

Case Notes

Construction Work: The Canons of Indian Law

Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

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

1. See, e.g., Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1138 (1990) (indicating the repeated congressional oscillations with respect to Indian law).

2. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985).

3. 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

4. The ANCSA, 43 U.S.C. §§ 1601-1629e (1994), was designed to open Alaska quickly to oil drilling and to provide a final determination of Indian land claims in the state, transferring millions of acres of land to highly structured native corporations. For a more extensive history of the ANCSA and the structure of the native corporations, see FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 746-57 (1982).

5. Specifically, the court found that the ANCSA did not strip Venetie of its status as a dependent Indian community and therefore it could tax state activity in the Village. See *Alaska v. Native Village of Venetie*, 101 F.3d at 1302; see also 18 U.S.C. § 1151 (1994) (defining Indian country as reservation land, dependent Indian communities, and Indian allotments). This status grants Venetie and other villages wide-ranging sovereign powers, substantially limiting state authority and significantly expanding tribal control. Indian country status is the first-order consideration in Indian law, determining who prosecutes most crimes involving tribal members, see 18 U.S.C. § 1152, who controls child custody proceedings, see 25 U.S.C. § 1911 (1994), and, as in *Alaska v. Native Village of Venetie*, who can tax various activities, see COHEN, *supra* note 4, at 406-16. The Ninth Circuit declared that 1.8 million acres in Alaska (an area about the size of Delaware) is Indian country. See *Alaska v. Native Village of Venetie*, 101 F.3d at 1289, 1302. Alaska estimates that the ruling doubled the amount of Indian country in the nation. See *Petitioner's Brief* at 17, *Alaska v. Native Village of Venetie*, No. 96-1577 (U.S. filed June 23, 1997). In total, the ANCSA lands span 44 million acres, see *Alaska v. Native Village of Venetie*, 101 F.3d at 1289, and whether these lands are Indian country is now unclear. The Ninth Circuit's ruling has had political repercussions. Alaskan Senator Ted Stevens began his ongoing efforts to split the Ninth Circuit in part due to this case. See David G. Savage, *Debate Rises over Proposal To Break Up Appeals Court*, L.A. TIMES, Sept. 21, 1997, at A3.

6. The canon played a key role in the decision. After determining that Indian country once existed in Alaska, the court called upon the canons of construction in considering whether the ANCSA extinguished

was misplaced. The most consistent interpretation of recent Supreme Court precedent involving the canon indicates that it does not apply to the ANCSA.

I

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

Most of the major recent Supreme Court cases involving statutory analysis of Indian law, however, can be read consistently if the canon is interpreted to apply only when Congress acted in its role as tribal trustee.¹⁰ The rationale for the canon, after all, arises from the trust relationship, as embodied in the conception that the federal government holds lands on behalf of the tribes and must manage these lands for the tribes' benefit.¹¹

it. Stating that the "ANCSA falls into that category of statutes enacted for the benefit of Indians," the court found that this "background principle" meant the statute should be "liberally construed" and "congressional intent to extinguish Indian country must be reflected by 'clear and plain language.'" *Alaska v. Native Village of Venetie*, 101 F.3d at 1294-95 (citation omitted). The court thus looked to whether the ANCSA was "clear[] and explicit[]," *id.* at 1297, and ultimately the canon was the basis of its decision that the transfer of title to the Native corporations did not extinguish federal superintendence, *see id.* at 1299.

7. This flexibility in the application of canons has been noted outside the realm of Indian law. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960) (pointing out that for every canon there is an opposite counter-canon); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649-56 (1992) (arguing that the lack of meta-rules explaining when to apply canons means they do not seriously constrain judges). Llewellyn's critique is not strictly true in the case of the canon favoring tribes, because there is no canon operating against the tribes. The Court, however, resorts to language about legislative intent when it wishes to rule against tribal litigants. *See DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) ("A canon of construction is not a license to disregard clear expressions of . . . congressional intent.").

8. *See infra* notes 12-32 and accompanying text. Indeed, the entire body of Indian law has been frequently criticized for its inconsistency. *See* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 72 (1992) (describing as "confused" the Court's decisions determining when tribal powers are not compatible with the tribes' status as dependent domestic nations); *id.* (pointing out that the law in this area has been frequently reformulated, reinterpreted, and, in one case, ignored); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH. L. REV. 109, 113 (arguing that decisions involving the trust relationship have been "often inconsistent").

9. *See South Carolina v. Catawba*, 476 U.S. 498, 506 (1985) ("The canon of construction [requires] the resolution of ambiguities in favor of Indians . . .").

10. While the canon also applies to treaties, this analysis does not. Congress appears never to have signed treaties as tribal trustee. Of course, this analysis also cannot account for cases that completely ignore the canon. Such cases, in any event, are tangential to *Alaska v. Native Village of Venetie* because the Court will almost certainly confront the canon. Finally, this theory may not apply to myriad cases involving one of the many surplus land acts, *see, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984); *Matz v. Arnett*, 412 U.S. 481 (1973), in which the Court determined whether congressional enactments diminished reservations. These cases form a unique body of law with its own set of tools. *See Hagen v. Utah*, 510 U.S. 399, 410-11 (1994) (pointing out the specific rules that apply in Surplus Land Act cases).

11. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("[The United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards."); COHEN, *supra* note 4, at 226 ("The federal trust

For example, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,¹² Congress had passed the relevant statute in its role as trustee, and the canon was strictly applied. The case involved a provision of the 1887 General Allotment Act (GAA),¹³ which provided for the distribution of reservation lands to individual tribal members. Although Congress may not have been acting with the best interests of the tribes at heart,¹⁴ it was still technically acting as trustee, because the federal government held the land in trust and Congress determined its distribution. The Court interpreted a GAA provision stipulating that, after the trust period expired, "all restriction as to sale, incumbrance, or taxation of [the] land shall be removed."¹⁵ Holding initially that this provision meant what it said, the Court upheld the state's ad valorem tax on the land.¹⁶ Subsequently, however, it applied the canon in finding that the statute did not allow an excise tax: "[O]ur choice between [two constructions] must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"¹⁷

Similarly, the Court gave the canon significant weight in construing a statute involving mineral development on tribal lands. Congress acted in its capacity as a trustee when it established rules to open Indian lands to non-Indian mining in 1891,¹⁸ as well as when it modified those rules in 1924 and 1938.¹⁹ The Court accordingly strictly applied the canon in *Montana v. Blackfeet Tribe*²⁰ when charged with deciding whether the 1924 provision permitting state taxation of the tribal royalties from the mineral leases survived the 1938 revisions. Even though neither the 1938 legislation nor its legislative

responsibility is a very important limitation on executive authority and discretion to administer Indian property and affairs. . . . [T]he federal executive is held to a strict standard of compliance with fiduciary duties." (citing *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935))

12. 502 U.S. 251 (1992).

13. 25 U.S.C. §§ 331-358 (1994). The GAA was an attempt to destroy tribes, "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Confederated Tribes & Bands*, 502 U.S. at 254. Congress divided former reservation lands into farm-sized parcels and transferred them to tribal members, held in trust by the federal government for 25 years. The land then became the property of tribal members in fee simple, fully alienable and taxable. See generally WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 233-35 (1981), COHEN, *supra* note 4, at 130-34. Though it remains on the books, the GAA policies effectively ended with the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-465). This Act prevented further allotment, indefinitely extended the trust period applying to land already allotted, and provided a mechanism for returning unallotted land to tribal ownership. See *id.*

14. Cf. *Confederated Tribes & Bands*, 502 U.S. at 254 (noting that the GAA unified a patchwork of policies allotting land on a freely alienable basis that had led to the rapid disappearance of Indian land).

15. 25 U.S.C. § 349.

16. See *Confederated Tribes & Bands*, 502 U.S. at 266.

17. *Id.* at 269 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

18. See Act of Feb. 28, 1891, ch. 383, 26 Stat. 794 (codified as amended at 25 U.S.C. § 397).

19. See Act of May 29, 1924, ch. 210, 43 Stat. 244, 244 (codified as amended at 25 U.S.C. §§ 396-398); Act of May 11, 1938, ch. 198, § 1, 52 Stat. 347, 348 (same).

20. 471 U.S. 759 (1985).

history mentioned taxation,²¹ the Court held that Congress's failure specifically to reauthorize taxation of tribal royalties prevented the state from taxing leases issued under the new statute. In reaching this conclusion, the Court repeatedly emphasized the canon, which appeared to be the determining factor in its decision.²²

In contrast, when the Court has interpreted statutes passed outside the trust relationship, it has been less solicitous of the canon. The Court virtually ignored the canon, for example, when interpreting the Buy Indian Act²³ in *Andrus v. Glover Construction Co.*²⁴ Although Congress intended the statute to benefit tribes, it did not act as their representative; the legislation was primarily a jobs program.²⁵ The case involved a close and complex reading of the interplay of two statutes,²⁶ and thus would appear to have offered a perfect opportunity for the Court to use the canon of construction to avoid a knotty analytic problem. The Court dismissed the canon, however, with only a passing reference in the last sentence of its opinion.²⁷

Nor was the trust relationship implicated when Congress "simply wished to build a dam."²⁸ Consequently the canon was not applied when Indian land was taken for that purpose.²⁹ In this instance, Congress was not acting as a tribal representative; the takings were effected as if the tribe had been a private individual. The Court therefore held that a clause of the statute providing that the land was open to public use abrogated the tribe's right to exclude non-Indians.³⁰ Although the majority opinion mentioned the canon,³¹ strict application of it would have dictated the opposite result.

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

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

23. 25 U.S.C. § 47.

24. 446 U.S. 608 (1980).

25. The Buy Indian Act requires the government to purchase Indian-made products when practical. See 25 U.S.C. § 47.

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

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

28. *South Dakota v. Bourland*, 508 U.S. 679, 698 (1993) (Blackmun, J., dissenting).

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

30. See *id.* at 683.

31. See *id.* at 687.

In sum, the cases illustrate a general, if unacknowledged, trend in recent opinions reinforcing the logic behind the canon's support of interpretations favoring tribes. The canon applies only when Congress acted as trustee.³²

II

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

This relationship, though, did not involve Alaskan Indians.³⁶ Indeed there was almost no federal-tribal relationship for the first ninety years following the cession of Alaska by Russia.³⁷ For the initial fifty years of American dominion over Alaska, Congress established only one reservation.³⁸ In the 1930s and 1940s, Congress did begin to authorize the creation of Alaskan reservations.³⁹ The trust status of these reserves, however, remained quite

32. Of course, the discussion above is not exhaustive. The selected cases, however, are typical. For other cases in which the canon has been strongly applied and Congress was acting as trustee in the relevant statute, see *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 149 (1984); and *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). For another example in which Congress was not acting as trustee (and indeed, explicitly abandoned the trustee relationship) and the Court did not apply the canon, see *South Carolina v. Catawba*, 476 U.S. 498, 506 (1986).

33. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

34. See *United States v. Kagma*, 118 U.S. 375 (1886). The Court noted: "They are dependent on the United States Because of the local ill feeling, the people of the States . . . are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, . . . there arises the duty of protection . . ." *Id.* at 383-84.

35. See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 (1975).

36. See Jeremy David Sacks, *Culture, Cash or Calories. Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 257-59 (1995) (stating that "[a]lthough they are ostensibly subject to the same trust relationship as Native Americans in the continental United States, Alaska Natives initially were not treated as dependent peoples by the federal government," and listing several ways in which the relationships differ); James E. Torgerson, *Indians Against Immigrants—Old Rivals, New Rules: A Brief Review and Comparison of Indian Law in the Contiguous United States, Alaska, and Canada*, 14 AM INDIAN L. REV. 57, 101-02 (1989) (indicating that the lack of trust status, more limited self-governance, and relatively significant political clout all distinguish Alaskan natives from those in the lower 48 states).

37. See COHEN, *supra* note 4, at 739. The federal government never signed treaties with Alaskan tribes, *see id.*, and minimal distinctions were drawn between Indians and non-Indians in Alaska, *see* DAVID S. CASE, *THE SPECIAL RELATIONSHIP OF ALASKA NATIVES TO THE FEDERAL GOVERNMENT* 2 (1978).

38. In 1891, Congress set up the Metlakatla Indian Reservation. See Act of Mar. 3, 1891, ch. 561, § 15, 25 Stat. 1095, 1101 (1891) (codified as amended at 25 U.S.C. § 495 (1994)). The Metlakatla Indians are discussed further *infra* note 45. A few other reservations were established by executive order. See COHEN, *supra* note 4, at 743-44.

39. See CASE, *supra* note 37, at 4. Venetic was one of these. See *id.*

unclear.⁴⁰ It was not until the enactment of the ANCSA itself that the United States took any determinative steps to decide the core issue in the trust relationship: native rights to Alaskan land.⁴¹ As Congress itself pointed out in 1971, for one hundred years “[t]he United States ha[d] simply not acted.”⁴² In the ANCSA, Congress was not acting to manage the land as tribal trustee. Instead, Congress was attempting to resolve all land claims in one fell swoop and open the way for oil development in Alaska.⁴³ Congress’s history⁴⁴ of treating Alaskan natives as an afterthought indicates that the trust interaction necessary to apply the canon of construction was absent.⁴⁵

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

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

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

42. H.R. REP. NO. 92-523, at 4 (1971), reprinted in 1971 U.S.C.C.A.N. 1292, 1294.

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

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

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