The Bicentennial of the Constitution and the Alaska Lands Settlement

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THE ALASKA LANDS ACT OF 1980 was a triumph for both conservation and constitutional government. It climaxed a lengthy process that had transformed Alaska from a distant territory to an integrated State of the Union and changed Alaska's lands from almost wholly Federal domain to mixed ownership by private interests, the State of Alaska, and the Federal Government.

From the beginning, the Constitution had governed Alaska's evolution as a possession of the United States. The power of the Federal Government to acquire and govern territories was determined by the Supreme Court in 1828 when Chief Justice John Marshall, speaking for a unanimous court, declared ".....the Constitution conferred absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty." He went on to say that the Constitution empowered Congress, once territory was acquired, ".....to make all needful rules and regulations, respecting the territory, or other property belonging to the United States."[1]

For many years after its purchase from Russia in 1867, Alaska remained a neglected administrative district, detached and remote from the rest of the Nation. Then, with the Klondike discoveries, the 1898 Gold Rush attracted thousands of stampeders and national attention to the isolated region. In 1905, responding to a law suit protesting the lack of common-law jury trials in Alaska, the Supreme Court ruled that Alaska, by its acquisition and subsequent acts of Congress, had been incorporated into the United States; therefore its laws must reflect the constitutional rights of United States citizens.[2] In 1912 Congress enacted full-fledged territorial government for Alaska, with a representative legislature and a non-voting delegate to Congress. There ensued a drive for statehood that followed earlier patterns of the contiguous western territories.

But again the underpopulated, far-north territory faded from view. The end of major gold excitements had combined with World War I job opportunities in the Lower 48 to drain people from the territory and thrust the statehood issue into limbo.

With the threat and actuality of Japanese invasion during World War II, national interest again focused on Alaska. Road and military-base construction and the fighting campaign in the Aleutian Islands brought thousands of civilian workers and service men northward. The war, plus its Cold War aftermath of radar stations and air bases—responding to Alaska's location astride polar air routes—would help push the Great Land into the ranks of statehood in 1959.

With the grant of statehood, Alaska was authorized to select 104 million acres from the Federal domain to provide an economic base for

its development and governance—a land base larger than all of California. The State's selection of choice lands throughout Alaska soon aroused Native Alaskans—Indians, Eskimos, Aleuts—who mobilzed to protect their ancestral homelands.

From the time of the continental Congress and the Articles of Confederation, Congress had reserved to itself the power to regulate trade and manage all affairs with the Indians. The framers of the Constitution recognized that earlier history, giving Congress the power to "regulate commerce.....with the Indian tribes." The broad meaning of the word commerce, which went beyond mere trade to encompass Indian affairs generally, together with the treaty-making power, gave Congress plenary power to deal with the Indians.

Often marked by inequities and dubious policies over the years, this constitutional responsibility included a higher purpose. It placed the Federal Government in the position of trustee and protector of Native Americans, who, in their dispersion and small numbers, could not hope to match the power of the dominant national society. Alaska Native organizations appealed to this trust relationship and to history as they made their case to halt State land selections. They cited the 1821 charter of the Russian-American Company, the Tsar's governing body in Alaska, which provided that "The natives.....are permitted to enjoy fishing along the shores where they live.....They are entitled also to catch the sea animals and wild beasts on these islands and places where they are living."[3] Alaska Natives called for protection of ancestral lands so that these traditional lifeways could be perpetuated.

To give Congress time to respond to these petitions, the Secretary of the Interior halted State land selections in 1966. Two years later occurred the gigantic Prudhoe Bay oil discovery at the margin of the Arctic Ocean on land already conveyed to the State. This event forced Congressional action, because an oil-pipeline-right-of-way across Alaska from frozen arctic shores to a warm-water port depended on settlement of Native land claims.

Thus was the stage set for the Alaska Native Claims Settlement Act of 1971. The new oil discovery had the effect of aligning a host of interests, most of them previously at odds: national security concerns over oil dependency, the oil industry, the State of Alaska, conservationists, and the Native land claimants. The act opened the way for oil development, which would mean royalty revenues to the State, and it allowed further progress in the partitioning of Alaska lands to meet the demands of the Natives, the State, and—through proposals requested by Congress for parks and other preserved lands—the Nation's conservationists.

The 9 years between the Native Claims Act and passage of the Alaska National Interest Lands Conservation Act of 1980 tested the Nation's political institutions. On a grand scale, with now-or-never urgency, the people, their agency trustees, and their elected representatives fulminated over Alaska's fate, striving to balance conflicting demands of preservation and development. The struggle brought to the fore diverse national values and viewpoints about

Alaska, ranging from the esthetic to the utilitarian. Only by the thinnest margin of time and events was the act consummated, for the trends of world history had caught up with the United States, thrusting it into the economics and politics of scarcity. No matter how many new parks and refuges might be enacted in the years to come, never again would such extensive landscapes be dedicated as preserved lands.

During the Alaska lands struggle, as in other testing times, the Constitution's division of powers among the three branches of government—legislative, executive, judicial—and between government and governed, all came into play. Neither the tyranny of the majority nor the dictates of any minority could dominate the proceedings. The upshot of the legislative process was a compromise, effected in part by joint Federal and State consultation, in part by many public hearings and visits with local people by members of Congress. The compromise roughly balanced conservation and development needs; national, State, and local interests; modern and traditional lifeways.

From any particular viewpoint the Alaska Lands Act was an imperfect resolution, because no compromise is perfect for any one party to a dispute. But constitutional government is based on compromise. Winner-take-all is a philosophy repugnant to constitutional government. That is why the Founders built into the Constitution the many safeguards that force factions to come to the table, negotiate, and compromise. In a profound sense, there are no winners, no losers in constitutional government.

James Madison made that point in Federalist Paper No. 10 during the effort to ratify the Constitution in 1787. He recognized that the true sanction of government is found not in goodwill but in the

(The bill) has many virtues. And it lacks many others. But I think it is wise at this moment to support it, and we have to accept that which is possible even if it is not perfect.[5]

In its scale the Alaska Lands Act was unique in our history—for example, it more than doubled the national parklands in a single legislative action. But in its genesis, its legislative background, and its final enactment the 1980 act followed constitutional patterns that had evolved throughout the Nation's Westward Expansion. In Alaska, as in the earlier West of Yellowstone and Yosemite, individuals and groups had found values for future generations in preserved lands. They had carried their message into the political arena, there to contend with those who perceived different futures for Alaska's outstanding landscapes. Through political processes ruled by constitutional checks and balances these varied perceptions had been cut and filed to conform with one another in a roughly balanced resolution. The result came not by governmental diktat nor by the domination of any particular interest. In this drama, with all of its imperfections and inefficiencies, is found the soul and the price of constitutional government.

Notes:

1. Carl Brent Swisher, *American Constitutional Development.* Houghton Mifflin Company, Boston, 1943, 126.
2. *Ibid.*, 480.
3. Robert D. Arnold, *et al., Alaska Native Land Claims.* Alaska Native Foundation, Anchorage, 1976, 24.
4. Vernon Louis Parrington, *Main Currents in American Thought.* Harcourt, Brace and Company, New York, 1927, I, 285.
5. *Congressional Record,* November 12, 1980, H 10528.

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The "Leopold Report" Revisited

Editor's Note: A group of eight U.S. National Park Service professionals met in December 1986 in Washington, D.C., to prepare a task directive for the National Park Service Director's Blue Ribbon Panel on the 1963 Leopold Report. The following two papers are among the products that emerged. The paper by Dave Graber is his assignment to synthesize the views expressed and come up with a "sense of the meeting." The Bill Brown paper is simply "his own." Denis Galvin, USNPS Deputy Director, to whom all the papers were submitted, agreed with the editors of FORUM *that both papers deserve to be circulated as submitted.*