UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 10-35175

WILLIAM CARLO JACHETTA,

Plaintiff/Appellant

v.

UNITED STATES OF AMERICA,
BUREAU OF LAND MANAGEMENT
and the STATE OF ALASKA,
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

Defendants/Respondents

On Appeal from the United States District Court
for the District of Alaska

REPLY BRIEF OF WILLIAM CARLO JACHETTA

TO STATE OF ALASKA DEFENDANT/RESPONDENTS ANSWERING BRIEF

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I. MR. JACHETTA IS ENTITLED TO COMPENSATION FOR HIS ALLOTMENT.

The State of Alaska ("Alaska") asserts that it is immune and owes nothing to Mr. Jachetta, although it admits entering, using, and taking hundreds of thousands of yards of gravel from Mr. Jachetta's allotment.[1] Alaska errs. Mr. Jachetta's protections against Alaska's trespassory taking are encapsulated in Federal law.

Federal law limits Alaska's ability to acquire an interest in an Alaska Native allotment to two federal procedures. Alaska can acquire an interest in an allotment through an eminent domain proceeding in Federal District Court under 25 U.S.C. § 357. Or, the State of Alaska may acquire an interest in an allotment by permission of the Secretary of the Interior under 25 U.S.C. § 323.[2] Each procedure requires Alaska to pay compensation. Alaska complied with neither provision.

First, 25 U.S.C. § 357 allows condemnation, but only in Federal court.[3] When Congress enacted 25 U.S.C. § 357, "Congress placed Indian allottees in the same position as any other private landowner vis-à-vis condemnation actions, with

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[1] Alaska does not address Mr. Jachetta's arguments that Alaska owes him compensation. Rather, Alaska asserts that the United States authorized it to take the gravel. As demonstrated below, the State is simply incorrect in asserting that the U.S. held "superior title to the property." State Appellee Brief at 7.

[2] *Nicodemus v. Washington Water Power Company*, 264 F.2d 614, 618 (9th Cir. 1959). ("In our opinion Section 323 and Section 357 offer two methods for the acquisition of an easement across allotted Indian land…").

[3] 25 U.S.C. § 357 provides, "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded shall be paid to the allottee." (Emphasis supplied).

the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds"[4] (emphasis supplied). Alaska's construct would turn this Congressional intent on its head.

Second, 25 U.S.C. § 323, allowing for the grant of rights of ways across allotments, provides "No grant of right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just."[5] Consideration must be at fair market value of the right granted, plus severance damages. 25 C.F.R. 169.2. Alaska did not obtain a right of way under 25 U.S.C. § 323, et. seq.

II. THE STATE OF ALASKA HAS TAKEN INTERESTS WITHOUT COMPENSATION.

A. An Inchoate Interest is a Compensatory Interest.

It is not disputed that Mr. Jachetta commenced use and occupancy of his Parcel B Alaska Native Allotment in 1960. Mr. Jachetta completed his required five years of use and occupancy to qualify for an Alaska Native Allotment under the Alaska Native Allotment Act (ANAA) in 1965.[6] The BLM granted Alaska a permit to enter and use Parcel B as a material site in 1968. Mr. Jachetta filed his

[4] *Southern California Edison Co. v. Rice* 685 F.2d 354, 356 (9th Cir. 1982) (Citing *Minnesota v. United States*, 305 U.S. 382, 388 (1938)).
[5] 25 U.S.C. § 325
[6] 43 U.S.C. §§ 270-1 to 270-3 (*Repealed* 43 U.S.C. § 1618 with saving clause).

application for his Parcel A and Parcel B allotments in December 1971. Alaska began entry and use of the Parcel B allotment in 1973.[7]

The ANAA gave Alaska Natives an entitlement to land.[8] This Circuit holds that Alaska Natives who occupy and use land for at least five years in the manner required under the ANAA are entitled to due process.[9] Thus, in 1965, as the State of Alaska acknowledges,[10] Mr. Jachetta held an inchoate preference right to Parcel B.

Alaska denigrates this right, noting that Mr. Jachetta's right was "merely an inchoate interest."[11] However, this "mere" inchoate right is defeated only when the inchoate title holder fails to complete the requirements to perfect his interest under law.[12] Mr. Jachetta did not fail to perfect his interest. He timely filed for his Alaska Native Allotment on December 10, 1971.[13]

The filing of Mr. Jachetta's application for Parcel B vested Mr. Jachetta's preference right.[14] This preference right then related back to commencement of

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[7] Excerpt of Record ("ER") at 108
[8] *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976).
[9] *Id.* at 141-142. (Citing *Goldberg v. Kelley*, 397 U.S. 254 (1970)).
[10] State of Alaska Appellee's Brief at 2, 4, 6-7.
[11] *Id.* at 6.
[12] *Glenn Knapp v. Alexander-Edgar Lumber Company*, 237 U.S. 162, 35 S.Ct. 517 (1915).
[13] ER at 130 and 140.
[14] *See State of Alaska v. 13.90 Acres of Land, et al.*, 625 F.Supp. 1315, 1319 (D. Alaska 1985).

use and occupancy, to 1960.[15] Mr. Jachetta's 1960 preference right took precedence over the State's competing 1968 application.[16] Because Mr. Jachetta's vested inchoate right defeats the State's 1968 permit, the State's 1968 multi-use permit is not a valid defense to Mr. Jachetta's claim.

Upon the filing of the application, the claimed lands are segregated from the public domain.[17] "Segregation of lands…bars subsequent *entry* by others."[18] Thus, at the time Mr. Jachetta filed his Native Allotment application, Parcel B ceased to be part of the public domain, and was no longer available to Alaska.[19]

From 1971, when Mr. Jachetta filed his allotment application, he held vested equitable title to Parcel B, and "the United States' legal title was held in trust for him."[20] This Circuit holds that "the right to income is coincident with the commencement of the entitlement to such trust period…[o]nce the trust period has

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[15] *See id.*
[16] *See id.* ("Once vested, the preference relates back to the initiation of occupancy and takes preference over competing applications filed prior to the native allotment application.")
[17] 43 C.F.R. § 1261.1(e)
[18] *See, id.* (Emphasis in original).
[19] *United States v. Buchanan*, 232 U.S. 72, 76-77 (1914). (Holding that land subject to inchoate title from occupancy and settlement under Homestead Act not public land to hold third-party criminal liable under statute "to prevent unlawful occupancy of the public land.")
[20] *13.90 Acres of Land*, 625 F.Supp. at 1320.

commenced, the government assumes the role of trustee for the benefit of the individual Indian for all income collected."[21]

III. MR. JACHETTA HAS A DIRECT CONSTITUTIONAL CLAIM.

Inverse condemnation lies against the sovereign as a result of the "self-executing character of the constitutional provision with respect to compensation."[22] The 5th and 14th Amendments, United States Constitution give rise to a "constitutional obligation to pay just compensation."[23] In *Jacobs v. United States*,[24] the U.S. Supreme Court stated:

> The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.[25]

Mr. Jachetta enjoys constitutionally-protected compensatory interest in Parcel B, which vested in 1971. Alaska admits that it entered and used Mr. Jachetta's Parcel B allotment since 1973. Alaska argues that it was authorized to enter and take from Parcel B through a federal permit.[26] But, Alaska's

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[21] *United States v. Pierce*, 235 F.2d 885, 891 (9th Cir. 1956).
[22] *United States v. Clarke*, 445 U.S. 253, 257 (1980).
[23] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[24] 290 U.S. 13 (1933).
[25] *Id.* at 16.
[26] State of Alaska Appellee Brief at 7.

agreement with the BLM is not a defense to Mr. Jachetta's Constitutional claims against Alaska, because the agreement did not bind Mr. Jachetta.[27]

In *Glenn Knapp,* the United States Supreme Court held that settlement between a trespasser and the United States does not bar a subsequent suit by a homesteader. There, as here, the conversion and trespass of the homestead occurred when the homesteader's rights were inchoate.[28]

The *Glenn Knapp* Court held that the homesteader was not barred from seeking redress because "such an unwarranted compromise..., [] constitutes no bar to judicial proceedings otherwise properly maintainable by him against the trespasser after receipt of his patent."[29] Thus, in *Glenn Knapp*, the fact that the trespasser had paid the government was no bar to the trespasser's liability to the homesteader. Similarly, here, Alaska's payment (or the free use of the gravel) to the government is no defense to Mr. Jachetta's claim.

The 5th Amendment does not prohibit the taking of private property, but instead places a condition on the exercise of that power.[30] The condition is the just compensation provision, which is "designed to bar the Government from forcing

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[27] *See Glenn Knapp, Inc. v. Alexander-Edgar Lumber Company,* 237 U.S. 162 (1915); *Heckman v. United States*, 224 U.S. 413, 445-446 (1912). (Held: suits brought by the United States bind Indian Allottees only when the suits are brought on the Allottee's behalf.)

[28] *237 U.S.* at 167-168.

[29] *Id.* at 169.

[30] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] Here, any agreement or permission that the State entered into with the United States does not bind Mr. Jachetta. Mr. Jachetta has not received any compensation. Mr. Jachetta has a Constitutional right to seek the compensation he is owed directly from Alaska.

IV. THE ELEVENTH AMENDMENT CAN NOT DEFEAT MR. JACHETTA'S CONSTITUTIONAL CLAIM.

"The very essence of liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford that protection."[32] This court should afford Mr. Jachetta the same protection as any other citizen against Alaska's uncompensated taking. Alaska, seeking refuge in the 11th Amendment,[33] urges to the contrary.

Alaska argues that Mr. Jachetta can sue the U.S under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491.[34] But it is Alaska that took the gravel. Alaska's courts lack subject matter jurisdiction to adjudicate a claim involving an Alaska

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[31] *Armstrong*, 364 U.S. at 49.
[32] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).
[33] The 11th Amendment provides, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens and Subjects of any Foreign State."
[34] Alaska Appellee Brief at pp. 5 and 15.

Native Allotment.[35] 11th Amendment immunity may not stand in the way of recovery in state court for claims brought under the Federal Takings Clause.[36] But, a holding by this Court that Mr. Jachetta's claims against Alaska are barred by the 11th Amendment would allow the 11th Amendment to stand in the way of recovery. Alaska's proposal would establish that Alaska Native and Indian allottees, a class of United States citizens, are not afforded the protections of the Fourteenth Amendment. Such a holding constitutes judicially-endorsed unconstitutional discrimination.

A. Mr. Jachetta Sues For the United States.

This suit is not one contemplated by the 11th Amendment bar. The 11th Amendment assumes an alternative forum for adjudication of Constitutional grievances. In *Harrison v. Hickel*,[37] this Circuit noted that "the lack of any forum to adjudicate a constitutional claim may raise a serious question."[38] The *Harrison* Court's holding, that the 11th Amendment barred an allottee's claims against Alaska, was premised on the allottee's failure to file claims against the Federal

[35] *State of Minnesota v. United States*, 305 U.S. 382, 389 (1939). *See also*, *Heffle v. State*, 633 P.2d 264, 269 (Alaska 1981).
[36] *Seven-Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954-955 (9th Cir. 2008).
[37] *Harrison v. Hickel*, 6 F.3d 1347 (9th Cir. 1993).
[38] *Id.* at 1352.

Government.[39] Citing *Aguilar v. United States*,[40] the *Harrison* Court stated that the Federal government has a "continuing duty" to evaluate an allottee's claim of prior valid right, to determine whether land was erroneously conveyed, and to sue on behalf of the allottee to recover title if land was so erroneously conveyed.[41] The *Harrison* holding, therefore, assumed that the United States would sue Alaska on behalf of an allottee in a circumstance like here—where property was erroneously conveyed.[42] Of course, had the United States filed a complaint on behalf of Mr. Jachetta, the 11th Amendment would not be an issue. The sole reason it is an issue is because the government cannot sue itself.

1. Mr. Jachetta Asserts the United States' Interest In Conveying Good Title.

The United States has a duty to give good title to those lawfully entitled to it. In *United States v. Hughes*,[43] where the United States mistakenly issued a patent to Hughes, the government was "bound in equity and good faith to hold harmless all

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[39] *Id.* at 1353. ("The Harrisons have never sued the United States, however, to compel it to adjudicate their dispute with the State of Alaska. They have thus failed to demonstrate that they have been denied a judicial forum.")
[40] 474 F.Supp. 840 (D. Alaska 1979).
[41] *Harrison* at 1353.
[42] In fact, the *Harrison* Court held that the United States is equitably required to sue on behalf of allottees in circumstances of erroneous conveyance. *Id.* at 1353. ("…the Department nonetheless has a continuing duty to the Native Allotment claimant…to determine whether the land was erroneously conveyed so as equitably to require the Government to seek a reconveyance of the land.")
[43] 52 U.S. 550 (1850).

persons who have derived title [erroneously conveyed …].”[44] Similarly, in *Heckman v. United States*,[45] the United States had a duty to sue to void conveyances of Indian allotments by Indian owners, in violation of their restricted status.[46] *Hughes* and *Heckman* establish that the United States has a duty to recover title for another who had a prior or better claim to the land, but whose right was infringed, in violation of the law.[47]

Here, under *Hughes,* the United States has a pecuniary interest in suing Alaska to surrender property, or alternatively, to recover compensation for such property that it erroneously permitted the State to take from Mr. Jachetta’s allotment.[48] Under *Heckman* and *Harrison*, the United States has a pecuniary interest in suing Alaska to recoup property acquired in violation of the ANAA under 25 U.S.C. § 357. Mr. Jachetta is thus asserting the government’s pecuniary interest.

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[44] *Hughes*, 52 U.S. at 555.
[45] 224 U.S. 413, 32 S.Ct. 424 (1912)
[46] *Heckman*, 224 U.S. at 438. “The authority to enforce restrictions of this character is the necessary complement of the power to impose them.”
[47] *Heckman* at 439.
[48] *Hughes* did not involve an Indian or Native allotment. The moral and legal obligation described in *Hughes* does not derive from a trust responsibility of the Federal government because Mr. Jachetta is an Alaska Native, but rather, derives from a general obligation a private seller owes. Thus, “[i]t is manifest that if the agents of an individual had been thus imposed on, the conveyance should be set aside because of mistake on the part of such agents and fraud on the part of the second purchaser in order that the first contract could be complied with. Nor can it be conceived why the government should stand on a different footing from any other proprietor.” *Hughes* at 568.

2. Mr. Jachetta has Prudential Standing To Assert the BLM's Claims Against the State.

In *Hodel v. Irving*,[49] the U.S. Supreme Court held that when the Secretary of the Interior has a conflict of interest, an individual may assume the role of the Secretary to assert a Constitutional takings claim.[50] An issue in *Hodel* was whether the individual allottees had standing to assert a takings claim which belonged to the decedents.

The *Hodel* Court held that the allottees had prudential standing to pursue a takings claim that would normally be brought by the Secretary, because the Secretary had a conflict of interest.[51] The Secretary could not be expected to file a claim that a statute is an unconstitutional taking while simultaneously charged with the responsibility of administering that statute.[52] Thus, *Hodel* establishes that an individual Indian may bring a takings claim involving trust property directly when (1) the Secretary has a conflict of interest and is unable to bring such a claim; (2) at common law, the claim is one ordinarily brought by an individual if it did not involve trust property; and (3) the individual is positioned to vigorously pursue the claim because its interests are inextricably linked to the claimant.

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[49] 481 U.S. 704 (1987).
[50] *Id.* at 281.
[51] *Id.* at 712.
[52] *Id.*

Here, the Secretary will not file a claim against Alaska on behalf of Mr. Jachetta. Nor can the government sue itself. If Parcel B was not a Native allotment, Mr. Jachetta would be able to bring a claim against Alaska individually, in state court. Mr. Jachetta's claims advance the BLM's interests and his own, as the two are intertwined.[53] The United States' duty to ensure Mr. Jachetta receives just compensation for his allotment is linked to Mr. Jachetta's inverse condemnation claim.

B. A Native Allottee May Sue Directly for Protection of His Property Right.

11th Amendment immunity is not absolute. The 14th Amendment expanded federal power at the expense of State autonomy and thereby fundamentally altered the pre-existing balance between the State and Federal power achieved by Article III and the 11th Amendment.[54]

Under the ANAA, Alaska Natives receive ownership rights in the land while the United States retains the power to scrutinize the various transactions by which the Indians might be separated from that property.[55] Thus, the allotment system

[53] *Heckman*, 224 U.S. at 414. "A transfer of allottee lands in violation of statutory restrictions is not simply a violation of the proprietary rights of the Indian, but of the governmental rights of the United States."
[54] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976).
[55] *See Squire v. Capoeman*, 351 U.S. 1, 9 (1956).

created interests in both the Indian and the United States.[56] The Indian's interest is proprietary, the United States' interest is governmental.[57]

Alaska, while conceding the obvious, asserts that only the United States has the responsibility to make Mr. Jachetta whole. Alaska errs. If the United States fails to protect an Indian allotment, the Indian allottee may prosecute the action.[58] The United States' responsibility to institute a suit to protect an allotment does not diminish the Indian's right to sue on his own behalf.[59]

C. A Native Allottee May File a Claim For Inverse Condemnation under 25 U.S.C. § 357.

The State, misreading *United States v. Clarke*, argues that 25 U.S.C. § 357 does not abrogate 11th Amendment immunity.[60] On the contrary, *Clarke* simply rejects inverse condemnation as an affirmative defense.[61]

In *Clarke*, defendants applied for a homestead patent on 80 acres adjoining a parcel that would later become an Alaska Native allotment.[62] Without obtaining

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[56] *Heckman*, 224 U.S. at 438.
[57] *Id.*
[58] *Id.* at 446.
[59] *See Creek Nation v. United States,* 318 U.S. 629, 640 (1943) ("That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions."); *Poafpybitty v. Skelly Oil Company* 390 U.S. 365, 372 (1968) ("federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official do not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights.")
[60] State of Alaska Appellee Brief at p. 8. (Citing *United States v. Clarke*, 445 U.S. 253, 259 (1980)).
[61] *Clarke* at 260.

an easement from the United States, Clarke built a road across the Tabbytite allotment.[63] Clarke later subdivided his homestead into 40 parcels, which later incorporated into a third-class city called Glen Alps.[64] Third-class cities lacked eminent domain power under Alaska law.[65]

In 1969, the United States filed a complaint to enjoin the use of the road across the Tabbytite Allotment.[66] This Circuit held that the Clarkes and other users of the road were liable for trespass, finding that Tabbytite had a right to an unencumbered allotment.[67] The Ninth Circuit held that, upon entry in 1954, Tabbytite's title was good against everyone but the United States, and that the Clarkes were not successors-in-interest to an easement implicitly retained by the Government.[68] The case was remanded to the District Court to issue an injunction.[69]

In 1975, the Municipality of Anchorage annexed Glen Alps and apparently took over maintenance of the roadway.[70] Upon remand to the District Court following the Ninth Circuit's injunction order, the Municipality appeared and

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[62] *Id.* at 260.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *United States v. Clarke*, 529 F.2d 984, 987 (9th Cir. 1976).
[68] *Id.* at 986-987.
[69] *Id.* at 987.
[70] *Id.*

opposed the injunction, asserting as an affirmative defense inverse condemnation.[71] The District Court and the Ninth Circuit interpreted 25 U.S.C. § 357 as authorizing a condemnation of Indian lands through inverse condemnation.[72] The District Court and Ninth Circuit held that just compensation was owed Tabbytite, but that an injunction should not issue.[73]

The United States Supreme Court held that the term "condemned" in 25 U.S.C. § 357 did not authorize a state or local government to "condemn" allotted trust lands through physical occupation.[74] The *Clarke* Court held that the injunction against the State of Alaska must stand, as the Municipality could not rely on any title acquired through a physical invasion without a formal condemnation proceeding.[75]

Mr. Jachetta's assertion that he may bring an action for inverse condemnation against the State of Alaska under 25 U.S.C. § 357 does not disturb *Clarke*. The Court in *Clarke* recognized that a landowner is entitled to bring an action in inverse condemnation. [76] The *Clarke* Court defined an inverse condemnation as "*a cause of action against a government defendant* to recover the value of property which has been taken in fact by the governmental defendant,

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[71] *Clarke*, 445 U.S. at 260.
[72] *Id.* at 261.
[73] *Id.*
[74] *Id.* at 253.
[75] *Id.* at 259.
[76] *Id.* at 257, (quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)).

even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[77] The Municipality was not the landowner seeking inverse condemnation. Rather, in *Clarke*, the Municipality alleged inverse condemnation as an affirmative defense.

Clarke does not prohibit an Alaska Native allottee from seeking just compensation. Indeed, 25 U.S.C. § 357 was enacted to protect, not hinder, a Native's private property interest.[78] Alaska's argument is thus contrary to Supreme Court jurisprudence. An eminent domain proceeding is "an indispensible prerequisite for the reliance of any State or Territory on the other provisions of [25 U.S.C. § 357]."[79] *Clarke* thus merely reaffirms the ancient rule that local governments have no right to open streets through property belonging to the United States and not sold by the United States.[80]

The *Clarke* Court's reference to *Poafpybitty* is only applicable in the case where a government asserts inverse condemnation as an affirmative defense. The *Clarke* Court cited *Poafpybitty*, stating that formal condemnation proceedings are required because:

> In the case of Indian trust lands which present the Government 'with an almost staggering problem in attempting to discharge its trust

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[77] *Id.* at 257, (quoting D. Hagman, Urban Planning and Land Development Control Law 328 (1971)) (emphasis in *Clarke*).
[78] *See, Nicodemus*, 264 F.2d at 608; *Minnesota*, 305 U.S. at 388.
[79] *Id.* at 259.
[80] *United States v. City of Chicago*, 48 U.S. 185, 198 (1849).

> obligations with respect to thousands upon thousands of scattered Indian allotments, the United States may be placed at a significant disadvantage by this shifting of the initiative from the condemning authority to the condemnee. [81]

In contrast, here, the U.S. gave away Jachetta's gravel. It was not faced with a staggering problem. Alaska accepted Jachetta's gravel. 25 U.S.C. § 357 is not being used as a shield. Mr. Jachetta, as the allottee, is entitled to relief.

D. 25 U.S.C. § 357 Validly Abrogates the Eleventh Amendment.

The test for 11th Amendment statutory abrogation involves a two step analysis:

* First, whether Congress has "unequivocally expressed its intent to abrogate the immunity;"[82]

* Second, if Congressional intent is found, the court must examine whether the Act was passed pursuant to a valid exercise of power.[83]

Both prongs are met here.

Congress has "unequivocally expressed its intent to abrogate immunity" when the overwhelming implication of the text will leave no room for any other reasonable construction.[84] 25 U.S.C. § 357 specifically allows condemnations.

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[81] *Clarke*, 445 U.S. at 257-258. (Citing *Poafpybitty*, 390 U.S. at 374).
[82] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996). (Citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).
[83] *Id.* at 59. (Citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456 (1976)).
[84] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-240 (1985). (Citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

There is no other reasonable way to understand this section than as authorizing allottees to file an inverse condemnation action against the State, so long as such an action is authorized under State law. Alaska state law authorizes inverse condemnation.[85]

Congress has the power to authorize Federal courts to enter an award against the State as a means of enforcing the substantive guarantees of the 14th Amendment.[86] One of these substantive guarantees is due process.[87] Another prohibits a State from denying "any person within its jurisdiction equal protection of the laws."[88] Accordingly, § 5 of the 14th Amendment authorizes Congress to enact "appropriate legislation" for the purposes of enforcing the provisions of the 14th Amendment, and to provide for private suits against the States or the States' officers which are Constitutionally impermissible in other contexts.[89] 25 U.S.C. § 357 was enacted to protect an allottee's due process right and his right to just compensation for his allotment interests.

In enacting § 357, Congress did not waive federal superintendence of allotments, but permitted States to exercise eminent domain in the Federal District

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[85] *State of Alaska, Dep't of Highways v. Crosby*, 410 P.2d 724, 728 (Alaska 1966).
[86] *Fitzpatrick*, 427 U.S. at 448.
[87] U.S. Const., 14th Amend., § 1.
[88] *Fitzpatrick*, 427 U.S. at 448.
[89] *Id.* at 456.

court.[90] However, § 357 also codifies an allottee's right to just compensation for any interests in the allotment acquired by the State.[91] In this context, § 357 creates a private cause of action for damages against the states for conduct that *actually* violates the 14th Amendment. Here, the State of Alaska acquired interests in Mr. Jachetta's allotment without paying just compensation to Mr. Jachetta. If Alaska Natives may not bring suit in the District Court to seek just compensation, then Alaska may with impunity, deny Alaska Natives due process and equal protection of the law to enforce a Constitutional right. There is no other forum to vindicate the rights of a Native allottee against a state taking of allotment property.[92]

Because § 357 abrogates 11th Amendment immunity, the Congressional purpose behind that section is fulfilled. The alternative, that federally-protected Indian allotment owners are not in the same position as other private land owners, violates the statutory purpose.

Alaska willfully took gravel from Mr. Jachetta's allotment. Beginning in 1973 and continuing for the next 30 years, Mr. Jachetta asserted that Alaska was taking his gravel from his allotment. [93] Notwithstanding his protests, BLM denied Mr. Jachetta's Parcel B application and, almost simultaneously, granted Alaska and

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[90] *Clarke*, 445 U.S. at 254.
[91] 25 U.S.C. § 357, "…and the money awarded as damages shall be paid to the Indian allottee."
[92] *Southern California Edison Co.,* 685 F.2d 356.
[93] E.R. pp. 138-140; 171-172; .

Alyeska Pipeline Service Company a Joint Use Agreement to use Mr. Jachetta's allotment as a material site.[94] Thus, as in *Glenn Knapp*:

> It does not comport with the spirit of the homestead law to say that, after the initiation and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant.[95]

Mr. Jachetta complied with the law. An Alaska Native Allottee who meets the statutory requirements for an allotment under the Alaska Native Allotment Act is entitled to due process.[96] Mr. Jachetta is entitled to due process and equal protection here.

V. CONCLUSION.

Mr. Jachetta is entitled to the protections against Alaska afforded only under Federal law, at 25 U.S.C. § 357. Mr. Jachetta's action against Alaska is consistent with Alaska law, and the federal forum is clearly the only forum possessing jurisdiction. Permitting Mr. Jachetta to pursue claims against the State to protect his property interest, Mr. Jachetta simultaneously advances the governmental interest of the United States to convey clear title, uphold the Fourteenth Amendment of the U.S. Constitution, and to protect Native allotments from third-

[94] E.R. at p. 95.
[95] 237 U.S. at 167-168.
[96] *Pence*, 529 F.2d at 141-142.

parties. Alternatively, the BLM's conflict-of-interest renders it unable to pursue the claims. Mr. Jachetta has prudential standing to assert these claims against the State of Alaska directly.

By our signatures below, we hereby attest that William Carlos Jachetta concurs in this Brief's content.

DATED at Anchorage, this 5th day of November, 2010.

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BRIEF FORMAT CERTIFICATE OF COMPLIANCE

(Circuit Rule 32-1)

I certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is proportionately spaced, using 14-point typeface, and contains 4,450 words, based on the word count of the word processing software currently used by our law firm.

s/Samuel J. Fortier

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Samuel J. Fortier