3	-	-	ND	-	ND	ND

NOAA Trawl Data

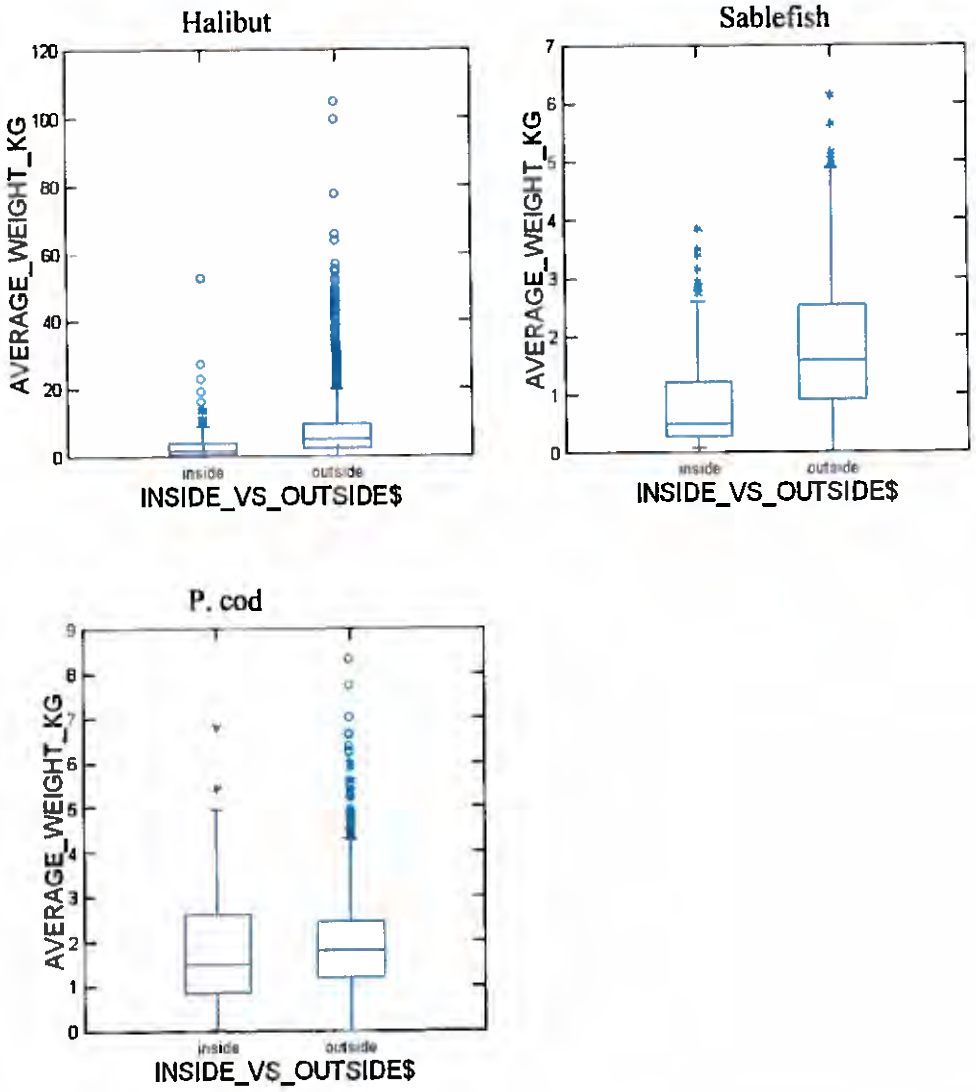
Inside vs Outside

Basic summary statistics for the NOAA trawl data from inside and outside the 3-mile line are shown in Appendix 8. When each of the three species were tested for differences in average weights inside compared to outside the 3-mile limit, all three species were significantly larger outside the 3-mile line than inside (Table 4, Figure 6).

Table 4. Comparison of NOAA trawl average size (kg) between inside and outside the 3-mile limit.

	Inside		Outside			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
Halibut average weight	3.36	1.85	7.65	5.11	152,432.5	<0.0001
Sablefish average weight	0.86	0.49	1.74	1.59	83,052.5	<0.0001
P. cod average weight	1.75	1.51	1.91	1.82	148,421.0	0.0147

Figure 6. Box plot comparisons of NOAA trawl survey average weights for halibut, sablefish, and Pacific cod.



Inside vs Outside by Zone

Basic summary statistics for the NOAA trawl average weights from the seven zones are shown in Appendix 8. When NOAA average weight data for all seven zones (Figure 1) were considered together in K-W tests by species, there was a significant effect of zone on halibut, sablefish, and cod weights (all $p < 0.0001$).

Direct comparison between adjacent inside and outside zones revealed that Pacific halibut were significantly larger outside than inside the 3-mile line in three out of four comparisons and not different in the fourth comparison (Table 5, Appendix 9). Sablefish were significantly larger outside than inside in four of four zonal comparisons (Table 5,

Appendix 9). Pacific cod were significantly larger inside than outside in two of four zone comparisons and not different in the other two (Table 5, Appendix 9).

Table 5. Comparisons of NOAA trawl average weights between inside and outside the 3-mile limit among adjacent zones.

	In-Cook Inlet		Out-Cook Inlet			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
Halibut average weight	**2.06**	**1.37**	**5.17**	**3.63**	**43994.5**	**0.0002**
Sablefish average weight	**0.50**	**0.48**	**1.36**	**1.22**	**613.5**	**0.0098**
P. cod average weight	**1.10**	**0.92**	**1.78**	**1.81**	**2343.0**	**0.0241**

	In-Kenai Peninsula		Out-Kenai Peninsula			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
Halibut average weight	7.64	4.69	8.78	6.44	19465.5	0.1467
Sablefish average weight	**1.10**	**0.72**	**1.97**	**1.89**	**17174.00**	**<0.0001**
P. cod average weight	2.03	1.96	1.85	1.81	40856.5	0.2946

	In-Gulf of Alaska		Out-Gulf of Alaska			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
Halibut average weight	**1.67**	**0.88**	**6.39**	**3.73**	**8901.0**	**<0.0001**
Sablefish average weight	**0.78**	**0.40**	**1.40**	**1.07**	**9467.5**	**<0.0001**
P. cod average weight	1.78	1.51	2.14	1.90	6048.0	0.0779

	In-Prince William Sound		Out-Gulf of Alaska			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
Halibut average weight	**3.50**	**2.27**	**6.39**	**3.73**	**53308.0**	**<0.0001**
Sablefish average weight	**0.75**	**0.48**	**1.40**	**1.07**	**27294.5**	**<0.0001**
P. cod average weight	**1.63**	**1.21**	**2.14**	**1.90**	**18114.5**	**0.0005**

Discussion

The IPHC longline data revealed that halibut were significantly more abundant per skate fished (a surrogate for per area of habitat) outside the 3-mile line than inside the line (Table 1). When subdivided by zone, halibut appeared to be more abundant in two of three outside zones compared to adjacent inside zones, but not different in the third (Table 2). When subdivided even further into traditional fishing areas, abundance was roughly as likely to be greater, lesser, or not different in outside traditional areas than in adjacent inside zones (Table 3).

What is a plausible explanation for the pattern of reduced likelihood of greater halibut abundance as the size of the study area decreases? One is that the traditional fishing areas are traditional because that is where halibut are most likely to be abundant and large, and

therefore where the greatest fishing effort is expended. If there is such an effect of fisheries removals as suspected, the fisheries-independent data used for this analysis from the traditional areas would be biased downward by the continual removal of both large and numerous halibut. Ideally, this analysis would have included the number and sizes of halibut removed from each area or zone, as well as the standing stock data used in this analysis, but such removal data is not readily available by specific geographic location. Therefore, this study could only be performed with the fisheries-independent sampling data, although the results must be considered in the context of routine removals from the most commonly targeted fishing areas. The fact that, even though halibut were no more abundant in traditional outside areas than in adjacent inside zones, they were significantly larger in the outside traditional areas (Table 3), supports the notion that the traditional areas are more productive for halibut than the inside zones. Further analyses of relative abundance inside vs. outside might be improved if halibut landings data, by statistical catch area, could be obtained and successfully incorporated with the fisheries-independent data.

Halibut were somewhat smaller outside than inside the 3-mile line based on the IPHC longline data (Table 1), but they were significantly larger outside than inside based on comparisons of traditional fishing areas to adjacent inside zones (Table 3). Based on the NOAA trawl data, halibut, sablefish and Pacific cod were mostly larger outside the 3-mile line. Again, these observations may be somewhat biased by routine harvest of the three species. Fishing removals tend to "fish-down" the sizes because most fishing activities are geared to catch larger individuals. Also, when the population is under exploitation, it tends to consist of younger and hence smaller individuals. Because the preferred fishing grounds are primarily in the OCS, it is possible that heavier fishing pressure there has reduced the average fish size outside the 3- mile line relative to inside the line. If this is the case, the differences observed in this study could be even more dramatic than reported here.

One other factor that influences relative abundance and size of the species of interest inside and outside of the 3-mile line is seasonal migration. Not much information is available to directly address this phenomenon, although local fishermen are very familiar with the fact that halibut, cod, and sablefish are mostly absent inshore and more available in the OCS during winter. A review of information on halibut winter offshore movement was provided by Knudsen (2008) and citations therein. Shimada and Kimura (1994) describe the general seasonal movement by Pacific cod from shallower inshore areas to deeper spawning grounds in the winter. All the IPHC longline data used in this analysis pertained only to summer (May through September), so could not be used for assessment of seasonal abundance. Similarly, the NOAA trawl data available for this study was unusable for relative seasonal abundance inshore vs. the OCS because it was almost entirely based on summer sampling only and it lacked records of trawl samples where halibut, sablefish, or Pacific cod were not captured.

Conclusions

The fisheries-independent IPHC longline and NOAA trawl survey data used in this study tends to support the general hypotheses that fish are, and likely were, larger and more numerous outside the 3-mile territorial limit than inside the line. The conclusions listed below are likely to be conservative in that the observed results are strongly influenced by contemporary and ongoing fisheries for all three of the target species. The fisheries in many cases may be focused on the outside areas analyzed in these studies, so may have reduced the size and abundance disproportionately there. Given this important caveat, the following conclusions can be made directly from the data.

1. Overall, Pacific halibut were more abundant outside the 3-mile territorial limit than inside, based on IPHC longline data.
2. When broken down by zone, halibut were more abundant in two out of three outside zones compared to the nearest inside zone, and not different in the third zone, based on IPHC longline data.
3. When analyzed by traditional outside fishing area, halibut abundance was no different than adjacent inside zones, based on IPHC longline data, but abundance in traditional areas may be biased downward by the effects of heavy fishing pressure.
4. Pacific halibut tended to be significantly larger in traditional outside fishing areas than in adjacent inside zones, based on IPHC longline data.
5. Pacific halibut, sablefish, and Pacific cod were all significantly larger outside the 3-mile territorial limit than inside, based on the NOAA trawl survey data.
6. When subdivided by zone, Pacific halibut, sablefish, and Pacific cod were significantly larger outside than inside in three out of four, four of four, and two of four comparisons, respectively, based on the NOAA trawl survey data.

The fact that halibut tended to be more abundant, and that halibut (in the case of NOAA trawl data), sablefish, and Pacific cod tended to be larger, outside the 3- mile territorial limit than inside, lends credence to the argument that local Chugach fishermen routinely fished in the OCS.

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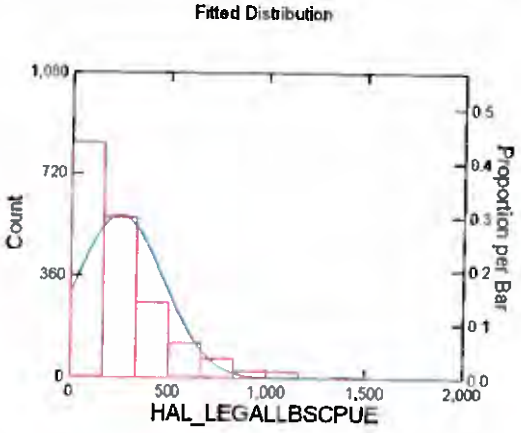
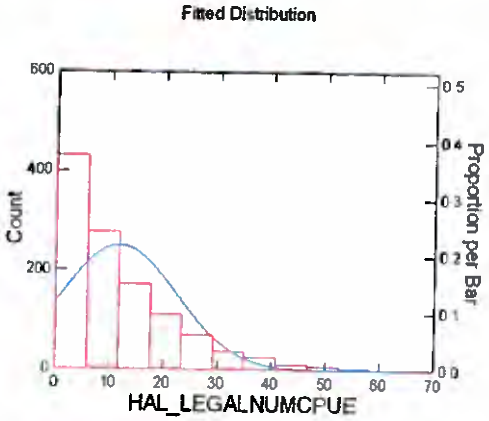
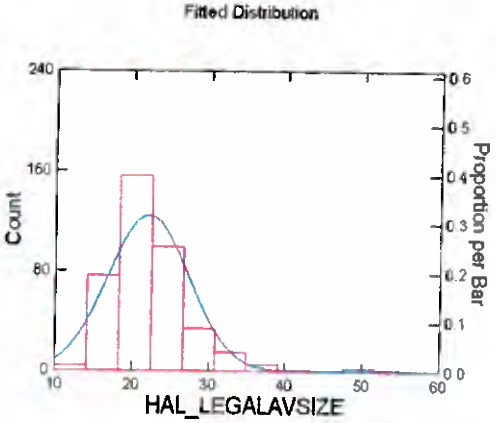
Shimada, A.M., and D.K. Kimura. 1994. Seasonal movements of Pacific cod, *Gadus macrocephalus*, in the eastern Bering Sea and adjacent waters based on tag-recapture data. Fishery Bulletin 92(4).

Appendix 1. Basic statistics, distribution, and goodness of fit of catch and size variables, for all IPHC longline data combined.

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	1,903	1,150	1,146
Minimum	0.00000	0.00000	11.42750
Maximum	1,657.86736	65.80956	69.72852
Median	197.15786	8.63373	22.09528
Arithmetic Mean	253.61671	11.80229	23.20833
Standard Error of Arithmetic Mean	5.04796	0.31470	0.20361
Standard Deviation	220.20923	10.67191	6.89287
Coefficient of Variation	0.86828	0.90422	0.29700
Skewness(G1)	1.63900	1.50814	1.82881
Standard Error of Skewness	0.05611	0.07214	0.07226
Kurtosis(G2)	3.47296	2.57754	6.34435
Standard Error of Kurtosis	0.11215	0.14415	0.14440
Shapiro-Wilk Statistic	0.85831	0.86115	0.88000
Shapiro-Wilk p-value	0.00000	0.00000	0.00000







Appendix 2. Basic statistics, distribution, and goodness of fit of average weight variables, by species, for all NOAA trawl data combined.

Results for SPECIES_NAME$ = Halibut

	AVERAGE_WEIGHT_KG
N of Cases	2,684
Minimum	0.01621
Maximum	104.37200
Median	4.71312
Arithmetic Mean	7.26892
Standard Error of Arithmetic Mean	0.16037
Standard Deviation	8.30846
Coefficient of Variation	1.14301
Skewness(G1)	3.51424
Standard Error of Skewness	0.04725
Kurtosis(G2)	21.36145
Standard Error of Kurtosis	0.09447
Shapiro-Wilk Statistic	0.68947
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Sablefish

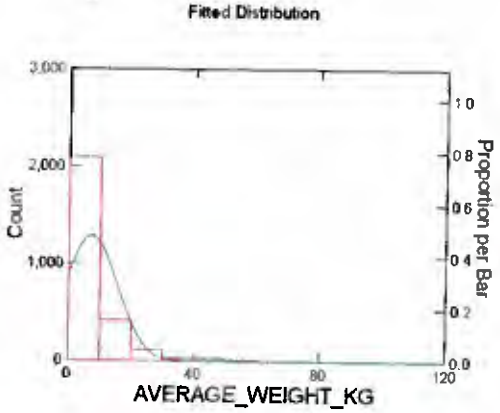
	AVERAGE_WEIGHT_KG
N of Cases	2,205
Minimum	0.02005
Maximum	6.13710
Median	1.45150
Arithmetic Mean	1.67170
Standard Error of Arithmetic Mean	0.02255
Standard Deviation	1.05899
Coefficient of Variation	0.63348
Skewness(G1)	0.63509
Standard Error of Skewness	0.05213
Kurtosis(G2)	-0.20367
Standard Error of Kurtosis	0.10421
Shapiro-Wilk Statistic	0.95371
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = P cod

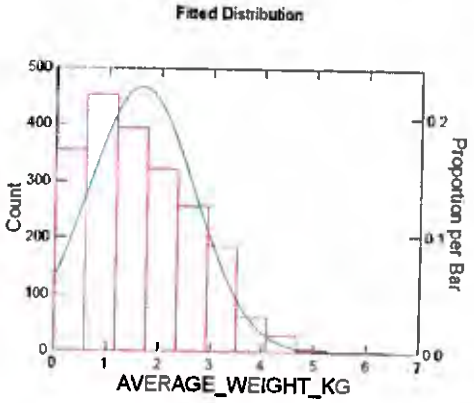
	AVERAGE_WEIGHT_KG
N of Cases	2,297
Minimum	0.00067
Maximum	8.30050
Median	1.81440
Arithmetic Mean	1.89650

	AVERAGE_WEIGHT_KG
Standard Error of Arithmetic Mean	0.02176
Standard Deviation	1.04277
Coefficient of Variation	0.54984
Skewness(G1)	1.02601
Standard Error of Skewness	0.05108
Kurtosis(G2)	2.68720
Standard Error of Kurtosis	0.10211
Shapiro-Wilk Statistic	0.95083
Shapiro-Wilk p-value	0.00000

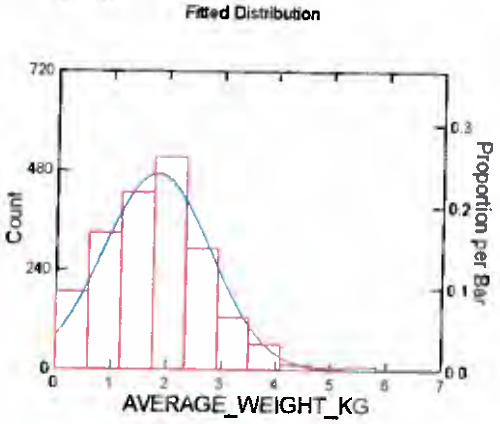
Halibut



Sablefish



Pacific cod



Appendix 3. Basic statistics for IPHC longline catch and size variables, comparing all inside data vs. all outside data.

Results for INSIDE_VS_OUTSIDE$ = inside

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	183	108	108
Minimum	0.00000	0.59772	16.04547
Maximum	911.12736	46.02443	34.34856
Median	120.37102	4.91874	23.33646
Arithmetic Mean	159.41155	6.34457	23.60875
Standard Error of Arithmetic Mean	10.18515	0.61796	0.41546
Standard Deviation	137.78220	6.42208	4.31763
Coefficient of Variation	0.86432	1.01222	0.18288
Skewness(G1)	2.50787	3.53895	0.47113
Standard Error of Skewness	0.17961	0.23252	0.23252
Kurtosis(G2)	8.43454	16.23816	-0.45530
Standard Error of Kurtosis	0.35735	0.46106	0.46106
Shapiro-Wilk Statistic	0.76103	0.64099	0.96803
Shapiro-Wilk p-value	0.00000	0.00000	0.01056

Results for INSIDE_VS_OUTSIDE$ = outside

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	1,720	1,042	1,038
Minimum	0.00000	0.00000	11.42750
Maximum	1,657.86736	65.80956	69.72852
Median	208.11944	9.56352	21.98283
Arithmetic Mean	263.63970	12.36796	23.16667
Standard Error of Arithmetic Mean	5.42385	0.33660	0.22061
Standard Deviation	224.94271	10.86534	7.10760
Coefficient of Variation	0.85322	0.87851	0.30680
Skewness(G1)	1.56503	1.41446	1.84251
Standard Error of Skewness	0.05901	0.07577	0.07592
Kurtosis(G2)	3.17824	2.27697	6.13495
Standard Error of Kurtosis	0.11795	0.15140	0.15169
Shapiro-Wilk Statistic	0.86888	0.87621	0.87504
Shapiro-Wilk p-value	0.00000	0.00000	0.00000

Appendix 4. Basic statistics for all IPHC longline catch and size variables, by zones.

Results for ZONE$ = In -Kenai Peninsula

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	69	42	42
Minimum	0.00000	0.59772	16.04547
Maximum	911.12736	46.02443	34.34856
Median	120.37102	4.99662	22.38879
Arithmetic Mean	186.27193	8.37737	23.14140
Standard Error of Arithmetic Mean	21.39010	1.48286	0.69787
Standard Deviation	177.67952	9.61002	4.52268
Coefficient of Variation	0.95387	1.14714	0.19544
Skewness(G1)	1.78035	2.19506	0.53081
Standard Error of Skewness	0.28874	0.36536	0.36536
Kurtosis(G2)	3.82584	5.39479	-0.38703
Standard Error of Kurtosis	0.57010	0.71663	0.71663
Shapiro-Wilk Statistic	0.81935	0.73736	0.96126
Shapiro-Wilk p-value	0.00000	0.00000	0.16381

Results for ZONE$ = In - Prince William Soun

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	114	66	66
Minimum	26.85986	1.40877	16.35357
Maximum	811.97806	10.95819	33.73342
Median	120.08595	4.91874	23.46917
Arithmetic Mean	143.15395	5.05097	23.90616
Standard Error of Arithmetic Mean	9.76514	0.28258	0.51573
Standard Deviation	104.26318	2.29567	4.18980
Coefficient of Variation	0.72833	0.45450	0.17526
Skewness(G1)	3.23839	0.52058	0.48001
Standard Error of Skewness	0.22647	0.29495	0.29495
Kurtosis(G2)	15.96530	-0.34430	-0.43049
Standard Error of Kurtosis	0.44926	0.58207	0.58207
Shapiro-Wilk Statistic	0.72494	0.96641	0.96571
Shapiro-Wilk p-value	0.00000	0.07067	0.06478

Results for ZONE$ = Out - Cook Inlet

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	287	179	179
Minimum	19.11777	1.32827	13.62798
Maximum	856.88320	28.17534	38.25841
Median	203.47890	10.29406	20.57938
Arithmetic Mean	223.59843	10.81497	20.71808
Standard Error of Arithmetic Mean	7.38288	0.43793	0.30420

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
Standard Deviation	125.07394	5.85914	4.06992
Coefficient of Variation	0.55937	0.54176	0.19644
Skewness(G1)	1.24327	0.55230	1.05354
Standard Error of Skewness	0.14384	0.18157	0.18157
Kurtosis(G2)	2.88276	-0.29454	2.69895
Standard Error of Kurtosis	0.28671	0.36121	0.36121
Shapiro-Wilk Statistic	0.92673	0.95841	0.94157
Shapiro-Wilk p-value	0.00000	0.00004	0.00000

Results for ZONE$ = Out - Kenai Peninsula

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	969	584	584
Minimum	0.00000	0.20125	12.34404
Maximum	1,657.86736	65.80956	52.69574
Median	252.55802	12.79060	21.29479
Arithmetic Mean	309.82362	15.53792	22.19505
Standard Error of Arithmetic Mean	7.69256	0.50363	0.24781
Standard Deviation	239.45987	12.17081	5.98849
Coefficient of Variation	0.77289	0.78330	0.26981
Skewness(G1)	1.41952	1.11842	1.27663
Standard Error of Skewness	0.07857	0.10110	0.10110
Kurtosis(G2)	2.62035	1.07791	2.87430
Standard Error of Kurtosis	0.15697	0.20186	0.20186
Shapiro-Wilk Statistic	0.88891	0.90802	0.92392
Shapiro-Wilk p-value	0.00000	0.00000	0.00000

Results for ZONE$ = Out - Gulf of Alaska

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	464	279	275
Minimum	0.00000	0.00000	11.42750
Maximum	1,140.41049	40.25051	69.72852
Median	105.38607	3.88130	25.54508
Arithmetic Mean	191.95787	6.72899	26.82385
Standard Error of Arithmetic Mean	10.13996	0.44348	0.55522
Standard Deviation	218.42140	7.40757	9.20736
Coefficient of Variation	1.13786	1.10084	0.34325
Skewness(G1)	1.82281	1.70619	1.55614
Standard Error of Skewness	0.11335	0.14587	0.14691
Kurtosis(G2)	3.32331	2.94425	3.80816
Standard Error of Kurtosis	0.22622	0.29072	0.29279
Shapiro-Wilk Statistic	0.78656	0.80517	0.89287
Shapiro-Wilk p-value	0.00000	0.00000	0.00000

Appendix 5. Basic statistics for each traditional area.

Results for ZONE$ = Chenega - 7

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	142	85	85
Minimum	4.58257	0.37735	14.36990
Maximum	725.22330	28.71399	52.69574
Median	136.10249	3.78556	25.62730
Arithmetic Mean	165.10879	5.40552	27.84093
Standard Error of Arithmetic Mean	11.17977	0.67788	0.80220
Standard Deviation	133.22238	6.24971	7.39591
Coefficient of Variation	0.80688	0.97567	0.26565
Skewness(G1)	1.30903	1.43139	1.22229
Standard Error of Skewness	0.20343	0.26115	0.26115
Kurtosis(G2)	2.06412	1.60542	1.70064
Standard Error of Kurtosis	0.40416	0.51676	0.51676
Shapiro-Wilk Statistic	0.89213	0.83454	0.90601
Shapiro-Wilk p-value	0.00000	0.00000	0.00001

Results for ZONE$ = Chenega 9

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	129	77	76
Minimum	0.00000	0.00000	14.43230
Maximum	855.04327	23.51031	63.62240
Median	82.27439	4.02505	24.67420
Arithmetic Mean	135.41973	5.77565	27.27757
Standard Error of Arithmetic Mean	13.21065	0.62503	1.29354
Standard Deviation	150.04409	5.48465	11.27680
Coefficient of Variation	1.10799	0.94962	0.41341
Skewness(G1)	2.13903	1.05894	1.51667
Standard Error of Skewness	0.21321	0.27391	0.27564
Kurtosis(G2)	5.89132	0.54729	2.10721
Standard Error of Kurtosis	0.42333	0.54146	0.54480
Shapiro-Wilk Statistic	0.78133	0.87948	0.84729
Shapiro-Wilk p-value	0.00000	0.00000	0.00000

Results for ZONE$ = Cordova 1

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	19	12	12
Minimum	64.88465	2.13471	25.29015
Maximum	807.55885	7.96960	38.08122
Median	186.42638	5.34039	31.01405
Arithmetic Mean	233.14333	5.36451	31.41171
Standard Error of Arithmetic Mean	36.26682	0.51787	1.17892

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
Standard Deviation	158.08338	1.79396	4.08391
Coefficient of Variation	0.67805	0.33441	0.13001
Skewness(G1)	2.80992	-0.25491	0.34595
Standard Error of Skewness	0.52377	0.63730	0.63730
Kurtosis(G2)	10.17653	-0.57255	-0.70112
Standard Error of Kurtosis	1.01427	1.23225	1.23225
Shapiro-Wilk Statistic	0.70552	0.97247	0.95351
Shapiro-Wilk p-value	0.00006	0.93491	0.68877

Results for ZONE$ = Cordova 4

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	41	24	24
Minimum	62.95838	2.27703	19.24897
Maximum	544.53176	21.77408	41.80068
Median	219.22785	7.54265	27.26277
Arithmetic Mean	231.86857	8.74550	28.33299
Standard Error of Arithmetic Mean	20.32840	1.17105	1.20323
Standard Deviation	130.16528	5.73694	5.89462
Coefficient of Variation	0.56138	0.65599	0.20805
Skewness(G1)	0.82914	0.87695	0.81725
Standard Error of Skewness	0.36950	0.47226	0.47226
Kurtosis(G2)	0.11055	-0.09120	-0.01659
Standard Error of Kurtosis	0.72448	0.91778	0.91778
Shapiro-Wilk Statistic	0.92333	0.90158	0.92907
Shapiro-Wilk p-value	0.00873	0.02325	0.09294

Results for ZONE$ = Cordova 5

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	250	150	146
Minimum	0.00000	0.00000	11.43156
Maximum	996.98638	23.51031	53.92646
Median	110.72421	4.69073	24.46541
Arithmetic Mean	164.61328	5.73794	26.38666
Standard Error of Arithmetic Mean	11.10789	0.41958	0.72090
Standard Deviation	175.63110	5.13874	8.71069
Coefficient of Variation	1.06693	0.89557	0.33012
Skewness(G1)	1.90169	1.07606	0.77916
Standard Error of Skewness	0.15400	0.19804	0.20068
Kurtosis(G2)	4.30299	0.69364	0.19549
Standard Error of Kurtosis	0.30681	0.39358	0.39877

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
Shapiro-Wilk Statistic	0.80512	0.89224	0.94787
Shapiro-Wilk p-value	0.00000	0.00000	0.00003

Results for ZONE$ = Cordova 12

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	46	27	27
Minimum	4.58257	0.37735	14.36990
Maximum	725.22330	28.71399	50.08465
Median	63.69626	1.24525	25.75994
Arithmetic Mean	100.57313	2.85883	28.70234
Standard Error of Arithmetic Mean	18.55951	1.05224	1.55411
Standard Deviation	125.87674	5.46762	8.07538
Coefficient of Variation	1.25159	1.91254	0.28135
Skewness(G1)	3.28306	4.41356	0.76663
Standard Error of Skewness	0.35010	0.44785	0.44785
Kurtosis(G2)	13.72729	20.94493	0.64238
Standard Error of Kurtosis	0.68763	0.87207	0.87207
Shapiro-Wilk Statistic	0.65381	0.42432	0.93513
Shapiro-Wilk p-value	0.00000	0.00000	0.09238

Results for ZONE$ = P Graham 2

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	32	21	21
Minimum	65.80112	3.78556	17.00683
Maximum	675.62619	25.61658	29.51302
Median	206.18936	11.32046	20.97827
Arithmetic Mean	238.14211	11.70478	21.39912
Standard Error of Arithmetic Mean	26.47544	1.58882	0.76749
Standard Deviation	149.76768	7.28089	3.51708
Coefficient of Variation	0.62890	0.62204	0.16436
Skewness(G1)	1.25780	0.61069	0.79622
Standard Error of Skewness	0.41446	0.50119	0.50119
Kurtosis(G2)	1.34565	-0.85583	0.08170
Standard Error of Kurtosis	0.80937	0.97194	0.97194
Shapiro-Wilk Statistic	0.88615	0.88909	0.92814
Shapiro-Wilk p-value	0.00280	0.02162	0.12633

Results for ZONE$ = P Graham 19

	HAL_LEGALLBSCPUE	HAL_LEGALNUMCPUE	HAL_LEGALAVSIZE
N of Cases	169	105	105

	HAL_LEGALLBSCPU-E	HAL_LEGALNUMCPU-E	HAL_LEGALAVSIZE
Minimum	53.83329	2.26409	14.94176
Maximum	725.05930	34.86699	36.84427
Median	241.15373	10.95820	20.81133
Arithmetic Mean	273.09457	12.91278	21.26362
Standard Deviation	151.20880	7.69261	3.45888
Coefficient of Variation	0.55369	0.59574	0.16267
Skewness(G1)	0.92985	0.89013	1.19480
Standard Error of Skewness	0.18678	0.23572	0.23572
Kurtosis(G2)	0.54929	0.24115	3.00024
Standard Error of Kurtosis	0.37146	0.46731	0.46731
Shapiro-Wilk Statistic	0.93269	0.92777	0.93050
Shapiro-Wilk p-value	0.00000	0.00002	0.00003

Results for ZONE$ = Tatitlek 3

	HAL_LEGALLBSCPU-E	HAL_LEGALNUMCPU-E	HAL_LEGALAVSIZE
N of Cases	70	42	40
Minimum	0.00000	0.00000	15.38404
Maximum	796.42673	16.70396	48.64044
Median	67.19617	3.73695	23.10298
Arithmetic Mean	126.16485	5.00063	25.37579
Standard Error of Arithmetic Mean	18.70573	0.75048	1.39339
Standard Deviation	156.50340	4.86368	8.81258
Coefficient of Variation	1.24047	0.97261	0.34728
Skewness(G1)	2.20597	0.96130	0.96621
Standard Error of Skewness	0.28675	0.36536	0.37378
Kurtosis(G2)	5.67494	0.00116	0.12618
Standard Error of Kurtosis	0.56627	0.71663	0.73260
Shapiro-Wilk Statistic	0.75068	0.85542	0.89287
Shapiro-Wilk p-value	0.00000	0.00009	0.00119

Appendix 6. Results of Mann-Whitney comparisons of IPHC longline halibut weight CPUE, numbers CPUE, and average weight between traditional outside fishing areas and adjacent inside zones.

Chenega 7

	Chenega 7		In–Kenai Peninsula			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
HAL_LEGALLBSCPUE	165.1	136.1	185.8	117.8	4253.0	0.9853
HAL_LEGALNUMCPUE	6.4	3.8	7.9	3.8	1475	0.7552
HAL_LEGALAVSIZE	**27.8**	**25.6**	**23.8**	**23.9**	**2029.0**	**0.0047**

	Chenega 7		In-PWS			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
HAL_LEGALLBSCPUE	165.1	136.1	143.1	120.1	8428.0	0.5705
HAL_LEGALNUMCPUE	6.4	3.8	5.1	4.9	2613.0	0.4714
HAL_LEGALAVSIZE	**27.8**	**25.6**	**23.9**	**23.5**	**3739.0**	**0.0005**

Chenega 9

	Chenega 9		In-Kenai Peninsula			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
HAL_LEGALLBSCPUE	**135.4**	**82.3**	**186.2**	**120.4**	**3473.0**	**0.0110**
HAL_LEGALNUMCPUE	5.8	4.0	8.4	5.0	1347.5	0.1340
HAL_LEGALAVSIZE	27.3	24.7	23.1	22.4	1841.0	0.1685

	Chenega 9		In-PWS			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
HAL_LEGALLBSCPUE	**135.4**	**82.3**	**143.1**	**120.1**	**5835.0**	**0.0056**
HAL_LEGALNUMCPUE	5.8	4.0	5.1	4.9	2333.5	0.4008
HAL_LEGALAVSIZE	27.3	24.7	23.9	23.5	2724.0	0.3770

Cordova 1

	Cordova 1		In-Kenai Peninsula			
Variable	**Mean**	**Median**	**Mean**	**Median**	**M-W u Statistic**	**P-value**
HAL_LEGALLBSCPUE	**233.1**	**186.4**	**186.2**	**120.4**	**853.0**	**0.0452**
HAL_LEGALNUMCPUE	5.4	5.3	8.4	5.0	261.0	0.8515
HAL_LEGALAVSIZE	**31.4**	**31.0**	**23.1**	**22.4**	**463.0**	**<0.0001**

	Cordova 1		In-PWS			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	233.1	186.4	143.1	120.1	1633.0	0.0004
HAL_LEGALNUMCPUE	5.4	5.3	5.1	4.9	444.5	0.4512
HAL_LEGALAVSIZE	31.4	31.0	23.9	23.5	711.0	<0.0001

Cordova 4

	Cordova 4		In-Kenai Peninsula			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	231.9	219.2	186.2	120.4	1820.0	0.0122
HAL_LEGALNUMCPUE	8.7	7.5	8.4	5.0	617.0	0.1320
HAL_LEGALAVSIZE	28.3	27.3	23.1	22.4	762.0	0.0006

	Cordova 4		In-PWS			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	231.9	219.2	143.1	120.1	3422.0	<0.0001
HAL_LEGALNUMCPUE	8.7	7.5	5.1	4.9	1082.5	0.0082
HAL_LEGALAVSIZE	28.3	27.3	23.9	23.5	1148.0	0.0012

Cordova 5

	Cordova 5		In-Kenai Peninsula			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	164.6	110.7	186.2	120.4	7601.5	0.1313
HAL_LEGALNUMCPUE	5.7	4.7	8.4	5.0	2717.0	0.1737
HAL_LEGALAVSIZE	26.4	24.5	23.1	22.4	3617.0	0.0762

	Cordova 5		In-PWS			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	164.6	110.7	143.1	120.1	13173.0	0.2474
HAL_LEGALNUMCPUE	5.7	4.7	5.1	4.9	4672.0	0.5112
HAL_LEGALAVSIZE	26.4	24.5	23.9	23.5	5347.0	0.2009

Cordova 12

	Cordova 12		In-Kenai Peninsula			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	100.6	63.7	186.2	120.4	997.0	0.0008
HAL_LEGALNUMCPUE	2.8	1.2	8.4	5.0	227.5	<0.0001
HAL_LEGALAVSIZE	28.7	25.8	23.1	22.4	821.0	0.0018

	Cordova 12		In-PWS			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	100.6	63.7	143.1	120.1	1531.0	<0.0001
HAL_LEGALNUMCPUE	2.8	1.2	5.1	4.9	252.5	<0.0001
HAL_LEGALAVSIZE	28.7	25.8	23.9	23.5	1239.0	0.0032

Port Graham 2

	Port Graham 2		In-Kenai Peninsula			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	238.1	206.2	186.2	120.4	776.0	0.0167
HAL_LEGALNUMCPUE	11.7	11.3	8.4	5.0	272.0	0.0137
HAL_LEGALAVSIZE	21.4	21.0	23.1	22.4	531.0	0.1894

Port Graham 19

	Port Graham 19		In-Kenai Peninsula			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	273.1	241.2	186.2	120.4	3649.0	<0.0001
HAL_LEGALNUMCPUE	12.9	11.0	8.4	5.0	1198.5	<0.0001
HAL_LEGALAVSIZE	21.3	20.8	23.1	22.4	2713.0	0.0294

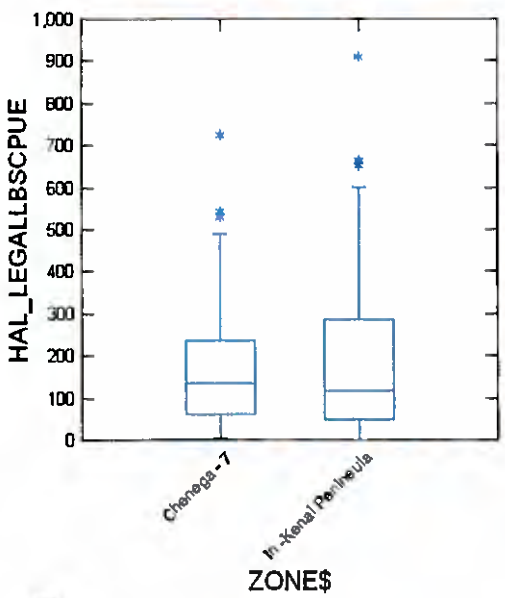
Tatitlek 3

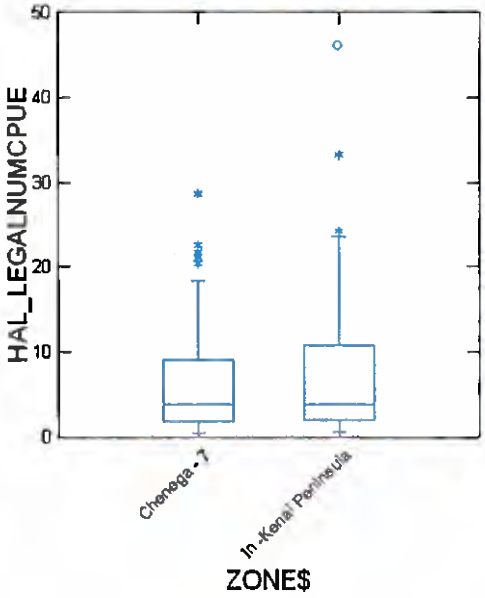
	Tatitlek 3		In-Kenai Peninsula			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	126.8	67.2	186.2	120.4	3128.5	0.0026
HAL_LEGALNUMCPUE	5.0	3.7	8.4	5.0	1111.0	0.0405
HAL_LEGALAVSIZE	25.4	23.1	23.1	22.4	800.0	0.7106

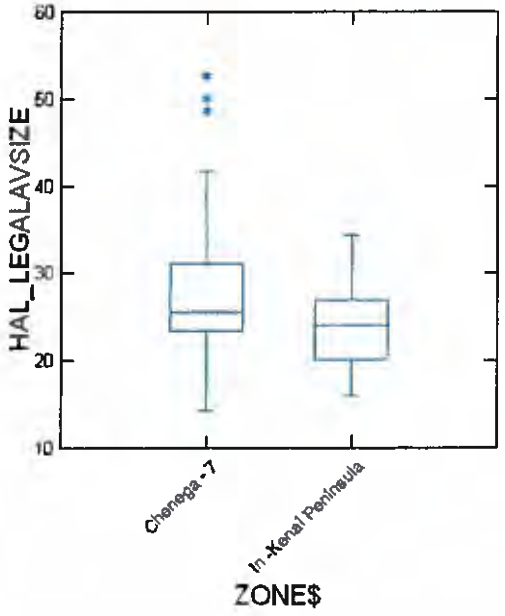
	Tatitlek 3		In-PWS			
Variable	Mean	Median	Mean	Median	M-W u Statistic	P-value
HAL_LEGALLBSCPUE	126.8	67.2	143.1	120.1	5145.0	0.0010
HAL_LEGALNUMCPUE	5.0	3.7	5.1	4.9	1612.5	0.1535
HAL_LEGALAVSIZE	25.4	23.1	23.9	23.5	1354.0	0.8246

Appendix 7. Graphics for comparisons of traditional outside fishing areas to adjacent inside zones.

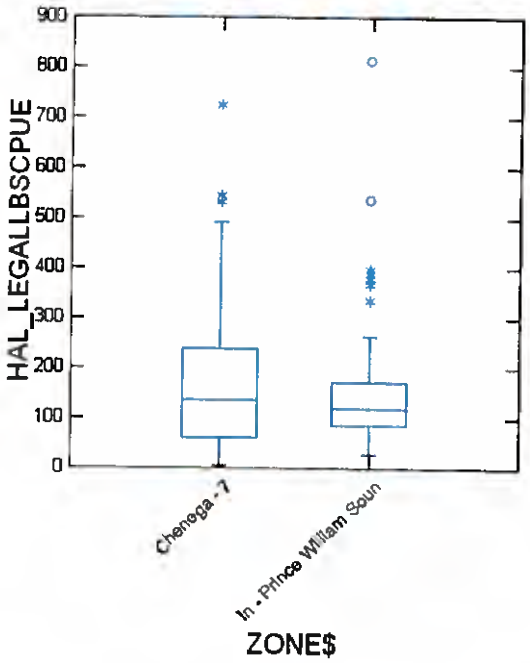
Chenega 7 vs. Inshore Kenai Peninsula

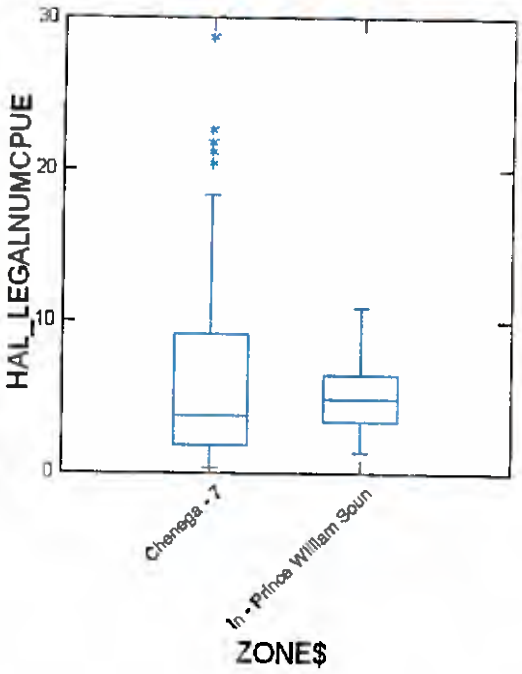


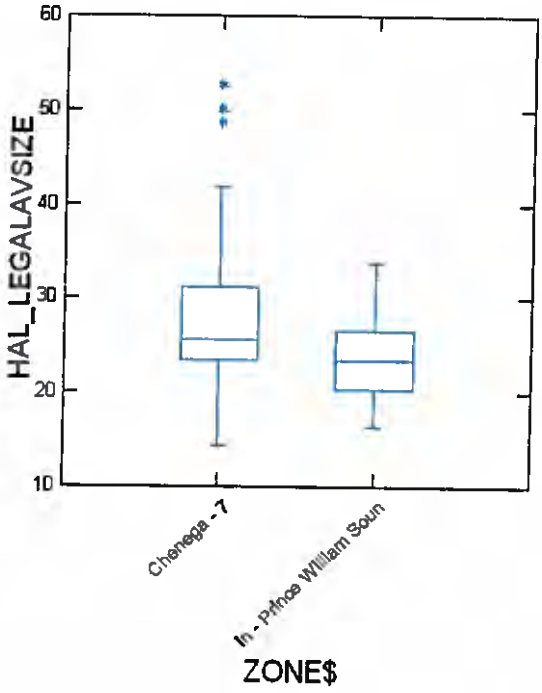




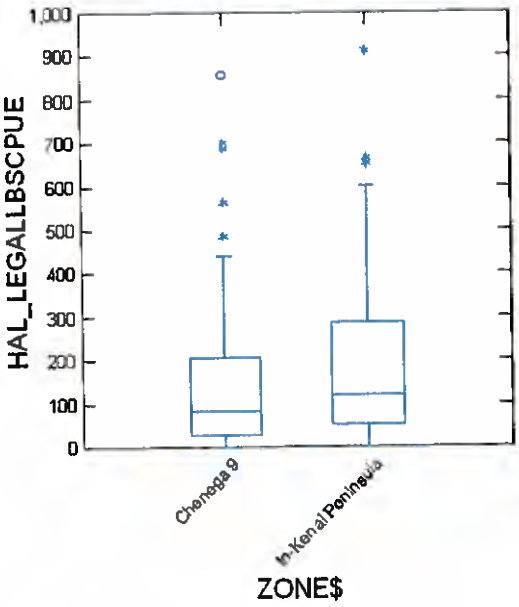
Chenega 7 vs. Prince William Sound

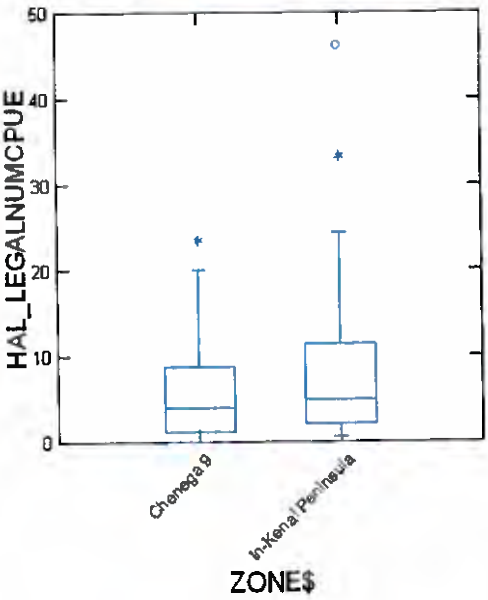


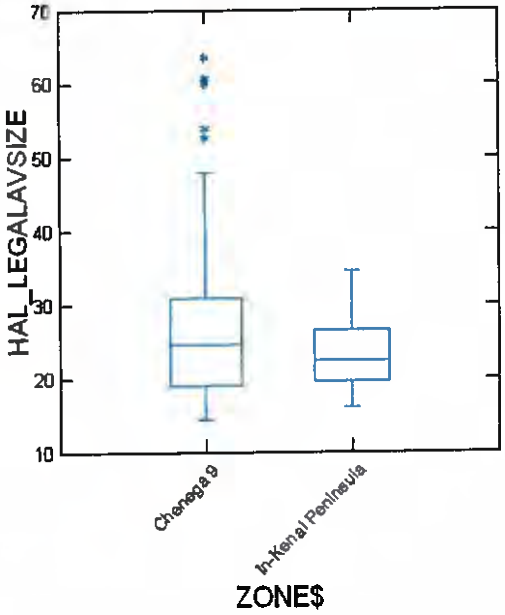




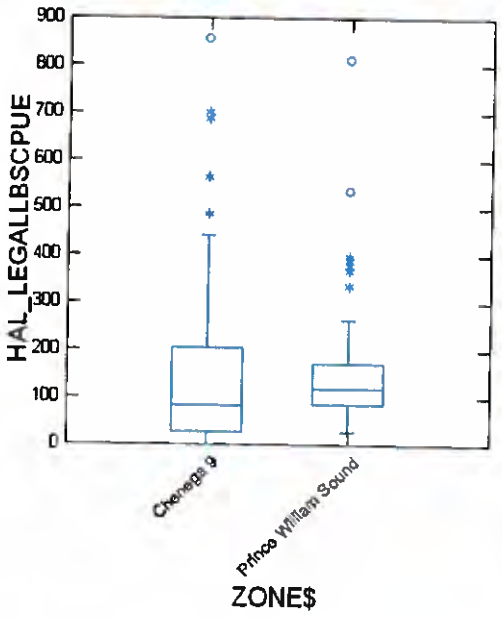
Chenega 9 vs. Inshore Kenai Peninsula

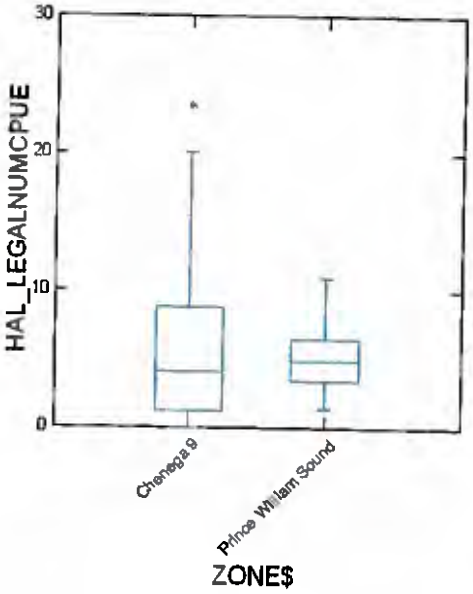


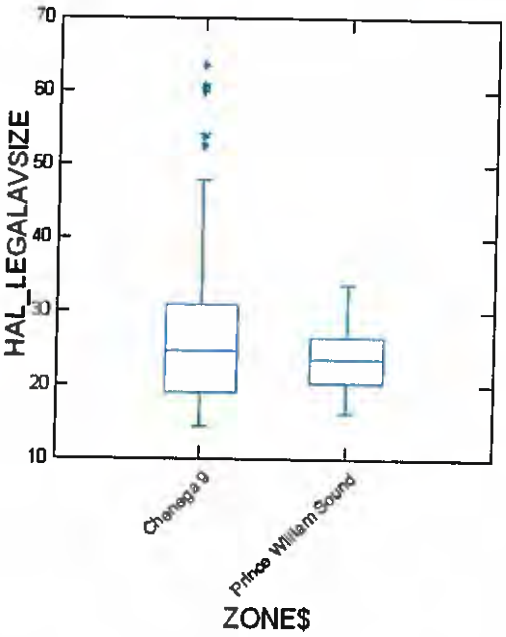




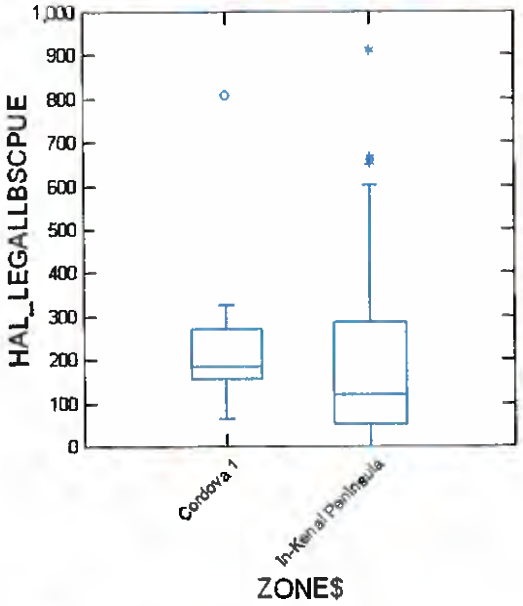
Chenega 9 vs. Prince William Sound

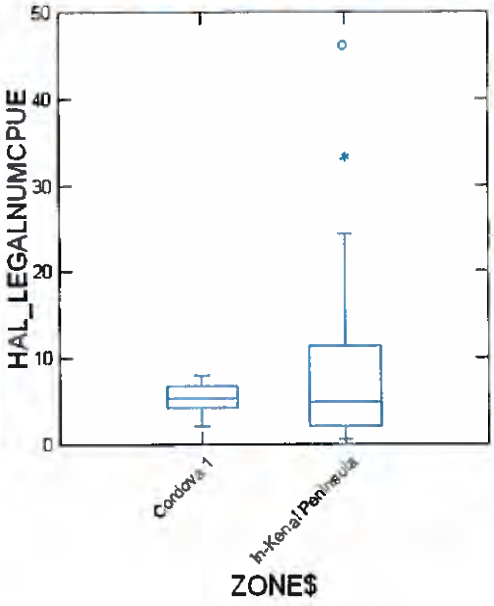


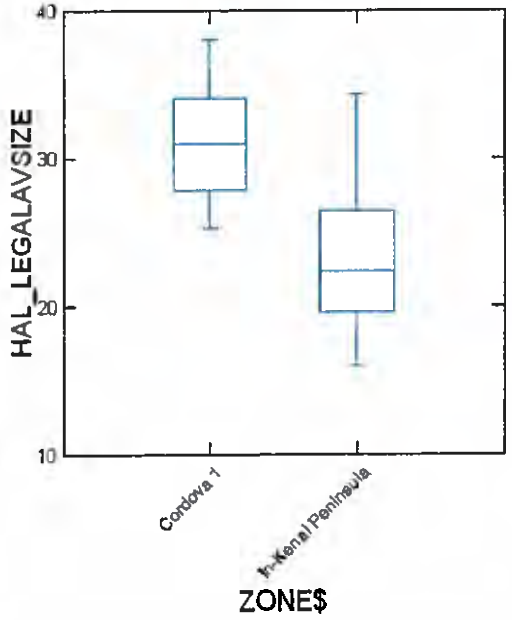




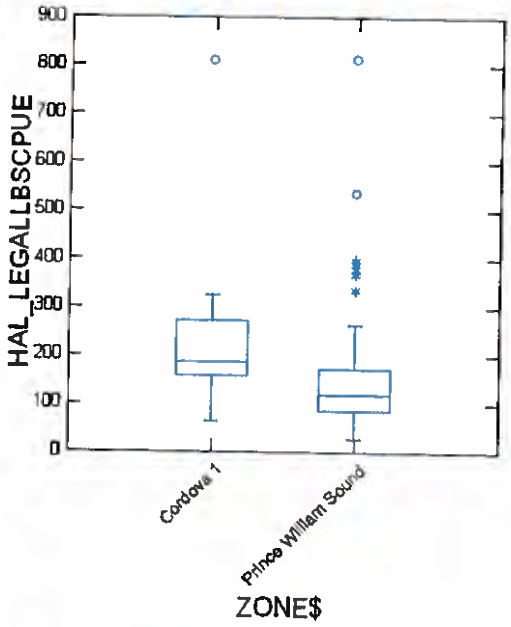
Cordova 1 vs. Inshore Kenai Peninsula

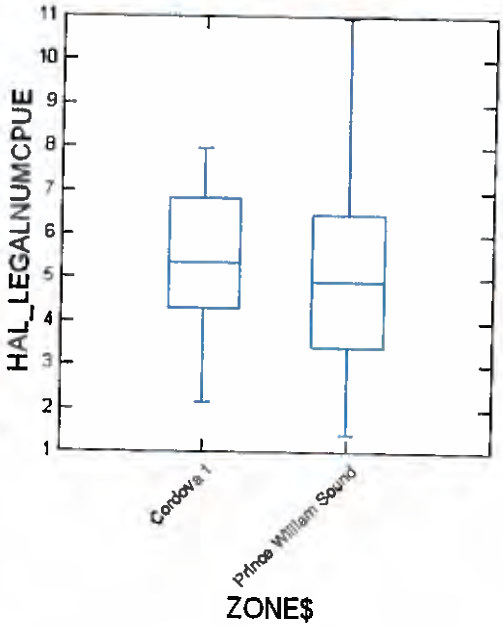


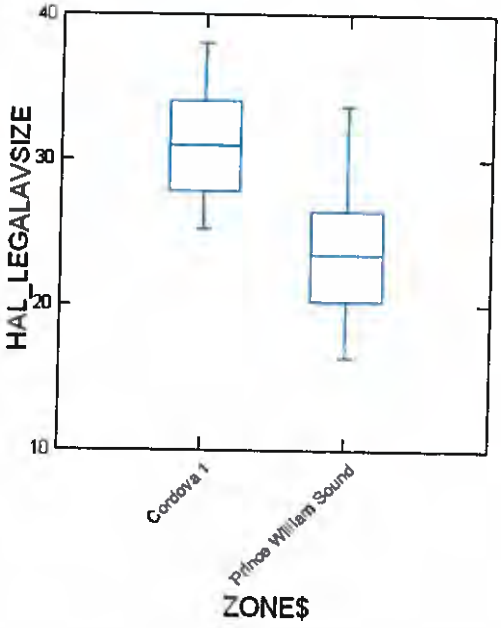




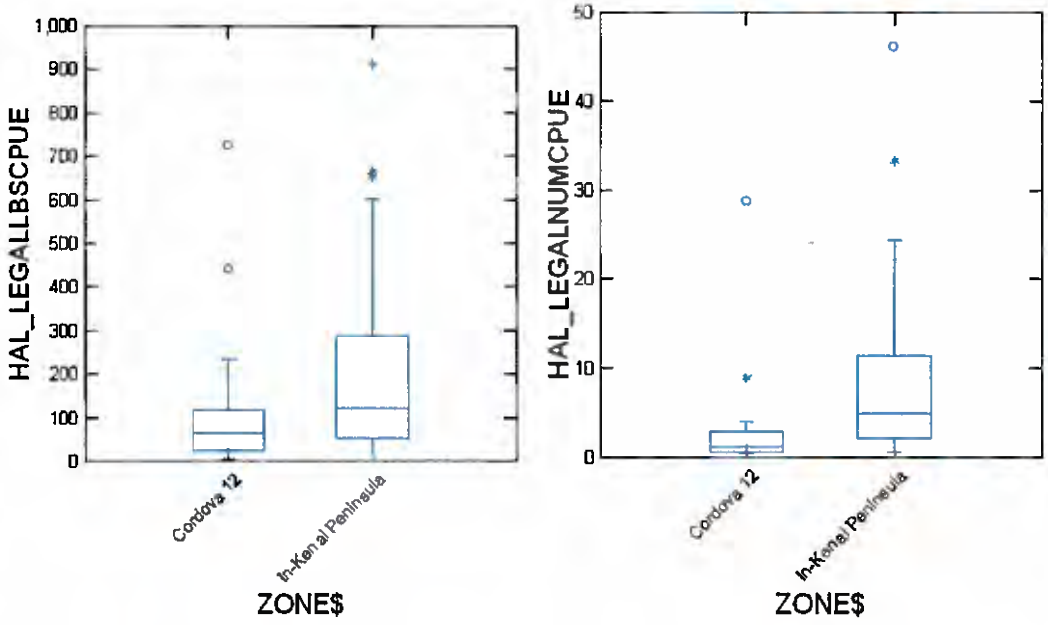
Cordova 1 vs. Prince William Sound

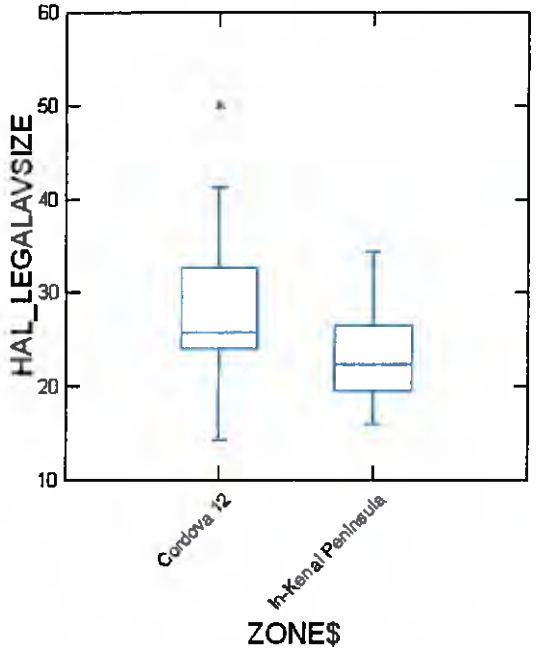




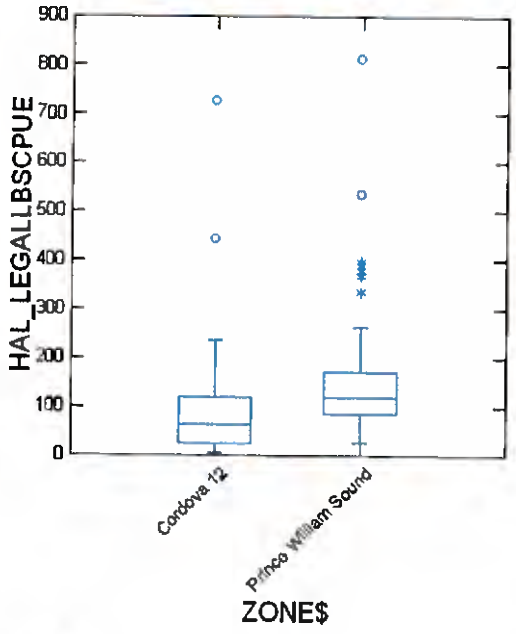


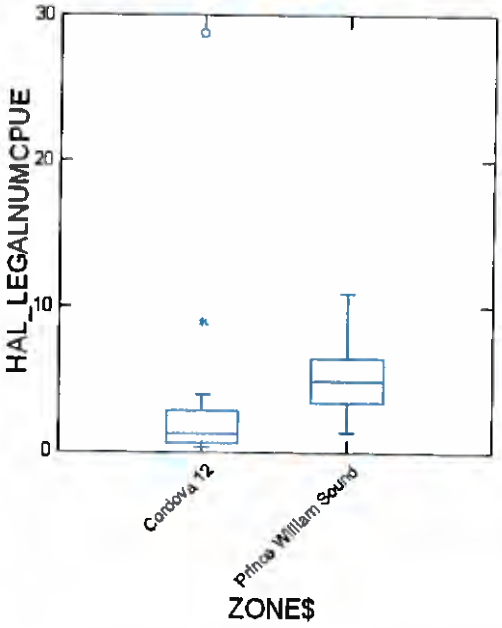
Cordova 12 vs. Inshore Kenai Peninsula

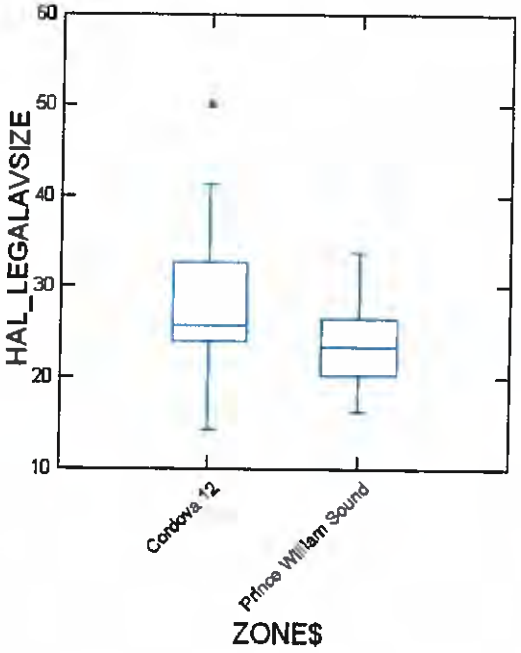




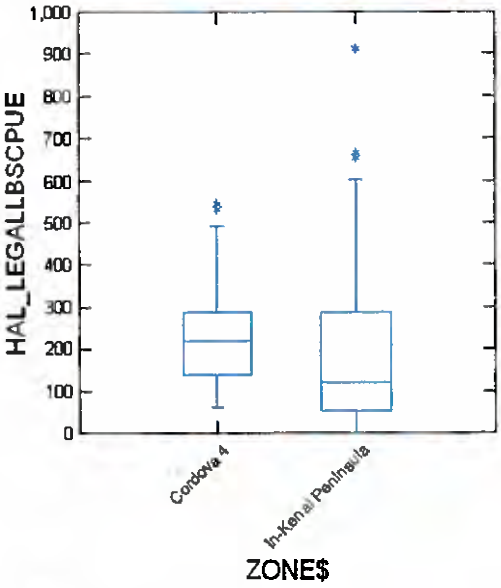
Cordova 12 vs. Prince William Sound

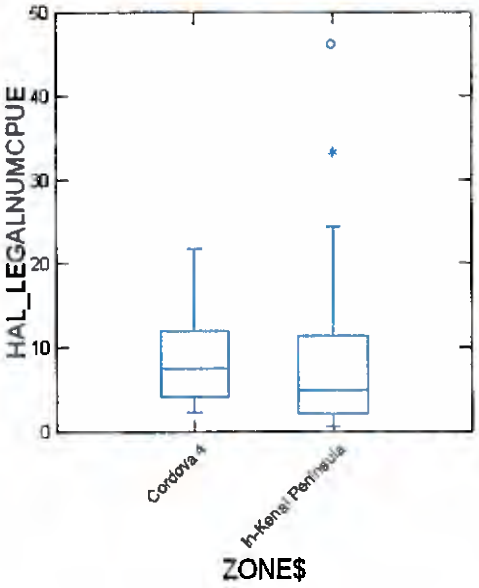


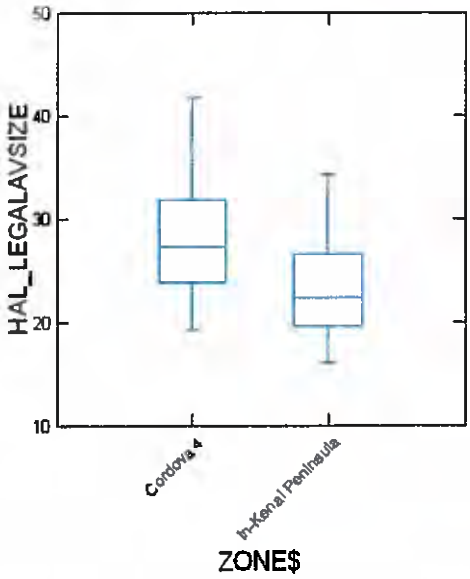




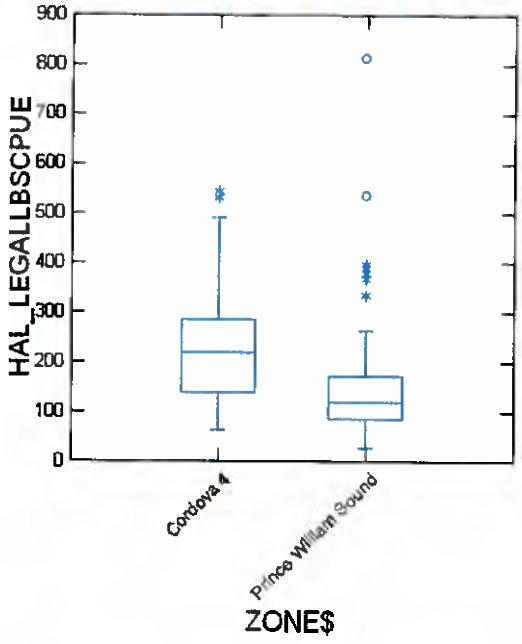
Cordova 4 vs. Inshore Kenai Peninsula

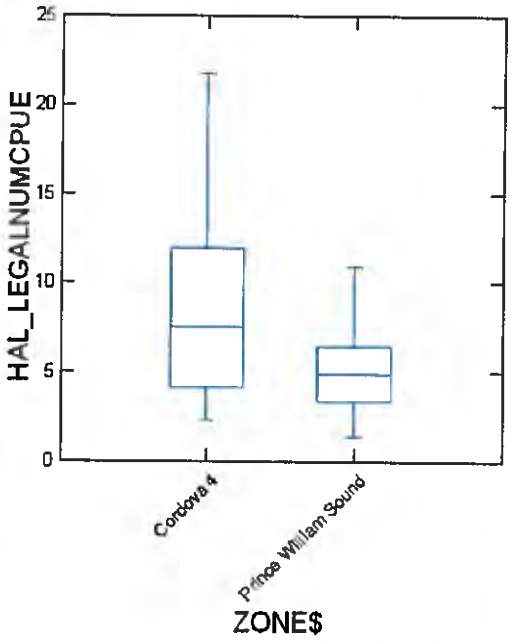


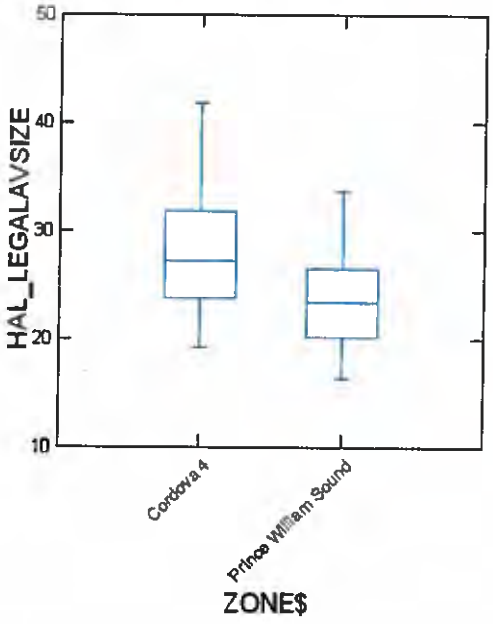




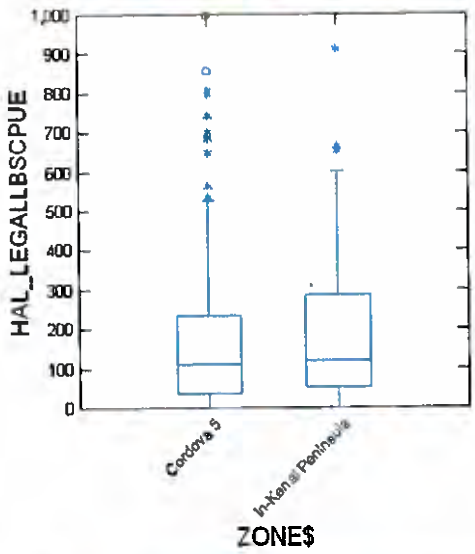
Cordova 4 vs. Prince William Sound

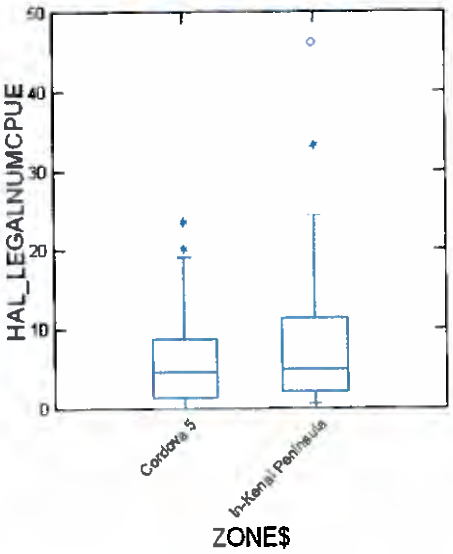


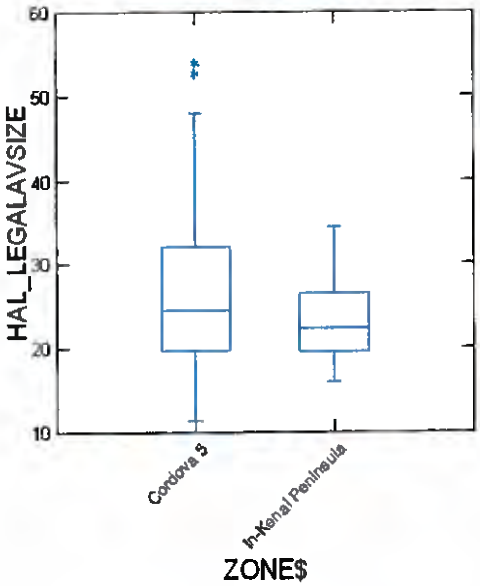




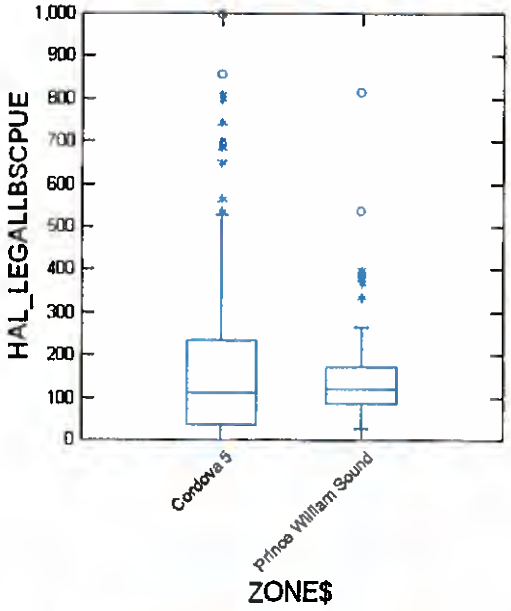
Cordova 5 vs. Inshore Kenai Peninsula

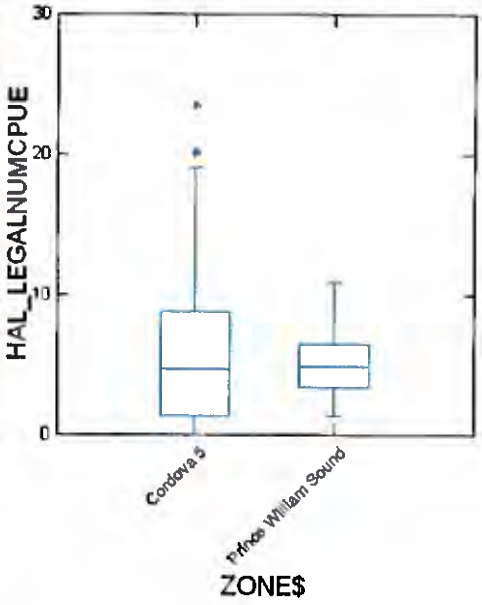


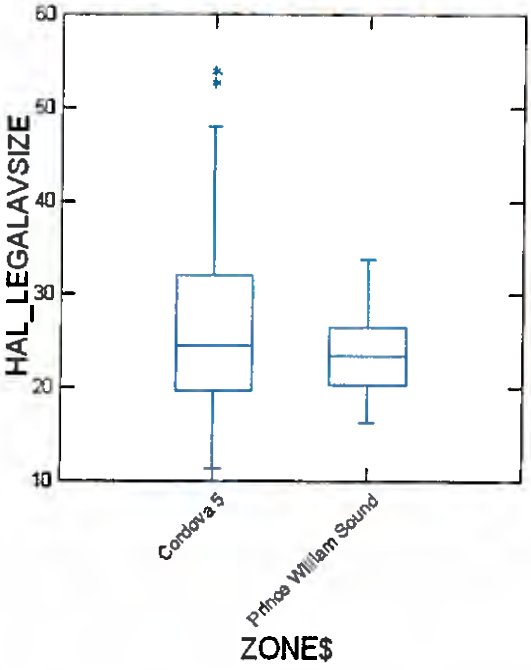




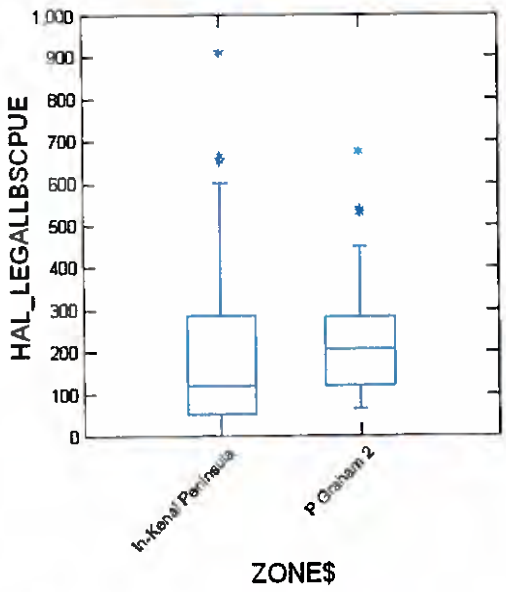
Cordova 5 vs. Prince William Sound

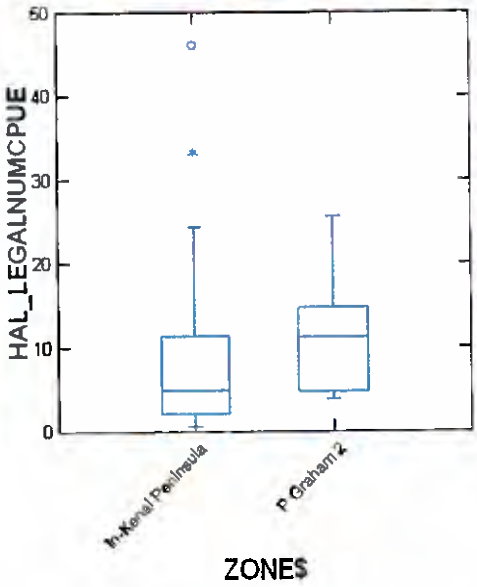


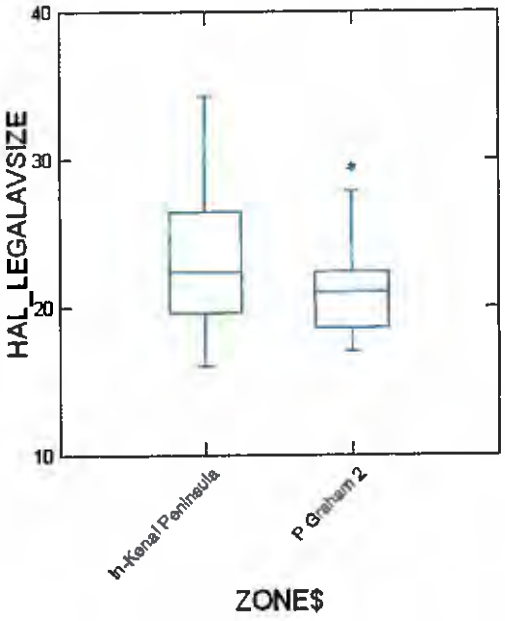




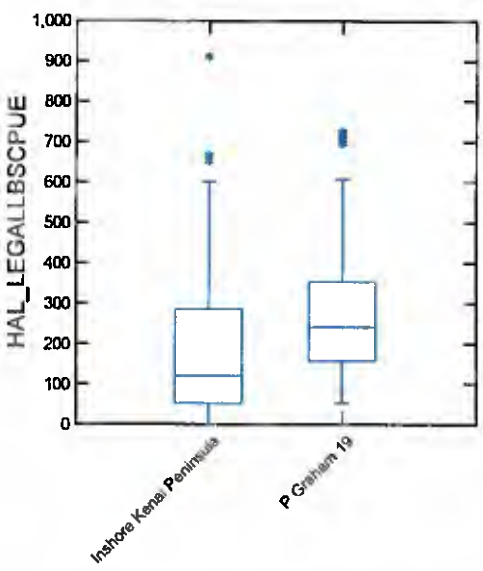
Port Graham 2 vs. Inshore Kenai Peninsula

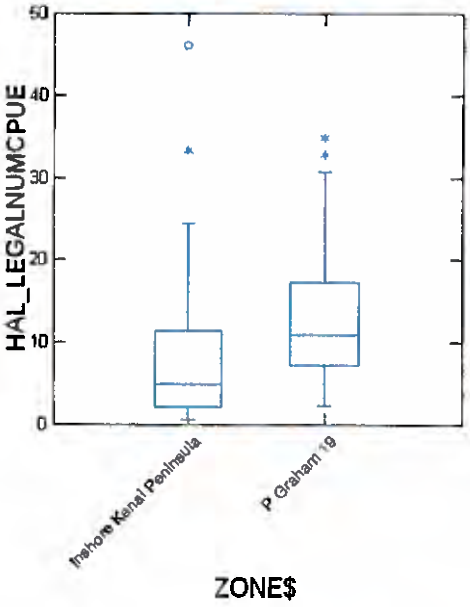


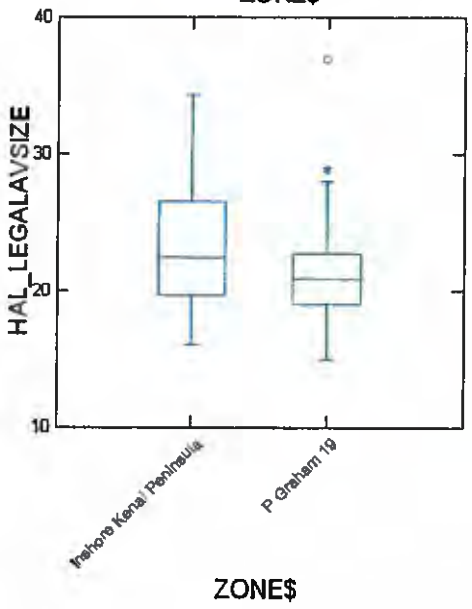




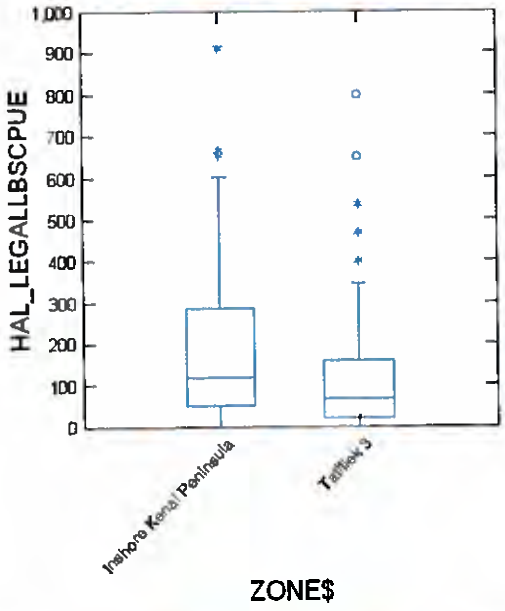
Port Graham 19 vs. Inshore Kenai Peninsula

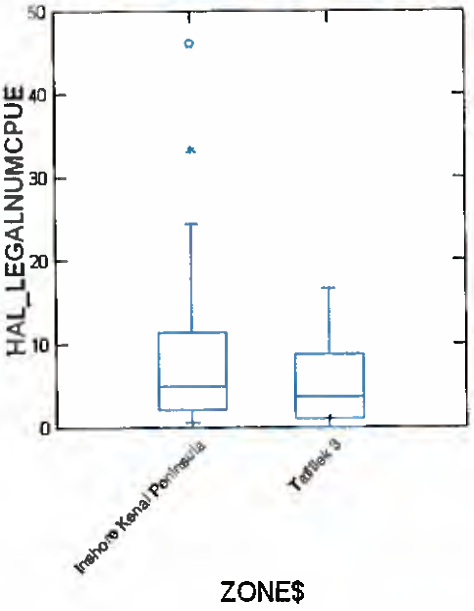


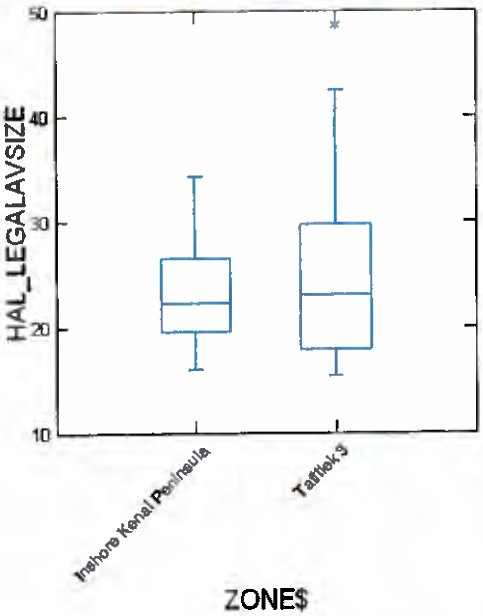




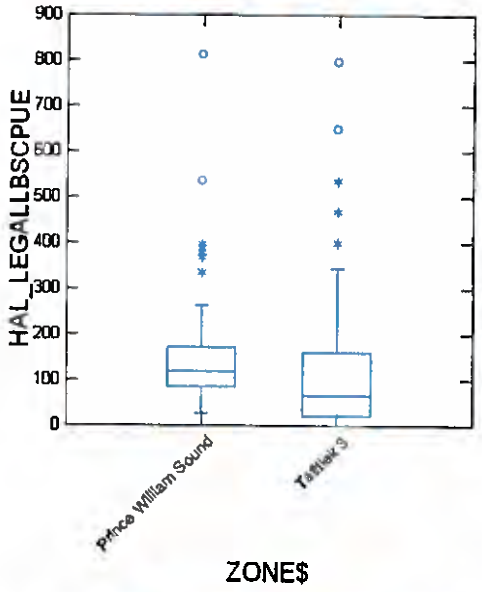
Tatitlek 3 vs. Inshore Kenai Peninsula

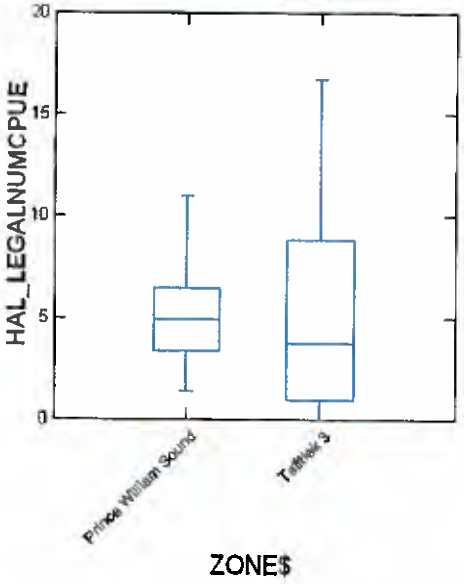


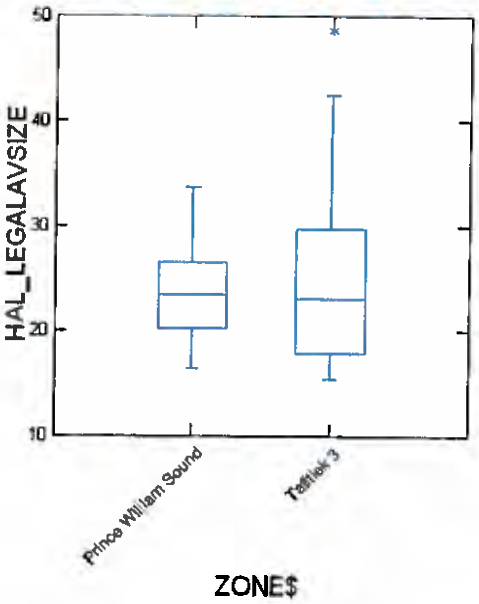




Tatitlek 3 vs. Prince William Sound







Appendix 8. Basic statistics for NOAA trawl halibut, sablefish, and Pacific cod average weight data inside and outside the 3-mile line.

Results for SPECIES_NAME$ = Halibut INSIDE_VS_OUTSIDE$ = inside

	AVERAGE_WEIGHT_KG
N of Cases	239
Minimum	0.01937
Maximum	52.61700
Median	1.85424
Arithmetic Mean	3.36396
Standard Error of Arithmetic Mean	0.31878
Standard Deviation	4.92825
Coefficient of Variation	1.46502
Skewness(G1)	5.41111
Standard Error of Skewness	0.15746
Kurtosis(G2)	44.54777
Standard Error of Kurtosis	0.31365
Shapiro-Wilk Statistic	0.55644
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Halibut INSIDE_VS_OUTSIDE$ = outside

	AVERAGE_WEIGHT_KG
N of Cases	2,445
Minimum	0.01621
Maximum	104.37200
Median	5.11000
Arithmetic Mean	7.65063
Standard Error of Arithmetic Mean	0.17134
Standard Deviation	8.47224
Coefficient of Variation	1.10739
Skewness(G1)	3.45560
Standard Error of Skewness	0.04951
Kurtosis(G2)	20.72901
Standard Error of Kurtosis	0.09897
Shapiro-Wilk Statistic	0.69593
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Sablefish INSIDE_VS_OUTSIDE$ = inside

	AVERAGE_WEIGHT_KG
N of Cases	174
Minimum	0.08245
Maximum	3.85550
Median	0.49200

	AVERAGE_WEIGHT_KG
Arithmetic Mean	0.86487
Standard Error of Arithmetic Mean	0.05918
Standard Deviation	0.78063
Coefficient of Variation	0.90259
Skewness(G1)	1.57694
Standard Error of Skewness	0.18412
Kurtosis(G2)	2.17214
Standard Error of Kurtosis	0.36623
Shapiro-Wilk Statistic	0.81033
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Sablefish INSIDE_VS_OUTSIDE$ = outside

	AVERAGE_WEIGHT_KG
N of Cases	2,031
Minimum	0.02005
Maximum	6.13710
Median	1.58750
Arithmetic Mean	1.74082
Standard Error of Arithmetic Mean	0.02333
Standard Deviation	1.05123
Coefficient of Variation	0.60387
Skewness(G1)	0.59988
Standard Error of Skewness	0.05431
Kurtosis(G2)	-0.21665
Standard Error of Kurtosis	0.10857
Shapiro-Wilk Statistic	0.95991
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = P cod INSIDE_VS_OUTSIDE$ = inside

	AVERAGE_WEIGHT_KG
N of Cases	157
Minimum	0.02519
Maximum	6.80400
Median	1.51200
Arithmetic Mean	1.75248
Standard Error of Arithmetic Mean	0.09993
Standard Deviation	1.25206
Coefficient of Variation	0.71445
Skewness(G1)	1.14513
Standard Error of Skewness	0.19366
Kurtosis(G2)	2.23840
Standard Error of Kurtosis	0.38498
Shapiro-Wilk Statistic	0.91587
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = P cod INSIDE_VS_OUTSIDE$ = outside

	AVERAGE_WEIGHT_KG
N of Cases	2,140
Minimum	0.00067
Maximum	8.30050
Median	1.81818
Arithmetic Mean	1.90706
Standard Error of Arithmetic Mean	0.02216
Standard Deviation	1.02528
Coefficient of Variation	0.53763
Skewness(G1)	1.02353
Standard Error of Skewness	0.05291
Kurtosis(G2)	2.73302
Standard Error of Kurtosis	0.10578
Shapiro-Wilk Statistic	0.95154
Shapiro-Wilk p-value	0.00000

Appendix 9.

Results for SPECIES_NAME$ = Halibut ZONE$ = Inshore Cook Inlet

	AVERAGE_WEIGHT_KG
N of Cases	21
Minimum	0.05829
Maximum	9.07200
Median	1.36961
Arithmetic Mean	2.06533
Standard Error of Arithmetic Mean	0.47173
Standard Deviation	2.16174
Coefficient of Variation	1.04668
Skewness(G1)	2.01062
Standard Error of Skewness	0.50119
Kurtosis(G2)	4.69745
Standard Error of Kurtosis	0.97194
Shapiro-Wilk Statistic	0.79240
Shapiro-Wilk p-value	0.00050

Results for SPECIES_NAME$ = Halibut ZONE$ = Inshore Gulf of Alaska

	AVERAGE_WEIGHT_KG
N of Cases	74
Minimum	0.01937
Maximum	11.33975
Median	0.88078
Arithmetic Mean	1.67289
Standard Error of Arithmetic Mean	0.26054
Standard Deviation	2.24128
Coefficient of Variation	1.33977
Skewness(G1)	2.45528
Standard Error of Skewness	0.27920
Kurtosis(G2)	6.74618
Standard Error of Kurtosis	0.55168
Shapiro-Wilk Statistic	0.70395
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Halibut ZONE$ = Inshore Kenai Peninsula

	AVERAGE_WEIGHT_KG
N of Cases	32
Minimum	0.45367
Maximum	52.61700
Median	4.68900
Arithmetic Mean	7.63599
Standard Error of Arithmetic Mean	1.73386

	AVERAGE_WEIGHT_KG
Standard Deviation	9.80817
Coefficient of Variation	1.28447
Skewness(G1)	3.38548
Standard Error of Skewness	0.41446
Kurtosis(G2)	14.34093
Standard Error of Kurtosis	0.80937
Shapiro-Wilk Statistic	0.63220
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Halibut ZONE$ = Prince William Sound

	AVERAGE_WEIGHT_KG
N of Cases	112
Minimum	0.31283
Maximum	27.21600
Median	2.26800
Arithmetic Mean	3.50418
Standard Error of Arithmetic Mean	0.34792
Standard Deviation	3.68200
Coefficient of Variation	1.05075
Skewness(G1)	3.48631
Standard Error of Skewness	0.22843
Kurtosis(G2)	17.35845
Standard Error of Kurtosis	0.45309
Shapiro-Wilk Statistic	0.67566
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Halibut ZONE$ = Cook Inlet

	AVERAGE_WEIGHT_KG
N of Cases	281
Minimum	0.01621
Maximum	29.83400
Median	3.62900
Arithmetic Mean	5.16649
Standard Error of Arithmetic Mean	0.28884
Standard Deviation	4.84191
Coefficient of Variation	0.93718
Skewness(G1)	1.84007
Standard Error of Skewness	0.14535
Kurtosis(G2)	4.40690
Standard Error of Kurtosis	0.28970
Shapiro-Wilk Statistic	0.82909
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Halibut ZONE$ = Kenai Peninsula

	AVERAGE_WEIGHT_KG
N of Cases	1,431
Minimum	0.18140
Maximum	104.37200
Median	6.44500
Arithmetic Mean	8.78307
Standard Error of Arithmetic Mean	0.24671
Standard Deviation	9.33280
Coefficient of Variation	1.06259
Skewness(G1)	3.48102
Standard Error of Skewness	0.06468
Kurtosis(G2)	20.56584
Standard Error of Kurtosis	0.12928
Shapiro-Wilk Statistic	0.70145
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Halibut ZONE$ = North Gulf of Alaska

	AVERAGE_WEIGHT_KG
N of Cases	733
Minimum	0.27200
Maximum	52.34500
Median	3.72796
Arithmetic Mean	6.39215
Standard Error of Arithmetic Mean	0.27160
Standard Deviation	7.35316
Coefficient of Variation	1.15034
Skewness(G1)	2.79679
Standard Error of Skewness	0.09029
Kurtosis(G2)	9.75347
Standard Error of Kurtosis	0.18034
Shapiro-Wilk Statistic	0.68449
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Sablefish ZONE$ = Inshore Cook Inlet

	AVERAGE_WEIGHT_KG
N of Cases	5
Minimum	0.22700
Maximum	0.85600
Median	0.48500
Arithmetic Mean	0.50221
Standard Error of Arithmetic Mean	0.10950
Standard Deviation	0.24486
Coefficient of Variation	0.48756
Skewness(G1)	0.56740

	AVERAGE_WEIGHT_KG
Standard Error of Skewness	0.91287
Kurtosis(G2)	-0.25006
Standard Error of Kurtosis	2.00000
Shapiro-Wilk Statistic	0.97469
Shapiro-Wilk p-value	0.90443

Results for SPECIES_NAME$ = Sablefish ZONE$ = Inshore Gulf of Alaska

	AVERAGE_WEIGHT_KG
N of Cases	53
Minimum	0.13600
Maximum	3.40200
Median	0.40317
Arithmetic Mean	0.77612
Standard Error of Arithmetic Mean	0.10829
Standard Deviation	0.78840
Coefficient of Variation	1.01521
Skewness(G1)	1.72944
Standard Error of Skewness	0.32745
Kurtosis(G2)	2.25392
Standard Error of Kurtosis	0.64442
Shapiro-Wilk Statistic	0.73036
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Sablefish ZONE$ = Inshore Kenai Peninsula

	AVERAGE_WEIGHT_KG
N of Cases	56
Minimum	0.15122
Maximum	3.85550
Median	0.72333
Arithmetic Mean	1.10280
Standard Error of Arithmetic Mean	0.12832
Standard Deviation	0.96026
Coefficient of Variation	0.87074
Skewness(G1)	1.19304
Standard Error of Skewness	0.31900
Kurtosis(G2)	0.56711
Standard Error of Kurtosis	0.62826
Shapiro-Wilk Statistic	0.84790
Shapiro-Wilk p-value	0.00001

Results for SPECIES_NAME$ = Sablefish ZONE$ = Prince William Sound

	AVERAGE_WEIGHT_KG
N of Cases	60

	AVERAGE_WEIGHT_KG
Minimum	0.08245
Maximum	2.26800
Median	0.47650
Arithmetic Mean	0.74966
Standard Error of Arithmetic Mean	0.06955
Standard Deviation	0.53872
Coefficient of Variation	0.71862
Skewness(G1)	0.87860
Standard Error of Skewness	0.30869
Kurtosis(G2)	0.11452
Standard Error of Kurtosis	0.60849
Shapiro-Wilk Statistic	0.90093
Shapiro-Wilk p-value	0.00014

Results for SPECIES_NAME$ = Sablefish ZONE$ = Cook Inlet

	AVERAGE_WEIGHT_KG
N of Cases	146
Minimum	0.09050
Maximum	3.96900
Median	1.21733
Arithmetic Mean	1.35602
Standard Error of Arithmetic Mean	0.06876
Standard Deviation	0.83088
Coefficient of Variation	0.61273
Skewness(G1)	0.78046
Standard Error of Skewness	0.20068
Kurtosis(G2)	0.22513
Standard Error of Kurtosis	0.39877
Shapiro-Wilk Statistic	0.94980
Shapiro-Wilk p-value	0.00004

Results for SPECIES_NAME$ = Sablefish ZONE$ = Kenai Peninsula

	AVERAGE_WEIGHT_KG
N of Cases	1,230
Minimum	0.02005
Maximum	6.13710
Median	1.89094
Arithmetic Mean	1.96672
Standard Error of Arithmetic Mean	0.02851
Standard Deviation	1.00002
Coefficient of Variation	0.50847
Skewness(G1)	0.37982
Standard Error of Skewness	0.06976
Kurtosis(G2)	-0.16780

	AVERAGE_WEIGHT_KG
Standard Error of Kurtosis	0.13940
Shapiro-Wilk Statistic	0.98407
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = Sablefish ZONE$ = North Gulf of Alaska

	AVERAGE_WEIGHT_KG
N of Cases	655
Minimum	0.04532
Maximum	5.03636
Median	1.06600
Arithmetic Mean	1.40238
Standard Error of Arithmetic Mean	0.04197
Standard Deviation	1.07426
Coefficient of Variation	0.76603
Skewness(G1)	1.17727
Standard Error of Skewness	0.09549
Kurtosis(G2)	0.65482
Standard Error of Kurtosis	0.19069
Shapiro-Wilk Statistic	0.87352
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = P cod ZONE$ = Inshore Cook Inlet

	AVERAGE_WEIGHT_KG
N of Cases	13
Minimum	0.02519
Maximum	3.67410
Median	0.91663
Arithmetic Mean	1.09888
Standard Error of Arithmetic Mean	0.32451
Standard Deviation	1.17005
Coefficient of Variation	1.06477
Skewness(G1)	1.27532
Standard Error of Skewness	0.61634
Kurtosis(G2)	0.72475
Standard Error of Kurtosis	1.19087
Shapiro-Wilk Statistic	0.83523
Shapiro-Wilk p-value	0.01844

Results for SPECIES_NAME$ = P cod ZONE$ = Inshore Gulf of Alaska

	AVERAGE_WEIGHT_KG
N of Cases	31
Minimum	0.05519
Maximum	6.80400

	AVERAGE_WEIGHT_KG
Median	1.51200
Arithmetic Mean	1.78400
Standard Error of Arithmetic Mean	0.24698
Standard Deviation	1.37512
Coefficient of Variation	0.77081
Skewness(G1)	1.65517
Standard Error of Skewness	0.42054
Kurtosis(G2)	4.66851
Standard Error of Kurtosis	0.82080
Shapiro-Wilk Statistic	0.87485
Shapiro-Wilk p-value	0.00180

Results for SPECIES_NAME$ = P cod ZONE$ = Inshore Kenai Peninsula

	AVERAGE_WEIGHT_KG
N of Cases	54
Minimum	0.04003
Maximum	5.44300
Median	1.96375
Arithmetic Mean	2.02902
Standard Error of Arithmetic Mean	0.16439
Standard Deviation	1.20800
Coefficient of Variation	0.59536
Skewness(G1)	0.47865
Standard Error of Skewness	0.32456
Kurtosis(G2)	0.21435
Standard Error of Kurtosis	0.63889
Shapiro-Wilk Statistic	0.97029
Shapiro-Wilk p-value	0.19852

Results for SPECIES_NAME$ = P cod ZONE$ = Prince William Sound

	AVERAGE_WEIGHT_KG
N of Cases	59
Minimum	0.40024
Maximum	6.80400
Median	1.20967
Arithmetic Mean	1.62682
Standard Error of Arithmetic Mean	0.15613
Standard Deviation	1.19922
Coefficient of Variation	0.73716
Skewness(G1)	1.63616
Standard Error of Skewness	0.31118
Kurtosis(G2)	4.50773
Standard Error of Kurtosis	0.61326
Shapiro-Wilk Statistic	0.83717

	AVERAGE_WEIGHT_KG
Shapiro-Wilk p-value	0.00000

Results for SPECIES_NAME$ = P cod ZONE$ = Cook Inlet

	AVERAGE_WEIGHT_KG
N of Cases	263
Minimum	0.00067
Maximum	5.44300
Median	1.81437
Arithmetic Mean	1.78509
Standard Error of Arithmetic Mean	0.06823
Standard Deviation	1.10646
Coefficient of Variation	0.61984
Skewness(G1)	0.37328
Standard Error of Skewness	0.15019
Kurtosis(G2)	-0.22112
Standard Error of Kurtosis	0.29927
Shapiro-Wilk Statistic	0.97287
Shapiro-Wilk p-value	0.00007

Results for SPECIES_NAME$ = P cod ZONE$ = Kenai Peninsula

	AVERAGE_WEIGHT_KG
N of Cases	1,396
Minimum	0.00850
Maximum	6.60000
Median	1.81459
Arithmetic Mean	1.84761
Standard Error of Arithmetic Mean	0.02382
Standard Deviation	0.88993
Coefficient of Variation	0.48167
Skewness(G1)	0.70819
Standard Error of Skewness	0.06549
Kurtosis(G2)	1.78200
Standard Error of Kurtosis	0.13088
Shapiro-Wilk Statistic	0.97223
Shapiro-Wilk p-value	0.00000

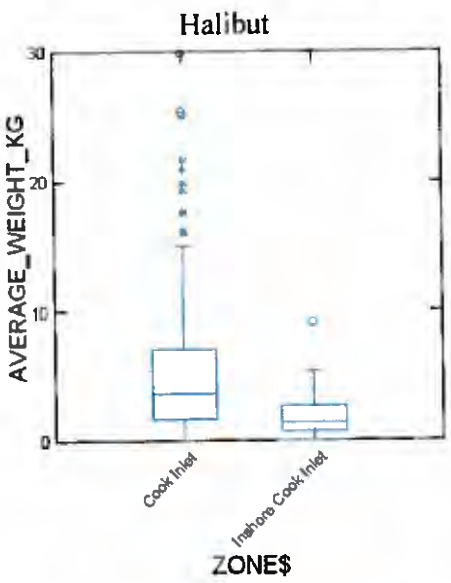
Results for SPECIES_NAME$ = P cod ZONE$ = North Gulf of Alaska

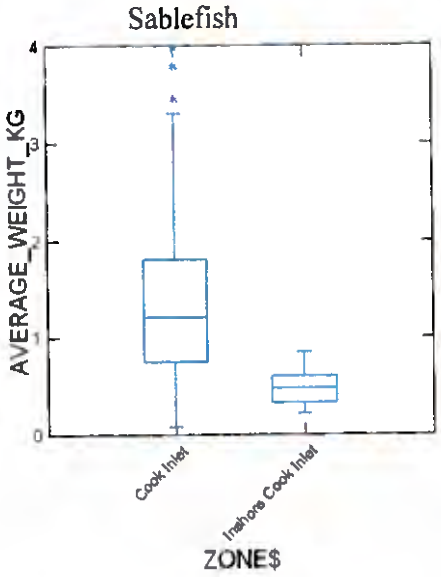
	AVERAGE_WEIGHT_KG
N of Cases	481
Minimum	0.09067
Maximum	8.30050
Median	1.90125
Arithmetic Mean	2.14631

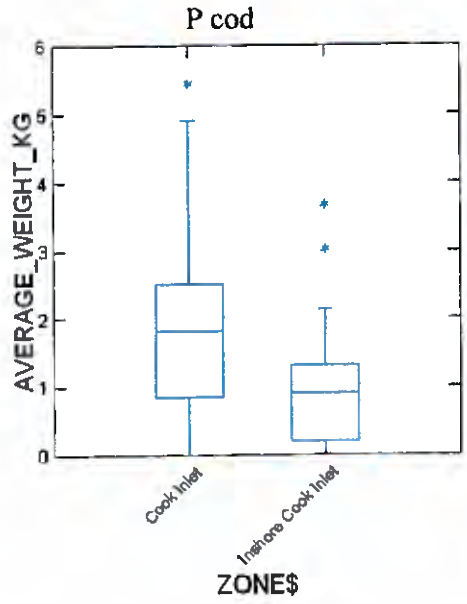
	AVERAGE_WEIGHT_KG
Standard Error of Arithmetic Mean	0.05837
Standard Deviation	1.28012
Coefficient of Variation	0.59643
Skewness(G1)	1.27122
Standard Error of Skewness	0.11134
Kurtosis(G2)	2.44633
Standard Error of Kurtosis	0.22223
Shapiro-Wilk Statistic	0.92082
Shapiro-Wilk p-value	0.00000

Appendix 9. Box plots of NOAA trawl weight comparisons inside and adjacent outside zones, by species.

Cook Inlet Inside vs Outside

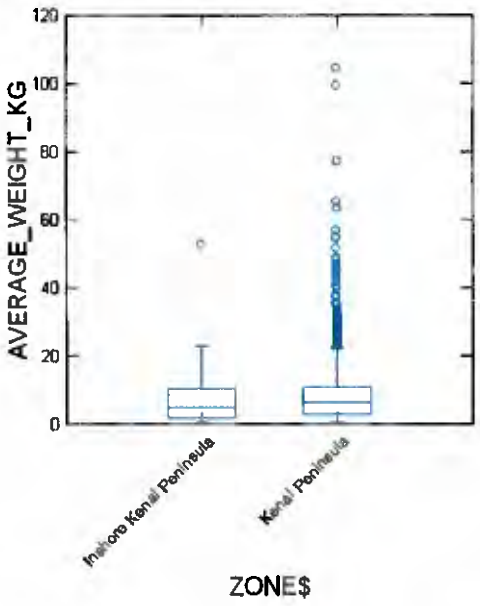




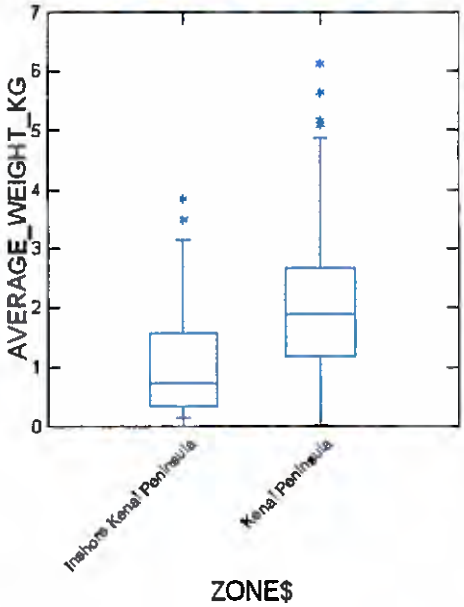


Kenai Peninsula Inside vs. Outside

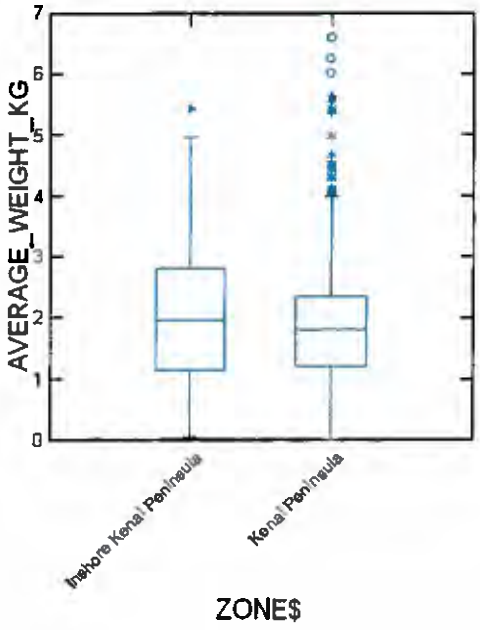
Halibut



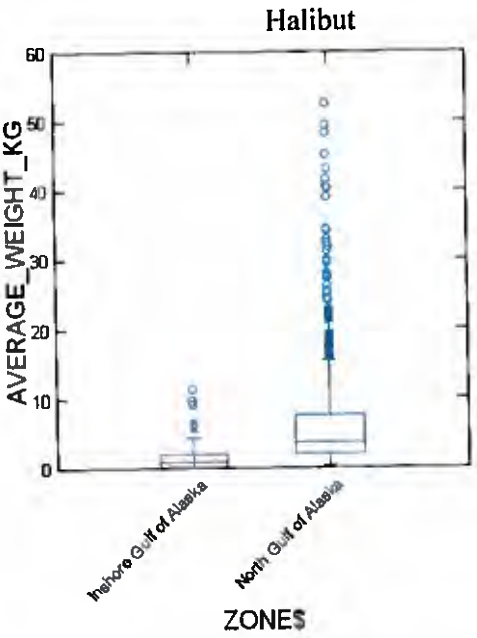
Sablefish

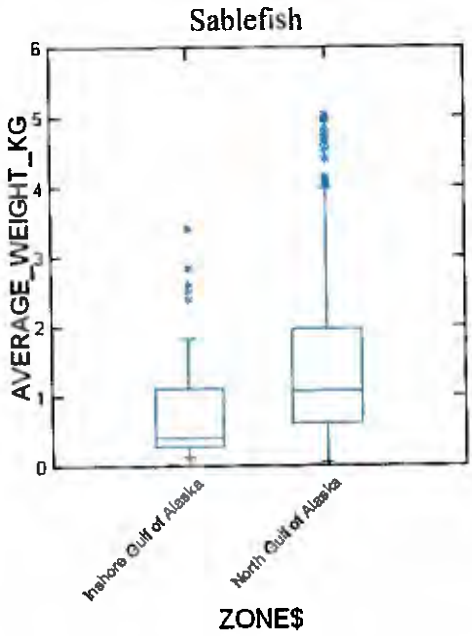


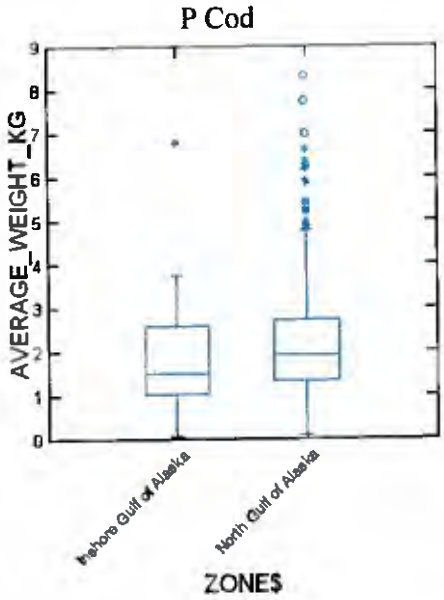
P cod



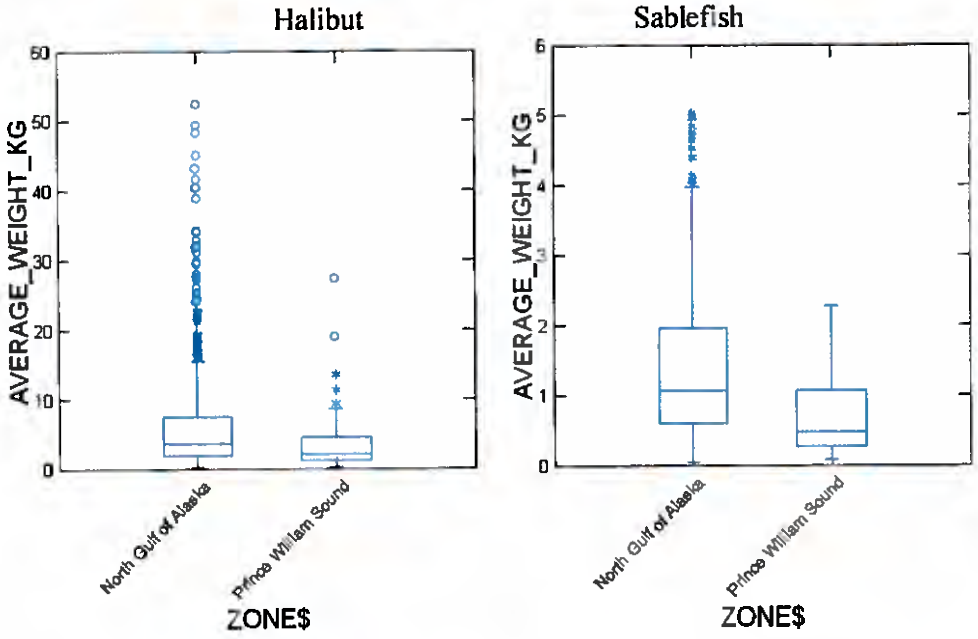
Gulf of Alaska Inside vs. Outside

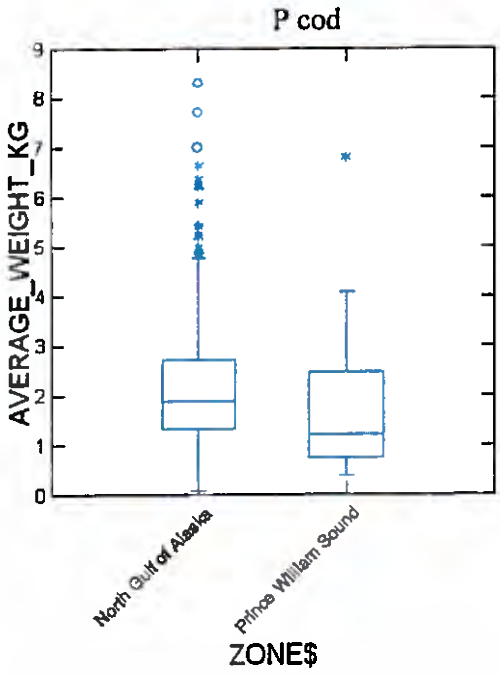






Prince William Sound Inside vs. Gulf of Alaska Outside





Eric Knudsen, Ph.D.
Consulting Fisheries Scientist

Rebuttal to Defendant's Fisheries Expert Reports

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May 15, 2008

Comments on: EXPERT REPORT of ROBYN P. ANGLISS Case No. A98-365-CV (HRH) (Marine Mammals) 3/7/08

1. Regarding Platforms of Opportunity Program (POP) opportunistic sightings of three sperm whales inshore near Montague Island and to the west (Section B.15, p. 8, Angliss 2008 and see figure below from Angliss 2008B), the accuracy of the three sightings could be questioned for several reasons, listed below. In the words of Angliss (2008, p. 6), "Opportunistic data on marine mammal distribution must be interpreted with some caution: sightings are collected only as a secondary activity, sighting effort is highly variable variable throughout much of Alaska and is extremely low in some areas, and sightings may be provided by either trained or untrained individuals."

a) Observational Conditions. Observing and identifying whale species is challenging, particularly due to variable conditions like distance, weather, sea state, light, and the brief time when the target whale is surfacing in which to make an accurate identification. Although the conditions reported from the POP database look reasonable (Angliss 2008b), the combination of conditions and observer experience could be questioned.

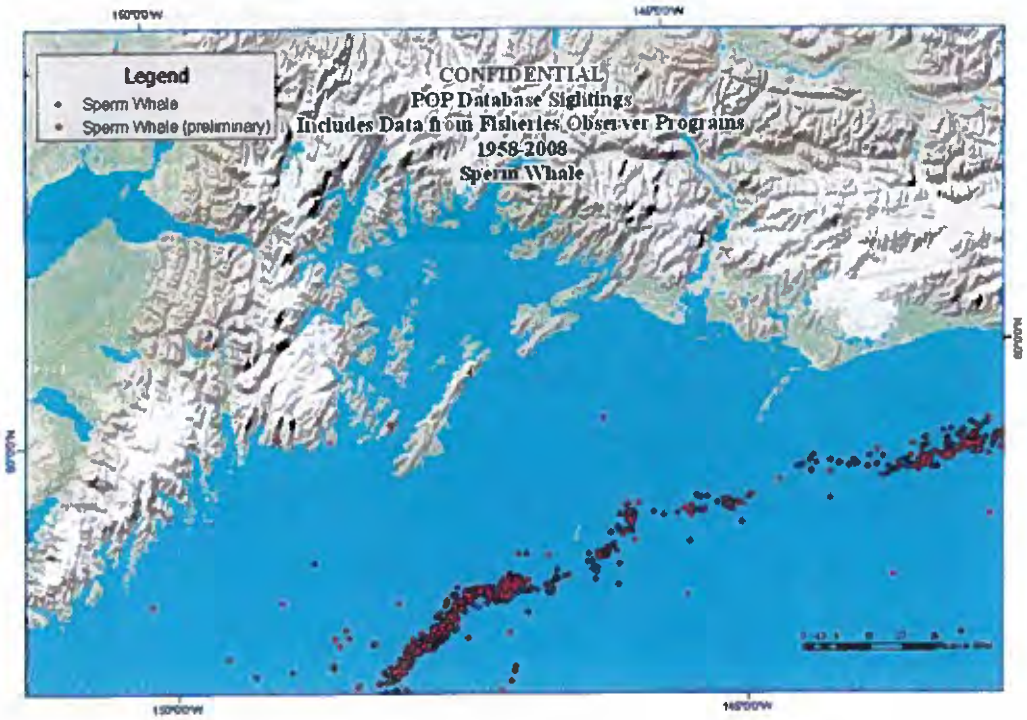

Figure 4. Illustration of sperm whale sightings from the POP database (Angliss 2008b).

b) Lack of Observer Experience. An observer must be experienced in whale identification techniques to increase the accuracy. A brief reference to fishery observer marine mammal training was given as: "Approximately 1.5-2 hours of training are focused specifically on

marine mammal identification." (Angliss 2008b). This is not much training time to cover the number of marine mammal species one might encounter in the North Pacific, all the details of species identification techniques and of accurate record keeping and it includes no practical experience or training. Photographs are often used to verify identification, but these are apparently not part of the record.

2. Actual Locations of Sightings. Some question arises as to the accuracy of the sighting locations, primarily due to a discrepancy between the figure provided by Angliss (2008b), Figure 1 above, and the figure provided by Clapham (2007), Figure 2 below. Note that Figure 1 shows three inshore sperm whale sightings, while Figure 2 shows only one.

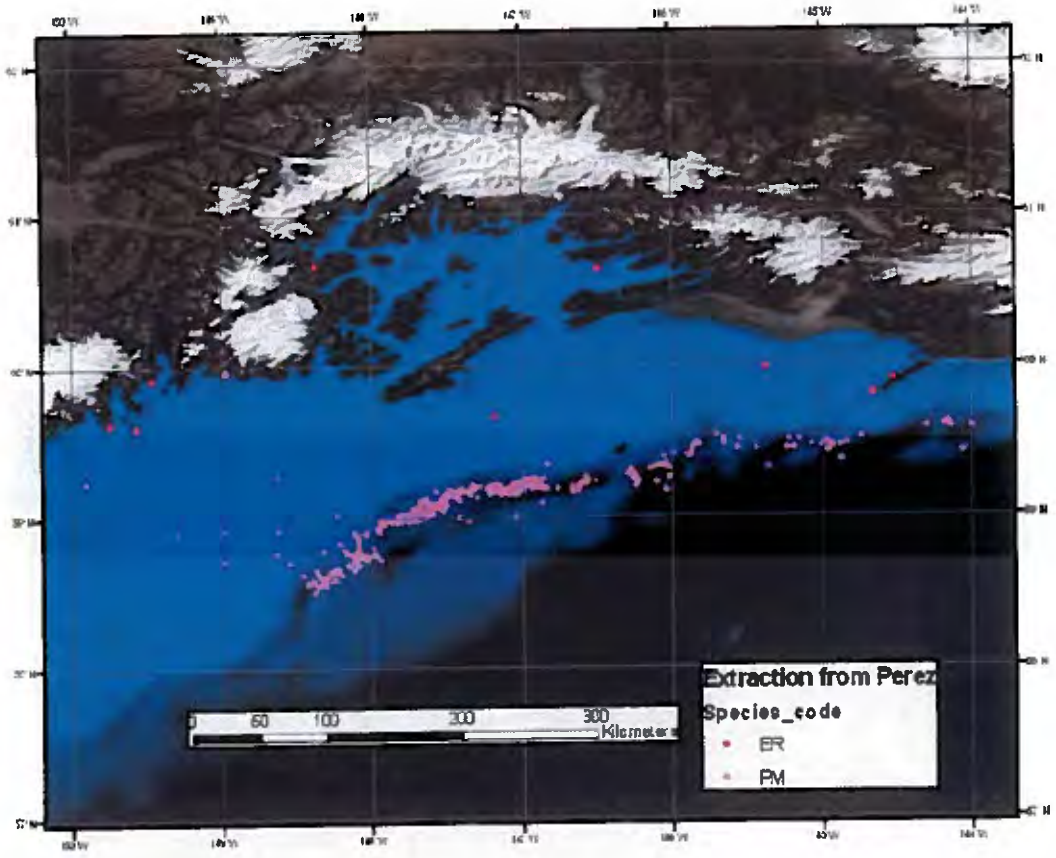

Figure 5. Sperm and gray whale sighting locations (Clapham 2007).

3. Rare Occurrence of Sperm Whales Within PWS. Sperm whales are rare in Prince William Sound or other inshore areas, but are more likely to be observed well offshore (Figures 1 and 2). Angliss (2008, p. 8) states "The stock assessment report for sperm whales of Alaska does not include Prince William Sound as part of the species' typical range (Angliss and Outlaw 2006)". See also Figure 3 below from Angliss and Outlaw 2006. Sperm whales are of very low abundance in the inshore areas. Therefore, if the Chugach people were to have killed a sperm whale, it would most likely have occurred in offshore waters where sperm whales are known to be more abundant.

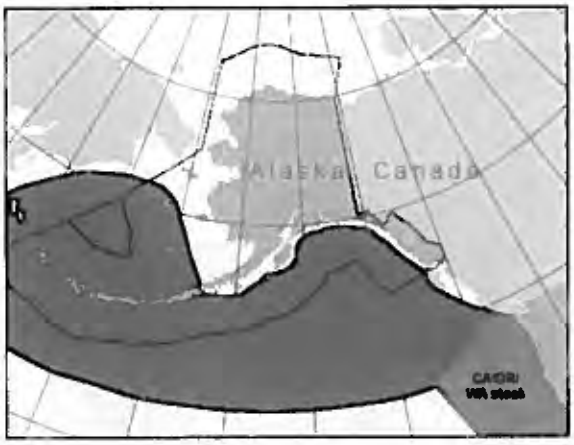

Figure 3. Approximate distribution of sperm whales in Alaska waters (Angliss and Outlaw 2006). Note that distribution does not extend to inshore waters anywhere along the Alaskan coast.

Furthermore, note that NMFS, NMML has very little of its own data on sperm whales: "NMML conducted two aerial surveys (primarily for small cetaceans) that included Gulf of Alaska waters outside PWS; these surveys took place in 1992 and 1998. In 1992, there were no sperm whale sightings and the only gray whale sightings were around Kodiak Island. In 1998, there were no gray whale sightings and two sperm whale sightings (57.91, 149.28; 57.90, 149.19)" (Clapham 2007). This is very minimal survey effort and the two sperm whales sighted were very far offshore.

The records of four sperm whale strandings in PWS over the years are somewhat questionable. Clapham (2007) states "Currently Prince William Sound stranding records contain 38 animals listed as "beach-cast". This total includes four gray whales and four sperm whales. These data are subject to change as more information becomes available and with further review of the records." The phrase "subject to change" raises questions about whether sperm whales, already known to be rare in inshore Alaska waters (Figures 1-3), were actually found along the South Central Alaska coast.

Assuming sperm whales actually do occasionally strand in South Central Alaska, Angliss (2008) opens the possibility that local people salvaged parts of stranded carcasses, but that fact does not rule out the possibility that whales were hunted offshore, beyond three miles. Also, if the sperm whale carcasses were found on the seaward side of the PWS islands, this would be further evidence of their offshore habits and the reduced likelihood of sperm whales occurring within PWS.

Comments on: EXPERT REPORT OF DANA H. HANSELMAN, Ph.D. 3/14/08

Good summary of sablefish biology.

No comments

Comments on: EXPERT REPORT OF MARK WILKINS

1. Regarding the analysis of "non-summer" fish distributions, Wilkens (2008, Sections D. 3 and 4), analyzed the wrong dataset.

a.) Some of the confusion stems from the erroneous definition of "non-summer". Wilkens (2008, Section D.4) refers to Ganley's statement of the contention that some or all of these species could not be found in the protected, inside waters of Prince William Sound during the fall, winter, or spring. This creates an erroneous basis for the analysis for two reasons:
i) The issue is not whether the species can be found, but whether they are sufficiently abundant to support fishing effort. There is a well-known difference in fisheries science between "presence-absence" data and relative abundance data, the latter being much more useful for determining whether a stock can support harvest.
ii) The time period to question is better characterized as winter, rather than fall, winter, and spring. Generally speaking the primary species of interest, halibut, cod, and sablefish, move offshore to the continental shelf in winter and become much less available inside territorial waters (see Shimada and Kimura 1994; Knudsen 2008 and citations therein).

b.) Therefore, Wilkens' analysis should actually have only included November, December, January, and February, the effective moths of winter in Alaska, rather than also including fall and spring. Furthermore, to truly address the issue of whether the target species were sufficiently abundant for harvest, the analysis should also have included a comparison to abundances outside the 3-mile limit in winter, or to relative inshore abundances in summer. Based on these concepts, Wilkens (2008) figures 2a - 2f are not very meaningful to answering the question of whether the Chugach people needed to travel beyond inside waters to seek sufficiently abundant fish in winter.

2. Statements about commercial fisheries landings (Wilkens 2008, Section D-5) are also flawed in several ways. Wilkens states: "Alaska Department of Fish and Game who provided 2005 and 2006 landings data for Pacific halibut, Pacific cod, rougheye rockfish, and sablefish from Alaska state waters in the vicinity of Prince William Sound. These data confirmed that all of these species were landed between October and April in 2005 and/or 2006, with cod being landed in each of those months except January and rougheye rockfish in all months except December and January. Pacific halibut were landed in March, October, and November and sablefish were landed in March and April (N. Sagalkin, personal communication, Table 1)."

a.) Non-winter months included in the evaluation. Again, as above, the months to focus on are November through February. Such evaluations should not include fall and spring.

b.) A more relevant comparison would have included offshore landings from the winter months. Wilkens' (2008) Table 1 does show some landings within Prince William Sound during winter months, although zero in January. However, the landings data would be

more meaningful if they were compared to all other months to see whether target species are as plentiful in Prince William Sound in winter as they are in summer.

3. Disagree with the statement (Wilkens 2008, Section D-6) that ".....if these groundfish species made up the bulk of the fish diet for the ancestors of the plaintiff villages during nonsummer months, they would not have necessarily had to venture onto the OCS to harvest them; they could very possibly have caught these species in the protected waters inside the Sound." Much of the existing evidence, although somewhat scant, suggests that the target species move offshore in winter, as noted above.

4. Regarding migrations to deeper waters within Prince William Sound (Wilkens, 2008, Section D-7), I am unaware of any data that shows these fish move to deeper waters within Prince William Sound. Rather, there is data (Seitz et al. 2003) that shows that at least halibut move offshore to the continental shelf area.

5. Disagree with the conclusion by Wilken's (2008, Section E–1) that the local people could have subsisted year round on the available fisheries resources in Prince William Sound. While it is likely that the subject fish resources are available inshore roughly spring through fall, there is insufficient evidence that they are available all year long. Further research is needed on relative winter abundances and on seasonal migrations before such conclusions can be substantiated. The apparent lack of fish in the winter could certainly have necessitated travel to the OCS for harvest of these species. Furthermore, Wilkens' conclusion does not address other areas where Chugach natives reside, outside Prince William Sound.

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78 Wash. L. Rev. 939

Washington Law Review
August, 2003

Notes & Comments

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

Andrew P. Richards

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

For seven thousand years, people from five Alaska Native villages (the villages) fished and hunted along the southern coast of what is today the State of Alaska. [1] They continued to use their traditional areas until 1995, when the Secretary of the Department of Commerce limited fishing for halibut and sablefish off Alaska. [2] Previously, both Alaska Natives and non-Natives pursued halibut and sablefish from Southeast Alaska to the Bering Sea. The ease of entry into these two fisheries spawned a modern-day maritime gold rush in which too many people risked too much money and life for steadily diminishing profits. [3] Fearing that over-fishing would destroy the halibut and sablefish stocks, the Secretary curtailed fishing seasons by the late 1980s from months down ***940** to days. [4] In 1995, the Secretary responded to concerns about harvesters' dwindling profit margins, and the inherent dangers of fisheries built on wild two- and three-day openings, by limiting the number of people allowed to participate in the halibut and sablefish fisheries to those who qualified for Individual Fishing Quota shares (IFQs). [5]

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

In 1998 and 2002, the villages claimed that the IFQ regulations violated their fishing rights based on aboriginal title to areas of the Gulf of Alaska. [12] Since the United States Supreme Court's decision in ***941** Johnson v. McIntosh [13] nearly two hundred years ago, the Court has recognized that Indian tribes hold aboriginal title to their territories. [14] Under aboriginal title, tribes may exclusively use and occupy their territories until Congress extinguishes their title. [15] The villages argued that the IFQ regulations limited their ability to fish in their traditional areas of Cook Inlet and Prince William Sound, citing as evidence the fact that the Secretary had awarded halibut IFQs to only seventeen village members, and sablefish IFQs to only one member. [16] In Native Village of Eyak v. Trawler Diane Marie, Inc. (Eyak I), [17] and Native Village of Eyak v. Evans (Eyak II), [18] the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Alaska, respectively, held that the paramountcy doctrine had extinguished the villages' rights. [19] Under the paramountcy doctrine, the federal government must control the exploitation of the seabed and ocean off the coast of the United States to fulfill its duty to defend the nation and to regulate international commerce. [20] The Eyak I and II courts reasoned that the villages' claimed aboriginal rights to the seabed and offshore waters were incompatible with federal sovereignty over those areas. [21]

This Comment argues that aboriginal title is compatible with federal sovereignty over the seabed and ocean off Alaska. Part I details the U.S. Supreme Court's aboriginal title jurisprudence. Part II describes the extension of federal jurisdiction over the seabed and ocean. Part III traces the history of aboriginal title claims to the seabed and ocean off Alaska. In Part IV, this Comment argues that the Ninth Circuit en banc or the U.S. Supreme Court should apply the Court's traditional aboriginal title analysis, and not the paramountcy doctrine, to aboriginal ***942** title claims to the seabed and ocean off Alaska because those claims are consistent with federal sovereignty over offshore areas.

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

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

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

In Johnson, the U.S. Supreme Court introduced into American law the doctrine of discovery, the principle that guided the European division of, and protected aboriginal title to, the New World. [27] The dispute in Johnson arose from Thomas Johnson's purchase of land from the Illinois tribe in 1775 in the area that became known as the Old Northwest. [28] Johnson purchased the tribe's land in defiance of King George III's ban on settlements after Britain won the French and Indian War in 1763. [29] As successor to Britain's interest in the Old Northwest, the United States acquired from the Illinois the same land that they had already sold to ***943** Johnson, and in 1818 granted that land to William McIntosh. [30] Johnson took exception to the re-conveyance of what he thought was his land and sued McIntosh in Johnson v. McIntosh, seeking to quiet title. [31] The Johnson case provided the Court with an opportunity to define tribes' rights to territory under federal sovereignty. The success of Johnson's suit depended on whether the Court would recognize the validity of the title he had purchased from the Illinois. [32]

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

Less than a decade after Johnson, the Court emphasized the subordination of tribal sovereignty over Indian land within the United States. [42] In Cherokee Nation v. Georgia, [43] the Cherokee sued the State of ***944** Georgia to prevent it from seizing and dividing their land. [44] The Court, however, refused to entertain the Cherokee's suit under the Court's original jurisdiction. [45] The Court decided that although the Constitution gave it original jurisdiction over cases between states and foreign nations, the Cherokee were not a foreign nation but a "domestic dependent nation[]." [46] The Court reasoned that the Cherokee were "completely under [United States] sovereignty and dominion" because the United States would consider itself invaded if any foreign nation attempted to acquire land from, or form political connections with, the Cherokee. [47] The Court described the relationship between the Cherokee Nation and the United States as resembling "that of a ward to his guardian." [48] After Johnson and Cherokee Nation, tribes retained their right to exclusively use and occupy their territory, but exercised that right subject to federal sovereignty.

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

U.S. Supreme Court decisions after Johnson have defined the scope of aboriginal title and the conditions under which aboriginal title can be extinguished. [49] In those cases, the Court held that all territories acquired by the United States are subject to aboriginal title [50] and that aboriginal title allows tribes to exploit the natural resources of their land [51] and water territories. [52] The Court's precedent permits only Congress to extinguish aboriginal title, [53] but does not require Congress to compensate tribes when it extinguishes their title because ***945** congressionally unrecognized aboriginal title is not a "property right" protected by the Fifth Amendment. [54]

1. Scope of Aboriginal Title

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

Within territory subject to aboriginal title, tribes possess both the rights retained and given up by treaty. As the U.S. Supreme Court explained in United States v. Winans, [64] treaties are "not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted." [65] Among the rights arising from aboriginal title is a tribe's right to exploit the resources on and beneath the surface of its territory. [66] ***946** In United States v. Shoshone Tribe, [67] the question before the Court was whether the Shoshone tribe's aboriginal title included the right to use the timber and minerals of its territory. [68] The Court concluded that those resources belonged to the tribe by dint of aboriginal title established by "undisturbed possess[ion] of the soil from time immemorial." [69]

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

The U.S. Supreme Court has never considered whether aboriginal title exists in the seabed and ocean off Alaska. However, in response to conflicts between Alaska Natives and non-Indians over control of fish trap sites, [76] the Solicitor of the Department of the Interior issued an opinion in 1942 finding that Alaska Natives had established exclusive rights to the seabed and ocean off Alaska, based on their use of those areas. [77] Following this opinion, the U.S. Supreme Court suggested that Congress also believed that these aboriginal rights existed. [78] In ***947** Organized Village of Kake v. Egan, [79] the Court held that the Alaska Statehood Act (Statehood Act) [80] neither extinguished nor formally recognized aboriginal rights to the seabed and waters off Alaska, but instead preserved for later resolution Alaska Native claims based on aboriginal title. [81]

2. Extinguishment of Aboriginal Title

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

Even when a tribe's aboriginal title has not been extinguished, Congress may take resources from the tribe's territory without paying compensation if it has not formally recognized the tribe's title. [89] In Tee-Hit-Ton Indians v. United States, [90] the Tee-Hit-Ton tribe of southeast ***948** Alaska argued that Congress owed them the value of timber that it had sold from land the tribe claimed was subject to its aboriginal title. [91] The Court assumed that the Tee-Hit-Ton held aboriginal title to their land, but concluded that their title, while permitting them to use and occupy their land, did not

give them "legal rights" to their land. [92] The Court decided that the Tee-Hit-Ton had no legal rights to their land because Congress had not formally set aside land for them to use, as it had for the Shoshone and other tribes with dedicated reservations. [93] Because the Tee-Hit-Ton lacked legal rights to their land, the Court held that the Fifth Amendment did not require that Congress compensate the Tee-Hit-Ton for the timber taken from their territory. [94]

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

The following three-step approach to assessing aboriginal title claims can be distilled from the U.S. Supreme Court's decision in Santa Fe. [95] First, the Court determined whether the United States had extended its sovereignty over the land at issue because all territory acquired by the United States comes subject to aboriginal title. [96] After recognizing that ***949** the Mexican Cession was subject to both United States sovereignty and aboriginal title, the Court examined whether Congress had extinguished aboriginal title in that territory. [97] After concluding that Congress had not extinguished aboriginal title, the Court remanded the case to the lower courts to decide the third question, whether the Walapais had in fact exclusively used and occupied their territory. [98] Under Santa Fe, a court must recognize a tribe's aboriginal title if the court finds that the United States has extended its sovereignty over tribal territory, that Congress has not extinguished aboriginal title to that territory, and that the tribe has exclusively used and occupied its territory. [99]

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

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

The "paramountcy doctrine" stems from two U.S. Supreme Court decisions, United States v. California [105] and United States v. Texas. [106] In these cases, the federal government claimed ownership of and control over the seabed off the coasts of California and Texas, respectively. [107] The Court employed sweeping language to hold in each case that the ***950** federal government must have the "paramount power" [108] to regulate exploitation of the seabed and ocean to fulfill its duty to defend the nation and to regulate international commerce. [109] Following the Court's recognition of this power, Congress enacted the Submerged Lands Act (SLA) [110] and the Outer Continental Shelf Lands Act (OCSLA). [111] These acts surrendered to the states title to the seabed within three miles of their shores [112] and extended federal "jurisdiction [and] control" over the seabed beyond three miles from shore. [113] Later, Congress established its exclusive regulatory authority over fisheries between three and 200 miles offshore [114] through the Fishery Conservation and Management Act of 1976 (Magnuson Act). [115] The SLA, OCSLA, and the Magnuson Act reflect the federal government's paramount control over the seabed and the ocean adjacent to the United States.

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

Oil was discovered off the coast of California in 1894, and by 1926 both California and Texas were executing offshore oil leases [116] on the assumption that earlier U.S. Supreme Court decisions had recognized that they held title to the seabed out to three miles from shore. [117] Shortly after California and Texas began leasing the seabed, Congress considered bringing the seabed within the "public domain," and the Secretary of the Department of the Interior suggested that the federal ***951** government might also lease the seabed. [118] In May 1945, the United States took the seabed controversy to the courts by suing the Pacific Western Oil Company to enjoin it from exercising a lease granted to it by California. [119] In September 1945, President Harry Truman declared United States jurisdiction over the natural resources of the seabed [120] and one month later the United States dropped its suit against Pacific Western and instead sued California. [121] In that suit, the United States challenged California's ability to issue oil leases based on its alleged ownership of the seabed off its shores. [122]

In United States v. California, the United States argued that its constitutional responsibility to "protect this country against dangers to the security and tranquility of its people" required it to control use of the "marginal sea and land under it." [123] California argued that it owned the resources of the adjacent seabed because it entered the Union on "equal footing" with the original states, which allegedly held title to submerged land off their coasts. [124] The Court disagreed with California, finding no historical support for the idea that the original thirteen colonies owned their adjacent seabed. [125] Instead, the Court decided that the dispute was less about title to the seabed and more about which government, state or federal, should have the power to decide whether foreign or domestic ***952** entities may extract natural resources from the "marginal sea" bordering California. [126]

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

Three years later, the Court reaffirmed this holding in United States v. Texas. [131] Texas, like California, advanced an "equal footing" argument to support its claim to the land and minerals underlying the Gulf of Mexico. [132] Texas asserted that it owned these resources because the Republic of Texas had previously owned them. [133] Texas maintained that the Republic had owned and regulated the seabed, [134] and had relinquished only its regulatory powers when it joined the Union. [135] The Court read Texas' history differently, deciding that the Republic had surrendered all of its claims to the seabed when it joined the Union on equal footing with the original states. [136] Invoking the language of federal sovereignty, the Court held that "national interests and national responsibilities" dictate that all property interests within the "marginal sea" must "unite in the national sovereign." [137] Although both California and Texas appeared to involve only competing claims to the seabed, the Court accepted the opportunity provided by each case to hold that the United States' sovereignty extends over both the seabed and the ocean ***953** above the seabed. [138] Furthermore, while neither case explicitly held that the United States owns offshore natural resources, [139] the paramountcy decisions clearly awarded the United States control over those resources. [140]

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

Between 1953 and 1976, Congress extended federal jurisdiction over the seabed and fisheries off the coast of the United States. [141] Congress exercised its newly won paramountcy powers over the seabed when it passed the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953. [142] The SLA conveyed to the coastal states title to the seabed within three miles of their shores, [143] and OCSLA extended federal jurisdiction [144] over the Outer Continental Shelf (OCS), which is the seabed beyond three miles from coastal states' shorelines. [145] Both the SLA and OCSLA preserved existing rights to the seabed under "the law in effect at the time they may have been acquired." [146] Two decades later, the Magnuson Act of 1976 [147] extended Congress' regulatory jurisdiction ***954** over fisheries between 3 and 200 miles offshore. [148] The enormous swath of ocean covered by the Magnuson Act is now known as the United States' "exclusive economic zone" (EEZ). [149] Although Congress hoped its regulations would resuscitate depleted fish stocks, and therefore boost harvesters' income, it passed the Magnuson Act primarily in response to foreign domination of United States fisheries. [150] Together, the SLA, OCSLA, and the Magnuson Act gave the coastal states title to the seabed within three miles of their shores, extended federal control over the OCS, and regulated fisheries between 3 and 200 miles offshore. [151]

Nearly twenty years after Congress passed the Magnuson Act, the Secretary of the Department of Commerce limited access to the commercial halibut and sablefish fisheries in the EEZ off Alaska by instituting the IFQ program. [152] The IFQ program regulates a vast area that includes sections of the Gulf of Alaska traditionally used by the Eyak villages. [153] Currently, only IFQ holders can commercially fish within those areas. [154] In 1995, the government awarded IFQs to the owners or lessees of vessels that legally caught and sold halibut or sablefish between 1988 and 1990. [155] People who want to fish for halibut ***955** or sablefish today, but who did not receive IFQs in 1995, must purchase IFQs from someone who currently holds them. [156] IFQs entitle harvesters to a share of the annual Total Allowable Catch (TAC) for a given area. [157] Each year, the International Pacific Halibut Commission sets the TAC for halibut, and the federal government sets the TAC for sablefish. [158] Halibut regulations limit Alaska Native villagers to a subsistence harvest of twenty fish per person per day. [159] Sablefish regulations allocate all sablefish to IFQ holders, leaving none for tribal harvest, because they assume that sablefish's preference for deep water puts them out of the reach of all but commercial gear. [160]

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

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

The U.S. Supreme Court has consistently held that only Congress has the power to limit or extinguish aboriginal title. [166] Consequently, five Alaska Native villages argued in Eyak I and II that the IFQ program may not restrict their aboriginal interests [167] in the seabed and ocean off Alaska because Congress has not extinguished those interests. [168]

The Eyak decisions followed litigation beginning with Village of Gambell v. Clark (Gambell I), [169] and involving similar claims made by different Alaska Native villages in the 1980s and 1990s. [170] Although the Gambell decisions implicitly recognized limited offshore aboriginal interests, [171] the Eyak courts held that the paramountcy doctrine had extinguished all aboriginal interests in the seabed and ocean off Alaska. [172]

A. The Gambell Litigation

In Gambell I, the Alaska Native villages of Gambell and Stebbins sued to enjoin the Secretary of the Department of the Interior from leasing the seabed off western Alaska to several oil companies. [173] The villages argued that offshore development would negatively affect their subsistence hunting and fishing rights, [174] but the Ninth Circuit held that the villages had sacrificed those rights for part of the $962,500,000 and 40,000,000 acres awarded to Alaska Natives under the Alaska Native Claims Settlement Act (ANCSA). [175] Congress passed ANCSA [176] to ***957** resolve the conflict between the State of Alaska and Alaska Natives over rights to the land Alaska had selected for state ownership after its statehood in 1958. [177] ANCSA settled the dispute by giving money and land to Alaska Natives while also extinguishing the Natives' aboriginal title to land and waters "in Alaska." [178] After noting that Congress passed ANCSA to "avoid further litigation of [aboriginal] claims," the Gambell I court interpreted the phrase "in Alaska" to mean a "geographic region" rather than the "area within the strict legal boundaries of the State of Alaska." [179] Therefore, the court held that ANCSA extinguished the villages' subsistence rights in waters beyond the boundaries of the State of Alaska. [180]

However, the Gambell I court also held that the villages could still enjoin the federal government's leases to the oil companies under section 810 of the Alaska National Interest Lands Conservation Act (ANILCA). [181] ANILCA [182] protects Alaska's rural residents' subsistence hunting and fishing on over 100 million acres of land. [183] Section 810 allows the Secretary of the Interior to limit subsistence uses when restrictions are necessary, but only after the Secretary attempts to avoid impacting subsistence activity in the first place. [184] Relying on the use of the phrase "in Alaska" in its "general sense" during House debates on ANILCA and on Congress' knowledge of the offshore hunting and fishing habits of Alaska's coastal villagers, the Gambell I court concluded that the phrase "in Alaska" carries the same meaning in ANILCA as it does in ANCSA. [185] Because it determined that section 810 applies to waters beyond Alaska's boundaries, the court ***958** enjoined the oil leases until the district court could evaluate the Secretary's compliance with section 810. [186]

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

On remand, the Ninth Circuit in Village of Gambell v. Hodel (Gambell III) [195] reconsidered the geographic scope of ANCSA in light of Gambell II's interpretation of the phrase "in Alaska" from ANILCA. [196] The Ninth Circuit

reversed its Gambell I decision and held that ANCSA does not reach beyond three miles from shore and therefore did not extinguish "aboriginal subsistence rights" that may exist in the seabed and waters beyond Alaska's boundaries. [197] Although the Gambell III court eliminated ANCSA as a defense to offshore aboriginal title claims, the court did not definitively answer the oil companies' second defense, that aboriginal title is incompatible with the United States' ***959** sovereignty over the seabed and waters beyond three miles from shore. [198]

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

The Gambell litigation ended with Village of Gambell v. Babbitt (Gambell IV) [207] when the Ninth Circuit affirmed the district court's holding that the case was moot because all the oil companies had given up their offshore leases. [208] This closure left the villages of Gambell and Stebbins in essentially the same legal position as when they first sued the Secretary of the Interior. The villages' residents could continue their subsistence harvest free from interference by oil exploration, but without the protection afforded by aboriginal title. The next opportunity for Alaska Natives to assert aboriginal title to the seabed and waters beyond ***960** Alaska's boundaries arose when the IFQ program restricted the Eyak villages' ability to fish for halibut and sablefish. [209]

B. The Eyak Litigation

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

The villages appealed to the Ninth Circuit, arguing that the district court erred by basing its decision on the theory that the villages' aboriginal title claim was equivalent to the state claims in the paramountcy cases. [215] The villages maintained that their claim was different because aboriginal title is not a claim of sovereignty but a right of exclusive use and occupancy, qualified by Congress' ability to extinguish that right. [216] To support their argument, the villages cited the Gambell III court's holding that "aboriginal rights may exist *961 concurrently with a paramount federal interest, without undermining that interest." [217]

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

That day dawned when the Eyak I villages filed another complaint against the Secretary of Commerce. [224] While the villages had argued in Eyak I that their aboriginal title gave them the exclusive right to exploit certain areas of the seabed and ocean off Alaska, [225] in Eyak II the villages claimed that the IFQ regulations interfered with their non-exclusive right to participate in the Alaskan halibut and sablefish fisheries. [226] The District Court for the District of Alaska observed that ***962** aboriginal rights are usually exclusive rights founded upon aboriginal title, [227] but also noted that "[a]boriginal hunting and fishing rights can exist without aboriginal title." [228]

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

Ultimately, the Eyak II court decided that non-exclusive rights are also repugnant to federal sovereignty over the seabed and ocean. [234] Because the villages' claimed rights stemmed from their former sovereignty over their territory, the court held that their rights had been extinguished when the federal government extended its own sovereignty over the seabed and ocean. [235] According to the Eyak II court, exclusive and non-exclusive rights equally threaten the "dominance of national sovereignty" [236] because of the Texas Court's holding that all offshore property rights must "coalesce and unite in the national sovereign." [237] The court distinguished the Makah's non-exclusive rights in the Pacific Ocean on the grounds that the Makah reserved those rights by treaty. [238] Citing to Ninth Circuit precedent, the district court found that the ***963** paramountcy doctrine essentially effected a "full title extinguishment" that only non-exclusive treaty rights survived. [239]

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

> [OCSLA] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery. [242] Despite OCSLA's apparent recognition of the fact that aboriginal title could exist in the seabed, the court held that the savings clause did not protect the villages' aboriginal rights. [243] The court reasoned that those rights had been extinguished in 1950, [244] the year of the Texas decision culminating the development of the paramountcy doctrine [245] and before Congress enacted OCSLA in 1953. [246]

Almost two centuries after Johnson, both the Eyak I and II courts applied the U.S. Supreme Court's paramountcy doctrine to offshore ***964** aboriginal title claims instead of the Court's traditional aboriginal title analysis. [247] In Eyak I, the Ninth Circuit interpreted its Gambell III precedent to permit only non-exclusive subsistence rights in the seabed and ocean. [248] In Eyak II, the District Court for the District of Alaska extended Eyak I by holding that the paramountcy doctrine extinguished all aboriginal rights to the seabed and ocean not reserved by treaty. [249] After Eyak I and II, therefore, the villages have neither exclusive nor non-exclusive rights to offshore areas, despite the Gambell III court's holding that "aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest." [250]

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

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

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

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

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

The Ninth Circuit en banc or the U.S. Supreme Court should apply the Court's traditional three-step aboriginal title analysis to offshore aboriginal title claims because the government's interest in maintaining control over the territories it acquires was at the root of both the paramountcy and the aboriginal title cases. In California and Texas, the Court held that the federal government must control the ocean and seabed in order to fulfill its sovereign duties to protect the nation and to ***966** regulate international commerce. [260] The Court feared that state ownership of offshore territory and disposal of its resources would interfere with the nation's ability to fight wars on, and conduct commerce over, the ocean. [261] These frontier concerns, however, are not uniquely maritime. As Justice Reed noted in his dissent in Texas, "[n]ational responsibility is no greater in respect to the marginal sea than it is toward every other particle of American territory." [262] The doctrine of discovery developed in Johnson, and applied to aboriginal title cases ever since, accommodates the same fears stressed by the Court in the paramountcy cases. [263]

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

Economic concerns also fail to support the conclusion that the paramountcy doctrine extinguished offshore aboriginal title. The ability ***967** of the United States to conduct "world commerce" [268] over the Pacific Ocean would remain paramount even with judicially recognized aboriginal title to the seabed and ocean. Aboriginal title would not deprive the United States of any mineral or fisheries resources it desires because Congress can extinguish congressionally unrecognized aboriginal title without paying compensation to the affected tribe. [269] Furthermore, aboriginal title would have no unwanted impact on foreign or interstate trade because tribal trade relations are the exclusive province of Congress. [270]

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

The Santa Fe and Shoshone Tribe decisions demonstrate that tribes retain their exclusive right to use and occupy their territory after it falls under United States sovereignty. By holding that offshore aboriginal interests would frustrate the federal government's ability to control exploitation of seabed and ocean resources, the Eyak courts failed to appreciate

U.S. Supreme Court precedent protecting aboriginal title to natural resources within acquired territories. Because the Court has found neither national security nor economic concerns reason enough to reverse its aboriginal title precedent, the Ninth Circuit en banc or the ***968** U.S. Supreme Court should apply the Court's traditional aboriginal title analysis to aboriginal title claims to the seabed and ocean.

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

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

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

Before and after the paramountcy decisions, the federal government acknowledged the existence of aboriginal interests in the seabed and ocean off Alaska and acted to preserve them. For example, in 1942 the Solicitor of the Interior observed that Alaska Natives recognized, between themselves, exclusive rights to exploit ocean areas and the seabed off Alaska. [282] The Solicitor concluded that those rights survived the extension of Russian, and later American, sovereignty over Alaska Native territory. [283] Sixteen years after the Solicitor's opinion, Congress preserved those rights when it admitted the State of Alaska into the ***969** Union. [284] As the U.S. Supreme Court noted in Kake, the Alaska Statehood Act neither extinguished nor recognized Alaska Natives' rights, but left them "unimpaired." [285]

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

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

The Eyak II court also held that the Statehood Act and OCSLA do not support the villages' claims because they were enacted after the paramountcy doctrine, and thus could not preserve extinguished rights. [291] This holding, however, renders the acts' savings clauses inconsequential, an effect contrary to that required by the traditional canon of statutory construction "that a statute should be interpreted so as not to render one part inoperative." [292] In sum, the Solicitor's opinion, the Statehood Act, and OCSLA support the conclusion that extension of federal sovereignty over the seabed and ocean did not extinguish the ***970** villages' offshore aboriginal title because that title is a "national interest and national responsibilit[y]." [293]

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

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

V. CONCLUSION

The Eyak I and II courts invoked the paramountcy doctrine to explain why five Alaska Native villages no longer have aboriginal interests in the seabed and ocean off Alaska. In its paramountcy decisions, United States v. California and United States v. Texas, the U.S. Supreme Court held that the federal government must have exclusive control over offshore areas to fulfill its sovereign duties to protect the nation and to regulate international commerce. Neither national security nor economic concerns justify extinguishing aboriginal title to the seabed and ocean ***971** because aboriginal title accommodates these concerns. Tribal enforcement of aboriginal title would not threaten the nation because tribes may not convey their territory to, or form political connections with, foreign entities. Furthermore, offshore aboriginal title would not complicate federal regulation of international oceanic trade because the Fifth Amendment does not require that Congress pay to extinguish congressionally unrecognized aboriginal title. For these reasons, aboriginal title is fully compatible with federal sovereignty over the seabed and ocean. Therefore, the Ninth Circuit en banc or the U.S. Supreme Court should apply the Court's traditional aboriginal title analysis, rather than the paramountcy doctrine, when analyzing offshore aboriginal title claims.

Footnotes

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

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

3 Ransom E. Davis, Individually Transferable Quotas and the Magnuson Act: Creating Economic Efficiency in Our Nation's Fisheries, 5 Dick. J. Envtl. L. & Pol'y 267, 283 (1996).

4 Id.

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

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

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

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

9 50 C.F.R. §679.40(a)(2)(A)-(B).

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

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

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

13 21 U.S. 543 (1823).

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

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

16 Steve J. Langdon, Resource Uses by Alaska Natives and Non-Natives in the Central Gulf of Alaska Outside Three Miles in the 20th Century 126-27 (Sept. 15, 2000) (unpublished report pertaining to Eyak II) (on file with author) (noting also that other, unidentified village members may hold IFQs).

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

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

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

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

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

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

23 Id.

24 Id. at 573.

25 Id. at 574.

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

27 Johnson, 21 U.S. at 574.

28 Id. at 555-56. The term “Old Northwest” described the land south of the Great Lakes, east of the Mississippi River, north of the Ohio River, and west of the Appalachians and other eastern mountain ranges. Robert A. Williams, Jr., The American Indian In Western Legal Thought 233 (1990).

29 Johnson, 21 U.S. at 594.

30 Id. at 560.

31 Id. at 571-72.

32 Id. at 572.

33 Id. at 574.

34 Id.

35 Id. at 573.

36 Id. at 574.

37 David S. Case & David A. Voluck, Alaska Natives and American Laws 36 (2d ed. 2002).

38 Johnson, 21 U.S. at 574.

39 Id.

40 Id. at 604-05.

41 Felix S. Cohen's Handbook of Federal Indian Law 487 (Rennard Strickland et al. eds., 1982) [hereinafter Cohen].

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

43 30 U.S. 1 (1831).

44 Id. at 15.

45 Id. at 20.

46 Id. at 17.

47 Id. at 17-18.

48 Id. at 17.

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

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

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

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

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

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

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

56 314 U.S. 339 (1941).

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

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

59 Id. at 357.

60 Id. at 343-44.

61 Id. at 345-46.

62 Id.

63 Id. at 360.

64 198 U.S. 371 (1905).

65 Id. at 381.

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

67 304 U.S. 111 (1938).

68 Id. at 113.

69 Id. at 117.

70 443 U.S. 658 (1979).

71 Id. at 670 n.15, 689.

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

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

74 Id. at 1318.

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

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

77 Id. at 476-77.

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

79 369 U.S. 60 (1962).

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

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

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

83 Id. at 346.

84 Id. at 343-44.

85 Id. at 357-58.

86 Id. at 360.

87 Id. at 347.

88 Id.

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

90 348 U.S. 272 (1955).

91 Id. at 275-77.

92 Id. at 279.

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

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

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

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

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

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

99 Id. at 345-47.

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

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

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

103 Santa Fe, 314 U.S. at 346-47.

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

105 332 U.S. 19 (1947).

106 339 U.S. 707 (1950).

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

108 Texas, 339 U.S. at 719.

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

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

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

112 43 U.S.C. §1311(a)(1)-(2).

113 Id. §§1331(a), 1332(1).

114 See 16 U.S.C. §1801(b)(1) (2000).

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

116 Edward A. Fitzgerald, The Seaweed Rebellion: Federal-State Conflicts Over Offshore Energy Development 28 (2001).

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

118 Hardwicke, supra note 117, at 401.

119 Fitzgerald, supra note 116, at 29.

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

121 Fitzgerald, supra note 116, at 28-29.

122 Id.

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

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

125 California, 332 U.S. at 31-32.

126 Id. at 29.

127 Id. at 32-33.

128 Id. at 34-35.

129 Id. at 34-36.

130 Id. at 38-39.

131 339 U.S. 707, 719 (1950).

132 Id. at 712; see also supra note 124 and accompanying text.

133 Texas, 339 U.S. at 711.

134 Id. at 712.

135 Id. at 713.

136 Id. at 718.

137 Id. at 719.

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

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

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

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

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

143 43 U.S.C. §1311(a)(1)-(2).

144 Id. §1333(a)(1).

145 Id. §§1331(a), 1332(2).

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

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

148 See 16 U.S.C. §1801(b)(1).

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

to regulate fisheries within the EEZ because the EEZ includes the same waters as the FCZ. Act of Nov. 14, 1986, Pub. L. 99-659, §§101(a), 102(c)(1)(A), 100 Stat. 3706, 3707.

150 Davis, supra note 3, at 283-84.

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

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

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

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

155 Id. §679.40(a)(2)(A)-(B).

156 Alliance, 84 F.3d at 345.

157 50 C.F.R. §679.40(b).

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

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

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

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

162 43 U.S.C. §1311(a)(1)-(2) (2000).

163 Id. §1333(a)(1).

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

165 Langdon, supra note 16, at 126-27.

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

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

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

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

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

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

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

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

174 Id.

175 Id. at 579.

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

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

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

179 Gambell I, 746 F.2d at 575-76.

180 Id. at 573.

181 Id. at 582.

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

183 Cohen, supra note 41, at 759.

184 16 U.S.C. §3120.

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

186 Id. at 582-83.

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

188 Id. at 540.

189 Id.

190 Id. at 534 n.1.

191 480 U.S. 531 (1987).

192 Id. at 555.

193 Id. at 552-53.

194 Id. at 555.

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

196 Id. at 1275.

197 Id. at 1280.

198 Id. at 1276.

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

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

201 Inupiat, 548 F. Supp. at 185.

202 Id. at 187.

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

204 Id. at 1277.

205 Id. at 1280.

206 Id.

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

208 Id. at 407.

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

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

211 Id.

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

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

214 Id. at 1094.

215 Id. at 1095.

216 Id.

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

218 Id.

219 Id.

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

221 Id. at 1096-97.

222 Id.

223 Id. at 1092 n.4.

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

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

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

227 Id. at 21.

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

229 Id. at 30.

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

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

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

233 Id. at 23-24.

234 Id. at 27.

235 Id. at 28.

236 Id. at 27.

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

238 Id. at 29.

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

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

241 43 U.S.C. §1342.

242 H. Rep. No. 82-695 (1953), reprinted in 1953 U.S.C.C.A.N. 1395, 1411.

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

244 Id.

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

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

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

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

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

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

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

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

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

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

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

256 Id. at 1278-80.

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

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

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

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

261 California, 332 U.S. at 36.

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

263 Johnson, 21 U.S. at 573-74.

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

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

266 Johnson, 21 U.S. at 573-74.

267 Cherokee Nation, 30 U.S. at 17-18.

268 California, 332 U.S. at 35.

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

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

271 California, 332 U.S. at 29.

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

273 Johnson, 21 U.S. at 574.

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

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

276 Texas, 339 U.S. at 719.

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

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

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

280 43 U.S.C. § 1342 (2000).

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

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

283 Id. at 464, 476.

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

285 Id.

286 43 U.S.C. §1342 (2000).

287 H. Rep. No. 82-695 (1953), reprinted in 1953 U.S.C.C.A.N. 1395, 1411.

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

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

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

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

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

293 Texas, 339 U.S. at 719.

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

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

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

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

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