Module One; Why the need for Land Claims?

Learning Objective: Understand why certain populations need to pursue lands claims settlements and which populations generally pursue land claims.

Understand why lands claims were pursued in Alaska

Be able to identify land claims and reform efforts underway in other parts of the world

Getting Started: Lands claims are about laws and legislation and these can be difficult reading. Study the lecture and additional readings carefully and submit your three questions/comments to the instructor via email before moving on to the quiz. Ask as many questions as you need, and use the Discussion Board to engage with other students throughout the course!

Lecture: Disputes over land have been a part of the human landscape ever since man first developed language for “this is mine and that’s yours”. Different peoples established boundaries around areas they considered as “theirs” and sometimes their neighbors disputed these boundaries because they also thought they had rights to the same area. Sometimes wars were fought over boundaries; other times neighbors agreed with each about where they should be and respected them, refraining from hunting, fishing, farming or grazing on their neighbor’s lands. In the worst case scenario entire populations lost their lands and had to move or become enslaved by the new ‘land-owners’. Once colonialism by European nations got under way in the 1500s more and more Indigenous populations around the world began to experience wholesale invasion of their lands. Depending on what kind of laws and attitudes the colonists brought with them, Indigenous Peoples may or may not have been able to retain any basis for attempting to re-establish their rights of landownership. Some Indigenous populations were simply annihilated by the colonizers. Indigenous Peoples in the Caribbean suffered such decimation of population after the Spanish arrived that those remaining today in small
communities on islands such as Cuba probably have little capacity to establish meaningful lands claims.

**The Doctrine of Discovery:** An understanding of this centuries old international legal principle is very important for understanding the basis for land claims in colonized countries today. While we will discuss it in connection with the North American continent you should understand that “Discovery” has application in any location that was colonized by a European power. In “Native America, Discovered and Conquered” Robert J Miller, whose work on Discovery is listed in the supplemental reading list for this course, summarizes the Doctrine as follows:

*Doctrine of Discovery provided, under established international law, that newly arrived Europeans immediately and automatically acquired property rights in Native lands and gained governmental, political, and commercial rights over the inhabitants without the knowledge or consent of the Indigenous Peoples.* (Miller 2006, 1)

In his Introduction Miller attributes 10 elements to Discovery which are summarized below. As you work through this course keep Discovery in mind because it has had a significant influence on how Indian affairs and land claims are still being dealt with by the U.S. Government today.

1. **First Discovery.** Understand here that Discovery involved competition between the European powers. The first one to arrive gained property and sovereign rights over the new lands. It was considered to create a claim of title but this was generally considered to be an incomplete title.

2. **Actual occupancy and current possession.** The ‘discoverer’ had to build a fort or settlement and occupy it, and do so within a reasonable length of time after first discovery.

3. **Preemption/European title.** This was a very valuable property right. The discovering power was the only one with the right to buy land from Native owners. The Doctrine of Discovery handed the right of preemption to the first arriving government. No other governments or individuals could buy land.

4. **Indian Title.** Discovery took away full property rights and ownership rights from Indigenous Peoples. After a European power ‘discovered’ their lands they only retained the rights to use and occupy the land (Aboriginal Title) but they could in theory keep these rights for ever by refusing to sell the lands. If they did choose to sell they were
limited in choice of buyers and could only sell to the discovering government, thus their title was a restricted ownership right.

5. **Tribal limited sovereign and commercial rights.** After being ‘discovered’ Indian Tribes were considered to have lost some of their inherent sovereign powers. They could no longer enter into trade agreements or other forms of diplomacy with other foreign nations...only with the government of the discoverer.

6. **Contiguity.** This element defined how much land a European power actually gained in its discovery. It provided for Europeans to have a reasonable amount of land surrounding the settlements they actually possessed in the New World. This was very important when different European powers had settlements fairly close together. Contiguity meant that discovering the mouth of a river meant that the discoverers now had a claim over all the lands drained by that river even if that included thousands of miles of unexplored territory.

7. **Terra Nullius:** This Latin term taken literally meant unoccupied or empty land but viewed through the Discovery lens it meant that if lands were not occupied by Europeans, or were occupied by non-Europeans but were not being used in a manner that European legal systems approved, the lands were considered to be empty or waste lands and available for Discovery claims. Europeans and Americans used a very liberal interpretation of Terra Nullius in America, considering lands that were very obviously occupied and in use as being ‘vacant’ because they were not being used ‘properly’.

8. **Christianity** was a very significant aspect of Discovery which considered that non-Christian peoples did not have the same rights of sovereignty and self determination because Christians could trump those rights simply be being Christians

9. **Civilization** as defined by Europeans, and later by Americans, helped bolster the sense of superiority that justified ‘Discovery’. Euro-Americans believed that God had directed them to ‘civilize and educate’ Indigenous Peoples and often to exercise paternalism and guardianship over them. (To understand the source of the belief system behind 8. and 9. better some knowledge of pre-colonial European religious law in the twelfth and thirteenth centuries is helpful.)

10. **Conquest** could mean a military victory. The concept of “just wars” shared by Spanish English and Americans allegedly justified the invasion and conquest of Indian lands under some circumstances. But Conquest was also used within the concept of ‘Discovery’ as another element of justification. There were only two ways to acquire Native title; (Aboriginal title) either by war, or by the use of treaties or contracts. (Miller 200, 3-5, and 64)
Both the British and the French learned very quickly after arriving in mainland North America that the land was not ‘terra nullius’ or uninhabited. The newcomers were outnumbered by the existing population and needed to develop methods of dealing with them over use of land and resources that did not lead to costly wars. While conquest was considered a possible extension of Discovery it was not preferred by colonists with limited resources. In both Canada and the United States Indian tribes and groups were recognized as having existing rights to the land, and both colonial governments negotiated treaties with the tribes. In Module Two we will look at the history of negotiation over land ownership and use between Indian tribes in the “Lower 48” states and the U.S. Federal Government that resulted in the treaties and system of Indian reservations that exist there today. Usually Tribes gave up aboriginal rights to large areas of land in exchange for the guarantee of tribal ownership of smaller amounts of land (reservations) and payments of cash, rights to hunt and fish off reserve, tools, and guarantees of the provision of services from the federal government.

It is important to recognize that the Tribes are not being “given” anything by the government when claims are settled: they are receiving cash, goods, and services in payment for the lands and natural resources they have relinquished. Also remember that under the Discovery Doctrine Tribes retained the right to ‘use and occupy’ until they chose to sell. In theory Tribes did not have to give up lands but the reality was they were usually forced into negotiation.

Tribes in both countries found it necessary to establish rights of ownership and control over traditional lands in the face of colonialism when it became clear that the alternative was complete loss of viability as tribal communities. If they did not establish ownership rights recognizable by the western legal system over at least some portion of their traditional lands they lost the entire future of their cultures, economies, subsistence, and social well-being. In Alaska, and some parts of Canada (where the term ‘reserve’ is used in place of the U.S reservation), Indigenous Peoples did not have to confront the issue of Land Claims until quite recently. In the modern context land ownership issues are now settled through lands claim processes rather than treaties. The U.S. Government stopped making treaties with Indian Tribes
in 1871 and instead used agreements in its negotiations with Indian governments over resources and land. (Kickingbird 1980, p17)

Alaska did not become a State until 1959 and at that time the land rights of Alaska Natives had not been addressed. No treaties had been negotiated and only a very small number of reservations had been created. Prior to Statehood in most of Alaska the impact of non-Natives in terms of land and resource loss was relatively small. With the exception of those in South East Alaska, Alaska Natives had found little reason to exercise their valid claims of ‘Aboriginal Title’ to the entire 375 million acre land mass that made up Alaska… but now the new State was set to ‘select’ 103 million acres of the same land. Clearly this was going to result in conflict as Alaska Natives found strangers claiming ownership of large areas of lands that had been theirs since time immemorial.

The ANCSA Timeline that follows highlights the chain of events that made a land claims agreement a necessity for Alaska Natives:

THE ANCSA TIMELINE

TREATY OF CESSION 1867

This was the sale of Alaska to the United States by Russia which took part with absolutely no consultation with Alaska Natives. Article III contains the following paragraph:

_The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country_

This clause in the Treaty of Cession established the statutory precedent which obligated the United States to protect the Alaska Natives’ aboriginal title to their lands. The implication was, that (at a future date), Congress would address the extinguishment or preservation of that title. While the question is often asked why there was no discussion with Alaska Natives about the
sale if we go back to the Doctrine of Discovery numbers 3 and 4, we remember that once a European Power (and in this case Russia was included in this category) ‘discovered’ the land. Natives powers to negotiate with foreign governments went away. How did Russia manage to claim enough ownership over such a vast area of land most of which had never seen a Russian? Look at Discovery number 6, contiguous. Certainly anyone who suggested today that the Yukon River drainage accounts for all of Alaska would be geographically incorrect, but the fact was that the Russians had found the mouth of the Yukon, and several other large rivers and they were invoking contiguous to take all the land between Canada and the western oceans. Was Alaska Terra Nullius? (Discovery number 7) Of course not but we have already seen some very liberal interpretations of this term and Alaska was no different.

**ORGANIC ACT 1884**

This Act reaffirmed the **obligation** of the United States to act at a future date on the question of Native lands and the settlement of claims and title to those lands. A provision in the Act states:

> Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress:

It should be noted that neither of these pieces of legislation actually prevented the reality of others taking lands from Alaska Natives, in spite of legitimate Native claims to the entire Alaskan land mass taking of Native land and resources by non-Natives could and did occur.

Here we see an example of Discovery number 3, pre-emption; Russia, the Discovering Power, had chosen not to purchase lands from Natives but instead, had sold this right in tact to the United States. Now it was up to the U.S. Congress to deal with the aboriginal title to the land...because under Discovery, and the U.S. Constitution, they were the only entity with the right to do so.
METLAKATLA.

In 1891 Congress established a reservation for a group of Tsimshian First Nations who had migrated to South East Alaska from Canada in 1887. This reservation, located on Annette Island near Ketchikan is the only reservation in Alaska which survived the ANCSA. (Note: ‘First Nations’ is the accepted Canadian term for Indian tribes. Indigenous groups with land rights in Canada may be referred to as Inuit, First Nations or Métis depending on their heritage).

NATIVE ALLOTMENT ACT 1906.

This act provided for the conveyance of up to 160 acres of land to adult Alaska Natives. Applicants could select any land as long as it did not include mineral resources. Most Alaska Natives did not apply for these allotments and many did not know the program existed. The titles to Native Allotments are held in trust by the Secretary of the Interior. Sale of an allotment must go through the Interior Department.

NATIVE TOWNSITE ACT 1926.

This allowed villages to be surveyed into lots, blocks and streets, with individual plots being conveyable to adult Alaska Natives. Land conveyed under both the Allotment Act and the Townsite Act was held under restricted title which means that the title is actually held in trust by the Secretary of the Interior. If the Native owner of an allotment or a restricted homesite wants to sell their property they can only do so with the assistance of the Secretary.

While both these Acts conveyed land to Alaska Natives they continued to ignore the question of those lands used and occupied by Natives under aboriginal title. The under-utilization of these ways to acquire land by Alaska Natives may have been for the best since the vast majority of Native land was retained as a whole under the definition of aboriginal title.

INDIAN REORGANIZATION ACT 1936

Congress passed this legislation in 1934 to restore Indian lands in the Lower 48 states that had been lost under the General Allotment Act and extended it to Alaska in 1936. It provided for the establishment of reservations and reserves in Alaska. Again title to these lands was held in trust
by the U.S. government as is the case with reservation lands in the Lower 48. Seven reservations were established under this Act between 1941 and 1946. These were located one each at Hydaburg, Diomede, Wales, Akutan, Unalakleet, Karluk, and one for the villages of Venetie, Kachik, Christian Village, and Arctic Village. Despite the submission of many other applications from villages totaling 100 million acres, no action was ever taken on the applications. In consequence the IRA only protected a small portion of Native lands from acquisition by others.

ALASKA CONSTITUTIONAL CONVENTION 1955

There was much debate during this Convention (which had very little Native input) about the rights of Natives to their lands and whether the Alaska Constitution should include a provision addressing Native land claims. When the Alaska Statehood Act was passed in 1958 the longstanding guarantee of protection of Alaska Native lands was again upheld:

Article XII General Provisions:

**SECTION 12. DISCLAIMER AND AGREEMENT.**
The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

Note that the Statehood Act does not define the words ‘right’ or ‘title’ and the assumption was continued that Congress would act to resolve land claims at a future date. Now, let’s look back at the Discovery Doctrine and the Plenary Powers of Congress. Even if the State had wanted to decide on Native land rights it couldn’t have done so; the **Commerce Clause of the U.S. Constitution** reserves that right to Congress!
The new state of Alaska received authorization to select 103,000,000 acres of land and they began to make these selections at once with complete disregard for Native ownership and rights.

**Plenary Power of Congress, Trust Doctrine, and Diminished Tribal Sovereignty**

You will notice in the ANCSA timeline that Congress has a lot to do with the lives and futures of Indian Peoples in the United States; in fact Congress has its hand in just about every piece of legislation that is specific to Indian tribes. If it sounds like Congress can do anything it wants to tribes, that is because they can thanks to something known as the Plenary Power Doctrine. The Plenary Power Doctrine is one of three fundamental Indian law principles developed by the Supreme Court over approximately a 200 hundred year span. Explained very bluntly, it gives Congress almost unlimited power over Indian affairs, including the power to completely terminate Indian tribes as it did to numbers of tribes during the 1950s. This power can be used in positive as well as negative ways; during the 1970s and 1980s Congress restored the Federal recognition of most of those tribes, but as we can see it leaves tribes in a somewhat insecure position. Together with the Trust Doctrine which implies a fiduciary, guardian, or trustee responsibility to tribes and the principle of Diminished Tribal Sovereignty (Domestic Dependent Nations), Congress has been provided with the power to ‘protect’ Indians through whatever means it sees fit.

**Other Land Claims and Negotiations**

Alaska Natives were not the only Indigenous Peoples negotiating with national governments over land in the second half of the 20th century. Multiple Land Claims negotiations were under way in Canada during this period including those of the Canadian Inuit that resulted in the creation of Nunavut, the James Bay Cree and Inuit negotiations in the Province of Quebec, and negotiations in British Columbia, Yukon Territory and the Northwest Territories. In other parts of the world including Central and South America, Australia, South-East Asia, India, Scotland, Israel, (and many more countries) dialogue between Indigenous peoples and state governments over land use and ownership is ongoing with varying degrees of success. We will look more closely at international land claims and negotiations in Module Eight.
ABOUT THE READINGS:

The Alaska State Constitution provides a backdrop for the negotiations that preceded the passage of ANCSA. Familiarity with it will help you to understand the situation in Alaska today.

The Alaska Organic Act and the Russia Alaska Treaty of Cession provide historical background to the course.

The chronological history of Nunavut and the Canadian First Nations treaty map give a snapshot of land claims in Canada, Alaska’s immediate neighbor to the east.


1884


Canadian First Nations Treaty Map Index [http://www.kstrom.net/isk/maps/cantreat.html#buttons](http://www.kstrom.net/isk/maps/cantreat.html#buttons)
