A Context for Setting Modern Congressional Indian Policy in Native Southeast Alaska

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THE TLINGIT PEOPLE WERE MIGRATING downstream, searching for a better life. Following the banks of a mountain stream, they came upon a glacier! The vast field of ice blocked their trek. Seemingly impassable, it was too steep to climb and too far to go around. Yet, the river flowed beneath the deep crevasses, so the People decided to build a raft and sail underneath the glacier. Once the vessel was built, they asked, "Who will go?" Two elderly women volunteered. "We have lived a long life. We will go." The pair boldly floated into the mountain of ice and disappeared.

When they emerged on the other side, the elders discovered a wondrous land! It was an immense temperate rainforest beside the sea, a maritime paradise teeming with awesome creatures, edible plants of all kinds, and bountiful waterways in one of the most beautiful places in the world. This terra nullius *was a Garden of Eden, located right on the shores of Native North America. The People identified this spectacular place as* Haa Aaní *(Our Land), the Land of the Tlingits.*

—A Tlingit Migration Story told by Walter A. Soboleff in 2006.[2]

In 2009, Congress will conduct hearings on Native land entitlement and other pressing indigenous issues in southeast Alaska, a land called ***Haa Aaní*** by the Tlingit Indians. A useful background context for those hearings may help guide the formulation of meaningful Congressional action for the twenty-first century. Several overarching questions inform the hearings. After thirty-eight years, how well has the Alaska Native Claims Settlement Act of 1971 (ANCSA) worked in southeast Alaska?[3] What impacts has federal law and policy had upon the well-being, subsistence, and cultural integrity of the indigenous inhabitants of America's largest rainforest? The treatment of these rainforest tribes, as federal protectorates under the Indian trust doctrine, stands as a barometer in the post-colonial world. On a larger level, it marks how our modern industrialized nation comports itself with Mankind's last remaining hunting, fishing, and gathering cultures that still live in the natural world, as well as the last remaining vestiges of the natural world itself.

The fate and well-being of marginalized Indigenous Peoples are pressing domestic and international concerns in the world today. During the twentieth century, many tribes in other lands went extinct.[4] The goal is to protect those who remain, especially after witnessing the tragic, reoccurring outbreaks of genocide throughout the twentieth century. This shift in public opinion

is seen in the approval of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[5] That historic measure breaks sharply from colonialism and its urge toward subjugation, dispossession, and exploitation. As an international guideline, the UNDRIP replaces oppressive policies from that era—which are still found in some former colonies—with minimum standards for each modern nation to protect the dignity, survival, and the cultural, economic, social, and political well-being of the world's Indigenous Peoples. Although the Bush Administration voted against the UNDRIP—along with three other dissenting nations—there are several reasons why the United States will not be the last to embrace the UN standards. Since 1970, federal Indian affairs have been guided by the cornerstone Indian self-determination policy. That is a precedent-setting and enlightened indigenous policy that sets a high standard for any nation and it is also the centerpiece of the UNDRIP. The Indian self-determination policy is strengthened in the United States by the law. First is the long-standing federal Indian trust doctrine, which was first articulated by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831); and, second, for almost two hundred years, our law treats Indian tribes as "domestic dependant nations"—that is, sovereigns which are described in *Worcester v. Georgia* (1832) as "protectorates" of the United States.[6] Finally, in the international arena, our nation is often a human rights champion. Americans eschew oppression. This combination of factors provides the heritage, history, and values to fully safeguard the well-being of Indigenous Peoples in the United States. The Bush Administration's vote against the UNDRIP does not wash away that heritage, nor bar in any way our stride toward a more just society in the post-colonial world. Consequently, Native Americans can realistically look forward with optimism that their political, cultural, and property rights as Indigenous People will be justly safeguarded in the United States during the twenty-first century.

This paper is an educational tool. It provides an indigenous perspective for setting congressional policy in Native southeast Alaska. That context is sorely needed. Native American aspirations, needs, and concerns are not well known by most Americans, including policymakers. This is especially true for the Tlingit, Haida, and Tsimshian for several reasons. First, they live in remote southeast Alaska. Most Americans have never set foot in their maritime homeland. Second, these tribal hunters, fishers, and gatherers continue to live in their indigenous aboriginal habitats. Their cosmology in the natural world is vastly different from that of most Americans who are more familiar with the Westernized way of looking at the world. By contrast, the tribal cosmology in southeast Alaska arises from primal ties to the natural world. As such, those indigenous cultures are still imbued with the age-old values of hunters, fishers, and gatherers that were instilled into our species during our long evolution as humans spread across the planet. This is reflected in the remarkable art, dress, dance, songs, language, architecture, social organization, and customs of the Pacific Northwest tribes that comprise their subsistence way of life, which are absolutely unique in the world

today. That way of life is similar, however, to all hunting, fishing, and gathering cultures around the world; and it depends upon cooperation with the animals and plants to ensure their renewal, not the conquest of nature. Those primal cosmologies contain valuable teachings about human relations with the animal and plant world. Unfortunately, that indigenous knowledge and value system is long forgotten by most Westerners living in industrialized landscapes, dismissed as an inferior way of looking at the world, or worse yet, demonized and stamped out in many colonized lands.

It is important that policymakers grasp and incorporate the unique needs, aspirations, and concerns of the Tongass rainforest tribes when setting Indian policy in the post-colonial world. In those nations where policy is set in derogation of indigenous needs, human rights violations are often found. Tlingit, Haida, and Tsimshian congressional testimony will document the indigenous aspirations, needs, and concerns for Native southeast Alaska. It will also address the overarching questions posed above, and make recommendations to Congress. This paper provides a context for evaluating that record. It presents several points that help inform modern federal Indian policy in Southeast Alaska.

We shall examine the history of colonization in southeast Alaska and scrutinize the forces at work. Prior to the creation of the Tongass National Forest ("TNF") in 1908, the land was owned, occupied, and in use by the aboriginal Tlingit, Haida, and Tsimshian peoples according to the laws and customs of those indigenous nations. In 1908, President Theodore Roosevelt issued an executive order to create the national forest. This summary action was done unilaterally at the zenith of the Age of Imperialism, when the United States administered a large colonial empire comprised of American colonies around the world, including Cuba, the Philippines, Puerto Rico, Panama, the Virgin Islands, Micronesia, Guam, the Wake Islands, Midway Island, San Domingo, and the territories of Hawaii and Alaska. In addition, the legal climate of this period under *Lone Wolf v. Hitchcock* (1902), treated American Indian reservations like colonies subject to the plenary power of Congress, that is, absolute power over Indian tribes as wards of the government without a right of judicial review.[7] The edict simply established the vast TNF *in the middle of the Indians' aboriginal homeland* where the tribes lived, hunted, fished, and gathered since times immemorial—a time span long before the Forest Service arrived to assume hegemony over its new fiefdom. Nearly every inch of the new federal enclave was already owned by the Tlingit clans, and their Haida and Tsimshian neighbors. This action was undoubtedly unbeknownst to most of the Indian inhabitants. Protests did come from missionaries on behalf of the Tlingit and Haida Indians "as an immoral confiscation of their property."[8]

On paper, the TNF was established subject to existing property rights. The executive order stated that nothing shall be construed "to deprive any person of any valid right" secured by the Treaty with Russia or by any federal law pertaining to Alaska. However, this nicety was all but

ignored on the ground, when it came to tribal land rights. No effort at all was made for several decades to acknowledge and determine Native land rights. In the meantime, the agency occupied the land and ran roughshod over the Native peoples. For most of the twentieth century—until Congress began to curb the powers of the agency in the modern era of federal Indian law (*circa* 1970-present)—the U.S. Forest Service history presents a classic case of colonialism. As will be seen, the occupation, usurpation, and destruction of the land and its bounty, and the marginalization of the indigenous peoples and ways of life are a microcosm of Manifest Destiny. That history will be summarized here based upon U.S. Forest Service documents and the official U.S. Forest history written by Lawrence Rakestraw, entitled *A History of the United States Forest Service in Alaska* (Tongass Centennial Special Edition, 2002) (Reprinted by USDA Forest Service). It will include the Native protests against the creation of the TNF and efforts to protect their rainforest homeland in the face of dispossession and destruction by the Forest Service's relentless drive to turn the rainforest into a paper and pulp mill industry.

That battle led to the infamous Supreme Court decision in *Tee-Hit-Ton Indians v. United States* (1955).[9] In one of the worst decisions ever handed down, the court held that the aboriginal land of the Tongass tribes could be confiscated by the United States government without compensating the owners. This novel doctrine of confiscation was justified by Justice Stanley F. Reed by raw conquest. He tersely explained:

> *Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, its was not a sale but the conqueror's will that deprived them of their land.*[10]

The frightening decision dispensed with aboriginal land rights and allowed the government to freely seize an entire tribal homeland *despite the Bill of Rights* which guarantees to all other landowners that no person shall be deprived of property "without due process of law . . . nor shall private property be taken for public use without just compensation."[11]

This paper will examine the events leading to the *Tee-Hit-Ton* doctrine of confiscation and its grave impacts upon the Tongass tribes. It will highlight the dispossession of Native land rights as the indigenous way of life was brushed aside, and tribal efforts to protect "indigenous habitat" in their ancestral territory needed to support hunting, fishing, and gathering ways of life. As used here, the term "indigenous habitat" refers to the land, waters, animals, and plants in ancestral homelands traditionally occupied by indigenous tribes, and used by them to support their aboriginal cultures and ways of life—that is, vital habitat in the natural world without which aboriginal cultures and ways of life cannot survive.

The paper will also examine the impacts of the closely-related Supreme Court decision in *Organized Village of Kake v. Egan* (1962) on the indigenous way of life, Native subsistence, and the present-day economy of the villages. As will be seen, today villagers ironically live in an abundance of natural resources in a place that might as well be a desert, because so little is actually accessible under federal law and policy.[12] In *Kake*, the court placed aboriginal Tlingit fishing rights in TNF waters by tribal communities who were entirely dependent upon salmon under state regulation. State control of rights vital to the tribes' way of life was granted, even though Alaska's Statehood Act "disclaimed all right and title to and the United States retained 'absolute jurisdiction and control' over, inter alia, 'any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives."[13] In retrospect, it is not hard to imagine what became of the tribal subsistence economy and way of life, once aboriginal fishing rights were safely tucked under the control of the new settler state.

As will be seen, these potent factors jeopardized the survival and well-being of one of the world's last remaining hunting, fishing, and gathering cultures, and certainly one of the last primal cosmologies in the United States. Why is a twentieth century history of colonialism, confiscation, and subjugation relevant to modern policymakers in the twenty-first century? We cannot "unring the bell," but history does provide the context for charting the future as a nation. Many countries have a legacy of colonialism. That heritage must be soberly confronted as a starting place for reform. As used here, "colonialism" is defined by law professor Robert Clinton as "the involuntary exploitation of or annexation of lands and resources previously belonging to another people, often of a different race or ethnicity, or the involuntary expansion of political hegemony over them, often displacing, partially or completely, their prior political organization."[14]

During the Colonial Era (*circa* 1492-1960), the indigenous nations of Africa, the Western Hemisphere, Australia, the Circumpolar World, Oceania, India, and most of Asia were colonized by Westerners. "Indigenous peoples" are defined as non-European populations who resided in lands colonized by Westerners before the colonists arrived. For them, colonization was invariably a harsh, life-altering experience as the colonization process usually included the invasion and involuntary occupation of their land; the outright appropriation of their property and natural resources; political subjugation and marginalization; stamping out their traditional religions, languages, ways of life and subsistence; warfare; and sometimes genocide. These destructive processes were "legalized" in nearly every colony according to the laws of the colonizers.

Colonization of Native land is invariably accompanied by destroying the habitat that supports the tribal way of life. Colonies displace the Natives, extract natural resources from the land, and remake the natural world for agriculturists and manufacturers. Thus, conquest of nature often accompanies the settlement of Native territory. In *The Conquest of Paradise*, historian Kirkpatrick

Sale examined the astounding level of environmental degradation that accompanied European colonization of the New World.[15] In 1823, Chief Justice John Marshall described the ebb and flow of colonization in the United States:

> *As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil . . . being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power.*[16]

In just a few short decades, for example, the Plains Indian habitat was virtually destroyed as countless millions buffalo and wolves were slaughtered and steel plows were pulled through native plant communities. When Native peoples resisted, the law invariably supported the destruction of their indigenous habitat, often with harsh, life-altering results. The depopulation of American Indians and destruction of their cultures following European contact has been attributed, in part, to the accompanying destruction of indigenous habitats.[17] Simply put, deforestation, dewatering, and destruction of the wild animal and plants that sustained Indian tribes, led to their collapse. Many went extinct following the conquest of nature in North and South America since 1492.

The age of colonialism ended after World War II, with the emerging independence of former colonies around the world. Although colonialism was ultimately rejected by the international community several decades ago, that system remains embedded in the laws and social policies of some former colonies as a cornerstone for dealing with Indigenous Peoples. Their paramount challenge in the twenty-first century is to identify and root out the "dark side" of those laws and policies and strike a more just balance for the rights, relationships, and responsibilities between Indigenous and non-indigenous peoples.

As will be shown, southeast Alaska is one place where this familiar history occurred. The region was colonized as a *de facto* Forest Service colony for most of the twentieth century; and the aboriginal nations that reside in the TNF live under that legacy today. The challenge for Native southeast Alaska is to repudiate, not prolong, that legacy and restore the well-being of the indigenous peoples to the fullest extent possible, at least until the minimum UN standards are achieved. The moral call to rebuild and restore colonized areas can be likened to the enormous American efforts normally undertaken to voluntarily restore the lands and infrastructure of nations defeated in war by the United States. This is almost always done in the national interest where our nation has, in effect, made a destructive mess and cannot in good conscience leave a devastated people without rebuilding and restoring their nation—that is, by putting them back on their feet. That same good moral conscience and national interest should obtain with even stronger force at home for America's indigenous nations living in colonized areas as protectorates of the United States. It is hoped that the congressional hearings will point the way toward that healing process in Native southeast Alaska.

1. Why *Tee-Hit-Ton* and *Kake* Deserve the Attention of Policymakers.

The ***Haa Aaní*** story deserves telling. It is a classic tale of colonization, the degradation of indigenous habitat, and cosmological conflict between different worldviews. It tells how ***Haa Aaní*** was colonized by the Forest Service (*circa* 1908-1955). The courts played a prominent role. They legitimized the outright confiscation of aboriginal property used for hunting, fishing, and gathering with the air of legitimacy in the *Tee-Hit-Ton* case; and the courts placed the indigenous subsistence way of life under the control of settlers in the *Kake* litigation.

By the 1950's and early 1960's when *Tee-Hit-Ton* and *Kake* were decided, Native America had slumped to its nadir. This was a time before the advent of the modern era of federal Indian law, when most Indians were living in abject poverty as marginalized persons upon the fringes of a nation bent on stamping out all vestiges of tribal culture during the Termination Policy era.[18] During this period, judges could dispense with niceties in Indian cases and simply "tell it like it is." A reading of the unvarnished *Tee-Hit-Ton* opinion does just that—in hard-edged, bone-chilling words; and it was easy to brush aside an ancient way of life in a colonized land by the *Kake* Court without realizing the enormous human and cultural costs at stake.

In that era, the legal climate recognized few Native American rights in the waning years before the advent of the modern era of federal Indian law (*circa* 1970-present). In 1954, the United States Supreme Court desegregated America in *Brown v. Board of Education* (1954) under the leadership of Chief Justice Earl Warren, but it was not ready to reverse doctrines of conquest and discovery in Indian cases.[19] Instead, the court was still bent on conquering America in 1955, if we take Justice Reed at his words in the *Tee-Hit-Ton* opinion, written just ten months after *Brown* was handed down. That opinion brings the Law of Colonialism into a harsh, modern-day context. It illustrates how easily the manifestly unjust confiscation of Native land can be justified by leading jurists as the law of the land.

The *Tee-Hit-Ton* case, with its misplaced notions of conquest, has never been reversed.[20] It raises several sobering questions that are critical to the cultural survival of Indian tribes and their aboriginal way of life in modern-day America.

The ruling holds that Indian tribes cannot rely upon the Fifth Amendment or aboriginal property rights to protect themselves against government seizure, and on another level leaves them helpless to protect "indigenous habitat" from destruction at the hands of the government. Today discussion of aboriginal title is largely a moot point, since most aboriginal property rights were extinguished long ago by voluntary treaty cessions, myriad government takings, or

outright confiscation as legalized in *Tee-Hit-Ton*. To be sure, some Indian owners were eventually compensated for takings by various congressional remedies in laws like the Alaska Native Claims Settlement Act ("ANCSA") or Indian Claims Commission Act ("ICCA").[21] However, monetary compensation for damages does not protect a way of life. That shortcoming raises the paramount question facing indigenous hunting, fishing, and gathering cultures in the world today: *How can Native Americans meaningfully protect "indigenous habitat" in ancestral homelands from destruction when that habitat remains vital to their hunting, fishing, and gathering existence?* Few Indian treaties in the lower 48 States reserved off-reservation hunting, fishing, and gathering rights in ceded land, and those that did often left those rights vulnerable to later invasions by "development." None of those treaties expressly reserved water needed to support hunting, fishing, and gathering in ceded habitat or other protection from environmental harm. Those treaty rights have recently been implied by the courts in a nascent, but important body of growing law. Unfortunately, the alarming rate of indigenous habitat degradation has quickly outpaced the development of this body of law, leaving many hunting, fishing, and gathering cultures in the Pacific Northwest vulnerable to extinction. In Alaska, no treaties were made at all.

In this cultural crisis, federal Indian law offers few realistic protections for the last remaining "indigenous habitat" in ancestral territory that is no longer owned or controlled by Indian tribes. The *Tee-Hit-Ton* decision and judicial mindset illustrates the practical difficulties encountered in the courts when tribes attempt to protect a vulnerable way of life that is dependent upon aboriginal habitats. Today, most remaining land owned by Native communities is held under treaties, executive orders, or statutes. Although some Indian land includes "indigenous habitat," most of that habitat is no longer tribally owned or controlled by Indian tribes or Alaska Natives after their aboriginal title was extinguished. Nevertheless, many Indian and Alaska Native tribes still struggle to maintain their traditional hunting, fishing, and gathering way of life, especially in the Pacific Northwest, which spans from the Yuroks in Northern California to the northern reaches of Tlingit country above Glacier National Park. Much of the critical habitat that produces fish, animal and plant populations necessary for that way of life is now federal land, or lies in navigable streams, riparian zones, and ocean waters beyond the outer continental shelf. Thus, the last remaining hunting, fishing, and gathering cultures have largely been divested of habitat critical to their survival. American law offers little protection for that habitat or way of life.

Why should we care? After all, the United States "mostly" paid the Indians for their ceded or confiscated territories. Huston Smith, the religion scholar, describes the ties to indigenous habitat in religious terms. One distinguishing feature of primal religion is "embeddedness" in nature. That occurs, according to Smith, to such a degree that we think "not of primal peoples as embedded in nature, but of nature . . . extending itself to enter deeply into them, infusing them in order to be

fathomed by them."[22] For them, the sanctity of nature is taken seriously. They venerate ancestral habitat through the world renewal ceremonies and belief systems found in Native America that transcend our lineal conception of time.[23] This "ensoulment" of nature, as described by Professor Gregory Cajete (Tewa), is the result of long human experience with the natural world by people who have interacted with a particular landscape so long that their identity is inseparable from the land.[24] This helps explain why Native People lament loss of ancestral land, removal, or destruction of tribal habitat, for this amounts to "a loss of part of themselves."[25]

> *Relationships between Native peoples and their environments became so deep that separation by forced relocation in the last century constituted, literally, the loss of part of an entire generation's soul. Indian people had been joined with their lands with such intensity that many of those who were forced to live on reservations suffered a form of "soul death." The major consequence was the loss of a sense of home and the expression of profound homesickness with all its accompanying psychological and physical maladies. They withered like mountain flowers pulled from their mother soil...*[26]

On another level, a larger, deeper cosmological battle took place in the struggle to colonize the Tongass. Government colonization of ***Haa Aaní*** pitted two conflicting cosmologies. Simply put, the way that indigenous tribes look at animals and plants in natural habitats—as the world's remaining hunting, fishing, and gathering cultures—is vastly different from the way settlers view colonized land. As will be explained, at one time, all humans were hunters, fishers, and gatherers who lived in the natural world and depended upon cooperation with nature to survive. Their cosmology universally respected life and revered the animals and plants found in human habitats. This worldview is still carried on by traditional Indigenous Peoples embedded in ancestral habitats. Some ten thousand years ago, an opposing cosmology began to emerge among those humans who began domesticating animals and plants in agrarian societies. Agriculturalists had to combat the natural world, control the plants, and dominate domesticated and wild animals to survive. They evolved a new cosmology that sanctifies domination of the land and the conquest of nature. The two ways of life would collide in ***Haa Aaní*** and compete for control of the rainforest. In *Kake*, the Supreme Court empowered the State of Alaska to determine the fate of Indians' hunting, fishing, and gathering existence by placing the exercise of their aboriginal fishing rights under state control.

As a result of *Tee-Hit-Ton* and *Kake*, the Tongass tribes would not only lose control of their lands, indigenous habitat, but also the exercise of rights vital to their way of life in this harsh colonial setting. Thus, as the Alaskan struggle spilled into the federal courts in those cases more than fifty years ago, it raised what has now become a crucial question facing the human family in the twenty-first century: *Can a hunting, fishing, and gathering way of life derived from tribal habitats survive in the colonized lands of modern nations?*

The way that we answer that question as a nation in the twenty-first century will tell much about our national character. Many dismiss the primal way of life as "inferior" or "primitive." Environmentalists doubt whether indigenous habitats in the natural world, or the natural world itself can survive in modern nations. Thus, a core question which confronts Congress is: *How modern society should comport itself toward the world's last remaining hunting, fishing, and gathering cultures.* Do these endangered human cultures have a right to exist? If so, what laws and policies need to be sharpened for that purpose? For governance, what is the best political model for federal control of minority cultures in the post-colonial world: abject domination, accommodation, cultural self-determination, or some other model that can assure their survival, well-being, and co-existence? Given the wide cosmological gulf that exists between agrarian and primal cultures, answers will test the tolerance of settler-state societies and the limits of their legal systems, and will reveal the character of our modern society.

The national interest insists upon just answers to these questions. Today most Americans appreciate the Native American cultures and want them preserved, as a result of changing values in a mature nation. Law and policy should keep pace with that social change in attitude. The UNDRIP standards may shine the way toward a more just culture in the post-colonial world. As we strive to find a just balance of rights, relationships, and responsibilities in the twenty-first century, the fate of the few surviving cultures that depend upon the integrity of indigenous habitat hangs in the balance. The world now insists that these questions be addressed and answered by each nation. The UNDRIP specifies that Indigenous Peoples must be given the right to own, control, and use ancestral territories and be provided effective means to protect the environmental integrity of indigenous habitat.[27] These UN standards seek to protect the well-being, dignity, and human rights of hunters, fishers, and gatherers who carry on the oldest way of life of the human race.

The struggle to achieve those standards affect raises some of the gravest matters ever expressed by international institutions. After all, "genocide" is defined by the United Nations as the deliberate destruction of a racial, ethnic or cultural group; and genocidal acts include "inflicting conditions of life calculated to bring about a group's destruction in whole or part."[28] Where indigenous peoples are concerned, some researchers interpret such acts to include "destruction of the habitats utilized by indigenous peoples."[29] As mentioned earlier, the challenge is to protect surviving indigenous groups. Today, most people deplore clear-cutting the world's remaining rainforests. We know that destruction of the Amazon rainforest, for example, will destroy the Indian tribes who live there; and public opinion insists that those cultures be preserved. Yet few realize that rainforest tribes exist *in our nation* and their way of life also depends upon healthy indigenous habitats. They inhabit the Pacific Northwest, from Yurok country in northwest California to Tlingit villages on the Chilkat River and Yakutat Bay. Their dignity, well-being, and survival are important national and

international questions that can not be decided solely by local politicians guided by parochialism, or by self-interest groups driven by narrow ideologies and interests.

2. The Cosmological Conflict over the way Humans View Animals and Plants.

There is a pronounced cosmological tension in Native southeast Alaska. To bring regional issues into perspective, policymakers must consider humanity's two age-old, often competing, ways of life and the conflicting cosmologies that arise from those worldviews. As used here, "cosmology" is the foundation for how a culture understands the natural order of the universe and the world around us, as derived from its religious, social, and political orders. From that vantage point, the fundamental interests at stake in the struggle to colonize ***Haa Aaní*** during the twentieth century emerge from the misty mountains, fjords, and bays of the temperate rainforest. As will be seen, when spurred by the forces of colonialism, the Western agrarian-based cosmology aggressively dominates the natural world, including the peoples who live there. This driving force ultimately produced the Supreme Court's *Tee-Hit-Ton* and *Kake* decisions, which jeopardized tribal property rights, indigenous habitat, and the way of life of the aboriginal tribes indigenous to ***Haa Aaní***. As we chart our course for the future, it is necessary to harmonize human cosmology in the region to strike a better balance and bring out the best in both worldviews.

The underlying cosmological tension in *Tee-Hit-Ton* and *Kake* was over the way humans view animals and plants. The timber sale in *Tee-Hit-Ton* would reduce a rainforest homeland to pulp and paper. This would devastate occupants who "were in a hunting and fishing stage of civilization," according to the Supreme Court.[30] The vital tribal area contained their burial grounds, towns, houses, smokehouses, and hunting camps. The Indians used the land "for fishing salmon and for hunting beaver, deer, and mink," and gathering "wild products of the earth."[31] In contrast, the Government was determined to establish timber-processing operations for the manufacture of pulp and paper. According to the Forest Service, protecting the Indians' way of life would "seriously delay, if not prevent, the development so earnestly desired by Alaskans" (meaning everyone except the aboriginal people who lived in Alaska for millennia).[32] Under the *Kake* decision, the tension between these worldviews would be resolved solely by the newcomers. *Kake* places the exercise of aboriginal fishing rights in TNF firmly under the control of the newly-formed State of Alaska. In so doing, the courts put the fate of the aboriginal cultures into the hands of strangers with an alien cosmology. The different way their worldview treats the natural world placed the tribal people in a vulnerable

position familiar in many colonies during that era.

How a society views animals and plants in the natural world defines its character, culture, and reveals innermost feelings about the living world around us. As explained in much more detail below, human "cosmology" can be divided for purposes of this paper into two venerated ways of life: (1) The hunting, fishing, and gathering existence is the oldest way of life followed by humans since the dawn of our existence. It gave rise to primal cultures that dominated human evolution for hundreds of thousands of years and although endangered today, this lifeway continues to prevail in a few isolated tribal habitats around the world. (2) The agricultural way of life emerged about ten thousand years ago. Over time, agriculturalists swept the planet, except for isolated pockets of hunting, fishing, and gathering cultures. Their cosmology now informs the mindset for viewing nature in modern societies. The two outlooks differ significantly: To inhabit a natural world, primal people must cooperate with animals and plants and encourage natural processes to survive, while agriculturalists living in a man-made world must control and dominate nature to survive. These differences account for much atrocity, discrimination, and conflict found in human history during the conquest of nature; and they were very much at play in the twentieth century struggle to colonize ***Haa Aaní***. A brief overview of these competing cosmologies follows.

A. THE ANIMAL-PEOPLES' COSMOLOGY.

The Indians of the TNF are a race of hunters, fishers, and gatherers. That is made abundantly clear from a government report issued in 1946 by Walter R. Goldschmidt and Theodore H. Hass, entitled *Haa Aaní: Our Land: Tlingit and Haida Land Rights and Use* (1946).[33] For all of human evolution and most of our history, the entire human population subsisted as hunters, fishers, and gatherers.[34] For 160,000 years, this way of life dominated our species. As we spread across the planet, life in this lengthy period instilled gut instincts that shaped our biology, minds, and spirit. The relationships formed with animals during this period wired the human spirit. The habits of animal behavior and plant knowledge were instilled in people. Ancient humans amassed in-depth traditional ecological knowledge about the Natural World that parallels modern man's fascination with Western science. Appropriate conduct for living with them guided human behavior. Hunting brought us into the wild and awakened our awe of animals, beings with remarkable attributes and powers. That awe may have inspired the first religions and art—as suggested by the animal spirits drawn in caves 20,000 years ago.

Spiritually, human hunters were animistic. People believed animals are endowed with spirits and souls. As animal spirits "gave" or "offered" themselves to humans, harvesting and eating them

required hunters to reciprocate by making offerings to them to ensure their return the following year. As illustrated by Native American beliefs, protection and reciprocity came from a sacred "covenant" forged between humans and the animals in mythic times, in which animal relatives willingly "gave" themselves to people in exchange for our prayers, reverence, and respect. We pledged to thank the animals, to respect them through song, dance, art, and story, and to call upon their spirits and seek their eternal return through ceremonies.[35] Those beliefs and practices sanctified our relationship with mystical animals and plants as hunters, fishers, and gatherers and legitimized our presence in their world.

Pockets of this belief system remain in Africa, North America, South America, Asia, and Oceania. One of the largest concentrations of these surviving cultures is in North America. They survived long enough to be studied by anthropologists.[36] Information gleaned from the Yup'ik, Inupiat, Cree, Bella Bella, Tsimshian, Kwakiutl, Nootka, Quileute, Quinault, Makah, Tlingit, Haida, Yurok, Hoopa, Klamath, Salmon Tribes of Puget Sound, Columbia River Tribes, Southwestern Dine, Apache, and Pueblo tribes, and hunter-gathers of the Northern Plains tells us much about Mankind's earliest existence. These contemporary hunters, fishers, and gatherers provide a glimpse of human existence in its earliest mode. Their way of understanding the world is a human legacy. Unfortunately, this cosmology has been forgotten, dismissed, and sometimes demonized by the modern world.

Those Native American cultures named above uniformly derive from a hunting, fishing, and gathering way of life. It produced indigenous cosmologies well-described by Gregory Cajete (Tewa) in *Native Science: Natural Laws of Interdependence.*[37] That worldview revels in Mother Earth's remarkable ability to support life. It proclaims Mother Earth as the foundation for human culture. That is, ethics, morals, religion, art, politics, and economics derive from the cycles of nature, behavior of animals, growth of plants, and human interdependence with all things endowed with a spirit of their own.

The people of ***Haa Aaní*** are traditional gatherers whose robust aboriginal economy was based, in large part, upon the abundant berries, roots, herbs, fruits, medicines, and other natural products found in the verdant rainforest.[38] And much of their culture was made of wood. In the cosmology of Native American gatherers, plants hold an esteemed place of honor as the staff of life and foundation for human and animal life. The plant world, for example, is called "Toharu" in Pawnee, which is a sacred concept for the "living covering" of Mother Earth.[39] Across North America, plants are venerated in creation stories that tell us who we are, why we are here, and what is our place in the world. They are honored in ceremony, song, art, lore, and religion as foods, medicines, and materials. As explained in many tribal traditions and ethnologies, plants have "talked" to people in Native North America and sometimes become their guardians. Accordingly, gatherers approach wild roots, berries,

peyote, corn, tobaccos, cedar, sage, and other medicines in a ritual way, just like humans have done throughout evolution. The prayers, ritual preparation, and pilgrimages that accompany gathering make subsistence profound. They place restraints upon gatherers in their use of plants and govern conduct in the plant world.

The women of the Columbia River tribes remember the covenant with plants. They know that plants came first and took pity upon humans. They hold Longhouse ceremonies to honor plant relatives before the first roots can be dug or the first berries can be picked. Unlike shopping at the corner grocery store, plants are sacred food with spirits of their own that cannot be approached without the proper ritual preparation. Though illogical to Western minds, for the women of these tribes gathering demands a respectful participation with plants as spiritual beings in a natural environment; and it is carried out on a distinctly spiritual plane.

Similarly, the Native American perception of animals mirrors hunting cultures around the world. Hunting is an ancient way of life in North America—a tradition much older than the 10,000 year-old Clovis Site. This tradition evolved songs, dances, ceremonies, art forms, and a spiritual reverence for animals. It produced an elaborate cultural context for hunting and a worldview that explains how humans should conduct themselves with animals.

As noted by scholars Smith, Eliade, and Cajete, the wall that separates humans and animals in the primal world is thin. Like most hunting cultures, the widespread kinship with animals found in Native America was established through covenants, dreams, visions, and lore. Through those means, many animals endowed with power communicated with humans and shaped their cultures. The "conversation of death" between hunter and prey, in the words of author Barry Lopez, which takes place in this context, takes on a primal meaning; and meat thus acquired becomes "sacred meat."[40] Today, Indian hunters often put a pinch of tobacco in the mouths of their kill to assist it on its spirit journey. It is part of the covenant made in mythic times. One Santee Dakota explained: "The animals long ago agreed to sacrifice their lives for ours, when we are in need of food or of skins for garments, but we are forbidden to kill for sport alone."[41]

The Pawnee tribe provides one example of the pervasive animal-influence in tribal cultures in North America. Animals predominate in Pawnee names, stories, songs, ceremonies, hunting, and in the tribal social order itself.[42] In mythic times, early Pawnees gained wisdom and knowledge about the spiritual world from the animals. As Eagle Chief (Pawnee) explained in 1907:

> *In the beginning of all things, wisdom and knowledge were with the animals, for* Tirawa, *the One Above, did not speak directly to people. He spoke to people through his works, the stars, the sun and moon, the beasts, and the plants. For all things tell of* Tirawa. *When people sought to know how they should live, they went into solitude and prayed until in a vision some animal brought wisdom to them.*

> *It was* Tirawa *who sent his message through the animal. He never spoke to people himself, but gave his command to beast or bird, which came to some chosen person and taught him holy things. So it was in the beginning.*[43]

At birth, every child came under the influence of a particular animal which became its guardian in life. That tie could also arise when kindly humans took pity on helpless animals—like bear cubs, puppies, and orphaned horses—who returned kindness with animal-powers. Animal spirits are said to dwell in medicine lodges. Their councils could take pity on deserving humans, teach them secrets, and give them power or protection. Birds are also helpers who mediate between humans and *Tirawaahat.* In mythic times, there was a world without birds, only animals and people; however, some families turned into the birds we see today.[44] Among them, hawks are guardians of warriors and messengers for the Morning Star; and the crows, eagles, magpies, owls, bluebirds, meadow larks, and roadrunners carry messages from the beyond. The mystical power of messenger birds is illustrated in a Pawnee family tale:

> *A youth accompanied a war party a long ways from home on his first raid, when he was wounded by an arrow and left for dead. Before he collapsed several days later, he prayed for help from the Creator* (Atius Tirawaahat), *then fell into unconsciousness. As he came to, an eagle stood before him and said, "I am from* Tirawaahat, *who has taken pity upon your prayer, so I am here to help you." The messenger bird told the youth, "Nearby you will find a buffalo carcass. Though it is old and filled with maggots, it will not make you sick. Eat and remember the blessings of* Tirawaahat, *be sincere in your prayers, and from now on you and your descendants will not get sick from food that you eat." After the eagle flew away, everything he said came true. The people were surprised and thankful when the boy returned home, for they thought he was dead, killed upon the prairie.*[45]

Even clams are regarded as wonderful beings in the Pawnee worldview. They have a cleanly nature, though they live in the mud.

Animal-human relations in Native America are intimate on many levels, as illustrated, again, by Pawnee society. In many stories, Pawnees marry buffalo or other animals, and transformation between humans and them often occurs. The stories teach that humans are closely related to the animals who voluntarily offer themselves to people as food. Thus, entire societies can be shaped by the animals in tribal habitats. Pawnee social fabric consisted of societies that originated from animals in visions. It was a society built upon the Crow Lances, Horse Society, Deer Society, Crazy Dogs, Brave Raven Lance, Young Dog, Otter Lance, and Iruska Society. The Pawnee received many tribal religious ceremonies from the Plains animals, such as the Bear, Buffalo, Horse, White Beaver, and Young Dog Dances. Even medicine came from the animal beings who formed bonds with Indian

doctors and taught humans their medical secrets, how to heal, and gave deserving doctors special powers. Through these many avenues, the traditional Pawnee way of understanding the world is heavily influenced by the spirits of animals.

In short, in tribal cosmology, animals help hunters, fishers, and gatherers become fully human and they are regarded as holy. Identification with revered animals runs deep on many levels. For example, the Pawnee admire the wolf, imitated its ways, and "became" wolves when scouting or at war. For this kinship, they are called "Wolf People" by neighboring tribes. Similarly, many tribes, bands, and clans are named after animals that shaped their cultures. They include Salmon People, Buffalo Nations, Snakes, Crows, Wolf-People, Crayfish Eaters, Whaling People, and the Tlingit Eagles, Ravens, and Wolves.

They are the Animal-people of Native North America. Because they walk in the tracks left by our ancestral hunters, their cosmology remembers and understands human interdependence with animals and plants as the natural order of the universe. As hunters, fishers and gatherers, they are still related to a living world where everything has a spirit. The worldview of Animal-people strongly encourages natural processes so that animals and plants can flourish and will return to habitats shared with humans. As such, their values and lifeways are still imbued with Mankind's ancient conservation ethic. That ecological ethic is evident in nearly every tribal habitat in North America, because those places *teemed* with animal and plant life, even after thousands of years of occupation by hunters, fishers, and gatherers.

B. THE AGRICULTURALISTS' COSMOLOGY.

The Western view of the world and how we should live in it is based upon a ten-thousand-year-old agrarian culture. Agriculture was a major revolution in human history. As used here, "agriculture" is a farming culture that tames, domesticates, and breeds plants and animals; reorders natural features; and controls natural processes to make nature more productive and beneficial to humans. Over time, Western farming civilizations underwent industrial, scientific, and technological revolutions. But they still retained an agriculturalist cosmology. The pervasive effect of agriculture on modern society is described by Jim Mason, an American authority on animal-human relations:

> *For nearly 10,000 years people of the West have farmed—that is manipulated nature for human benefit. Ponder for a moment this long human experience and how deeply it influences our thinking and culture. This is a hundred centuries of controlling, shaping, and battling plants, animals, and natural processes—all things of the world around us that we put under the word* nature. *Controlling—and ultimately battling—nature is a very old way of life to us. It is a stance with nature so*

> *deeply ingrained in us that we are rarely conscious of it. Controlling nature is second nature to us. We are people of an agrarian culture, and we have the eyes, ears, hearts, and minds of agriculturalists. Whether or not you have ever been a farmer, or even a visitor at a farm, if you are a Westerner you are imbued with the culture of the farmer and it determines virtually everything you know and think about the living world around you.*[46]

Agriculturalists must control the natural world to survive. It is impossible to farm virgin land or breed untamed animals for food. So land must be significantly altered to produce crops. Natural hydrology must be reordered for irrigation. Local wildlife must be suppressed, because insects, birds, predators, pests, and vermin kill farm animals or eat crops. Native plant communities must be destroyed to make way for crops grown by man. In the end, nature is conquered.

At its heart, the genius of agriculture is animal husbandry and mass crop production. This requires utter domination of plants and animals. Their biological processes, genetics, behavior, and lives are altered. Strict control is necessary to tame, domesticate, breed, and cultivate them. In this regime, animals and plants lose their stature. They become property with a slavish existence for Man's benefit. This form of enslavement is at odds with the animal-human relation in hunting cultures, as seen in Standing Bear's (Lakota) remarks:

> *The animals had rights: the right of man's protection, the right to live, the right to multiply, the right to freedom, the right to man's gratitude. In recognition of these rights, people never enslaved the animals, and spared all life that was not needed for food and clothing.*[47]

Because agriculturalists must constantly battle the living world to sustain their way of life, their cosmology must support, rationalize, and romanticize the conquest of nature; and it must exalt human domination of all other forms of life. That cosmology is described by Mason as a God-given domination of the natural world.[48] He coined the term "dominionism" to describe the exercise of human supremacy over all living things.[49]

This way of thinking has deep religious and intellectual roots in the Western world. Our exalted place in the world is a foundational religious principle of early agrarian cultures. It was strengthened by secular thinkers during the industrial, scientific, and technological revolutions, as Western civilizations morphed into modern societies. Animal-human relations in modern society were summed-up by Sigmund Freud in 1917:

> *In the course of his development towards culture man acquired a dominating position over his fellow-creatures in the animal kingdom. Not content with this supremacy, however, he began to place a gulf between his nature and theirs. He denied the possession of reason to them, and to himself he attributed an immortal soul, and made claims of divine descent which permitted him to annihilate the bonds of community between him and the animal kingdom.*[50]

Freud described our supposed supremacy as "human megalomania."[51]

In the Book of Genesis, biblical scribes wrote down the religious traditions of Judaism and Christianity in the early agrarian societies of the Middle East. In the foundation myth of Western civilization, the Creation Story of Genesis tells agriculturalists why they are here. After creating the world, plants, and animals, God made humans in his own image and granted them "domination over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth."[52] God ordered humans to multiply and "have domination over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."[53] God gave these early agricultural people all living things—the herbs, trees, fruits, seeds, beasts, fowl, and crawling creatures. In turn, animals would "fear" and "dread" humans, as the natural order of things:

> *And the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea.*[54]

In Genesis, there is no religious restraint in man's relation to animals and plants. Rather, it is God's will that humans should own, rule over, and exploit all living things. This divine mandate, according to Mason, "tells the sacred story of how we came to have dominion over all of nature."[55]

Over the ages, the Western Intelligentsia contributed to the biblical version of domination. A long-line of thinkers—beginning with Aristotle through Roman thinkers, to St. Augustine and St. Thomas Aquinas—heartily endorsed the theme.[56] Aquinas taught that animals have no souls. He departed sharply from hunter-thinking.[57] Western science helped pave the way for the conquest of nature. In the 1600's, Sir Francis Bacon said nature is a slave to man and can be conquered by science. Rene Descartes classified animals as dumb, unfeeling beasts that are incapable of thought, sensation, speech, or communication, animated only by machine-like reflexes. This idea freed us from moral guilt in our dealings with animals, since they are lowly, mindless beings without a soul. It severed any lingering human connection with animals and detached us from their world. As the only sentient spiritual beings on the planet, humans can treat animals and plants as they see fit. According to Mason, this opened the door for unbridled exploitation:

> *Descartes's decoupling from, and desensitizing of, nature blew away any remains of timidity or remorse a person might have in carrying out the ruthless, often violent deeds of nature conquest.*[58]

Thus, science "freed" Westerners from kinship with other living things. They could now dominate life on earth without moral restraint. Absolute human control of the living world, then, rests upon a solid religious, scientific, and philosophical foundation in Western cosmology. As Cajete observed, Western culture "disconnected itself from the natural world in order to conquer it."[59]

Carried to its logical conclusion, "dominionism" creates a "Brave New World" for animals and plants. They live in bondage, subject to the "dark side" of agriculture. We dare not think about the abject cruelty involved in mass animal husbandry, with the stomach-turning treatment of food animals in factory farms, or how untold millions of them are killed in mechanized slaughterhouses.[60] Hidden away from public view, these nightmarish animal factories are haunting places where Man's ruthless application of technology has outpaced our current ethical horizon.[61] Unlike hunter-fishers-gatherers, we are totally estranged from our food supply. Monstrous treatment of non-human life is second nature to people anesthetized by a cosmology that safely distances humans from animals and plants. We cope by thinking, "That's alright, they're only animals—*this is the natural order of things.*" This outlook assaults wild animals and plants with even less compunction; and we do not hesitate to destroy their habitat, so long as it benefits a human interest. Governor Sarah Palin chanted that mantra in 2008, when she told the American public: "You bet we will drill, baby, drill. And we will mine, baby, mine."[62]

Unfortunately, "dominionism" does not stop at animal-human relations.[63] It sometimes spills over into human relations. *If we can enslave or exploit animals, why not people?* When people view others as "animals," racism quickly surfaces. Discrimination, dispossession, and violence usually engulf vilified people who are branded as sub-human "vermin," "monkeys," "savage beasts," "pigs," "baboons," "vipers," "curs," "cockroaches," or "insects"—especially when these animal-stereotypes are reinforced by scientific racism.[64] That climate breeds injustice—racism, intolerance, and colonialism—and fosters socially-acceptable violence normally reserved for pests. In this context, animal exploitation leads to exploitation of people. It provides a mental analogue for injustice.

"Dominionism" in human relations becomes strident when fueled by the forces of colonialism. As Europe colonized the world, its notions of racial, cultural, and religious superiority joined forces with its long tradition of dominating the living world. That potent combination of forces produced one of the most destructive cosmologies in human history. It set in motion a "perfect storm" that engulfed Indigenous Peoples and the natural world. The modern legal systems of those aggressive societies have the capacity to produce manifestly unjust cases, like *Tee-Hit-Ton.*

In retrospect, we can only regret the historical aggression and great harm done to tribal peoples and habitats around the world, as human cosmologies collided during the conquest of nature in the past five hundred years. In that wake, ancient ways of life and the habitats upon which they depend are nearly extinct today. Human and biological diversity in the modern world depends upon curbing the excesses found in those legal regimes and recapturing the values, relationships, and cosmologies of the hunters, fishers, and gatherers who live in ancestral habitats. Unless the avowed goal of the modern world is to eradicate our oldest way of life, the law in each nation should justly mediate between those differences so that all of human culture can survive and co-exist. Today there

is hope that this can be achieved, because many now admire, not despise, the world's remaining hunting, fishing, and gathering cultures. Even hardened city dwellers find walks in the woods to be therapeutic. People grow lawns and gardens not because they need food, but because it somehow feels good and reconnects them, and animals bring out the humanity in autistic children when all other forms of therapy fail. Those urges promote human wellbeing and assist in recovering balance in our lives. Thus, the inbred connection to the natural world is not entirely dead, even in urban dwellers living in an industrialized land. After all, in our heart we are still Animal-people as a result of our biological upbringing, though it may dimly beat in the modern world.

To preserve the hunting, fishing, and gathering cultures, the unwarranted excesses found in agrarian societies that threaten the existence of hunters, fishers, and gatherers must be curbed by policymakers who are in a position to do so. Society must identify those excesses, reconcile differences that separate farmers from hunter-gatherers, and protect the best in both worldviews. This path offers the best hope for rekindling human spirituality after colonialism has run its course and the spiritual wells that fueled the conquest of nature have run dry. Indeed, this may be the *only* path to a more just culture in a mature nation that joins Indigenous and non-Indigenous people together for peaceable co-existence on the same planet. Against this general backdrop of the world's competing cosmologies, we journey next into in the remarkable land of the Tongass Indian tribal nations.

3. The Aboriginal Inhabitants, Cultures, and Natural Resources of *Haa Aaní.*

The Tlingit, Haida, and Tsimshian nations are rainforest tribes who reside in the great Pacific Northwest. After ten thousand years, these aboriginal hunters, fishers, and gatherers merged closely with ***Haa Aaní*** and evolved a striking culture that mirrors their habitat. In mythic times, little difference existed between early humans and the animals and fish that inhabited ***Haa Aaní***, except in form. In those days, spirits freely transformed from animal to human, and back. This metaphysical kinship relationship shaped tribal society. For example, crossing the line that sometimes divides humans from animals, the Tlingit called themselves Eagles or Ravens, and they still do. The Animal-Fish people organized into clans respectfully named after exalted animals or fish who took pity upon early humans, such as, the Killer Whale, Dog Salmon, Wolf, Frog, and Bear Clans. Together, the clans make up present-day Tlingit society and provide identity for the People.

The Tongass tribes inhabit America's largest rainforest—an area about the size of West Virginia. Tribal villages dot shorelines along the islands, bays, rivers, and fjords of southeast Alaska. This homeland forms one of richest environments on earth. It is a remarkable place inhabited by whales, salmon, moose, deer, bears, eagles, and many other creatures. Berries of all kinds grow along the streams; and the beaches provide a breadbasket of seafood. This amazing habitat produced an astounding aboriginal culture. Tsimshian fishermen, who fish in waters on and off the coast of their Annette Island Indian Reservation, set the tone for that aboriginal Pacific Northwest Coast seafaring culture. These islanders migrated to the island from nearby British Columbia in 1887 to inhabit what is the only federally recognized "Indian reservation" in Alaska, recognized by Congress in 1891. The Haida and Tlingit migrated into ***Haa Aaní*** in the earlier mists of time, perhaps 10,000 years ago. Tlingit art, architecture, dance, music, spirituality, technology, and the subsistence way of life arose from the rainforest, rivers, and sea; and they comprise a culture that reflects the rich coastal habitat nestled against snow-covered mountain peaks.

In addition to land and sea, these tribal societies are heavily influenced by the animals and plants of southeast Alaska. This influence is evident in the abstract Tlingit art forms, such as carvings, totem poles, masks, and painting style. This beautiful, animistic art is surreal, as if produced from another world. It is at once imbued with a powerful spirituality deeply-rooted in the natural world. Similarly, the hunting, fishing, and gathering way of life of Tongass tribes are also based upon the same spirituality. Tribal ties to indigenous habitat run deep, because the two are one in the same.

In 2006, the author visited ***Haa Aaní*** to see the land and visit the people involved in the *Tee-Hit-Ton* and *Kake* litigations. The trip to this enchanting place is almost impossible to describe on

paper. The waterfalls, glaciers, immense mountains, and water bodies defy description. Whales steam across the horizon, while large-sized brown bears gallop through the tidelands, among crowds of eagles feasting on salmon, not to mention the marine life that congregates along the shorelines. Here, humans talk to the trees. "The trees are alive," explained one Tlingit attorney, "you cannot cut them without asking permission before they can be used for any purpose." Even to this day, Sealaska—the Native corporation created by federal law for Southeast Alaska—holds an annual Tree Ceremony to give thanks to the spirits of the trees. I experienced Nirvana in the Chilkat River Valley, a home to every known race of salmon. In Klukwan, Tlingit women hunt moose in the bush and lead rich traditional lives, while artists carve spellbinding animals in wood. In this land, Eagles and Ravens imitate animals as they dance; and humans are engulfed by the Natural World.

4. The U.S. Forest Service's Administration of *Haa Aaní* (1908-1955).

The TNF was carved out of Indian land. In 1908, nearly every inch was owned by Tlingit clans, and their Haida and Tsimshian neighbors. Today they comprise eighteen federally-recognized Indian tribes who live within TNF boundaries. As mentioned earlier, the TNF was created subject to any existing property rights.[65] However, Indian land rights were ignored as the Forest Service began its operations. Indian rights, if any, could be determined later.

In the early years from 1908 to 1920, the major agency tasks in Alaska were to finalize national forest boundaries, reconnoiter the natural resources, and map possible dam sites, mill sites, and pulpwood possibilities.[66] A young forester, B. Frank Heintzleman (1888-1963) came to Alaska in 1918 to help inventory the forests. He would later be promoted to Regional Forester and work to limit aboriginal property rights. Ultimately, Heintlzleman became the Governor of the Territory of Alaska from 1953 to 1957.

In 1920, twenty million board feet of timber was cut, primarily along Alaskan shores.[67] President Harding called for the development of a pulp industry in Alaska.[68] The "Roaring Twenties" saw agency growth and flourishing timber sales. Visiting industrialists eyed the pulp possibilities of ***Haa Aaní***, after two staggering sales of 1.6 billion feet of timber caught their attention in 1927.[69] They wanted "a piece of the pie" before all the trees were gone.

During this period, one Tlingit man belonging to the Raven People, named William Paul (1885-1977), emerged as a prominent attorney and indigenous political leader. He brought *Tee-Hit-Ton* as a test case.[70] He was born in 1885 at Tongass Village, Alaska, into the Tee-Hit-Ton Clan. He became a charismatic orator with many accomplishments, supporters, enemies, victories, and defeats. During the 1920's, this interesting Tlingit lawyer emerged as a force. He attacked school segregation in ***Haa Aaní***; won citizenship for his people; secured the right to vote; and fought to protect salmon fishing. He helped build the Alaska Native Brotherhood ("ANB")—founded in 1912 as the nation's first Native American civil rights organization—into a potent political voice. He launched a newspaper in 1923 to press the ANB political agenda; and, in the same year, Paul was elected to the territorial legislature as the first Native legislator. These victories set the stage for a long and distinguished career in the face of great adversity.

Despite the controversy that surrounded his work, William Paul was a real hero. His many feats are all the more remarkable, because they were accomplished before the 1924 Indian Citizenship Act, at a time when Native Americans were a subjugated and demoralized race. In 1929, Paul confronted the biggest challenge of his day: The fight for Native land rights in ***Haa Aaní***. At an ANB

convention, he urged the people to fight for their land. During the 1930's, Paul lobbied for legislation authorizing land claim litigation in the Court of Claims to secure compensation for the taking of aboriginal land. A law was passed in 1935, but it required suit by a central body representative of Tlingit and Haida Indians, even though *clans* are the landowners in Tlingit society. This proviso created internal debate over the best litigation approach. At last, in the 1940's as the debate continued, Paul began filing cases to test his theory that the clans are the proper parties to litigate land rights, instead of the intertribal organization designated in the claims statute. By that time, the controversial litigator had been disbarred from the practice of law in Alaska, but he guided land rights litigation conducted by his two sons, attorneys William Paul, Jr. and Fredrick Paul.

Thus, in the 1940's a formidable Tlingit Raven emerged. William Paul would challenge Forest Service destruction of ***Haa Aaní*** and litigate to protect his way of life. Early victories sent shockwaves to agencies that were disturbing the use and possession of Tlingit land.[71] With the help of his sons, he would fight-on as the architect and star witness in the *Tee-Hit-Ton* test case, which was filed by the Paul litigation team in 1951. They would face adversity in the courts as they confronted the Forest Service managers.

In 1929, when William Paul issued the battle-cry to protect aboriginal land rights, the Forest Service frenzy to extract natural resources from ***Haa Aaní*** was at full-cry. The frantic pace slowed somewhat during the Great Depression, but quickly resumed and was in full force by the 1940s, as Regional Forester Heintzleman marched toward an empire made of pulp. By then, the agency governed a vast fiefdom. It exercised unquestioned power in the TNF to parcel out water rights, homesteads, special use permits for mines, canneries, fox farms, and to build reservoirs, pipelines, and tunnels, like an omnipotent ruler.[72]

The clash with the Indians was inevitable, as rangers made destructive sweeps into the forest from the 1930's to the 1950's to burn or destroy Native subsistence camps and remove their structures from the land. Foresters, loggers, and homesteaders often treated Indians "as trespassers on their own lands as if these lands had been abandoned or ceded."[73] In 1946, Tlingit people complained about "instances of violent confrontation" and a pattern of "being driven out due to intimidation or competition."[74] As ***Haa Aaní*** became a *de facto* colony of the Forest Service, "Government appropriation and restrictive regulation of traditional Native lands [were] a source of tension."[75] A 1944 memorandum describes timber sale procedures:

> *Exterior boundary of area is surveyed and blazed. Strips are then run through the area and a ten to twenty percent sample of the timber is cruised. Any improvements of importance on the area are readily seen, and special clauses are inserted in timber sale contracts which state measures to be used in protecting these improvements.*

Disruption of Native subsistence, land use, and occupancy was unavoidable in the rip and run operations that clear-cut into, among, and around homesites, villages, burial grounds, subsistence camps, and gardens. During the 1940's, the Tlingit Indians were still living on the land attempting to subsist.

During Regional Forester Heintzleman's Administration (1937-1953), the pitched battle began. In 1944, the Department of Interior woke up and began developing protections for aboriginal land and subsistence rights in ***Haa Aaní***. Following various petitions and hearings, Secretary of the Interior Harold Ickes issued a 1945 decision that recognized significant aboriginal land claims, together with hunting, fishing, trapping, and gathering rights, in the TNF and adjacent waters.[76] The Department resolved to establish Indian reservations on those aboriginal lands within the TNF. This proposal shocked foresters who vigorously opposed the creation of Indian reservations in their fiefdom.[77]

The Heintlzeman Administration fought to protect the agency's regime. Agency documents from this period show efforts to rally administrative, political, and public opposition against aboriginal rights, and to lobby in Washington against recognition of those rights.[78] Sounding the alarm, Heintzleman warned, "with not less than 18 Indian groups in the National Forest . . . very substantial portions of the National Forest would be split off for Indian use"—besides, aboriginal land is the best in the TNF and the rest "would hardly be worth retaining."[79] The agency argued it is "extremely improbable" that Congress would subordinate "non-Indian rights, equities and interests."[80] It opposed any relief that would disrupt progress or the "industrial possibilities" of the TNF.[81] The interdepartmental squabbling between the Interior and Agriculture Departments produced a standoff. This allowed the Regional Forester to continue timber sales in aboriginal areas in 1946 and ignore the Interior Department's determination until ordered otherwise by Congress.[82]

By 1947, the Natives were in open revolt. The ANB defiantly charged the Forest Service and pulp corporations with trespass on aboriginal lands. Even more alarming to agency big-wigs, several villages threatened the regime's timber monopoly by negotiating *Indian* contracts to sell timber on aboriginal land. The revolt caused the besieged foresters to retaliate by sending spies into the villages, interrogating the Indians, and threatening villagers with trespass actions to curtail the subversive sales.[83] In turn, the Indians *dared* the Forest Service to arrest them for exercising their property rights.[84] The tug-of-war between the Forest Service, Interior Department, ANB, and the tribal villages, scared away bewildered pulp paper companies. The Forest Service scrambled to quell the revolt which lasted into the 1950's.

In the midst of this turmoil, Paul scored a stunning legal victory in *Miller v. United States* (1947) that stopped the confiscatory rule of ***Haa Aaní*** in its tracks.[85] The Ninth Circuit's *Miller* decision affirmed the existence of congressionally-recognized aboriginal land in ***Haa Aaní*** and

ruled that it cannot be seized by the Government against the consent of Tlingit landowners without paying just compensation.[86] Unfortunately, the *Miller* rule was short-lived. It produced backlash just five months later, when Congress enacted a classic settler-state law. To combat the *Miller* decision, the lawmakers passed a Joint Resolution that authorized the Secretary of Agriculture to sell timber and land within the TNF "notwithstanding any claim of possessory rights" based upon "aboriginal occupancy or title."[87] Thus, the agency could sell aboriginal timber and land, so long as the receipts were maintained in a special account "until the rights to the land and timber are finally determined." Though it took no position on the validity of Indian land rights, the ramrod measure authorized the immediate sale of their property—the involuntary sale of ***Haa Aaní***. The "final ownership determination" provision in this law was a cruel and meaningless gesture, since there would be little practical hope of recovering alienated land after the fact, much less restoring habitat destroyed by industrialists. Thus, despite tribal opposition to the 1947 act, the Forest Service succeeded in side-stepping the *Miller* decision by simply changing the rules, an easy feat for insiders in a colonized land.[88] The Supreme Court would later describe the law as a "congressionally approved taking of land."[89] This is a euphemism for confiscation. The 1947 law amounted to theft. In short, this rainforest was stolen in 1947 in a classic tale of North American colonialism.

5. The Tlingit Bring Suit in the Courts of the Confiscators.

Under the authority of the 1947 act, the agency sold 60 million board feet in 1950.[90] Pulp investors formed the Ketchikan Pulp Company and, in 1951, won a contract to buy 1.5 billion cubic feet of timber at bargain-basement prices to manufacture pulp over a fifty-year period.[91] The sweetheart deal was a long-awaited triumph. At last, Forest Service dreams of a pulpwood industry would come true.[92] The sale of all the merchantable timber would destroy an immense area in the vicinity of Wrangell, Alaska, the aboriginal homeland of William Paul and the Tee-Hit-Ton Clan. They would resist confiscation of their property by filing *Tee-Hit-Ton v. United States* to test the nature and extent of Tlingit land rights in Alaska.

The early 1950's were bad times for Indian test cases. Those years marked the low point in Native American life, when Indian tribes faced a legal, social, economic, political, and cultural nadir.[93] At this time, the national Indian policy worked to terminate federal Indian trust responsibilities, extend state power over Indian reservations, and assimilate Indians into mainstream society. The last thing on Washington's mind was to protect a divergent way of life, much less aboriginal property rights in far-away ***Haa Aaní***. The Supreme Court began the twentieth century with the Law of Colonialism, in cases like *Lone Wolf v. Hitchcock* (1903) and *United States v. Sandoval* (1913).[94] In 1955, the Supreme Court could hardly be expected to row against the tide. Justice Stanley Forman Reed wrote the *Tee-Hit-Ton* opinion. His views reflected the times. In 1946, he wrote that Indians who occupy their aboriginal homes, without definite congressional recognition of their right to do so, are like "paleface squatters on public lands without compensable rights if they are evicted."[95]

The Supreme Court took the case to resolve two conflicting decisions concerning Tlingit land rights. The decision in the court below held that no rights exist because Congress has not recognized aboriginal land rights in Alaska, whereas *Miller* held several laws confirm such rights.

In the Supreme Court, the Indians advanced two arguments. First, they claimed absolute ownership of the land by virtue of aboriginal occupation since time immemorial. This original Indian title in Alaska is just like ordinary real estate owned by white people, despite the doctrines in *Johnson v. M'Intosh* (1823) and its progeny that espouse inferior Indian land rights. They argued that *Johnson*'s doctrines of discovery and conquest are inapplicable in Alaska, because the historical, political, and legal background in Alaska is fundamentally different from that of the lower forty-eight states. After all, Russia never "conquered" any Alaska tribes; and the Tlingit possess a highly-developed culture and well-defined system of land ownership. Alternatively, the litigators claimed Tlingit land rights under two federal laws pertaining to Alaska that confirm aboriginal possessory interests in land, as

recognized by the Ninth Circuit in the *Miller* case.[96] A congressionally-recognized possessory right to the land arises under the Alaska Organic Act of 1884:

> *Indians . . . shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them [with title to be acquired in a manner prescribed by] future legislation by Congress.*[97]

Similarly, the Act of June 6, 1900 reads: "Indians . . . shall not be disturbed in the possession of any lands now actually in their possession."[98] Under either theory of land ownership, William Paul's team argued that Tlingit property may not be taken against their will without just compensation; and, thus, the sale of timber from Tlingit land is an unconstitutional taking. The Government denied all of the Indians' contentions.

The Supreme Court rejected the Tlingit arguments. It went to great lengths to extend the usual apologies about injustice and avoid blame that are commonly found in unjust decisions. First, the opinion repeats *Johnson*'s excuse: "Conquest gives a title which the Courts of the Conqueror cannot deny."[99] To avoid blame for injustice under the doctrine of conquest, the Court hid behind a presumption of good faith:

> *It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.*[100]

In any event, justice is irrelevant and immaterial, because "the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy and thus is not a matter open to discussion."[101] Even though justice and morality are beyond the pale when it comes to dispossessing Indians, we should not be alarmed for "American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization" and they would like to "share the benefits of our society" with Indians.[102] (That good will, however, does not "allow the tribes to recover for wrongs." It is extended only as "a matter of grace, not because of legal liability."[103]) After the Court upheld the outright confiscation of Tlingit property, it defended its ruling with a bald claim that, "Our conclusion does not uphold harshness as against tenderness toward the Indians."[104] Despite his platitudes, it is hard to hide manifest injustice.

The Court held that Indian land rights are subject to the doctrines of discovery and conquest. Under those doctrines, those rights disappear "after the coming of the white man" and thereafter Indians can inhabit land only with "permission from the whites."[105] Justice Reed equated discovery with conquest. He reasoned that (1) conquest is a legitimate means to extinguish aboriginal title; (2) the Government conquered all Indian tribes, as a matter of fact—either through warfare or by forcing treaties upon Indians involuntarily; and therefore (3) all aboriginal title in the United States

had been extinguished by conquest prior to the *Tee-Hit-Ton* case, with the sole exception of any lands that Congress had chosen to grant back to the Indians.[106] The opinion states:

> *Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conqueror's will that deprived them of their land.*[107]

Under this rationale, conquerors do not have to compensate Indian tribes when they seize aboriginal land, because "original Indian title" is not a property right in a conquered land; and any Indian occupancy of aboriginal homelands that is "not specifically recognized as ownership by action of Congress, may be extinguished by the Government without compensation."[108] The Court rejected the argument that these nefarious legal doctrines do not apply in Alaska.[109] In addition, contrary to the holding in *Miller*, the *Tee-Hit-Ton* Court found "nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress."[110] Consequently, Tlingit property rights "may be extinguished by the Government without compensation" just like Indians in the lower forty-eight states.[111] Relief for the Indians, if any, must come from Congress, not the courts—"no other course would meet the problem of growth of the United States."[112]

Federal Indian law hit rock bottom with the 1955 decision. It sanctioned one of the greatest land heists in twentieth century American legal history. In the eyes of the law, outright confiscation of land is normally considered abhorrent, because it is prohibited by the Bill of Rights. Consequently, legal principles that sanction outright confiscation are suspect, as they come from the bottom of the barrel infected with nefarious notions of raw conquest and abject colonialism.

In the wake of *Tee-Hit-Ton*, the Forest Service stepped-up timber sales in the TNF. In 1959, a second pulp mill opened in Sitka, Alaska. The decision unleashed habitat destruction throughout ***Haa Aaní*** by the Government with impunity. The way of life of Tlingit hunters, fishers, and gatherers was placed into jeopardy as the dispossessed Indians helplessly watched their homeland being turned into paper and pulpwood. Public concern mounted in the ensuing decades as clear-cutting began to injure the habitat and the salmon runs.[113]

In the midst of this dispossession and environmental destruction, the Tongass tribes lost control over the exercise of rights vital to their tribal hunting, fishing, and gathering existence. In the 1962 *Kake* decision, the Supreme Court held that the exercise of those aboriginal rights would be controlled by the state. The newcomer became owners and stewards of the land, as well as the regulators of the Indian way of life. Colonization of ***Haa Aaní*** was complete.

6. Efforts to Overcome the Impacts of *Tee-Hit-Ton* and *Kake.*

Several vital challenges lay ahead for the Tongass tribes during the modern era of federal Indian law. First, the Indians were determined to obtain damages for the taking of their property. Second, they needed to establish a land base in their homeland. Third, they needed legal protections for their hunting, fishing, and gathering existence and to regain self-government in ***Haa Aaní***. Fourth, the tribes needed to protect indigenous habitat in the TNF. Finally, these primal cultures needed to secure a reliable body of law to protect their right to exist as distinct cultures in a modern-day settler state, as a matter of cultural survival. This would be a tall order for tribal leaders who followed in William Paul's footsteps.

Compensation for taking ***Haa Aaní*** came from two sources. In 1968, the Tlingit and Haida received $7,546,053.80 in damages in *Tlingit and Haida Indians v. United States* (1968), as compensation for aboriginal land "taken from them by the United States without payment of any compensation therefore."[114] This action was filed under the 1935 act mentioned earlier, obtained by William Paul, which gave the Court of Claims authority to award damages for Tlingit and Haida land claims.[115] In 1971, Congress contributed additional millions in compensation, as part of an elaborate settlement of all aboriginal land claims and hunting and fishing rights in Alaska. Congress extinguished those rights in the Alaska Native Claims Settlement Act of 1971 (ANCSA) in exchange for $962.5 million and forty-five million acres distributed to Native corporations.[116] The Tongass tribes received their share of these assets, and over a half-million acres of their ANCSA lands came from the TNF.[117] The implementation issues and current concerns surrounding Native land entitlements under federal law some thirty-eight years later will be detailed at the upcoming congressional hearings.

Furthermore, the Indians of ***Haa Aaní*** would be governed by their federally recognized tribes and villages, with a village and regional corporate structure created by ANCSA. The rule of ***Haa Aaní*** as a *de facto* Forest Service colony came to an end, though many Native Alaskan challenges remain to protect tribal existence in a land where aboriginal natural resources are mostly owned and controlled by others under the *Kake* decision and its progeny.[118] Governance and control over natural resources which are vital to the these cultures may also be detailed in the congressional hearings.

The 1962 *Kake* decision turned control over aboriginal hunting, fishing, and gathering rights to the State of Alaska. ANCSA extinguished those aboriginal rights in Alaska altogether. However, at the same time Congress expected the Secretary of the Interior to protect traditional hunting and fishing practices.[119] In 1980, a statutory scheme for protecting traditional Native subsistence

practices on public lands—including the TNF—was created by the Alaska National Interest Lands Conservation Act (ANILCA).[120] As a result of these statutory protections, the Tongass tribes are able to exercise some measure of their aboriginal existence and practice cultural self-determination in our modern society, as a positive first step in achieving the UNDRIP standards set in 2007. To some degree, the federal statute permits the Indians continue to hunt, fish, and gather, but it may fall short of preserving an ancient, but endangered indigenous subsistence lifestyle and cosmology that is under any measure a living treasure, because it provides a rare link to the human past in a modern-day world. The barriers and impediments to the exercise of rights vital to the survival of these cultures will be detailed by their representatives in the Congressional hearings.

ANICLA also curbed rampant timber sales in the TNF that were destroying indigenous habitat. The law created fourteen wilderness areas in the national forest, totaling over 5 million acres. Vital TNF habitat protection increased in 1990, when the Tongass Timber Reform Act designated five additional wilderness areas and several roadless areas in order to retain the wilderness characteristics of the TNF. The last pulp mill closed in 1997. By 2001, employment in the timber industry had fallen to just 780 jobs. Today, 13.2 million acres of the 16.8 million acre TNF are in a protected, non-development status. In the end, the Forest Service dream built upon "rip and run" clear-cutting operations failed.

Any logging done today on Native land in TNF borders is carried out by Native villages or corporations at a pace of development controlled by the Native peoples themselves, and it is done commensurate with the oldest way of life known to the human race, for the indigenous habitat of ***Haa Aaní*** maintains viable populations of fish, wildlife, and plants necessary to support the Tlingit way.[121] Today, traditional food obtained from tribal habitat remains at the center of Tlingit culture. However, challenges remain in accessing those resources and protecting the habitat necessary to produce them.

These significant successes since the *Tee-Hit-Ton* and *Kake* decision would not have been possible without intervention by Congress. As interpreted by Justice Reed, the doctrines of federal Indian law lacked sufficient vitality to protect a lifeway dependent upon tribal habitat in ***Haa Aaní***. To their credit, lawmakers filled the void with statutory protections. Some of that intervention was prompted by the need to resolve aboriginal claims in Alaska and to protect the environment of a magnificent region by a nation that is still searching for a land ethic to co-exist peacefully with the natural world. The Endangered Species Act ("ESA") represents a major shift in "dominionist" thinking, described above. The ESA is the most comprehensive law for the preservation of endangered species ever enacted. It provides effective means to conserve critical ecosystems needed by endangered or threatened species to survive.[122] Unfortunately, this watershed statute is not triggered until a species falters on the brink of extinction, and then it acts to place them on a life-support system; whereas, the hunting, fishing, and gathering way of life in the Pacific Northwest

depends upon healthy habitats that produce viable animal and plant populations. However, American law and social policy may be evolving in that direction. Significantly, federal law now recognizes that the "[m]ajor cause of extinction is destruction of natural habitat;" that animals and plants have intrinsic, incalculable value; and that the preservation of endangered species from extinction is more important than the projects of man.[123] It is but a short step for our society to protect animals and plants in their natural habitats *before* they become endangered, just like the hunting, fishing, and gathering cultures have done since the dawn of time. At that point, our human family will come full circle with life on earth.

This is not simply an environmental issue; and environmental groups are not the new "landlords" in ***Haa Aaní***, even though their voice is a constructive force in southeast Alaska. The effort to protect indigenous habitat in ***Haa Aaní*** so that the Native cultures will continue to exist and thrive raises much larger human rights, cultural, and anthropological issues; and it will require Congressional attention to save the endangered tribal cosmologies, worldviews that will be critical to our nation in forming a real American land ethic necessary to protect the blessings of Mother Earth. The need for Congress to protect indigenous habitat is made clear by the UNDRIP. The UN asks each modern nation to protect that habitat when Native people depend upon it to carry on their way of life. Article 26 provides: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" and it requires legal protections for those lands, territories, and resources. Article 28 asks nations to affirmatively help Indigenous Peoples to conserve and protect that habitat. While not legally binding on the United States, the historic declaration suggests that our nation has an obligation to strengthen laws to protect indigenous habitat in ancestral areas that are presently outside of tribal control. International tribunals and the high courts in other countries are already beginning to recognize and extend similar habitat protection. For example, in *Awas Tingini v. Nicaragua* (2001), the Inter-American Court of Human Rights held that Nicaragua violated tribal property rights by granting a logging concession to a foreign company to log traditional lands.[124] The court held that there is an international human right of Indigenous peoples "to the protection of their customary land and resource tenure."[125] In *Maya Indigenous Community of Toledo District v. Belize* (2000), the Inter-American Commission of Human Rights recommended that logging and oil concessions on traditional tribal land be suspended to protect Mayan land rights.[126] It determined that Belize failed to protect that habitat. These international developments suggest that the *Tee-Hit-Ton* and *Kake* mindsets are outmoded and Congress much uplift federal Indian law to comport with the United Nations' minimum standards.

7. Conclusion.

The conquest of Alaska has run its course. Most Americans seek not to look at the land in the twenty-first century like colonists bent upon exploitation and dispossession, but rather as a society that has joined indigenous and non-indigenous peoples together in a more just culture. With the passage of federal legislation during the modern era of federal Indian law, we can glimpse the hopes of the next generation—Alaskans at peace with the Natural World and all of its inhabitants. Given the hardships imposed by *Tee-Hit-Ton* and *Kake*, we are fortunate that the rainforest tribes of ***Haa Aaní*** managed to persist, and not wink out of existence like so many other tribal cultures in the world during the twentieth century. ***Haa Aaní*** is still inhabited by Eagles and Ravens. Everyone can celebrate the struggle to protect America's greatest rainforest. Today there are millions who love the land and admire the hunting, fishing, and gathering ideals of the Pacific Northwest Indians. Their way of life is everyone's legacy. Let us arise, take stock of the federal laws and social policies that impact Native southeast Alaska, and chart our course for the future.

Endnotes

1 Walter R. Echo-Hawk is an attorney with the Crowe & Dunlevy law firm of Oklahoma and a Justice on the Supreme Court of the Pawnee Nation. Previously, he served as a staff attorney for thirty-five years for the Native American Rights Fund (NARF) with a wide range of federal Indian law experience.

2 Personal Communication with the author. Walter A. Soboleff is a venerated Tlingit elder who turned 100 years old on November 14, 2008.

3 Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1602-1628.

4 *See, generally*, Eugene Linden, "Lost Tribes, Lost Knowledge," *Time Magazine* (Sept. 23, 1991), pp. 46-56. Linden was deeply concerned about the "cultural holocaust" confronting the world's tribes, because when these cultures die, "vast archives of knowledge and expertise are spilling into oblivion, leaving humanity in danger of losing its past." *Id.* at 46.

5 United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), U.N.G.A. Res. 61/295, U.N. H.R.C., 61st Sess., Annex, Agenda Item 68, U.N. Doc. A/RES/61/295 (2007). The UNDRIP is reproduced at: www.narf.org/events/07/declaration.pdf. *See also*, "United Nations Adopts Historic Declaration On The Rights Of Indigenous Peoples," NARF L. Rev., V. 32, No. 2 (Summer/Fall 2007), pp. 1-17. Article 43 provides: "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

6 *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

7 *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). *See also*, Blue Clark, *Lone Wolf v. Hitchcock*: Treaty Rights & Indian Law at the End of the Nineteenth Century (Lincoln & London: University of Nebraska Press, 1999); "Symposium: *Lone Wolf v. Hitchcock*: One Hundred Years Later," 38 Tulsa L. Rev. 1 (2002).

8 Lawrence Rakestraw, *A History of the United States Forest Service in Alaska* (USDA Forest Service, 2002) at 17 (citing missionary correspondence to the Secretary of the Interior).

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

10 *Id.* at 289-290.

11 U.S. Const., Fifth Amendment.

12 *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

13 *Id.* at 64.

14 Robert N. Clinton, "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law," 46 Arkansas L. Rev. 77, 86 (1993).

15 Kirkpatrick Sale, *The Conquest of Paradise: Christopher Columbus and the Columbian Legacy* (New York: Alfred A. Knopf, 1990).

16 *Johnson v. M'Intosh*, 21 U.S. 543, 590-591 (1823).

17 Walter Echo-Hawk, "Genocide and Ethnocide in Native North America," in John Hartwell Moore (ed. in chief), *Encyclopedia of Race and Racism, Vol. 2, g-r* (Thompson Gale, 2007), p. 48; Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1493* (Norman: University of Oklahoma Press, 1987).

18 *See, generally*, Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (London, New York: W. W. Norton & Co., 2005).

19 *Brown v. Board of Education*, 347 U.S. 483 (1954).

20 It was most recently cited with approval by the *Supreme Court in Idaho v. United States*, 533 U.S. 262, 277 (2001).

21 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1603 *et seq.* ("ANCSA") (extinguishing all Aboriginal land claims in Alaska in exchange for various forms of compensation); Indian Claims Commission Act of 1946, 62 Stat. 683 ("ICCA") (creating a special commission to hear native claims against the United States.)

22 Huston Smith, *The World's Religions: Our Great Wisdom Traditions* (HarperSanFranscico, 1991) at 376. This book contains a great discussion on the nature of primal religion.

23 Mircea Eliade, *The Myth of the Eternal Return* (Princeton Univ. Press, 1971) (trans. by Willard R. Trask).

24 Gregory Cajete, *Native Science: Natural Laws of Interdependence* (Santa Fe: Clear Light Publishers, 2000).

25 *Id.* at 94.

26 *Id.* at 188 (citations omitted).

27 *See*, Articles 18-20, 24-29, 31-32, 38-40, UNDRIP.

28 *See*, United Nation's Convention on the Prevention of and Punishment of the Crime of Genocide (1948).

29 Robert Hitchcock and Tara Tweed, "Physical and Cultural Genocide of Various Indigenous Peoples," in Samuel Totten, et al (eds.), *Century of Genocide: Eyewitness Accounts and Critical Views* (New York: Garland Publishing, 1997), p. 378.

30 *Tee-Hit-Ton*, 348 U.S. at 287.

31 *Id.* at 286.

32 Letter from Claude R. Wichard, Secretary of Agriculture to Secretary of the Interior (February, 5, 1944), p. 2 (author's files).

33 Walter R. Goldschmidt and Theodore H. Haas, *Haa Aaní: Tlingit and Haida Land Rights and Use* (1946, reprinted by University of Washington Press, Seattle and London, Sealaska Heritage Foundation: Juneau, 2000), Thomas F. Thornton, ed. See also, Thomas R. Berger, *Village Journey: The Report of the Alaska Review Commissio*n (Hill and Wang: New York, 1985); Richard G. Newton and Madonna L. Moss (eds.), *Haa Atxaayi Haa Kusteeyix Sitee, Our Food Is Our Tlingit Way of Life: Excerpts From Oral Interviews* (USDA Forest Service, 2005).

34 Richard B. Lee and Irven DeVore (eds.), *Man The Hunter* (Chicago:Aldine Atherton, 1966).

35 *See, e.g.*, William S. Laughlin, "Hunting: An Integrating Biobehavior System and Its Evolutionary Importance," in Lee and DeVore (1966) at 305; Barry Lopez, *Of Wolves And Men* (New York, London, Toronto, Sydney: Scribner, 1978) at 90-97; Smith (1991) at 372-377; Eliade (1971); Cajete (2000) at 156-165.

36 Lee and Devor (1966).

37 *See* note 24, *supra.*

38 Goldschmidt and Haas ((2000) at 19-26.

39 "Toharu" possess supernatural power in the Pawnee belief system. They play several ceremonial roles in Pawnee ceremonies, such as the Pipe Dance, Kitkahaki Dance, and Young Dog Dance. The plant world is one of the powers who make life possible, and plants helped early humans understand the meaning of sacred things. *See, e.g.*, Alice C. Fletcher, *The Hako: Song, Pipe, and Unity in a Pawnee Calumet Ceremony* (Lincoln and London: University of Nebraska Press, (1904) 1996), p. 31.

40 Lopez (1978) at 90-95.

41 Quoted in Paul Goble, *All Our Relatives: Traditional Native American Thoughts about Nature* (Bloomington, Indiana: World Wisdom, Inc., 2005).

42 *See*, George A. Dorsey, *The Pawnee Mythology* (Lincoln and London: Bison Books Edition, (1906) 1997) (based on turn-of-the century interviews with Pawnee elders); James R. Murie, *Ceremonies of the Pawnee* (Lincoln and London: University of Nebraska Press, 1981), Douglas Parks (ed.); George Bird Grinnell, *Pawnee Hero Stories and Folk Tales* (Lincoln: University of Nebraska Press, (1889) 1961).

43 Quoted in Goble (2005).

44 "Death of the Flint-Monster: Origin of Birds," told by Curly-Head between 1899-1902 in George A. Dorsey (ed.), *Traditions of the Skidi Pawnee* (Boston and New York: American Folklore Society, 1904), pp. 24-30.

45 Told by the author's uncle, Myron Echo Hawk, and recorded by Roger Echo-Hawk.

46 Jim Mason, *An Unnatural Order: Uncovering the Roots of Our Domination of Nature and Each Other* (New York, London, Toronto, Sydney, Tokyo, Singapore: Simon & Schuster, 1993), 21-22.

47 Quoted in Goble (2005).

48 Mason (1993) at 21-22.

49 *Id.* at 25.

50 Cited by Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (New York: Lantern Books, 2002), p. 3 (quoting Sigmund Freud, "A Difficulty in the Path of Psycho-Analysis," (1979) in *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (London: Hogarth Press, 1955), Vol. XVII, 130 (James Strachey, trans.)).

51 *Id.* (quoting Sigmund Freud, "Fixation to Traumas—The Unconscious" in Introductory Lectures on Psychoanalysis—Part III (1916-1917), Lecture XVIII, *Complete Works*, Vol. XVI, 285).

52 Genesis (1:26).

53 Genesis (1:28).

54 Genesis (9:2).

55 Mason (1993) at 28.

56 *Id.* at 33-49; Lopez (1978) at 147.

57 North America hunters believe animals have souls. In 1918, Bear-With-Paws (Lakota) stated: "The bear has a soul like ours, and his soul talks to mine in my sleep and tells me what to do." Pete Catches (Lakota) explained: "All animals have power, because the Great Spirit dwells in all of them, even a tiny ant, a butterfly, a tree, a flower, a rock." Thus, the Sioux say, "Do not harm your weaker brothers, for even a little squirrel may be the bearer of good fortune." *See*, quotes in Goble (2005).

58 Mason (1993) at 38.

59 Cajete (2000) at 211.

60 Patterson (2002).

61 *See*, Jim Mason and Peter Singer, *Animal Factories: The Mass Production of Animals for Food and How it Affects the Lives of Consumers, Farmers, and the Animals Themselves* (New York: Crown Publishers, 1980)

62 Scott Sonner (Associated Press Writer), "Palin Appeals to Nevadans to Help Swing Election," San Jose Mercury News (Nov. 4, 2008) (http://www.mercurynews.com/news/ci_10893972).

63 Patterson (2002).

64 *Id.* at 25-50.

65 The proclamation establishing the TNF provided that nothing shall be construed "to deprive any person of any valid right" secured by the Treaty with Russia or any federal law pertaining to Alaska.

66 Rakestraw (2002) at 70, 77.

67 *Id.* at 74.

68 *Id.* 83.

69 *Id.* at 112.

70 Stephen Haycox, "*Tee-Hit-Ton* and Alaska Native Rights," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Canadian Plains Research Center, University of Regina and Ninth Judicial Circuit Historical Society, 1992), p. 128-143. Paul's bibliography is published in Nora Marks Dauenhauer and Richard Dauenhauer (eds.), *Haa Kusteeyi, Our Culture: Tlingit Life Stories* (Seattle, London, Juneau: University of Washington Press and Sealaska Heritage Foundation, 1994), pp. 503-524.

71 See, *Miller v. United States*, 159 F.2d 997 (9th Cir. 1947) and discussion *infra*.

72 The agency asserted the authority of the Regional Forester to do all these things. *See, e.g.*, Regional Forester Memorandum, C. M. Archbold, October 9, 1953 (Author's files). *See also*, Rakestraw (2002).

73 Goldschmidt and Haas (1998) at xvii-xviii.

74 *Id.*

75 *Id.*

76 "Claims of the Natives of Hydaburg, Klawock, and Kake, Alaska," (Department of the Interior, July 27, 1945) (author's files).

77 *See, e.g.*, Letter from Secretary of Agriculture Claude R. Wickard to Secretary of the Interior Harold L. Ickes (Feb. 5, 1945) (author's files); Memorandum from Lyle F. Watts, Chief, Forest Service to Secretary of Agriculture (Dec. 11, 1944) (author's files), p. 2.

78 *See, e.g*, Memorandum from B. Frank Heintzleman, Regional Forester, to Chief, Forest Service (June 11, 1946) (relaying territorial opposition to aboriginal rights in the TNF and legislative efforts to extinguish those rights); Memorandum from B. Frank Heintzleman, Regional Forester, to Chief, Forest Service (Oct. 30, 1946) (author's files) (passing along helpful political information about local opposition to aboriginal rights in the TNF); Letter from B. Frank Heintzleman to Region 10 (May 27, 1947) (author's files) (Complaining about Tlingit opposition at a congressional hearing to H.R. 204, which would authorize timber sales in the TNF regardless of any aboriginal property right claims);

79 Memorandum from Regional Forester B. Frank Heintzleman to Chief, Forest Service (Nov. 5, 1945) (author's files); Memorandum from Regional Forester B. Frank Heintzleman to Chief, Forest Service (Oct. 17, 1947) (author's files) (aboriginal land is located in "the most commercially useful zone of the forest.");

80 Letter from Secretary of Agriculture Claude R. Wickard to Secretary of the Interior Harold L. Ickes (Feb. 5, 1945) (author's files), p. 3.

81 *Id.*

82 Memorandum from B. Frank Hentzleman, Regional Forester, to Chief, Forest Service (June 25, 1946) (author's files) (calling attention to Indian protects to a timber sale in aboriginal land recognized by the Interior Department: "We can expect frequent protests . . . until the whole question is finally settled by Congressional action," but in the meantime "it would be inadvisable to try to compromise with the Interior Department in any of these cases at this time."); Memorandum from B. Frank Hentzleman, Regional Forester, to Division Supervisors, Southern and Petersburg (June 12, 1946) (author's files) ("I cannot see that we are justified in suspending any form of Forest Service administration while awaiting a higher decision in the matter."); Confidential Memorandum of C.M. Archbold, Division Supervisor (July 1, 1946) and attachments (passing along confidential orders from Hentzleman to be more careful when awarding special use permits that affect Indian structures, but continue making timber sales in designated areas); Letter from Don C. Foster, General Superintendent, to William A. Brophy, Commissioner of Indian Affairs (June 21, 1946) (author's files) (complaining that the Forest Service sold 1,300,000 feet of timber in an area set aside by the Secretary of the Interior for the aboriginal uses of the Kake community.)

83 Memorandum from B. Frank Hentzleman, Regional Forester, to Division Supervisors (Oct. 20, 1947) (author's files) (ordering the Supervisors to investigate any Indian timber sale as a high priority for possible trespass actions); Confidential and Personal Letter from "Arch" (presumably C.M. Archbold, Division Supervisor) to "Frank" (presumably Hentlzeman) (Oct. 17, 1947) (author's files) ("We will try to stop such cutting [at Kake and Klawock] by trespass proceedings."); Memorandum from C. M. Archbold,

Division Supervisor, to Regional Forester (Dec. 9, 1947) (author's files) (reporting on timber cutting contract between the Kaasan community and the Timber Development Corp.); Memorandum from A. W. Hodgman, Forest Manager, to C. M. Archbold, Division Supervisor (Dec. 8, 1947) (author's files) (reporting investigation on a possible Tlingit sale of timber on aboriginal land claimed by the Kaasan Village); Letter from Lyle F. Watts, Chief, to Georgia Hardwood Timber Company (Dec. 10, 1947) (author's files) (asserting "the Indians have no authority to sell the timber on the national forest land.").

84 Statement of Thomas L. Jackson, Timber Committeeman of the Kake Indian Village (undated) (author's files).

85 *Miller v. United States*, 159 F.2d 997 (9th Cir. 1947).

86 *Miller* held the government is liable for taking Tlingit tidelands. It reached this result in a round-about way. The court first recognized aboriginal title, then ruled that the Russia Treaty extinguished it. Nonetheless, the court still awarded damages, because it determined that Congress has repeatedly recognized and protected a Tlingit right to possess traditional lands. For example, the Alaska Organic Act of 1884 provides that Indians "shall not be disturbed in the possession of any lands actually in their use or occupancy." *Miller* sent shockwaves to the Forest Service, because the disturbance of Tlingit land use and possession was at the core of its administration of the TNF.

87 Joint Resolution, 61 Stat. 920 (August 8, 1947).

88 Heintlzeman's letter to Region 10 (May 27, 1947) (author's files) (Reporting on the congressional hearing on the bill and complaining about Tlingit opposition) suggests that he went to Washington D.C. to lobby for the measure.

89 *Tee-Hit-Ton*, 348 U.S. at 275.

90 Rakestraw (2002) at 127.

91 *Id.*

92 Timber-hungry Japanese would establish a second pulp mill at Sitka in 1959. *Id.* at 128.

93 Wilkinson (2005).

94 *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sandoval*, 231 U.S. 28 (1913).

95 *United States v. Alcea Band of Tillamooks et al.*, 329 U.S. 40, 58 (1946) (Reed, J., dissenting).

96 The Tlingit brief in the Supreme Court is reproduced at 1954 WL 72830.

97 Sec. 8, Organic Act for Alaska of May 17, 1884, 23 Stat. 24.

98 Sec. 27, Act of June 6, 1900, 31 Stat. 321, 330.

99 *Tee-Hit-Ton*, 348 U.S. at 280.

100 *Id.* at 281 (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525).

101 *Id.* (quoting *Beecher*).

102 *Id.*

103 *Id.* at 282.

104 *Id.* at 290-291.

105 *Id.* at 279.

106 Newton (1980) at 1241-1242.

107 *Tee-Hit-Ton*, 348 U.S. at 289-90.

108 *Id.* at 288-289.

109 *Id.* at 278. The Court took the "all-Indians-are-alike" approach, even though the Tlingit lived in major permanent communities and enforced sanctions for violating their property rights and extended them to the early settlers.

110 *Id.* at 288.

111 *Id.* at 289.

112 *Id.* at 290.

113 Rakestraw (2002), pp. 139-145, 155-176.

114 *Tlingit and Haida Indians v. United States*, 389 F.2d 778, 791 (Court of Claims, 1968).

115 49 Stat. 388.

116 43 U.S.C. §§ 1601 et seq. The complex statutory settlement scheme is described in *Cohen's Handbook of Federal Indian Law* (Lexis Nexis, 2005 ed.), § 4.07[3].

117 Rakestraw (2002), pp. 159-160.

118 For example, the Tlingits are still implementing their land entitlements under ANCSA, nearly 30 years later. In addition, they must now contend with some environmentalists who consider ***Haa Aaní*** their new fiefdom, as well as Forest Service hold-outs who harbor old notions of conquest and dominionism. However, the days of absolute rule of ***Haa Aaní*** by the Forest Service as a *de facto* colony are gone.

119 *Cohen's* (2005 ed.), § 4.07[3][a]. The extinguishment of aboriginal hunting, fishing, and gathering rights by ANCSA was preceded by the Supreme Court decision in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), which subjected Tlingit trap fishing to state regulation.

120 16 U.S.C. §§ 3101 *et seq.* That complex scheme and the enormous on-going efforts to implement it are described in *Cohen's*, *supra*, § 4.07[3][c].

121 Record of Decision entered by Regional Forester Dennis E. Bschor (Feb. 24, 2003), pp. 19, 26.

122 *See*, *Tennessee Valley Authority v. Hill*, 437 U.S. 154, 180 (1978).

123 *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985, 994995 (D. Haw. 1979). *See*, *Tennessee Valley Authority v. Hill*, 437 U.S. at 168-169 (the social and scientific costs attributable to the disappearance of a species cannot be calculated); *Kandra v. United States*, *supra* (extinction is the *ultimate harm*); *State of Ohio v. U.S. Dept. of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (animals have value that cannot be captured by their monetary worth); *Palila v. Hawaii Dept. of Land and Natural Resources*, *supra* (endangered species are of the utmost importance to mankind); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) (Endangered species take precedence over the "primary mission" of federal agencies.)

124 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, [2001] IACHR Petition No. 11 577.

125 *Id.*

126 *Maya Indigenous Community of the Toledo District v. Belize*, Case No. 12.053, Report No. 40/04, Inter-Am. C.H.R. OEA/Ser.L/V/II.122 Doc. 5 rev, 1 at 727 (2004), ¶ 1, (http://www1.umnn.edu/humanrts/cases/40-04.html).