

# Did I Hear That Right? One Anthropologist's Reaction to Colleague's Testimony in a Court Case Involving Alaska Native Aboriginal Hunting and Fishing Rights on the Outer Continental Shelf

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## Introduction

In August of 2008, I attended portions of the Native Village of Eyak vs. Carlos Gutierrez trial<sup>1</sup>, held in Federal District Court for the State of Alaska, in Anchorage. I heard some of my colleagues, who appeared as expert witnesses for the United States Federal Government (the defendant in the case), giving testimony, some of which I found deeply troubling. In this paper, I recount some of the troubling testimony and respond to it, at the same time deconstructing the logic underlying the testimony. However, I first need to describe the context of the trial.

The plaintiff Chugach Region villages, including the Alaska Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham, originally filed suit in 1995 (Native Village of Eyak vs. Trawler Diane Marie, Inc., Case No. A95-0065-cv), claiming exclusive aboriginal hunting and fishing rights in the Outer Continental Shelf (OCS), as a challenge to new regulations limiting access to halibut and sablefish fisheries in the Gulf of Alaska and lower Cook Inlet (Holland 2009:2). According to H. Russel Holland (2009:3):

*[The] court decided the aboriginal title issue on cross-motions for summary judgment, granting the federal defendant's motion and denying plaintiff's motion. The court held that: (1) federal paramountcy precludes aboriginal title in the OCS, and (2) there is no exclusive aboriginal right to fish in navigable waters based on aboriginal title outside of a treaty or federal status.*

The plaintiffs appealed this decision to the Ninth Circuit Court, which affirmed Holland's ruling. Plaintiffs then filed the lawsuit under consideration here, for non-exclusive aboriginal hunting and fishing rights on the OCS, in 1998. The judge granted the Secretary of Commerce's motion for summary judgment, holding "that plaintiff's claim of non-exclusive aboriginal hunting and fishing rights cannot exist as a matter of law due to the US's paramount sovereignty" (Holland 2009:4)<sup>2</sup>. The plaintiff's again appealed to the Ninth Circuit Court, which remanded the case to the District Court,

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<sup>1</sup> The defendant in the case is the current US Secretary of Commerce, so the case is now called Native Village of Eyak vs. Gary Locke; Carlos Gutierrez was Secretary of Commerce in 2008, when this portion of the case was heard.

<sup>2</sup> In the interest of brevity, this account is slightly simplified. For more detail, refer to the actual rulings.

instructing the District Court to “decide what aboriginal rights to fish beyond the three-mile limit<sup>3</sup>, if any, the plaintiff’s have...for purposes of this limited remand, the District Court should assume that the village’s aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law” (Holland 2009:5). The remanded case (*Eyak vs. Gutierrez*) was heard in United States District Court for the State of Alaska, in Anchorage, in August 2008.

In order to support the defendant’s case, archaeologists presented what I consider to be some questionable ideas as testimony. I do not have the time of space to discuss each of the points raised in the testimony of these defense witnesses, but I will hit on a few key points of their argument.

### **Challenging Chugach Identity**

According to an archeologist who served as an expert witness for the defense (Witness 1), prior to contact, there was no Chugach people, there were only “independent local groups distributed across the landscape,” and the concept of the Chugach people is an artifact of contact and assimilation (*Eyak v. Gutierrez* 2008b, Volume 6:112; Volume 7:12). This idea is central to the defendant’s case; if the Chugach were not a tribe prior to contact, they lack standing to claim aboriginal rights as a tribe in the present. In oral testimony, Witness 1 stated that, “Prince William Sound and the lower Kenai Peninsula are the ancestral home of local groups that later became known as the Chugach people” (*Eyak v. Gutierrez* 2008b, Volume 7:80). However, According to Lydia Black (2004:86), the name Chugach as applied to the people of the Prince William Sound area was already known to the Russians prior to 1766 (before any actual contact between the Russians and the Chugach); the name had been “obtained from Aleut informants and from Kodiak Island captives among the eastern Aleuts.”

### **The Local Group Concept**

Another archeologist, also appearing as a defense witness (Witness 2), when questioned about the “local group” concept, and when he had started using it, said, “...actually it’s a term that Birket-Smith and de Laguna used too, so it’s not my term” (*Eyak v. Gutierrez*, Vol.6:6). When it was pointed out to him that neither researcher used the term he said, “You know, I’m not certain of that. I thought they did. I know they mention the word tribes and then talk about the fact that, really, the Chugach were not in a formal sense tribes. It’s my recollection that they did, but I might be mistaken” (*Eyak v. Gutierrez* 2008b, Volume 6:6). When plaintiff’s council asserted that this witness had not used the term “local groups” until the previous year (2007-2008), when Witness 1 had begun work on the case, he said, “Well, I’ve been working on this case since 1995 and the more I read, the more I...think about this case, I think my evolution in this case has certainly evolved over the last 13 years...I would say my discussion of that has evolved recently, yes” (*Eyak v. Gutierrez* 2008b, Volume 6: 6-7). In an attempt to justify the use of the term “local groups”, Witness 2 said:

*...de Laguna and Birket-Smith talk about eight something...eight something of Chugach. And the suffix that’s applied to the names—miut—basically means ‘people of’. De Laguna and Birket-Smith, I believe, both say that these groups, entities, agglomerations of people, were geographically based and then named after their principal*

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<sup>3</sup> I.e., in the OCS.

*village....So, if you call them local groups, or clumps...clumps of Natives, or whatever you want to call them, the idea is still the same. I think the designation local group might be the same, but I think the idea that there were collections of Chugach based in a principal village with a geographic identity goes all the way back at least to de Laguna and Birket-Smith...(Eyak v. Gutierrez 2008b, Volume 6:7).*

On the topic of local group territories, Witness 1 wrote:

*The ethnographic, ethnohistoric and archeological evidence demonstrates that these indigenous local groups operated within restricted (local) territories. While it is possible that some local group leaders may have managed access to some limited portions of nearby EEZ<sup>4</sup> waters by members of their own local group, no evidence exists for any entity that could—or did—function regionally prior to European contact (Eyak v. Gutierrez 2008a:10).*

However, according to Birket-Smith (1953:19), “Kayak, Wingham, and Middleton Islands as well as Controller Bay belonged to the Chugach and were inhabited by a separate group within the easternmost tribe of Prince William Sound.” He makes a distinction here between ownership of territory, and the occupation of that territory, and is saying that though the territory is occupied by a specific subgroup, the territory belonged to the Chugach as a whole.

One example given by Witness 1 to support the idea that there was no Chugach regional identity prior to contact, is telling:

*The use of the term “Chugach” to denote regional tribal identity is in all likelihood also a post-European phenomenon, as Birket-Smith (:20) explained: “The Chugach call the early inhabitants of the Sound auxkerulu’t. They were not, however, a separate people, but spoke the same language and lived in the same way as the present population; in fact, they were the ancestors of the latter, who mixed with the Russians.” It is clear from this passage that the consultants Birket-Smith talked to in the 1930s acknowledge the uniqueness of the indigenous people...(Eyak v. Gutierrez 2008a:12, emphasis in original)*

What is actually interesting about this passage from Birket-Smith, is that it showed that the Chugach elders gave a single name for all of the Chugach prior to contact, rather than different names for a series of so called “local groups”. Whether or not Chugach was the actual name the people called themselves, what is relevant is that they had an identity at a regional level, which this passage, selected by the witness himself, clearly shows.

In the expert witness statement written by Witness 1, the designation “local groups” is used as if each village, by virtue of being a local group, would be precluded from membership in any larger

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<sup>4</sup> The EEZ is an acronym for Exclusive Economic Zone, the term used during the trial to refer to the area on the OCS where the Chugach claim aboriginal use.

social unit, such as a regional group or tribe. However, the designation “local group” just denotes one level of social organization; it is not a description of an entire social structure (Haggarty 1982:195). According to Townsend, “...usually several neighboring villages which shared a number of links, particularly of kinship through intermarriage comprised a society” (1980:131-132). According to Malinowski<sup>5</sup> (1960:57):

*The local group may consist of a nomadic horde, a sedentary village, a little municipality or township, or be simply the organization of scattered hamlets or homesteads ...according to the situation, we might speak of areas, districts, provinces, all or one of them, always bearing in mind that we can list them as institutions only insofar as they are definitely organized. The widest such territorial unit of potential cooperation, exchange of services, and community of interest would be the tribe, in the cultural sense of the term.*

To extrapolate from his writings, I believe that had Malinowski categorized prehistoric Chugach social organization, he would regard the villages as local groups, but would consider the Chugach as a whole to be a single tribe, based on their common language and culture. We also find support for the idea of a prehistoric Chugach Nation closer to the Chugach homeland. Based on his research among the Inupiat, Burch (1991:12) concluded:

*...the precontact population of Alaska was divided into a large number of nations, or countries. These nations were tiny ones in terms of population, but they were nonetheless just as distinct from one another as Israel and Syria, or as Germany and Austria, are today. Each of these nations had dominion over a clearly delimited territory, and each of them was comprised of a clearly defined citizenry.*

Witness 1 states, “The dispersed nature of the relatively small village remains in Prince William Sound and the Outer Kenai Peninsula...suggests a correspondingly small and localized Prince William Sound/Outer Kenai Peninsula population, structured in such a way that any EEZ use was also small and localized” (Eyak v. Gutierrez 2008a:11). The implication here appears to be that the human populations in the areas were “localized”; that is socially and culturally isolated. However, the small population, rather than resulting in more insularity would make it more likely that these groups would join together to form a larger group, as too small a population would be unable to sustain itself over time (Malinowski 1960:144 ; Burch, personal communication 2008). Also, while it sounds logical that “small and localized” groups would only be able to use something in a “small and localized” way, this is a false analogy. It is entirely possible that even if the Chugach groups were “small and localized” that they could still make extensive use of the EEZ, either alone or in cooperation with one another.

In his written testimony, Witness 1 frequently references James Haggarty’s dissertation as support for his use of the term “local group” (Eyak v. Gutierrez 2008a:13-14), but Haggarty does not

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<sup>5</sup> I turned to Malinowski in an effort to find someone who was writing about anthropological theory during the time Birket-Smith and de Laguna were working on their Chugach books. I found Malinowski’s discussion of the terms “local group,” “tribe,” and “culture” to be well thought-out, and have used it extensively in this paper.

use the term in the way Witness 1 asserts he does in the cited document. According to Haggarty (1982:195), "...the local group was the fundamental social unit within traditional Westcoast society, even among groups who were in turn organized into tribal and confederacy units." So, according to Haggarty, even among the Westcoast tribes from which the witness draws his example, the local group was only the lowest level of organization among groups that were, in turn, joined into tribes and confederacies.

Though they do not use the term, the defendants' expert witnesses seem to be arguing that the Chugach are a "secondary tribe" (Fried 1975) formed either by the Russians to consolidate control or by the Chugach themselves, as a means to defend themselves against first Russian, and then American state expansion (Eyak v. Gutierrez 2008a:41).

Witness 1 asserts, "There is no archaeological evidence for regional political entities existing in the region prior to Contact" (Eyak v. Gutierrez 2008a:22). While this may be true, there is likewise no evidence demonstrating that such entities did not exist, and the witness does not state in any explicit way what sort of evidence would either prove or disprove the existence of such entities.

Witness 1 asserts that there was no Chugach tribe prior to contact. To support this contention, he gives a dictionary definition of the term, and states, "The term "tribe" implies a level of social organization involving claimed descent from a common ancestor, beyond the local group level" (Eyak v. Gutierrez 2008a:15). This is only one of many possible definitions of the term "tribe," but it is the one the witness has chosen, and it should be noted: the Chugach do claim descent from a common ancestor; he is called "the first Chugach" (Johnson 1984:1).

The dictionary definition used by Witness 1 does not agree with Drucker's definition of tribe (Drucker 1951:220), which Haggarty (1982:200) also uses. Drucker defines the "local group" as basically the extended family, which remains together as it moves from site to site during the seasonal round, and for Drucker the tribe results when more than one "local group" shares a winter village. Witness 1 appears to be calling Drucker's "tribe" a local group. Judging from his own work, if Drucker were considering the Chugach, he would probably call the family and partner groups that participated in their seasonal round together the "local group", would call each winter village containing more than one "local group" a "tribe", and the Chugach as a whole a "confederacy".

### **A Tribe in the Political Sense**

Defense witnesses made much of Birket-Smith's statement that the Chugach did not have tribes "in the political sense" (Birket-Smith 1953:20). Birket-Smith's wording here is very precise, he does not say tribes are unknown among the Chugach, but only that tribes "in a political sense" were unknown. According to Malinowski (1960<sup>6</sup>:164-165):

*...a distinction must be made between the tribe, in the cultural sense of the word, and the tribe as a politically organized unit. The tribe as the widest carrier of a unified culture consists of a group of people who have the same tradition, customary law, and techniques, and have*

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<sup>6</sup> Originally published posthumously in 1944. This would have been available to Birket-Smith, though there is no way to be certain he read it; however, it is an example of the kind of ideas concerning social and political organization that were current at the time, to which he may have been responding.

*throughout the same organization of smaller groups, such as the family, the municipality, the occupational guild or the economic team (Malinowski 1960:164-165).*

Malinowski also made a distinction between a tribe-nation and a tribe-state:

*A tribe-nation...is not necessarily politically organized. Political organization implies always a central authority with the power to administer regarding its subjects, that is, to coördinate the activities of the component groups; and when we say power, we presuppose the use of force, spiritual and physical alike. I suggest that...the tribe-state is not identical with the tribe-nation. I fully agree...that political groupings are absent among the most primitive cultures known to ethnographic observation. The cultural groupings, however, are there (Malinowski 1960:165).*

When Birket-Smith wrote that the Chugach lacked tribes in the “political sense,” he likely meant that the nature of their political organization was not that of a state; i.e., they had no centralized authority, nor did they have a standing army, but he did not mean (and did not state) that the Chugach were not a tribe. Malinowski (1960:165) continues:

*The charter of the tribe-nation can always be found in those traditions that deal with the origins of a given people, and that define their cultural achievements in terms of heroic ancestral performance. Historical legends, genealogical traditions, and historical explanations used to account for the differences between their own culture and that of neighbors, would enter into this, too.*

These are the very aspects of Chugach culture the witness ignores when he discounts the importance of oral history. Malinowski (1960:163-164) argues:

...people who live contiguously have exclusive claims to a definite portion of territory, and carry out conjointly a number of activities in which direct man-to-man cooperation is indispensable, and tends to become organized. However rudimentary such organization might be, it implies a statement of the groups’ claim to its lands. This very often is associated with mythological and religious, as well as the strictly legal, claims. Into the charter, therefore, enters the definition of individual rights to municipal citizenship, the claim of a group as a whole to its land and a whole set of historical, legendary, and mythological tradition that weld the group into a unit grown out of its soil.

By Malinowski’s definition, the evidence from oral history, written history, linguistics, and archaeology all support the interpretation that the prehistoric Chugach People constituted a tribe-nation.

### **Seasonal Round**

On the one hand, Witness 1 appears to be trying to transplant Haggarty’s interpretation of the social and political organization of Hesquiatic Harbor to the Chugach region; on the other hand, he

claims the prehistoric Chugach did not have a seasonal round (Eyak v. Gutierrez 2008a:41-41), while the prehistoric Hesquiat population did (Haggarty 1982:201). According to the Witness 1, each prehistoric Chugach local group harvested within a “constrained territory” immediately adjacent to its village:

*Because these were small autonomous social units of limited geographic scope, resources were limited to those available in the immediate region surrounding the village and people outside the local group were considered a threat regardless of linguistic affiliation. In Prince William Sound, as in other areas, defensive sites (fortified locations on islets) were an important consideration for village location in order to protect the local group from threats posed by any other neighboring local groups or Tlingit invaders (Eyak v. Gutierrez 2008a:15).*

This assertion that the harvesting territory of each local group is limited to the immediate vicinity of each village is built on the previous unsupported assertion that each village was autonomous in such a strict sense as to prevent cooperation among other villages within the region. This also raises another question: How can you tell, archeologically, who the Chugach were defending against?

The only factual basis cited for the idea that the seasonal round is a post-contact phenomenon is that biologists believe there was greater resource abundance prior to over-harvesting in the nineteenth century, but contact occurred well before these depletions, and there is no evidence of the hypothetical “constrained territories” at the time of contact.

In addition, the apparent attempt to uncritically transplant Haggarty’s interpretation of the prehistory of Hesquiat Harbor to the Chugach Region is wrong-headed. Haggarty (1982:203-204) himself states that you need to evaluate each culture on its own: “Regional environments and socio-economic groups have both a present and a past; each with its [sic] own unique history that serves to differentiate them from all other environments or groups. Each needs to be studied in turn.”

### **Social Stratification**

Among the earliest accounts of the European explorers, we find references to the existence of social stratification; the Chugach had “nobles,” “commoners,” and slaves. We also know that surpluses were generated prior to Russian contact, allowing the Chugach to adopt a modified form of the Tlingit potlatch, still practiced in vestigial form today in Russian Orthodox Christmas celebrations in the Prince William Sound Native villages (Simeone and Miraglia 2000:105).

In discussing a “high class” dialect of his Native language, Chugach elder John Klashinoff mentioned that the Chugach had a rank above chief, which he called a “king”. He indicated that Theodore Chemavisky’s father, Peter Chemavisky who was the last chief of Nuchek was also a “king.”

***Ketz:** Yeah. Last year when you and Ted were giving the place names, you were saying that he was talking high class. What do you mean by high class?*

***Klashinoff:** I was saying that he was talking high classy?*

***Ketz:*** *Yeah, you were saying that Ted was talking high class way a few times.*

***Klashinoff:*** *Oh, yeah. There's some of those Native words are...you call high class, what I...I don't understand 'em myself unless they're explained to me, but Teddy knows some words that I don't understand, but there's another word for 'em, and I can use my word. He calls things sometimes where I don't even know what he says, but he learned that from his Dad, I guess, and...*

***Ketz:*** *Was that because his Dad was a chief?*

***Klashinoff:*** *'Cause his Dad was more like a king (laughs). He was a king, see? See, we got different names for a king, see...(Klashinoff 1979)*

It is tempting to see this as a possible echo of a pre-contact Chugach nation-state. However, Makarka Chemavisky told Birket-Smith that there was no Chugach “king” prior to the arrival of the Russians, and Birket-Smith (1953:93) concluded, “the ‘king’s’ office was probably an innovation introduced by the Russians and necessitated by sea otter hunting”. This would not account for a different dialect. I believe what this quote does support is the existence of social stratification among the Chugach prior to contact.

Witness 1 agrees that Chugach society was stratified, but fails to acknowledge that this results in a social system which operates on very different rules than a that of a band. To quote Burch (personal communication 2008):

*Inupiaq societies were stratified in the sense that there were variations among individuals and families with regard to wealth and power, but there were no ranked classes of people, such as nobles, commoners, and slaves. Very different types of system.*

According to Malinowski (1960:60):

The distinction by status and rank, the formation of class and caste, do not occur at the earliest levels of culture. But they occur with the development of wealth, or military power, of conquest, and thus, of ethnic stratification.

Witness 1 asserts that, “high ranking people controlled access to resources in the sense that they had inherited the hereditary privileges to specific resources and certain areas but they needed the commoners and slaves to conduct the bulk of the work” (Eyak v. Gutierrez 2008a:19). Witness 1 cites Ben Fitzhugh (2003:81) for this scenario, but the quote he gives from Fitzhugh states that the claims of the “wealthy” over resources “were based on the ability to defend resource locations and punish unsanctioned use,” and makes no mention of heredity. If Fitzhugh is correct, ability as a leader could have been much more important than heredity in determining status and power.

### **Oral History vs. Hearsay**

The defense contended that oral history is hearsay, and objected to its introduction as evidence on that basis. Witness 1 sought to discredit all of the oral history gathered by Frederica de Laguna and



Kaj Birket-Smith in Prince William Sound in the 1930s as irrelevant, asserting that the oral history had been invalidated due to assimilation of the Native people, and discontinuity in the culture. On the stand he said:

*I respect the traditions, the culture, the knowledge of the past that the elders give us, especially when we're talking about a group of people who have been assimilated or attempted to be assimilated....However; and this is the caveat that I maintain, as we see in Birket-Smith when he's talking with individuals from the 1930s, their knowledge of those prehistoric sites and their knowledge of that landscape as it existed in the 1750s, late 1700s into the early 1800s—it does not apply (Eyak v. Gutierrez 2008b:6-99).*

Witness 1 makes a distinction between “memory culture,” which relates only to the respondents’ individual life experiences and associated memories, and oral history which has been passed down through generations. He asserted that of the two, only “memory culture” is reliable. On this basis, he concludes that the respondents Birket-Smith and de Laguna interviewed would only have had information dating back to the mid- to late- 1800s; i.e., pertaining only to the span of their own lifetimes and therefore, only to the post-contact era (Eyak v. Gutierrez 2008a:37).

Birket-Smith (1953:6) exhibited appropriate caution concerning how much could be said about Chugach culture based on the limited information available to him in the 1930s, stating:

*...the reconstruction of a culture based upon a foundation so slender as the memory of three or four old or elderly persons and a very few surviving traits must of necessity be incomplete and far too often unreliable.....On the other hand the general impression of the picture is that of a culture so closely akin to the better known Kodiak pattern that there is no reason for questioning the correctness of the main lines, even though some details may be wrong or misunderstood, and many others omitted owing to lack of information.*

Haggarty, whom Witness 1 frequently cites, based his conclusions regarding the prehistory of Hesquiat Harbor partly on oral history (1982:206). It cannot be denied that there are few things we can know with certainty about the prehistoric period. However, the defendant’s witnesses used caution as an excuse to discard oral history (aside from “memory culture”) entirely.

In his work among the Inupiat, Burch (1991:1, 3-5) found oral history to be reliable as far back as 200 years, stating:

*...Native historians could tell me not only about what had happened during their own lifetimes, but also about events and people from their parents’ lifetimes. Some could tell me about events that had taken place during their grandparents’ lifetimes and even earlier than that....in every single instance where independent corroboration was possible, the accounts of the Native historians were confirmed.*

Burch concluded, “information that is provided by people whom the Inupiat consider competent historians should be regarded as true until proven false, no matter how extraordinary what they say may at first appear” (Burch 1991:11-12), but laments, “Most of my colleagues still do not believe what Natives have to say about their own histories. ‘Narrative history,’ ‘memory culture’—these phrases commonly are used as pejoratives by many representatives of the social science disciplines in Alaska” (Burch 1991:12).

Makarka Chemavisky and the others interviewed by Birket-Smith and de Laguna were relating portions of the Chugach oral tradition, which is part of the traditional culture. The oral traditions and myths passed on were products of Chugach culture, and as such contain a lot of information about that culture, including Chugach daily life, values, and world view (see Johnson 1984).

Makarka was reportedly born in 1847, and was considered a Chugach historian (Birket-Smith 1953:3). He was interviewed in the 1930’s. If we apply Burch’s findings on the Inupiat to the Chugach, the information Makarka provided could be reliable to as far back as the 1730s, a decade before Bering approached Kayak Island.

### **Written History**

This mention of Bering and Kayak Island brings us to written history, which Witness 1 also discounts. There is evidence for a Chugach identity in the eighteenth century (e.g., Wrangell 1980:59; Black 2004:86) but, according to Witness 1, the explorers couldn’t distinguish one group from another, so they gave them names based on where they were seen.

It is true that caution must be used when interpreting the statements of early explorers regarding the Natives they encountered. However, such accounts provide a window to information not otherwise available today. It appears significant to me that the explorers’ descriptions of the Chugach and their territory generally agree with the Chugach oral history.

Despite his mistrust of historical sources, Witness 1 uses them to attempt to support his own argument:

*Pelagic fur seal hunting by Makah and other people...from Vancouver Island in the EEZ area in the historic period proves that other Native Americans used the resources of the EEZ without any resistance from Chugach-speaking people. In the 1880s, the migratory fur seal hunt was prosecuted by captains of schooners who took Makah and...people of Vancouver Island aboard their schooners and followed the fur seals along their migration route into the Bering Sea (Eyak v. Gutierrez 2008a:42).*

This is an odd passage. It appears that the hunting did not actually happen in the EEZ, but the schooners only passed through there. How would the Chugach know who was on the schooners? Even if they were hunting in the EEZ, this proves nothing about the situation in the prehistoric period—this is even after the Russian period.

It is also appropriate to note here, that modern nations, including the United States, are unable to completely exclude intruders from their territorial waters. It is known that German submarines entered US waters during World War II, and there is a long history of refugees from Cuba entering the

US from the water--this does not mean that the US has surrendered its sovereignty. Why should the pre-contact Chugach be held to a standard that is impossible to maintain even with modern radar and sonar?

Another example Witness 1 gives from the historical record involves the journal of Alexander Walker. According to Witness 1, Walker:

...describes a village that included both summer and winter houses that was abandoned by 1786. The notion that there were year-round village sites in Prince William Sound that were in existence prior to European contact indicates that things changed radically in the historic era, and that independent groups did position themselves on the landscape—the village sites—basically the archeology in the broad perspective in Prince William Sound, we see...Places where habitations were focused prior to contact (Eyak v. Gutierrez 2008b, Vol. 6:115-116).

Walker does visit a village that he believes to be abandoned. He and his men open a grave there, which they examined and then re-interred. The next day, Walker encounters some Natives in “canoes,” Walker (1982:144) relates:

We were not a little concerned to understand, that they had discovered our visit to the Village, and the opening of the Grave. They complained much of our having infringed the rights of the dead, and one of them even shed Tears, and wept on the Occasion: however a single blue Bead was sufficient to put all to rights....

As we wished to accompany them to their habitation, we enquired where they lived. They at first endeavoured [sic] to make us believe, that their Houses were at a great distance. When notwithstanding this, we offered to go with them, they all took Opportunities of leaving us, every Canoe took a different course.

The Chugach Natives Walker encountered clearly did not want him to know where they were living. While there is room for interpretation, it appears to me likely the village Walker visited was an active village, only temporarily abandoned, either at Walker’s approach or for the season. I do not see how Walker’s account in any way supports the idea of “independent groups” among the prehistoric Chugach.

### **Barren Islands**

Witness 1 asserts that the presence of prehistoric village sites in the Barren Islands means that the Islands were inhabited by a politically independent local group, separate from the Chugach (Eyak v. Gutierrez 2008a:32-33). As far as I know, you cannot tell by looking at the archeological record whether or not a group was politically independent. According to the witness:

*The Barren Islands situation shows the importance of understanding the local group concept, the need for having available systematic archeological survey data, and a cautionary tale against de-contextualizing ethnohistoric data. This...likely was a local group territory during the late prehistoric era. The fact that it was named and used in the post-Contact era by Alutiiq people from both the Kenai and Kodiak areas indicates that the Barren islands might have been*

*abandoned—either early in the Contact era or maybe just before Contact. Perhaps surviving members of the local group dispersed to both the Kenai and Kodiak areas. The archaeological data indicates permanent residences in the form of midden deposits on top of roughly 700 year old volcanic ash fall. This clearly indicates the existence of the classic local group pattern of an independent village entity operating with a restricted territory (Eyak v. Gutierrez 2008a:33)*

But how does it indicate that? How does the fact that two groups used the place as a stopping off point, and that each group has a place-name for it, indicate it was abandoned? How does the presence of apparently permanent residences indicate that this was a “classic local group” in the sense Witness 1 means it? None of these things follow logically from one another. None of these “conclusions” is tied to the data in any conclusive way. These assertions are stated, but not proven.

### **Permanent Autonomous Villages vs. Social Ties**

Witness 1 cites Joan Townsend for the assertion that the Chugach lived in “permanent autonomous” villages (Eyak v. Gutierrez 2008a:14). However, a close reading of Townsend demonstrates that she is not using the word autonomous in the same absolute sense, as she goes on to state that a society was usually composed of “several neighboring villages which shared a number of links, particularly of kinship through intermarriage” (Townsend 1980:131-132).

The witness agrees that there were links between the so-called autonomous villages within the region, but fails to register that all of these connections negate the possibility of these villages being truly autonomous in the way he asserts. The links are what make them part of a larger whole. Even if the Chugach villages had been “politically autonomous” that would not necessarily prevent them from regarding themselves as part of a larger cultural group, or from forming alliances or agreements with other villages.

### **Linguistic Evidence**

In oral testimony, Witness 1 denied the validity of the entire field of linguistic theory as it relates to the reconstruction of prehistoric languages. When asked for a reaction to prior testimony given by linguist Jeff Leer, the witness said, “...we don’t have language data from the time of contact...I don’t think it’s appropriate to say that...what Leer’s collecting in the twentieth century relates to the precontact time” (Eyak v. Gutierrez 2008b:Vol. 7:38) To say that the twentieth century Native language in the Chugach region “bears no relation” to the prehistoric language, one must assume the Chugach made up a common language—without coordinating with one another—the day before the first Europeans arrived. It seems, the defense wanted to assert nothing could be known about the prehistoric languages in the Chugach region precisely because language is an important criteria for determining the limits of a cultural group. According to Malinowski (1960:165): “The most characteristic index of tribal unity [is] the community of language; for a common tradition of skills and knowledge, of customs and beliefs, can only be carried on conjointly by people who use the same tongue”.

### **Post-Contact Amalgamation**

Another idea Witness 1 brings in from Haggarty's work at Hesquiat Harbor is that of post-contact amalgamation of local groups serving to mask the pre-contact social organization:

*...post-contact life in the Northern Gulf of Alaska region was characterized by amalgamated social units comprised of people of Alutiiq, Aleut, Tlingit, and/or European descent. The survivors of the formerly independent local groups amalgamated into new villages located not according to the best and most defensible location near resource concentrations rather based on new socio-economic and political considerations ...determined by Europeans (Eyak v. Gutierrez 2008a:15-16).*

Since the Chugach were never fully subjugated by the Russians, it is unlikely that much about their way of life in the Russian period was "determined by Europeans." It is more realistic to assume that the Chugach made decisions for themselves in response to the presence of Europeans which brought new problems, but also new opportunities.

Some amalgamation did occur in the Chugach region, but not to the extent Haggarty (1982:204) describes for Hesquiat Harbor. According to Haggarty (1982:205):

*...the term "Hesquiat" still has little meaning for the old people who will use instead the name of their respective local groups when explaining where they are from....the fact that the old people continue to distinguish themselves from other Hesquiat speakers on the basis of local group affiliation indicates clearly the degree of autonomy enjoyed by local groups in the past.*

No such situation pertains in Prince William Sound. I am unaware of any evidence that the villages of Chenega on Chenega Island and Tatitlek at Ellamar were new villages founded after contact—in fact, according to de Laguna (1956:25, 30) both were pre-contact villages, though Tatitlek had been forced to move from Ellamar in the first decade of the twentieth century. Recent excavation at Chenega in association with the construction of a pavilion over the site of the Russian Orthodox church unearthed a greenstone adze (Heather Hall, personal communication 2009), seemingly confirming de Laguna's suspicions that Chenega was an old village dating back to the prehistoric period. To my knowledge, only one Chugach village—Nuchek on Hinchinbrook Island,—was a post-contact village. Nuchek may have been an amalgamation of people from Hinchinbrook and Montague Islands.

Continuing his theme of post-contact amalgamation, Witness 1 states:

*...there are no place names associated with some of the high ranking people who were reported to have occupied portions of the outer coast of Montague Island. The plaintiff's place names likely reflect the post-Contact era reality of the amalgamated villages comprised of survivors of the former local groups (Eyak v. Gutierrez 2008a:26).*

The implication here, is that the loss of some place names would somehow destroy the validity of the place names that survived; this is not a logical conclusion. However, even if the conclusion were sound,

the evidence on which it is based is not. There are, in fact, several recorded Chugach place names associated with southeast Montague Island. De Laguna reported a name for the village at Wooded Island that is used by this witness as his prime example:

*Black Stepan's grandmother's father was supposed to have lived on Wooded Island....Makari did not mention any villages in this group of islands, but said there had been a sea otter hunting camp on the westernmost island. The name for the island, uqci'uvit, "Winter Place," suggests, however, a more permanent settlement (de Laguna 1956:34).*

In addition, in a tape recorded oral history interview Chugach elder Theodore F. Chemavisky gave a second name for Wooded Island; *Sukullum Iqua*, which means "end of Montague."<sup>7</sup>

### **No Escaping Assimilation**

Witness 1's written statement includes a discussion of population movement (Eyak v. Gutierrez 2008a:29) which seems to be aimed at implying that the Chugach of today are ethnically impure and therefore cannot claim aboriginal rights, because they are not the same people who were in the region pre-contact. He asserts that by the 1860s the Chugach population had acquired "large doses" of Russian blood, and presents a lengthy discussion of the family history of a man named Nicholas Gregof (Eyak v. Gutierrez 2008a:35). I do not know whether this particular man had any Russian blood or not, but as Lydia Black has pointed out, many Alaska Natives acquired Russian names through baptism, rather than through genealogical descent:

*There is ethnographic evidence that Aleuts believed that names had power and each person acquired, in addition to the name given at birth, other names in the course of the life cycle....From the earliest baptisms a pattern emerged in the bestowal of Christian names....The newly baptized person was given the name of a saint...and in addition acquired the patronymic derived from the baptismal name of his or her sponsor and the use of the sponsor's family name...It is this naming practice that explains the adoption of Russian names by Aleuts; it became widespread...in Prince William Sound by the middle of the [nineteenth] century (Black 2004:224).*

It should also be remembered that many of the people called "Russians" who came over during the early contact period may not have been Europeans at all, but Kamchadal or Siberian Natives who were called Russians because they were Russian citizens. So, while there may be some Russian blood mixed with the Chugach, it may not be as extensive as the predominance of Russian surnames would make it appear. That said, I do not believe that the addition of Russian blood would necessarily negate Chugach Native identity.

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<sup>7</sup> These Native place names were translated by the Alaska Native Language Center in the early 1980s. Copies of the place name lists are on file at the BIA ANCSA Office in Anchorage.

For Witness 1, assimilation only goes one way. If a Chugach individual adopts a trait of another culture, the Chugach are assimilated. If a person from another culture moves to a Chugach community and adopts their culture, it is still the Chugach that are assimilated.

### **Culture Change**

Witness 1 reintroduces the idea, successfully put forward in litigation over the Exxon *Valdez* oil spill, that if a culture changes at all, it loses its validity. Much of the witness' argument is devoted to pointing out ways in which Chugach culture has changed since contact or how, even prior to contact, it reflected influences from the culture of neighboring groups. The underlying assumption is that as soon as a culture changes in any way, if it is influenced by another culture, if there is intermarriage with other groups, if they forget a single place name—the culture becomes contaminated and loses all validity. However, this is based on an outmoded view of culture as a static entity or thing (Jones 2009:1). I would argue that a static culture is a dead culture. To my mind, the examples of change presented by Witness 1 only go to demonstrate that Chugach culture is alive as it continues to be reinterpreted and practiced by the Chugach people.

### **Looking Forward From the Past**

Witness 1 contends that he is “looking forward from the past”; while the rest of us are “looking back from the present” (Eyak v. Gutierrez 2008b, Vol. 6:98). He stated in oral testimony, “When we project back into the past, current situations, it may not be so accurate” (Eyak v. Gutierrez 2008b, Vol. 7:25). It would seem, therefore, in his vision, it is okay for things in the past not to make sense to us today. I think this denies our shared humanity. While each culture responds to human needs and desires in different ways, the basic needs (food, shelter, safety, viability of offspring) and desires (companionship, social ties) are constant. Another culture may appear exotic, but given enough study, it should not be completely incomprehensible. The witness' statement does raise one question: How does one “look forward from the past”? Is a time machine required? Linguist Jeff Leer was not in the Chugach Region at the time of first contact between the Chugach and Europeans, but neither was the witness.

### **CONCLUSIONS**

It appears the defense sought to prove each Chugach village was independent because if there was no unified Chugach People prior to contact, no claim could be laid for any aboriginal rights by the Chugach as a whole. However, this defense assertion is not supported by the evidence.

While carefully contextualizing ethnographic and historic data is a good idea, the way Witness 1 used this phrase, it seems to simply mean discarding anything that does not fit into one's preconceived notions. That is; discarding the data and replacing it with what one imagines to have been the case. This is not contextualizing data, it's eviscerating it. In order to make their case, these defense witnesses emptied out all of the valid evidence and then replaced it with data from other places and times. In his testimony, Witness 1 made unsupported assertions, and then built his argument on his own assertions, assuming them to be correct. This is proof by assertion; that is to say, no proof at all.

In thinking about this testimony, I asked myself whether Alaskan anthropologists need to establish a set of ethical guidelines for the use of anthropological and archeological data in court

testimony. When I asked my colleagues that question, the response was a chorus of groans, amid which were two valid questions: 1) who would determine what was an ethical use of data, and 2) who would enforce the guidelines? If we attempted this, we might just be opening a very large can of worms, and achieve little in the process.

There is room for differences of opinion. My problem with some of the testimony presented for the government's case is that unsupported opinions were presented as fact. In some cases, things that can not be known were presented as being known with absolute certainty. Within the discipline we understand that very little about the past can be known with this kind of certainty, but the court may not realize that. The anthropologists testifying for the plaintiff villages appropriately acknowledged that there are uncertainties, and that there is room for debate (as did one of the other anthropologists testifying for the defense). However, if the court accepts the certainty expressed by the two defense witnesses whose testimony has been discussed here as the standard for the discipline, it would make the testimony of the plaintiff's witnesses appear weak by comparison.

At stake in this case is not only the potential for the establishment of community quotas for halibut and sablefish for the Chugach Native villages, a potential economic boon, and a break with the history of the Chugach being progressively marginalized within their own homeland. The judgment in this case could set a precedent with potential impact on Native American groups throughout the United States. It is one thing to engage in speculative debates over theory in the academic realm, but when anthropology is used in making decisions that affect people in the real world, we need to be very careful to be accurate in what we say, admit what we do not (and cannot) know, and be honest about our assumptions.

I would argue that the Chugach have survived despite oppression. Unfortunately, the ideas presented by these two defense witnesses, if they are allowed to prevail, will have fostered a continuation of the trivialization, marginalization, and oppression of the Chugach people and their culture.

### **Post Script**

At one point during testimony, Judge Holland told Witness 1, in reference to the prehistoric Chugach villages "Well, I'll tell you right now you haven't convinced me yet that they were in fact independent..." (Eyak v. Gutierrez 2008b, Vol. 6:124). However, the Judge's ruling makes it appear that the archeologists appearing as witnesses for the defense actually were successful in convincing the Judge on this point:

*The court finds that the weight of professional opinion holds that at and before contact, the plaintiffs' predecessor villages were independent, non-political entities—"non-political" because there is no evidence that the villages had any organized governmental structure such as a council of elders....and the court finds that, although culturally related, the villages of Chenega, Tatitlek, Port Graham, Eyak, and Nanwalek were all independent of one another. There was no area-wide organization or grand chief. The best evidence is that each village sustained itself by its own efforts (Holland 2009:17-18).*



Holland goes on to state:

*None of the ancestral villages were in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis. Such use and occupancy as probably existed was temporary and seasonal, and more likely than not was carried out by the residents of individual ancient villages as distinguished from any kind of joint effort by multiple villages (Holland 2009:21).*

The judge ultimately ruled against the plaintiffs, once again, stating, “the court concludes that no nonexclusive right to hunt and fish in the OCS ever existed for any plaintiff village as a matter of federal Indian law” (Holland 2009:21).

Having reviewed all of the testimony, I found Holland’s ruling bewildering. Even if Holland accepted what I consider to be questionable testimony on the part of the witnesses discussed here, it seemed to me that the defense had a very weak argument. I think Walter Echo-Hawk (2010:43-51) makes a good point when he proposes an effort to eradicate “unjust legal fictions in Federal Indian Law. He points out that the American legal system is based on the application of precedents, and many of these precedents come from cases that were decided based on unfair and unjust assumptions, often rooted in racism and greed. It is therefore, not surprising that new rulings, based on these bad precedents, are also often fundamentally unjust. To quote Echo-Hawk (2010:34-35), “It is troubling that courts often eschew any interest in, or duty to inquire into, questions of morality or justice; instead the avowed task is simply to apply existing law, regardless of any harsh or unjust outcomes”. In my opinion, Holland’s rulings in the Eyak litigation are unjust, and have their roots in outdated ideas concerning conquest and subjugation, which had no basis in international law, even at the time of first contact between Native Americans and Europeans.

Eyak vs. Gutierrez has now been sent back to the Ninth Circuit Court for reconsideration. Oral arguments were heard in September 2011, and a decision is awaited.

## REFERENCES CITED

- Birket-Smith, Kaj (1953) *The Chugach Eskimo*. Nationalmuseets Skrifter, Ethnografisk Raekke, VI. Copenhagen: Nationmuseets Publikationsfond.
- Black, Lydia T. (2004) *Russians in Alaska, 1732-1867*. Fairbanks: University of Alaska Press.
- Burch, Ernest S. (1991) From Skeptic to Believer: The Making of an Oral Historian. *Alaska History*, Vol. 6 (No. 1), pp.1-16.
- de Laguna, Frederica (1956) *Chugach Prehistory: The Archaeology of Prince William Sound, Alaska*. Seattle: University of Washington Press.
- Drucker, Philip (1951) *The Northern and Central Nootkan Tribes*. Bulletin of the Bureau of American Ethnology, No. 144. Washington, D.C.: Smithsonian Institution.
- Echo-Hawk, Walter R. (2010) *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided*. Golden, Colorado: Fulcrum Publishing.
- Fitzhugh, Ben (2003) *The Evolution of Complex Hunter-Gatherers: Archaeological Evidence from the North Pacific*. New York: Kluwer Academic/Plenum Publishers.
- Fried, Morton H. (1975) *The Notion of Tribe*. Menlo Park: Cummings Publishing Co.
- Haggarty, James C. (1982) *The Archaeology of Hesquiat Harbour: The Archaeological Utility of an Ethnographically Defined Social Unity*. Pullman: Washington State University Anthropology Department (Ph. D. Dissertation).
- Holland, H. Russel (2009) *Findings of Fact and Conclusions of Law, Native Village of Eyak, et al., Plaintiffs vs. Gary Locke, Secretary of Commerce, Defendant*. 7 August. Case No. 3:98-cv-0365-HRH. Anchorage: US District Court for the District of Alaska.
- Johnson, John F.C. (1984) *Chugach Legends: Stories and Photographs of the Chugach Region*. Anchorage: Chugach Alaska Corporation.
- Jones, Andrew M. (2009) *Performance, Improvisation and Change: Problems with the Analysis of Cultural Change and Practices of Dwelling*. Paper Presented at Alaska Anthropological Association 36<sup>th</sup> Annual Meeting. 14 March. Juneau.
- Klashinoff, John (1979) Taped interview. Jim Ketz, interviewer. 7 June. Cordova, Alaska. Tape 79CAC006. On file at the BIA ANCSA Office, Anchorage.
- Malinowski, Bronislaw (1960) *A Scientific Theory of Culture and Other Essays*. New York: Oxford University Press.
- Native American Rights Fund (2005) *Annual Report*. Boulder, Colorado.
- Native Village of Eyak, et al., Plaintiffs, vs. Carlos Gutierrez, Defendant (Eyak v. Gutierrez) (2008a) *Expert Report of Christopher Brian Wooley*. 14 March. United States District Court for the District of Alaska, Case No. A98-365-CV (HRH).
- Native Village of Eyak, et al., Plaintiffs, vs. Carlos Gutierrez, Defendant (Eyak v. Gutierrez) (2008b) *Transcript of Proceedings, Trial by Court*, Volumes 1-7. 18-28 August. United States District Court for the District of Alaska, Case 3:98-cv-00365-HRH.
- Simeone, William E. and Rita A. Miraglia (2000) *An Ethnography of Chenega Bay and Tatitlek, Alaska*. Technical Memorandum 5, submitted to Minerals Management Service, Alaska

- OCS Region, Social and Economic Studies Unit. November. Anchorage: Alaska Department of Fish and Game, Division of Subsistence.
- Townsend, Joan (1980) Ranked Societies of the Alaskan Pacific Rim. *Senri Ethnological Studies*, Vol. 4, pp. 123-156.
- Walker, Alexander (1982) *An Account of a Voyage to the North West Coast of America in 1785 and 1786*. Edited by Robin Fisher and J.M. Bumsted. Seattle: University of Washington Press.
- Wrangell, Ferdinand Petrovich (1839) *Russian America Statistical and Ethnographic Information, by Rear Admiral Ferdinand Petrovich Wrangell With Additional Material by Karl-Ernst Baer*. Materials for the Study of Alaska History, No. 15. Translated from the German edition of 1839 by Mary Sadouski, edited by Richard A. Pierce. Ontario: The Limestone Press, Kingston.