BOOK REVIEW

ALASKA NATIVES AND AMERICAN LAWS

ALASKA NATIVES AND AMERICAN LAWS. By David S. Case, University of Alaska Press, Fairbanks, Alaska, 1984. pp. xxii, 586. $25.00

Reviewed by Monroe E. Price*

One of the most important attributes of a serious survey work is that it contains a perspective on the field of law under examination. Because no survey can be totally comprehensive, it must contain, whether it is obvious or subtle, an agenda, a vision, an understanding of the way in which law interacts with the historical evolution of a particular area of activity. This is true whether the treatise is about tort law, employment discrimination, or, like David Case's important work, about Alaska Natives. In the short run, the value of a treatise is in the cases and statutes it cites and its worth as a reference book; in the long run, it is the vision, the agenda, the perception that signifies the importance of the work.

David Case has chosen a definite vision and perception in the writing of *Alaska Natives and American Laws.*[1] It is a strong vision; whether it is a correct vision will be answerable only in hindsight. The gamble concerning vision is so important and fundamental to a translation of the past and an extrapolation into the future, that it is important to dwell on that vision as a means of understanding the book.

Case's vision is one of Native communities in Alaska, struggling to maintain their cultural integrity, resisting waves of population changes and legislative disturbances, aspiring to reassert their power and authority, their subsistence lifestyle and their communal self-definition. It is not a vision of the impact of modern corporate law unalterably changing the course of Alaska Native history.

As in a vast painting, where the iconography is complex, the method of understanding *Alaska Natives* turns on what is excluded as well as what is included in the book. Decisions concerning emphasis,

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1. D. CASE, ALASKA NATIVES AND AMERICAN LAWS (1984) [hereinafter cited as ALASKA NATIVES].

space, or the density of figuration distinguish what the author considers to be important. To understand Professor Case's book, as any book in which history is important to the written legal analysis, we must know how to read history. What is dominant or considered to be dominant in that history? What are the telling turns of events? What are the precursors of substantial change? What are the values that are seemingly preserved and what are those that seem subject to change? Law is a guide to history and history is a determinant of law. Changes in Indian policy, more so than in other areas of the law, are prime examples of the interaction of law and history.

This interplay of law and history, as applied to David Case's analysis of the impact of American laws, reduces Case's inquiry to one succinct question: What was the historical importance of the Alaska Native Claims Settlement Act (ANCSA)?[2] How revolutionary was it? To what extent is it becoming the dominant ordering principle of the future of Native peoples in Alaska? In a book on the relationship between American laws and Alaska Natives, should ANCSA occupy center stage? Should its complexities, the intricacies and subtleties of its relationships with prior law and practice be the focus of discussion? The answers to these questions depend to a great extent on one's vision of, or perhaps one's hope for, the future.

In *Alaska Natives,* Professor Case portrays a version of ANCSA in which its cultural and legal influence is important but not determinative. Its significance in terms of its impact on the life and times of the people of the state is only minor. Case construes ANCSA as narrowly as possible. The effort is made, perhaps successfully, to view ANCSA solely as a land settlement with almost no implications for questions of Native subsistence or sovereignty. If cultural survival turns only on subsistence and sovereignty, and if ANCSA can be successfully interpreted as only a land settlement, then Professor Case is correct about ANCSA's minor cultural and legal influence. If, however, ANCSA is far more pervasive and more difficult to limit than Professor Case construes it to be, and as many believe it to be, then the book is important, scholarly, vital as a reference, but wrong in its central thrust.

This sideways dealing with its theme should not detract from the great contribution to law and understanding that Professor Case's book represents. For the lawyer and scholar fortunate enough to be involved in the complexities of the Alaska Native experience, this book is an absolutely necessary reference. The treatment of the issues surrounding the subsistence lifestyle of Alaska Natives is one example of Case's contribution. Subsistence has historically been one of those

2. 43 U.S.C. §§ 1601-28 (1982).

subjects that has been pervaded by passion and political concerns of the highest order. How the Native community maintains its hold on the stuff of subsistence in a society that is destroying the land is fundamental to the future of the Native people.

Professor Case provides a thoughtful, thorough, and analytical setting in which the debate over subsistence can take place. The book sets forth a kind of tripartite analytical foundation for understanding subsistence: economic or physical reliance; cultural and social value; and the role of custom and tradition.[3] The author recognizes the difficulty in applying traditional reservation-based law to the preservation of Native subsistence values[4] and, as a consequence, ingeniously builds an alternative foundation for the assertion of such rights.

The essential basis of this alternative approach lies in federal preemption of state laws dealing with subsistence. This federal preemption results from international treaties and similar actions, statutes, and regulations. The material on treaties is particularly thorough, gathering useful information about migratory bird treaties, fur seal and whaling doctrines, and the Polar Bear Convention.[5] The discussion of federal statutory preemption[6] contains very useful treatments of the Marine Mammal Protection Act,[7] the Endangered Species Act of 1973,[8] and the Reindeer Industry Act,[9] among other statutes.

Ultimately, however, Case must confront the question of whether there is a basis for a doctrine that specifically protects Native, *qua* Native subsistence rights. He points out that "the federal trust responsibility doctrine related to Alaska Native subsistence is still developing,"[10] although he nevertheless recognizes that "Native off-reservation subsistence uses under recent enactments are not generally exclusive rights, but are exercised in common with other similarly situated (i.e., rural) Alaska residents."[11] The importance of this recognition is accentuated when Case discusses the culmination of federal subsistence legislation, the Alaska National Interest Lands Conservation Act (ANILCA).[12] He concludes that "bowing to present day political reality, ANILCA established subsistence protections for most rural Alaska residents — Native and non-Native."[13] Section 803 of

3. ALASKA NATIVES, *supra* note 1, at 275.
4. *Id.* at 278.
5. *Id.* at 280-86.
6. *Id.* at 285-92.
7. 16 U.S.C. §§ 1361-1407 (1982).
8. 16 U.S.C. §§ 1531-43 (1982).
9. 25 U.S.C. §§ 500-500n (1982).
10. ALASKA NATIVES, *supra* note 1, at 293.
11. *Id.* at 294.
12. *Id.* at 298; 16 U.S.C. §§ 3101-3233 (1982).
13. ALASKA NATIVES, *supra* note 1, at 299.

ANILCA, in defining the subsistence uses to be protected, speaks of "the customary and traditional uses by rural Alaska residents,"[14] not of Alaska Natives.

The book does not deal extensively with the potential threat to subsistence created by the privatization of public lands, which involves the granting to Native corporations of fee patent to lands that were once open for entry for subsistence purposes without the danger of trespass. As some Native corporations become more involved in land development and more inextricably involved in ownership and dominion,[15] additional threats to subsistence patterns are more likely to arise from the implications of ANCSA itself.

The discussion of subsistence is an example of both the strength and the weakness of Professor Case's treatment of the federal preemption issue. Without doubt, the work presents the fullest available exploration of the legal basis of subsistence and the context in which subsistence law develops. On the other hand, Case is reluctant, perhaps appropriately, to recognize how fundamentally corrosive the enactment of ANCSA might be to the perpetuation of subsistence values, and, as a result of the change in federal law, how the subsistence rights of Alaska Natives become intertwined with the subsistence rights of other rural Alaskans. Substantial dangers exist in the evolution of a legal framework in which the Alaska Natives do not reap the exclusive benefit from the enactment of federal legislation. More significant than the legislative dangers, the conveyance of lands to the Native Corporations, which have Indian sponsorship and a nominally Native direction, will ironically pose a threat to subsistence.

The author's treatment of sovereignty issues presents similarly fundamental questions where the viewpoint of the book is telling. Professor Case takes a forthrightly minimalist view of the impact of ANCSA on tribal sovereignty. Indeed, the book is an exceptional brief articulating the case for retained sovereignty and the prospect for its exercise. For Professor Case, "the cultural significance of Native self-government appears to lend a sense of urgency to Alaska Native claims to 'sovereignty.' "[16] The lynchpin of the argument is that "as to Native rights of inherent self-government," it is incorrect to assume that ANCSA "extinguished every aspect of special Native American status in Alaska."[17]

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14. *Id.* at 300 (quoting 16 U.S.C. § 3113 (1982)).

15. For example, Native corporations may become involved in programs of reconveying lands to individual shareholders.

16. ALASKA NATIVES, *supra* note 1, at 435.

17. *Id.* at 447.

Professor Case recognizes that ANCSA does "cast substantial doubt on the practical exercise of [Native] self-government."[18] Under the standard nineteenth century federal settlements with Indian tribes, "an ownership interest in the land and substantial governmental authority over it were both confirmed to the tribal government."[19] By contrast, in Alaska ownership of land has been severed from the kinds of entities that might have the best argument for governing it and creation of organizations that would have clear governing authority has been avoided.

Because the Alaska setting is not typical of those federal-Native relations in which sovereignty has been established, a careful substitute structure for asserting sovereignty must be built. There has to be a conceptual severing of land ownership from the power to rule, a conceptual step that has some, though not a totally convincing, basis in Supreme Court decisions.[20] Professor Case finds great significance in the self-determination legislation passed by Congress in the 1970's, and calls ANCSA itself "the first in a line of . . . major pieces of self-determination legislation."[21] Still, words can be deceiving; it would not be the first time that actions destructive to sovereignty were wrapped in the flag of palliative charity. Furthermore, little in ANCSA is self-determinative; one of the major efforts of the Native community continues to be obtaining statutory declarations that ANCSA is neutral on the subject of retained sovereignty.

The bright spot in the sovereignty debate has been the Alaska Supreme Court, as Professor Case acknowledges.[22] And it may well occur that the state comes to understand that delegated sovereignty will be helpful to Alaska in dealing with difficult issues of governance in the rural parts of the state. Recognition by the state that it has much to gain from a strengthened relationship between the Native community and the federal government would allow a flowering of new strength in the relationship.

These are times of great change in the way Alaska Natives perceive themselves and in the way they will be considered under federal legislation. As the end of twenty years of special status of native corporations under ANCSA approaches, and as the Native community comes to grips with altered possibilities in the post-1991 era, untold new complexities will develop. How revenues are shared under Section 7(i) of ANCSA, how the dialogue concerning sovereignty goes

18. *Id.*

19. *Id.*

20. *Id.; see, e.g.,* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Jones v. Meehan, 175 U.S. 1 (1899).

21. ALASKA NATIVES, *supra* note 1, at 449.

22. *Id.* at 455.

forward, how the cultural needs of the Native community will be preserved, how taxation of resources will be treated — this will be the new agenda. Professor Case's book will be a helpful preface to this evermore intricate context of law and reality.