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TRANSCRIPT OF PROCEEDINGS

ROUNDTABLE DISCUSSIONS

ANCSA & 1991

VOLUME XXII

ANCHORAGE

NOVEMBER 16, 1984

ALASKA NATIVE REVIEW COMMISSION
HON. THOMAS R. BERGER
COMMISSIONER

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1984



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Transcripts of the Alaska Native Review Commission are produced in two series. Those in Roman numerals are for the Roundtable Discussions. Those in Arabic numbers are for the Village Meetings.

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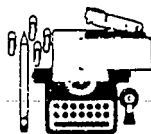


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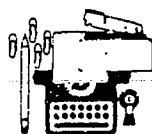
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1 (NOVEMBER 16, 1984)

2 (TAPE 9, SIDE A)

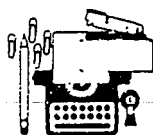
3 MR. BERGER: Well, let's pull
4 ourselves together here.

5 (LONG PAUSE)

6 MR. BERGER: We've had two very
7 useful days of discussion and I would like us to simply carry on
8 with that discussion today for as long as we can, and I am glad
9 to see you all here and Dolly Garza today. Dolly is chairman of
10 the 1991 committee of the Village Corporation at Craig.

11 If I can summarize what we have talked about thus far,
12 we considered the ways in which the corporations might be
13 protected from being taken over. Our assumption was that the
14 land and other assets, but the land especially, would be left in
15 the hands of the corporations. So the problem then that we
16 addressed was how do we make sure those corporations aren't taken
17 over after 1991, and there were a number of suggestions made. We
18 talked about the possibility of placing corporate land in the
19 Land Bank. That was a suggestion that many felt had drawbacks.
20 Then we decided to look at what would happen if the land were
21 transferred from corporate ownership to ownership in some other
22 entity, and we were looking at (and I would like to lump together
23 again), we were looking at non-profit corporations (and) at
24 cooperatives -- both state authorized entities -- and we were
25 going to look at IRA's. Not with the view to opening up the
whole discussion about sovereignty, that's something that comes
at the roundtable in December, but simply to look at IRA's as
receptacles, so to speak, convenient vehicles for holding Native
ancestral land.

I thought that today I would just go back to the
discussion about the Land Bank for a minute or two to make sure
that we have exhausted that. Then we would come again, if you
don't mind, to look at the non-profits, the co-ops, and IRA's.



1 And I thought that on the non-profits and co-ops -- and Mr.
2 Fessler was good enough to discuss those at length yesterday -- I
3 thought I would ask Elizabeth if she had anything to add, Monroe
4 Price if he had anything to add. And, on the IRA's, I thought I
5 would ask Ralph Johnson to discuss those, and then others to join
6 in that discussion. Then I thought we could talk about, go back
7 to the question, "well if these are good places to put the land,
8 how do we get it there?" And I thought we would go back, if you
9 don't mind, to the question of complying with Alaskan state
10 corporate law for getting it from here to there, whether you are
11 trying to get incorporation of an IRA or a non-profit. Then we
12 thought also we would look at the question of solicitation of
13 proxies, and we'd have Elizabeth talk about that since she has
14 written the state law on the subject. And, then I thought we
15 would look at voting trusts; that is if you don't put the land
16 anywhere, can you put the shares somewhere, so the shares can be
17 taken over? And then I thought we would conclude our discussion
18 in our three days by returning to where Bart Garber started us
19 off, that is, the whole question of Native values and corporate
20 values, or Native values and western values, however you want to
21 put it, and just see if we can't draw back from the details and
22 take a look at the philosophical underpinning of this whole
23 business.

24 So, that's what I thought we would do today. I know
25 some of you, or at least one or two of you, have to leave at
noon, and I... but I thought we would carry on into the afternoon
we, well, and there were some people who had been in the audience
who had wanted a chance to speak as well. And when we reach that
question of values at the end, perhaps we might invite some in
the audience who expressed a wish to speak, to participate. So,
maybe we could go back to the Land Bank -- I know this is
covering the ground again -- but this is pretty important ground
and from my point of view it's worthwhile to emerge from this



1 discussion with the principles clear in one's mind. David, you
2 wanted to make one or two observations about the Land Bank.

3 MR. CASE: First, maybe we
4 mentioned it yesterday, but I think it's just worth nothing
5 that... I know we discussed it among... several of us discussed
6 it afterwards... that after the enactment of the Allotment Act, I
7 think it was within a period of ten years after 1887, I could be
8 a bit wrong (INTERRUPTION -- You mean the Dawes Act) Right, the
9 1887 General Allotment Act, which is also sort of the opposite of
10 the land status of the Claims Act in a way, but jurisdiction
11 parallels.

12 It restricted land from alienation, and of course
13 taxation and all the rest for a period of 25 years, and what
14 began to happen, the President was authorized to extend that
15 period of trust for a longer period of time and what began to
16 happen rather shortly after the Dawes Act, really was that the
17 President began to extend that period of restriction. And, it is
18 curious and one might say eerie that we are now talking about
19 further restrictions and more permanent restriction and long term
20 restrictions on the ANCSA lands. And that seems to come up in
21 the context of what's called the Land Bank, and I was sort of
22 tossing and turning and I woke up this morning and maybe this is
23 -- reflects on the quality of the idea, but it occurred to me
24 that land placed in a land bank is protected from taxation and
25 it's protected from judgments and it's protected from adverse
possession, and is federally managed; and that begins to sound an
awful lot like a reservation, functionally anyway.

Now there is some difference, of course. The land in
the Land Bank can be condemned under state law. On a reservation
it can't, and of course it's not really -- well maybe it is --
but it's not functionally, it's not legally not -- it's not, the
word isn't used, it's not held in "trust". But -- I was just
reflecting on all that, it's a bit curious, historically this has



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1 happened -- something like this has happened before, and although
2 the word is not ever -- has never been in favor in Alaska, I
3 wonder if, when we are talking about the Land Bank, if we are
4 really not talking about something like a reservation, and I
5 don't know why that is, but I just thought I'd put that on the
6 table.

7 MR. BERGER: I must say, David,
8 that in some recent discussions I've had with some Native people
9 in the Anchorage area, that notion of and reluctance to use the
10 word reservation... but, your dream this morning is more widely
11 held than you think. There appear to be a number of people who
12 would welcome an "Indian Country" kind of concern that would have
13 much of the same kinds of characteristics, hopefully not some of
14 the negative characteristics, but some of the same protection
15 characteristics and held in trust. And, so I don't think that
16 your summary is quite far off from, really, some feelings of some
17 fairly... some people have thought very carefully about that
18 issue. David Case and then go to Roland. Does that mean you
19 want the floor? The... under the General Allotment Act, the
20 Dawes Act of 1887, Indian reservations were broken up.
21 Individual Indians received allotments, land and fee, but they
22 couldn't sell it for 20 years -- or 25 years -- was it -- 25
23 years. And did you say that the President was authorized to
24 extend the period of non-alienability of land under the Dawes Act
25 -- is that what happened?

MR. CASE: That's my
recollection, but if --.

MR. BERGER: And you are saying
that the Land Bank seems to be a way of simply postponing the --
of continuing the immunities or the protections under ----?

MR. CASE: The protections under
ANCSA aren't the same as under the Dawes Act, because the land
can be sold without Secretarial consent, and so forth. But, it



1 -- some of the other restrictions are similar to prevention of
2 taxation and so.

3 MR. BERGER: But it's in a way
4 like the shares were made inalienable under ANCSA, and now the
5 protection, in a sense, is being moved over from the shares to
6 the land under the Land Bank, or is that being too simplistic --
7 simple minded?

8 MR. CASE: Well, I am not sure,
9 because the protections are both on the land and on the stock,
10 but they're different kinds of restrictions, one might call them
11 protections and so they both had restrictions on them, land and
12 stock, just different kinds.

13 MS. WORL: I'd just like to point
14 out that even though they were -- there were these restrictions
15 from taxation and alienation, it didn't mean that the Secretary
16 couldn't lease -- lease lands and I think what's important to
17 bring out is that there were, you know, reservations where -- you
18 know -- a significant amount of lands were leased out and even
19 here in Alaska, in having come back from Barrow and taking a look
20 at development and of movement of population into Barrow, land
21 becomes very significant and one of the things that we are
22 finding out is that there is -- it looks like there is a
23 significant or high percent of restricted lots that are being
24 leased out, long term leases to often non-Natives.

25 MR. BERGER: Who's leasing them,
I'm sorry?

MS. WORL: Well, the leases --
it's Native land, Native individual allottees are leasing their
lands to non-Natives.

MR. SHANKS: Well, just to kind
of touch back on David's dream or nightmare or whichever it might
be; actually, some of the models that were used for the Land Bank
weren't really reservation status at all, but some of them were



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1 in fact some of the agriculture taxation acts in the western
2 states. Like the Williamson Act in California, and some others
3 which essentially some of the western states have passed to keep
4 land and agriculture status by giving it a preferred tax position
5 over the years. And, essentially, that's even where the idea of
6 like the renewable contract almost came from, so that's where --
7 some -- kind of some of the background on the land banks.

8 I think there is one significant difference, too, which
9 I think you are aware of when they are putting together the
10 legislation on the Land Bank, and that one of the primary
11 differences between the reservation and the Land Bank is that --
12 the Land Bank really does operate essentially as a bank. I mean
13 it's just isn't the sense of a bank where, if you have excess
14 assets, you put your money in the bank and you draw out what you
15 need when you need it, and use it. The idea was that the
16 corporation could essentially take its excess lands, put it in a
17 bank, and then draw it out as they needed it -- leaving the
18 corporate structure in place, to make those decisions, you know,
19 how much land to put in the Land Bank, and how much land to take
20 out of the Land Bank, and how to take it out. I don't think that
21 the people who originally put together the Land Bank ever saw
22 this as the panacea of protecting all the land.

23 I don't think that anybody ever viewed it as a
24 corporation we would want to run down and take a hundred percent
25 of its land holdings and throw it in the Land Bank. The idea was
that it would be a repository for lands that had no immediate
value or no immediate economic need in the village structure,
since we'd take those excess lands, or those lands that were
particularly important to traditional uses, subsistence uses and
those kinds of things and put them in the Land Bank. But I don't
think it was ever intended to be total answer to protecting all
the land that a corporation might own. It was designed to serve
-- you know -- one small purpose and I think that some of the



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1 major problems come in when you try to stretch it to this overall
2 land protection kind of aspect, and since you distort out of its
3 original purpose which was a way of protecting excess land or
4 lands that were -- that had -- were important to the village in a
5 non-economic sense, they were traditional lands with subsistence
6 lands. So, I think that's part of where we run into these --
7 some of these problems is when we try and distort this purpose
8 and make it broader than it really was -- when -- before putting
9 that thing together.

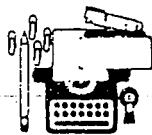
MR. PRICE: I'll defer.

MR. FREDERICKS: [INTERRUPTION BY
SOMEONE IN THE AUDIENCE.] One other thing. Our lands, I said we
had a million acres. Our lands are buffered either by the
National Refuge and Fish and Wildlife; they have different
regulations. That's been our problem, is, we go to an agency --
say we wanted -- we looked at it and say, we want to put some of
our land into a land bank, and they criss cross, they bound
together with Fish and Wildlife and refuges, and they said,
"well, you gotta go to them", "you gotta go to those," and we
have no regulations and that's what' being on -- you know --
nobody knows. There is no regulations, I guess, and that's been
the problem -- you know.

FROM AUDIENCE: And you just get
a bunch of them.

MR. PRICE: I think that's one of
the reasons for [I'm] Monroe Price, dealing with the "deem to be
included" language in the Land Bank. But, all I wanted to say
was that it seems to me that in one conceptual sense, a
reservation is merely -- is merely a decision by the society that
land ought to be reserved from the ordinary workings in the
market place, and that it ought to be reserved from certain other
law-making authorities.

But take the market place as the first aspect of it.



1 We have a lot of ways in our society for deciding that
2 certain pieces of land at certain times ought to be held out from
3 the ordinary workings of the market place. Indian reservations
4 is one such concept. The Williamson Act and other refuges, etc.
5 are another, and I guess in that sense that the Land Bank
6 represents that. So I don't think that there is anything unique
7 about it in that sense. The questions is more to -- how do you
8 determine or who determines and how do you determine how long you
9 want to keep something out of the workings of the market place,
10 and with what incentives to come back in or stay out and under
11 what terms?

12 MR. R. JOHNSON: I think there
13 are two basic concepts that need to be kept in mind. In New
14 Zealand, with the Maori, and the 1887 Dawes Act, and more
15 currently with the ANCSA, there has been an attempt by the
16 governing powers to individualize Native ownership. Now, if that
17 individualization takes, if it is accepted by the Native
18 community and becomes a permanent change in the way of life, then
19 that's fine. But what happened in New Zealand, and what happened
20 after the 1887 Dawes Act and what I see happening here is that
21 the Native community does not wish to carry through on that total
22 individualization effort. In some respects, yes, but in some
23 respects, no. There is a clear intent by the community to wish
24 to hold the land in either a permanent or semi-permanent way. In
25 each of the cases in the past that that's occurred, in New
Zealand and with the 1887 Dawes Act it has resulted in a major
problem or fractionalization of ownership. Because you have two
concepts going head on against each other: one is the concept of
maintaining a community, a communal way of life, and the other of
individual ownership. And as long as that individual ownership
is restricted, and it's going to descend from owner to owner to
owner, it can't be conveyed away. Then, the fractionalization of
ownership occurs that creates all kinds of conflicts, makes it



1 difficult if not impossible to manage the land as such. And, so
2 it seems to me that if this Commission or if the Native community
3 or whatever is interested now in re-establishing some kind of a
4 semi-permanent or permanent base, that care should be taken to
5 assure that the fractionalization question does not start in
6 again. That's a very serious kind of problem that has not been
7 foreseen before, and we should now, through our knowledge of
8 history, be able to foresee it, and either eliminate the
9 individual ownership or buy it, one way or the other. But don't
10 try to do two things at once.

11 MR. PRICE: I want to ask Ralph
12 this question.

13 Under the Native Claims Settlement Act, there is an
14 individualization of stock ownership and not an individualization
15 of land ownership. That seems to be a fundamental difference
16 from the Allotment Act, and the fractionalization that will occur
17 will be a fractionalization of stock. Unless the Native
18 corporations themselves individualize land holdings, which they
19 might. But, I wanted you to reflect on that distinction to see
20 whether fractionalization of the stock is okay. Are there
21 adverse social consequences to the fractionalization of stock,
22 and how that relates to the Allotment Act?

23 MR. R. JOHNSON: I think you are
24 right, in that there is a significant difference, but in fact if
25 it's restricted, if the stock is restricted, then I think there's
a danger of the same thing happening of the stock descending and
being split and being split so the stock ownership has no real
meaning except as a membership in a group, but it doesn't have
the market characteristics of ordinary stock, I think that's
true.

MR. PRICE: Why is that -- I just
want to isolate and identify the harm and the social ill. In
fractionalization of land the problem is that it becomes in some



1 ways unusable, undefinable, even the community can't deal with
2 the land. With the fractionalization of stock and the corporate
3 ownership of land or the socially communal ownership of land if
4 control is maintained. It's just as if you just have larger
5 percentages of ownership in the community -- different patterns
6 of ownership.

7 MR. R. JOHNSON: Unequal owner-
8 ship?

9 MR. PRICE: Possibly unequal.

10 MR. R. JOHNSON: You will have
11 unequal quantities of ownership, you will also have ownership
12 that will eventually bifurcate to a point where it will be
13 insignificant, where the participants won't have any incentive to
14 participate as they would if they were involved in a government
15 operation. If they were members of a tribe they'd each have one
16 vote, and they would participate in the tribe or village govern-
17 ment which would then manage the land. I think that it ends up
18 being much the same thing if you restrict the alienability of the
19 stock. It's different in the sense that we are more accustomed
20 to the idea of splitting stock. We see stock being split, but
21 each stock at that point has monetary value, and enough value so
22 that it's worth splitting. But if we start splitting stock that
23 has virtually no monetary value, then who keeps... One reason I
24 mention this is if you look at the history of the Maori, they did
25 the same thing; they had corporations with stock and it becomes a
terrible burden on the person who is trying to keep records of
who owns the stock. I mean it splits and it splits, it isn't
worth anything, and who wants to keep track of it, and the owners
don't participate in the enterprise. And they don't have a one
person/one vote kind of relationship to the management of the
land.

MR. PRICE: Well, I think that
that is the problem, and it is an important one, but it's a

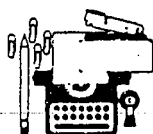


1 different one from the general Allotment Act. And it may be that
2 if one conceives that as a significant problem you would deal
3 with it differently. You might prohibit different percentage
4 shares after a certain amount.

5 MR. BERGER: Well, I think we
6 have wrestled that one to the ground. Glenn and then Tony.

7 MR. FREDERICKS: It's interest-
8 ing, Ralph, that what you say of these other Indians or whatever
9 they are, but is happening in our village. The elders especially
10 are saying to us, "how can we take this piece of ground once you
11 give it to us with a deed at... Put restrictions so that our kids
12 won't sell it, it'll be theirs forever." It is very interesting,
13 the fractional, I can understand that because two kids don't say
14 the same thing. Like one wants to sell it, and the other wants
15 to hold it, and we are seeing that now. We are going to see it
16 more, but maybe there is a way of doing this; maybe the
17 corporations can put it and individually give each person some
18 acreage that they could do as they wish -- you know, something.
19 But, it is interesting because it's happening already.

20 MR. STRONG: The -- we've
21 wrestled it to the ground, but let's wrestle it a little bit
22 longer because of the kind of problem that Glenn has just
23 articulated here. The analogy to allotments is a lot more, a lot
24 stronger than a lot of people perceive when I have looked... I
25 worked with the American Indian Policy Review Commission, and one
of the things that we looked at with the Policy Review Commission
was the problem of allotments. And, I also studied that problem
a little bit more when I was working in the United States Senate.
One of the problems that was identified with allotments where
fractionated ownership was taking place, is that there were cases
where one acre of land was owned by 362 people, and there was
times where... how do you manage that... how do you determine if
one of the people want to sell it, they've got to get 361 other



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1 people to agree to sell it. Also, if -- so what the result was
2 that the people who were managing the land was the Department of
3 Interior, and the way they managed the land was to lease it out.
4 But, when they got... when they would lease it out for such
5 things as grazing permits, and grazing permits or something like
6 the grazing permit, the lessor had to pay a fee to the Department
7 of Interior which would be split among the 362 people. The
8 lessor pays for one acre of land - how much money per year for a
9 piece of grazing land? Say if is a 100 acres of land, they pay
10 maybe \$100.00 per year. The Department of Interior has to write
11 a royalty check or a lease check to each one of those 362 people
12 so they end up writing a thirty-two cents (\$.32) check for 362
13 different people once a year, and it costs them more to write the
14 check than the check is worth. And if we don't deal with that
15 problem in the terms of fractionated ownership of shares, if we
16 are having one share being owned by 20 people and there is a
17 distribution of \$5.00 per share, the corporations can end up
18 paying more for printing the check than the check is worth. And,
19 how many times do they have to go through that kind of
20 difficulty? I think it is a real problem.

21 MR. BERGER: I am told that some
22 regional corporations, they now are down to persons who hold less
23 than one share, and that's only 13 years after everybody started
24 out with a hundred. Dolly, then Rosita and the David.

25 MS. GARZA: I am sorry I missed
the first two days, it's unfortunate for me but... Shaan-Seet,
Inc., is one of the few village corporations who's made our
shareholder whole amount distribution under the ANILCA
provisions, and we distributed one and half acres per one hundred
shares to our 317 shareholders. And one of the things that was
debated probably for several years is whether or not the
shareholder should be given fee simple title or whether or not
they should be given, say, a hundred-year lease. All of the lots



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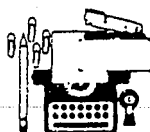
1 are on waterfront property, and the purpose was to provide these
2 shareholders an op -- the land to build a house in Southeast. A
3 lot of the land is owned by Tongass National Forest and there is
4 no lot available for building. After wrestling with it -- for
5 several years, the board voted a fee simple distribution and we
6 maintained first right of refusal in repurchasing. That was the
7 way we were going to attempt to maintain it within Native hands.
8 And now, the board is wrestling again with what are we going to
9 do if half of our shareholders come in the first year and want to
10 sell their land? Do we have the money to pay for it, and if not,
11 how are we going to try and assure that it stays within Native
12 hands? So it's a problem that's being faced now, I don't know if
13 we should have gone through the lease program because the share-
14 holders were very adamant that...they felt that the land was
15 theirs and they wanted it in their name to do with as they
16 pleased.

17 MR. BERGER: Could I ask you a
18 question, Dolly? You said that the corporation has the right of
19 first refusal. Are those lots, once they are assigned in fee
20 simple to shareholders, are they subject to property taxation if
21 you happen to live within a city or borough?

22 MS. GARZA: Under the ANILCA
23 Provision they are not taxable for ten years. None of the land
24 is within the taxable boundaries, but -- that was one of the
25 purposes of putting it under the ANILCA provision, was to avoid
the taxation.

MR. BERGER: That's right, there
is a ten year provision. Rosita, and then David.

MS. WORL: Yeah, I guess I'd just
like to bring out one thing -- and that is, what's the primary
use of the land to the people? And supposedly allotments outside
of communities were selected for hunting and fishing activities,
and from my observations, I have found that when allotments are



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1 within hunting and fishing, primary hunting and fishing areas,
2 that people tend to treat it as communal land even though there
3 is -- individuals have title to it. However, when you have a
4 competing use for resource development, then very quickly the
5 individual rights take ... it will take primary consideration and
6 in that case that's where I've seen individuals either lease
7 their allotments. But, the point is that if it's hunting and
8 fishing areas, then people seem to come and go at, in their usual
9 patterns, irrespective of ownership.

MR. BERGER: David did you want
the floor?

MR. CASE: But just briefly, one
thing that Tony mentioned triggered something. You said that the
effect of the Allotment Act was to put the ... increasing the
management of the allotments totally in the Department of
Interior. Of course, it is always there, but there is no -- so
fractionated that nobody else can make a decision about it. And
that may well be the result of fractionating shares in a
corporation is that they are divided so -- into such numerous
little pockets that management is more able to exercise complete
control -- or put more complete control over the corporation.
This never occurred to me, but I was discussing this issue with
an attorney regarding the corporation, and that was the
conclusion, I guess, is that restricting stock would really
strengthen the management of the corporation insofar as its
ability to control voting on the shares.

MR. BERGER: Dolly, could I ask
you a question, did your corporation distribute those ANILCA lots
by lottery or how did you do that?

MS. GARZA: Yes, it was by
lottery. There were two sites, one along the lake, and one along
an inlet that's close to Craig and the shareholders had to decide
which bank they wanted to be in, and then numbers were picked.



1 It allowed for up to five lots to go together. Say you would
2 pick one name, say my name, and if my family, my mom and my
3 brothers and sister chose to, then that would mean that five lots
4 would all go to my family and it would be myself, my sister, my
5 brother, my brother and my mom. And so there are many areas
where there are five lots to one family.

6 MR. BERGER: And, what -- were
7 you -- did you give your own judgment on whether you thought that
8 this was a -- having the opportunity to think about it now, was a
good idea, or not so good, or inevitable or ...?

9 MS. GARZA: I think it's one of
10 the best things that our corporation has done, because we have
11 provided something to our stock owners. If our corporation falls
12 apart, at least they've got something, that's our idea. The
shareholders are very happy with it. We've run into problems but
it seems like it's nothing that we can't work out.

13 MS. E. JOHNSTON: I just wanted
14 to, if I could, tie together what Dolly was talking about and
15 what Ralph referred to. Although in this group we have talked
16 and taken very seriously that the protection of Native lands is
17 important, and that there is a tremendous desire for the communal
18 aspect, in addition, there is the desire that Dolly has referred
19 to. In our region it is a -- it's not only a minority, but it's
20 much smaller than the thirty-six percent, but there is truly
21 already just as Ralph described, the tension between "I want my
22 land" and by that I mean, what "I myself own individually". And
23 unlike what Dolly described as where the board actually wrestled
24 clearly with the tension between that, and the communal aspect,
25 some of the shareholders who want this are not wrestling with the
tension there at all. It is as though there is no tension, and
of course there is. Because, once it does pass individual
ownership you have a totally different ball game. And also Dolly
referred to the fact that at least this meant that the



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1 corporation did accomplish something for the shareholders, and
2 again, I'll go back to the Bristol Bay Region. But, some of the
3 villages in our region will not succeed in economic terms, and
4 they are -- if you're like in the posture of, okay this is
5 something we can do, and this is something we can achieve. And,
6 of course, that again exacerbates that tension between the
7 desirability of the lands that go on, and are protected, and the
8 individual ownership. It's a little -- I'm very happy you
brought that out because I think it's already there, a little
more than we had sort of admitted in the first two days.

9 MR. PRICE: Along these lines,
10 I'd like to ask this question. Let's assume that you could take
11 all the subsurface properties of a corporation, or of all the
12 corporations -- of a corporation and divide it into something
13 which this may not be the correct name -- unit trust in which
14 there could be individual holdings. So that basically you took
15 subsurface and allotted it to individuals, so that there would be
16 a new corporation called Bristol Bay Subsurface Trust and every
17 shareholder got a hundred shares of stock in it, and could do
18 whatever they wanted to with it. They could sell it or they
19 could keep it. Are there the same social, moral and other
20 concerns with respect to that as there would be with respect to
21 land?

22 MS. E. JOHNSTON: I think until
23 every village is comfortable with the strength or weakness of
24 14(f) -- * mean -- tell me Rose Marie Maher, you had tenure I
25 would think they would be very concerned with who owned and had
control of the subsurface.

MR. PRICE: Let's say subsurface
is not under village lands. That may not affect you very
seriously, but it does other corporations.

MS. E. JOHNSTON: Yeah, Bristol
Bay and Calista are two -- it's a moot point and that ...



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1 MR. GARBER: Well, no I really
2 can't say that. I just point out that there is a conflict here,
3 and I acknowledge that there are individual interests in
4 communal. The problem is as finding a balance, rather than just
5 saying pick one or the other. See, I am an attorney, I am a
6 corporate attorney, I admire the administrative capabilities of a
7 corporation. But, then again, I realize the destructiveness in
8 one part that you are talking about right now, this was -- and I
9 wanted to address the idea those lands that aren't on village
10 [land]. Well, there is only half of the regional corporations
11 that are in that posture. Most of the others, not just Bristol
12 Bay and Calista, don't have separate estates, and I guess maybe
13 that might be alleviated at some point if there [was] an ability
14 to switch estates at some time if the village corporations get in
15 the position -- the bargaining position and the regions have the
16 knowledge that they have the faith to be able to do that. So
17 that might be able to be done. But, otherwise, where in my
18 corporation -- you know you got a situation where a region is
19 telling you that they can do what they want with the subsurface.

15 MR. PRICE: I was asking in -- to
16 determine what it is that is deemed to be important in terms of
17 the communities' control of resources and its development of
18 resources. Is that a land-related concern, is it a development
19 concern, if you could I'm prepared for the purpose of my
20 hypothetical to take out the subsurface under village land
21 because it just allows me to ask the question and in a sharper
22 way? And, that is, are there concerns non-legal, but moral,
23 Native value oriented, in separating out subsurface assets and
24 having those be allotted, as it were, where there is no conflict
25 with village corporations, etc. I mean where there is no
conflict with subsistence.

24 MR. GARBER: That's a
25 hypothetical, that's hard to imagine I mean.



1 MR. PRICE: Well, it isn't. Why
2 is it hard to imagine?

3 MR. GARBER: I guess what you are
4 talking about, is there any part of the psyche -- Rosita you
5 might want to talk about this also, that says that we could split
6 between development and the other side.

7 MR. PRICE: Let's say that
8 Bristol Bay owns -- has made a lot of money in real estate in
9 Anchorage -- let's make it developed lands in urban areas of the
10 State, and if you value the assets of the corporation, 20% of the
11 value existed in these developed opportunities. Should the
12 region or the village be able to separate that out and, I think
13 Glenn mentioned this earlier, into a separate corporation which
14 is allotted. I would say that the stock in the corporation is
15 unrestricted and would anybody have any qualms about that. Is
16 there something to worry about in an instance in which you take
17 assets of the corporation that have no subsistence related value
18 or -- land related value and spend them out. You could have
19 objections on the grounds this is the economic heart of the
20 region or the village or whatever, but.

21 MR. STRONG: Whether the communal
22 instinct goes over to pure economic concerns -- I don't know -- I
23 mean that's going to have to be answered in each area -- in the
24 area that you and I are more familiar with. The number of
25 at-large shareholders kind of tends to push the answer into the
area of yes, that they are willing to go ahead now, allot them
individually. I don't think that a -- even a community smaller
than the one I come from is adamantly opposed to economic
development. I mean, that's one of the major purposes of the
Act. I mean, yes, there was a concern that we wanted to get our
land, but there was just as much comment in the legislative
history that said we want to get jobs because our people are poor
and nothing is going on, just like Chris said. I think that



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1 you're gonna have a tougher row to hoe in areas where there are
2 stronger interests to one side to go ahead and continue the
3 communal economic aspect also. But, I don't know, there's that
4 possibility that it -- we have a way of looking at it within the
5 regions to see who is at large, who is a village shareholder, to
6 see who has that little more at stake. But, other than that I
7 can't talk for anyone.

8 MS. MAHER: Yes, our region
9 selected a lot of land away from the villages, for purposes of
10 resources and I think what you are suggesting would be
11 unacceptable because the main reason the selections were made was
12 for the resources to provide jobs for the shareholders and it's
13 all related to the shareholders. Also, all the regional
14 corporation shareholders that live in the villages are both
15 shareholders of the village and the region, and I think it would
16 be unwise to separate that out. And, even if the land was away
17 from the village. Cause if you are on a regional corporation
18 level, you are still dealing with the same shareholders. The
19 main reason was for economics for the villages and the region.
20 The shareholders needed jobs, we have a project up in the Eagle
21 country, up there that spent a lot of money on because we felt it
22 would provide shareholders with jobs, so I think it's related.

(NOVEMBER 16, 1985)

(OVERLAP TAPE, SIDE A)

19 MS. GARZA: What Rose said is
20 true also in Southeast, several of the village corporations
21 selected land out of their immediate area and a majority of the
22 land has been selected around Prince of Wales, and that was
23 because of the value of the...

(NOVEMBER 16, 1985)

(TAPE 9, SIDE B)

24 MS. GARZA: (Continued)...timber,
25 but I think the Southeast village corporations are all in a



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1 similar situation where they have a limited amount of land unlike
2 other village corporations. And, the major perception of that
3 land is economic development, and whether or not any of the
4 village corporations would be willing to put that land in a land
5 bank, time will tell. But, if we are looking at economic
6 development and what he had stated earlier that the Land Bank
7 would be for land which would not go -- which would have no
8 economic value than there is no land in Southeast that would go
9 in the Land Bank. But, I think what the village corporations are
10 going to have to do is decide - divide it up as Bart said. Okay,
11 what land will be used for private interest, say future land
12 distributions which Shaan Seet is considering, what land of our
13 23,000 acres will be for commercial development, and what land
14 will be for timber development, and then what land will be for
15 communal use only. But, I think the village corporations are
16 going to have to decide that on their own.

17 MS. WORL: I am going to try to
18 give a stab answering Monroe's question over here. And, I first
19 of all -- he would have to deal with a couple of premises and
20 sometimes I think may be misconceptions about Native societies,
21 and one is that -- there is this assumption that there wasn't
22 individual property. I -- you know -- from my knowledge,
23 individual property, individual rights has always been a
24 characteristic of Native society, but we tend to focus only on
25 the communal aspect. So -- and then the other issue is that
there are always -- I mean Native societies were -- never
egalitarian societies, and so there were always rich people and
always poor people whether they were called chiefs of malex or
what. And, so there was never -- you know -- an equal
distribution of resources or land among Native people. But to
protect that communal aspect, that common use is -- I mean you --
requires that you have land, that you do have land that you
utilize in common and utilization of the land creates social



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1 encumbrances from the user. It creates a bond and obligation so
2 someone else ... You know where there is a redistribution of the
3 resource, or a service -- you know rendered by the one who the
4 recipient of a recourse. So, you have to have some common use of
5 land. And, I think your question is very interesting. It might
6 be a way to -- you know to satisfy both individual rights as well
7 as compact communal rights.

8 Oh, excuse me, the other issue that I wanted to bring
9 out, though, is that I think that if communities have -- or do
10 very well, or they are attempting to do very well to try to
11 manage those -- the need to protect subsistence, but also the
12 very need to have economic development, and in that case whether
13 it's their lands or other peoples lands, what I think the focus
14 is being -- has been on environmental protection or things like
15 that.

16 MR. STRONG: Thank you, I am
17 going to address Monroe's issue that he rose as well.

18 The allocating or giving subsurface rights to
19 individuals, breaking up the subsurface rights and giving it to
20 individuals, he asked if there was going to be a concern, and my
21 immediate reaction was sort of a blank. I didn't know what kind
22 of concern I'd have, but when I think of it in terms of going
23 back to my village, some of the shareholders of the corporation
24 have been given subsurface rights to lands right near the
25 village, but they live down in Los Angeles or they live in
Seattle, or where ever. They've been given a fee simple title,
although to a lesser estate than full title, but what's to say
that they won't sell that to somebody else, to a company that
wants to -- has discovered that there was some iron ore that's
real important or some other mineral that's real important to a
company and to the company's resource development. They go ahead
and buy that land -- they have a right to go ahead and develop
that resource, but I'm living in Klukwan. I don't want that -- I



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1 don't necessarily want my environment destroyed for its
2 subsistence purposes, or just for the lifestyle for whatever
3 reason, I don't want it developed. I can't -- what rights do I
4 have to stop that person or that company from developing that
5 subsurface estate. I mean he does have some right that's en-
6 forceable in court to go ahead and develop it, I can't absolutely
7 prohibit it, I could perhaps put some restrictions on it through
8 my tribal government, or whatever local government I'm using.
9 But it does present some real difficulties in terms of how do you
10 maintain the control over the development of it them. So, that's
11 -- you know -- when I first -- thing that came to my mind on it.

12 MR. GARBBER: Monroe, it kind of
13 points out the issue of, yes you could, even in the situation
14 where land had -- that the use was allocated. There is [a]
15 personality even in tribes that you can have exclusive use
16 rights and you know that. The point that Tony points out, it
17 kind of hooks in with destiny, self-determination, this issue
18 that, "why don't you let the Natives decide themselves what they
19 want to do." And, if it's the choice of all those people who are
20 there, and they make that conscious choice to do it, well that's
21 fine. The problem is that the kind of groups that we have that
22 are set up, and you know very well what the one[s are] that we
23 are familiar with, I have regional shareholders who are not from
24 my area. We have an arbitrary, as a matter of fact, those who
25 are from my area who actually are traditionally there are in the
minority. The people who are in my area are from other places.
Now that's fine, and that only affects us in the one large urban
area. But, if you allow stock alienation that will occur in
other areas only much more adversely where the absentee landlord
is -- you know that affects the other people -- you know -- it
may be the larger corporation or individual shareholders or
limited partnerships elsewhere. So, that's where you get into



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1 the problem where it's a conscious choice, but that's where you
2 get the true conflict.

3 MS. MAHER: I -- it just rang a
4 bell what you said, why not let the Natives decide for
5 themselves. I come from a village that has 206 shareholders,
6 they are also shareholders of a regional corporation. When we
7 first started [in] 1973, there was no word to describe
8 corporation. How do you explain to people that do not speak
9 English very well what shares and corporation and a piece of
10 paper means, and I think -- you -- let the Natives decide for
11 themselves. A lot of the older people do not -- still do not
12 understand what that piece of paper means, can they make that
13 decision?

14 MR. HAGEMAN: Just, -- just to
15 speak to that issue.

16 I think that sometimes we look at -- at and we've
17 reviewed some options yesterday, or some -- some ideas, some
18 alternative structural forms to the for-profit corporation as a
19 way of protecting the land. We looked at cooperatives, and
20 various forms of non-profit organizations. I think that in some
21 ways, what -- Rosemary what you are raising is an issue that --
22 that -- it may be an obvious one, but I will raise it anyway.
23 Not only are we talking about structural forms or ways to protect
24 the land, I think part and parcel of that is not only a concern
25 for -- will those forms be congruent with values. The values of
the people for which that structure is supposed to serve. But, I
think we are also raising the issue of the capacity, and I don't
mean just in terms of skills, of Native managers, but the
capacity of any management group to make those structural forms
do what it is that we want them to do. When we look at Land Bank
or David Case's nightmare, when we look at state-chartered
non-profits or cooperatives, we look at adjustments to present
for-profit corporations, or the existing for-profit corporations.



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1 I think those structures demand varying kind of, varying levels
2 of management skills, sophisticated approaches and I'm really
3 concerned that we may find a structural form that may be least on
4 the -- at the outset appear to serve as well in terms of
5 protecting the land, but we don't know how to make it work and we
6 don't have the skills to make it work, and so we are going -- if
7 we are going to fail and it will appear that it's the Native
8 people who are failing. When it is not Native people who are
9 failing, it's the structural form that we have adopted.

10 MR. BERGER: Well, maybe we could
11 -- we have talked about the possibility of assignment of
12 individual parcels of land to shareholders, and Dolly told us
13 that had been done by her corporation. I don't think it's been
14 done by many others. Perhaps, one reason is that the possibility
15 for doing so is limited in many other places, but -- no -- I
16 would be interested in knowing what the

17 INTERRUPTION: I grew up there
18 and part of the plan, and there is two or three other places
19 where the homesite provisions have been attempted to be
20 implemented. There are technical difficulties with identifying
21 the land and equalizing value that -- and Bristol Bay has done
22 it, I think in part.

23 GARBER/JOHNSTON INTERCHANGE: Two
24 of the villages in the region have done a homesite program. Two
25 in Bristol Bay, that's -- it's functional though. Those are the
one and a half acre homesite lots are they? What about the
Seldovia -- that's not under -- I'm not certain the ANILCA ones
are taking advantage of because of the tax consequences. Well,
what about aside from ANILCA, haven't there been other
subdivisions -- distributions -- I think that there have been of
monies and perhaps lands, but there have been part liquidations
to provide for distributions of money that I am aware of, that I



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1 have heard of through the grapevine. But, it might be useful for
2 the commission to get a survey of that.

3 MS. GARZA: One thing real quick.
4 One of the village corporations in Southeast brought it up to
5 their shareholders and they voted against it because they were
6 afraid that if it went to fee simple title, that it would be
7 bought out because the area has a lot of -- recreational
8 development potential. But,

9 MR. BERGER: What village was
10 that?

11 MS. GARZA: Yakutat. And the
12 corporation itself was shocked that the shareholders had voted it
13 down.

14 MR. BERGER: The shareholders
15 were concerned that the one and a half acre homesites might be --

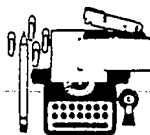
16 MS. GARZA: Sold.

17 MR. BERGER: To the Native sort
18 of thing.

19 MS. GARZA: Yes. There is a lot
20 of recreational development potential there, and that's what they
21 are afraid of is non-Natives coming in and harvesting the
22 resources that they've used subsistently. But our corporation is
23 somewhat sorry that we did do an ANILCA distribution, and there
24 are definite advantages to just do a partial liquidation.

25 MR. BERGER: Well, what are the
advantages?

MS. GARZA: It's to the
shareholder themselves under the ANILCA distribution. The lots
are valued at, I think at like fifty bucks. And so if you sell
your lot for the appraised value is about fifteen thousand, I
think. If you sell your lot for fifteen thousand which is
probably a minimum price, you have to pay the gains -- capital
gains income tax, which is substantial. If we had done a partial



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1 liquidation the lots would have been valued at the appraised
2 value of fifteen thousand. And, if the shareholder sold the lot,
3 then he would have to pay capital gains on very little, and that
4 was something that we had not thought about before and we had
5 considered going back to the shareholders and saying, "well do
6 you want to change it to just a partial liquidation", but it had
7 taken so long to get to that point that we decided not to.

8 MR. BERGER: Well, just around
9 the table here is the -- you say there's two in Bristol Bay that
10 have distributed homesite lots under ANILCA two villages. Are
11 there any others in Southeast beside Craig. No. Marlene says
12 no.

13 MR. CASE: I know of one in Cook
14 Inlet that has done a partial liquidation of -- based on --

15 MR. BERGER: Which is that?

16 DAVID CASE: Salamatoff.

17 MR. BERGER: And, what is the
18 size of the ...

19 MR. CASE: It varies, they --
20 bases the -- they were all appraised and so the -- the -- amount
21 of land is given a dollar value, and everybody gets a different
22 amount of land, but all with an equal value.

23 MR. SHANKS: Seldovia had a
24 different kind of program., they used long-term leases. Ninilchik
25 had a distribution -- Fort Yukon has had -- homesite program, and
Bethel is ready to get into one. I think Dillingham, didn't
Dillingham have some kind of program out there.

INTERRUPTION: Don Nielsen is
shaking his head no.

MR. SHANKS: Okay, I thought they
had. But there has been several villages that have either
already undertaken a program like this, or are actively pursuing
a program like this. I think it's at-leastways the village land



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1 manager I talked to, it is a real hot topic every time there is a
2 shareholder meeting, and the pressure is getting greater and
3 greater on not only village but regional corporations to make a
4 distribution of land. I know our corporation has been looking at
5 it, and again because of the unique status of our corporation, we
6 end up with about a two and one-half million dollar bill to get
7 over the zoning and platting requirements of the Municipality of
8 Anchorage, and then we look forward to having to have probably
9 two or three million dollars in the bank in order to operate our
10 first rights of refusal on any of the lots that do come up for
11 sale. But there are a lot of villages that are looking into
12 this, it is a very active program.

13 MR. GARBER: You should look at
14 the underlying reason why the homesite program had to be inactive
15 in the first place, also to get an appreciation of the idea.
16 Under ANCSA there are 14(c)(1) reconveyances to people who had
17 houses in places there already. So, I mean, you had conveyances
18 already mandated by ANCSA. The problem was, is that the younger
19 people or some who weren't in the village at the time who had an
20 established residence or fish camp or something, but who were
21 shareholders couldn't get land out from the corporation in any
22 way other than through a partial liquidation or through some
23 other means that had to have overall shareholder approval. And,
24 even if you did that, there was to the tax consequences, so that
25 -- the lands under ANCSA through 14(c)(1) have -- are deemed
conveyed because they're authorized by ANCSA, these other ones
wouldn't be. So, that's part of what the homesite was to get to
be able to authorize the corporations to get lands out to people
who hadn't established residences, but would. And, to have some
of these protections.

MR. BERGER: Can I ask a question
about that.



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1 In the Craig thing, they distributed them to every
2 shareholder because presumably under corporate law, you can't
3 discriminate and give some people lots and refuse to give other
4 people lots and they had to do it by lotteries so that everybody
5 was treated equally. How do you reconcile that with the business
6 of some people already have lots under 14(c). Others want lots
7 so the corporation provides them with lots under ANILCA.
8 Immersed as we were yesterday in corporate law, I think I
9 remembered enough to ask this question.

10 MR. GARBER: Well, Dan Fessler
11 can probably talk to it more generally, but there's a requirement
12 for pro rata distributions. I mean a shareholder has, when their
13 distributions made a general law of corporate laws that you have
14 the right to pro rata distribution of what is made unless the
15 shareholders agree otherwise. I mean, but Dan can you specify on
16 that.

17 MR. FESSLER: This would be yet
18 another example of the fact that, although we have mandated under
19 ANCSA that the corporations be created under Alaska law, the
20 initial requirement that corporations engage in certain
21 distributions was part of the federal law and the corporations
22 honored that, they honored that obligation. It would
23 theoretically offend the common law concept that is enshrined in
24 the bare bones statutory law that Alaska has on corporations. It
25 is clear that under Alaska concepts of corporate obligation that
a corporation cannot engage in discriminatory distribution of its
assets. In this instance, I don't know whether there has ever
been any challenge to the notion that the corporation was
engaging under distributions mandated by federal law, but they
did not carry out similar distributions that would be
theoretically within its discretion. Or indeed if the
corporation had obliged the intent of federal law by making a



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1 distribution of land to a certain shareholder because that was
2 the requirement of ANCSA.

3 Later on we come along and make distributions of lands
4 and partial liquidation, or treating them in some way as
5 distributions by way of dividends, and then try and exclude from
6 that distribution to persons who had previously received land.
7 Whether or not that could be challenged on the ground that that
8 will be discriminatory, it's simply about the fourth specific
9 example that we've had that ANCSA corporations at their birth and
10 under the mandate of federal legislation have been forced to
11 behave in a manner which, were they not ANCSA corporations, would
12 be highly dubious under just general state law corporate
13 concepts.

14 MR. BERGER: Yes, Elizabeth.

15 MS. E. JOHNSTON: One of the
16 things is I think is we think conceptually about the 14(c)
17 required distributions. Those were really not distributions in a
18 sense of corporate assets. Under ANCSA, it was decided that
19 people who were there at a certain magic date be they
20 shareholders or non-shareholders, would be entitled to Native or
21 or Native, yes, would be entitled to certain types of land for
22 certain types of purposes. Primary place of residence is the one
23 that springs to mind, but I know there are others listed under
24 the Act. So, and these were not really --these if you like were
25 lands owned, encumbered by Congress with other people's
ownership. The corporation became a vehicle or conduit. As
opposed to the homesite situation, where you are dealing with
lands that were corporate lands and assets and fall under the
concepts that Dan was referring to as the question about per
share or per capital -- I should say per share type distributions
that are tended under corporate law to be equal and Dolly's group
had handled that by the lottery systems, so that you did have
valuation questions and that sort of thing.



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1 MR. BERGER: Rosita.

2 MS. WORL. In the North Slope
3 there is the community up there that -- well -- there are a
4 number of the communities and corporations that transferred some
5 of their land within the village to the North Slope Borough, and
6 the North Slope Borough then in turn built public housing on
7 corporation lands. And, the corporations had to turn their land
8 over to the Borough in order for them to utilize HUD money to
9 build the house. And so, then those houses then transferred to
10 both Native and non-Native. One of the corporations itself also
11 made a head -- but -- had a lottery, and the only individuals,
12 the only shareholders who could participate were young - young
13 adults with children.

14 MR. BERGER: Well, maybe I could
15 summarize what I think we have learned in this discussion. That
16 is, Rosita made the point that Native people traditionally had
17 notions of private property to put it in a rough way, as communal
18 property, and it may be that the provisions of ANILCA relating to
19 homesites are a way of reflecting that in the modern world -- we
20 are still left seems to me -- in all my travels the only -- I
21 think the only place I've been to we held a hearing at Klawock
22 and some people came from Craig and told us about the homesite
23 program. But, I can't think of any other village where they told
24 us they had distributed the lots, that's why I thought it was not
25 commonplace. But it may be the 1985 study has actually
documented the extent to which this has been done. And -- but it
is certainly something that's worth pinning down.

21 Roland, you didn't have anything to add to that did
22 you?

23 MR. SHANKS: No, I don't have any
24 firm numbers on how many. I know that, like I say, from
25 attending more meetings than I'd care to admit, it's always a hot
topic. It is a topic of discussion that comes up almost



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1 immediately when you get more than two land managers together in
2 one room. "Have you done it, if so, how'd you do it, are you
3 going to do it, if so, how are you gonna do it." Part of the
4 topics.

5 MR. BERGER: Maybe that's a point
6 at which to change the subject. Because it still leaves us with
7 the question, of the broad question of Native lands that were
8 traditionally held or thought of as communal land. We were
9 talking about non-profits, cooperatives and IRA's and -- perhaps
10 we could return to those three because it seems to me that --
11 that is what arises out of the AFN -- Resolutions Number 7 and 8
12 which we had reached yesterday, and -- perhaps we could continue
13 with that.

14 My recollection is that the Land Bank while protecting
15 Native land from taxation as well as judgments and adverse
16 possession, didn't protect the land from corporate takeover or
17 corporate failure. It seems to me that after Dan Fessler talked
18 about non-profits and co-ops, it was clear that if you
19 transferred land to a non-profit or co-op, you at least were
20 protected from corporate failure if your business risk-taking
21 activities were in the original entity and not in the non-profit
22 at a co-op. And you were protected against corporate takeover and
23 corporate failure. You were not protected against property
24 taxation, as I understand it. Perhaps that's not an accurate
25 summary of what was said and I think we should go back into that
again.

Tony, you wanted to start the discussion.

MR. STRONG: I -- I did want to
add one more twist to this discussion about these alternative
structural forms that we were talking about yesterday and that is
the problem that is a perceived problem if nothing else, that's
raised by people in -- I've seen it all over the state. And,
that, the issue of when you have a limited number of people who



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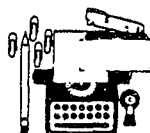
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1 are being elected to these different positions and limited number
2 of skills in the given community or within the given region.
3 Oftentimes you have a situation where there is a person who sits
4 on the village corporation board of directors or acts as an
5 officer of the village corporation who also sits on the board of
6 directors for the regional corporation. And that raises a
7 question among a lot of the shareholders -- that there's a
8 conflict of interest. That conflict of interest between the
9 village corporation and the regional corporation, and how do you
10 resolve that conflict. And when we are talking about setting up
11 other forms of land holdings, if we are going to talk about
12 holding land in the cooperative or in a non-profit. How do you
13 resolve the potentials for conflicts of interests between the
14 land holder and the developing company when they're making
15 decisions, and I think that's an important twist to the
16 discussion.

17 MR. BERGER: Well, could I see if
18 Dan Fessler or Elizabeth Johnston want to add anything to what
19 they said yesterday about non-profits and cooperatives.

20 The problem that we face, it seems to me at the very
21 outset of these three days was people in the villages want to
22 protect their land to pass it on from one generation to another
23 in perpetuity. We talked about the corporate structure, can it
24 be done in that way; we then moved on to look at the possibility
25 of transferring land to these other entities, and I suggested, I
took the liberty of suggesting that there were three concerns
that ought to be paramount. [One] protection from loss through
corporate failure, [two] protection from loss through corporate
takeover, and [three] protection from loss through taxation. And
no one has argued strenuously with those three criteria.

MR. PRICE: Which I raised
earlier, distributional patterns. That is to say flexibility in
distribution of benefits. A non-profit has a different range of



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1 obligations with respect to benefit distribution, but I'd ask --
2 when could you -- will you also ask Dan to revisit the taxation
3 of lands held by non-profits. I wasn't clear whether it was his
4 view that they are non-taxable.

5 MR. BERGER: Right, revisit
6 taxation of land held by non-profits, Dan would you do that.

7 MR. FESSLER: It would be my
8 assessment, subject to corrections by people who would know
9 something about the peculiarities of Alaska law, that the general
10 concept is that if land is held by a non-profit, and the
11 non-profit itself does not qualify for exemption from taxation
12 predicated upon some other attribute of the entity, such as it's
13 a religious entity, or it is organized for charitable or
14 eleemosynary purpose. That -- for what would be the types of
15 things that we are talking about the land holdings of non-profit
16 entities are fully exposed to taxation.

17 PRICE/FESSLER EXCHANGE: The
18 lands of Knik or Eklutna are held for the benefit of a set of
19 beneficiaries, how broad does this set of beneficiaries have to
20 be before it -- becomes eleemosynary.

21 MR. BERGER: Let's define
22 eleemosynary.

23 MR. FESSLER: Eleemosynary is one
24 of those lovely terms, but you always when you use it someone
25 will ask you to spell it. The concept of eleemosynary is -- goes
back to the corporal works of mercy -- in scripture of the basic
purpose of the -- of the corporate entity was to minister to the
sock, okay -- that was an eleemosynary. If it serves as a
hospice for the dying, that is an eleemosynary purpose. You need
to get the impression that one of the -- you don't envision
Native corporations turning themselves into eleemosynary
institutions. If that's a -- well, there may be some
disagreement here, but I mean the basic notion first of all of



1 taxation of non-profit entities is -- has come under a great deal
2 of scrutiny. I don't know how many of you may have seen the
3 television program done on 60 Minutes some four years ago called
4 "Dial In For Money", which indicated how -- how you could get to
5 the American public by saying that something was a non-profit
6 entity. People immediately acted with a sort of disarmed sense
7 of suspicion. They thought, "well, gee this must be a soft,
8 cuddly type corporation", as opposed to one of those ratty
9 corporations that's in the marketplace looking for profit. And a
10 number of people have done very well, while giving the impression
11 somehow that they might be trying to go good in the world. And,
12 the notion of what is appropriate organized as a non-profit
13 entity is, in itself, coming under great scrutiny. Now, the
14 Internal Revenue Service has detailed regulations to ascertain
15 whether or not an entity can, by simply calling itself a
16 non-profit entity, achieve non-profit non-taxable status or can
17 achieve the status of deductions for people who give money to it.
18 States are increasingly becoming sophisticated in distinguishing
19 between two basic types of non-profit corporations but are called
20 mutual benefits non-profits that are organized for the benefit of
21 their members, and public benefits non-profits which have some
22 public function. Normally charitable entities are conceptualized
23 as belonging as public benefit non-profits. And, then states
24 make determinations as to whether they will extend tax
25 concessions to them, predicated upon the function they're serving
in society. Mutual benefit, non-profits in no state which has
made the sophisticated judgments are extended any tax benefits at
all.

MR. PRICE: Okay, I guess what I
wanted to try to tie with what the Judge has talked about
earlier, the communal services or the communal benefits or some
of the communal functions.



1 MR. FESSLER: Communal benefits
2 in this context are meant the entire public at large.

3 MR. PRICE: Well, all right --
4 but let's say that you are in Craig or a village, which may have
5 non-Native as well as Native -- members, one question one could
6 ask is, could you have a non-profit designed to benefit all
Native people living in Nome?

7 MR. FESSLER: Yes.

8 MR. PRICE: And, would it be
9 non-taxable -- could it be charitable -- would the fact that it
10 only benefits Native people in Nome, preclude from receiving
11 non-taxable treatment under state law?

12 MR. FESSLER: That's a public
13 policy which I am not prepared to answer. I don't know what the
14 attitude of the Alaska Department of Commerce would be.

15 MR. PRICE: But is it arguable?

16 MR. BERGER: Well, leaving aside
17 the attitude at law there is no reason why they would not be
18 taxed, is that your point.

19 MR. FESSLER: No reason why they
20 would not be taxed, and obviously government is increasingly
21 taking the presumption that it bends every doubtful issue of
22 whether you are susceptible to taxation or not in favor of saying
23 that you are susceptible to taxation.

24 MR. BERGER: But, but I could
25 narrow this just slightly.

MR. FESSLER: What I am trying to
say to you is that there is no automatic tax exemption garnered
either by state or federal law by calling yourself a non-profit
entity.

MR. BERGER: But if you are not
making money, if you don't have something -- if you don't earn



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1 something that is called a profit you are not liable to income
2 tax.

3 MR. FESSLER: You are not liable
4 for income tax, but you can go broke evading income taxes by not
5 having any money.

6 MR. BERGER: But, all right, so
7 we could confine ourselves to property tax.

8 MR. FESSLER: Property taxes are
9 a federal issue, and therefore there is no uniformity in American
10 and State law.

11 MR. PRICE: I guess the question
12 would be -- and I -- this is a statement -- if Cook Inlet Native
13 Association which is the non-profit [arm] of the Cook Inlet area,
14 it serves non-Cook Inlet shareholders as well as Cook Inlet
15 shareholders, and a wide variety of social services own land in
16 the Cook Inlet -- in Cook Inlet or anywhere else would that be
17 taxable, that's the question I was asking.

18 MR. FESSLER: And, I would not be
19 competent to answer that question.

20 MR. PRICE: Maybe David can
21 answer that.

22 MR. BERGER: Dolly Garza and then
23 David Case.

24 MS. GARZA: It seems like that
25 would be -- it would be decided as each corporation chose to do
that. And, in corporations say in Nome or Kotzebue where you
know -- in villages 90 percent of the public of the community is
Native, then it may be viewed as a public service and be
non-taxable. But, in a village -- say with Craig where only 16
percent of the community is Natives, even though that non-profit
may [be] applied for non-taxable status, the non-Native in the
area may protest to the State and the non-Profit in Craig may not
be able to obtain that status.



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1 MR. BERGER: David Case.

2 MR. CASE: I too am not competent
3 to answer this question, but I do have some knowledge of
4 non-profit taxation under State law. I guess probably the
5 question as near as I can tell hasn't fully been decided. But,
6 there are organizations like Cook Inlet Native Association that
7 do public purpose kinds of activities in other cities and they
8 are arguing now that they are not subject to property tax of that
9 Municipality under State law. And, as far as I can tell they
10 have a good argument. And, of course, the distinction of which I
11 am aware is that has to do with Providence Hospital. And, I
12 don't think it went off on the eleemosynary grounds, but
13 Providence Hospital is not taxable. It is not subject to
14 property tax.

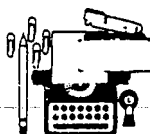
15 MR. FESSLER: It also happens to
16 be held by the Roman Catholic Church.

17 MR. CASE: Yeah, but, the office
18 building that it owns next to Providence Hospital.

19 MR. FESSLER: You have the
20 Archbishop who is your mentor in life ...

21 MR. CASE: Does that mean that
22 the office building next to the hospital that is taxable,
23 shouldn't be taxable?

24 MR. FESSLER: When the
25 legislature was looking into the question of revising the
not-for-profit corporation law in Alaska last year, people were
startled to find that the most common not-for-profit
organizations in this state are tied either overtly or rather
tangentially to religious purposes. And there is no question as
to why that's being done. You create the presumption of
favorable tax treatment under the federal government by saying
that you can't define a religion, and you create the more than
thin edge of the wedge for favorable treatment under State law,



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1 because it is quickly found out that the first time the State
2 challenges one of these non-profits, all of the others are
3 brought in to protect you on the ground that if anything with a
4 religious overtone is taxed then God knows what next. They will
be taxing the Synagogues and cathedrals, I mean that's been --

5 MR. BERGER: Let Davis just carry
6 on for a minute.

7 MR. CASE: The office building
8 next to the hospital which is on the hospital grounds and owned
by the Sisters of Providence is taxable.

9 MR. FESSLER: I am certain that
10 it is because, again, certain institutions, large institutions
11 such as the Archdiocese of Anchorage have for years carefully
12 conceded that they wanted to distinguish between those lands and
13 those assets which were held primarily for religious use and
14 those which were not, and they have allowed without protest the
15 imposition of state tax on things which they held were not being
16 used for religious purposes. But, the hospital itself is
organized as a non-profit entity, and it is you know, not about
to lay down its religious affiliation because that's a very
important thing for it.

17 MR. CASE: I mean, the point -- I
18 don't want to labor this -- but the hospital as I understand it,
19 is not taxable because if its activity but the office building
20 which is a distinction perhaps only the Alaska Supreme Court can
understand, but the office building next to it used for doctors
offices is taxable, is subject to city property tax.

21 MR. FESSLER: Yes, and we found
22 that last year that there were individuals who sincerely held the
23 belief that if a church wanted to open a chain of McDonalds'
24 franchises that, because any of the proceeds used from the chain
25 of McDonald's franchises would go to the glorification of God's
work as well as the corruption of the digestive systems of



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1 people, and therefore, speed them on their way to God, that these
2 dual purposes meant that they would be free of taxation.

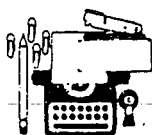
3 MR. BERGER: Caleb Pungowiyi who
4 is president of a non-profit, I am waiting for you to clear up
5 this question.

6 MR. PUNGOWIYI: Okay, I'm going
7 to speak on it from the point about the City of Nome, which has
8 taken some churches to heart concerning this law that the State
9 of Alaska has concerning -- exclusively for charitable,
10 religious, and education and hospital use. The City has taken
11 the position that the word exclusive strictly means that for that
12 specific purpose. If it's going to be for religious purposes,
13 then they should be exclusively used for religious purposes. If
14 it's not for religious purposes, then it should be taxable.
15 That's the way the City of Nome has interpreted the law. It's
16 currently before the Supreme Court of Alaska and the Supreme
17 Court has not yet ruled on that.

18 And, it applies to other non-profit organizations where
19 the land is owned by the non-profits is subject to city tax
20 unless it is used for either one of those. Either hospital use
21 or for charitable use -- not just simply because they are
22 non-profit does not mean that it is a non-taxable asset.

23 MR. BERGER: You are head of
24 Kawerak which is a non-profit. Does Kawerak own any real
25 property?

MR. PUNGOWIYI: Yes, we own some
real property in the City of Nome. And, the way we have gotten,
we have paid our taxes for the first year, but for the next year
we are setting aside the land for educational purposes, and that
the building that we built on that land will be for educational
purposes. And, therefore, exempted from property tax.



1 MR. BERGER: And it depends not
2 on the fact that it is a non-profit that owns the land, it's the
3 purpose for which the land is used.

4 MR. FESSLER: And that is as it
5 ought to be. I mean, in many jurisdictions where they don't want
6 to try and fight these battles, the way you do it is you say that
7 if you can qualify under the federal law, so that contributions
8 are tax exempt, then as far as we are concerned that's the
9 operative determination, and we will exempt you from local real
10 estate taxation. In other words, it's very common in the United
11 States for municipal governments that have home rule, and
12 therefore, their own taxing power to abrogate this decision.
13 Because it is a hot political question, it is quintessentially a
14 political question.

15 MR. BERGER: Well, I wonder if we
16 could -- Marlene Johnson.

17 MS. M. JOHNSON: The City of
18 Ketchikan took Ketchikan Indian Corporation to court over a piece
19 of land that the Ketchikan Indian Corporation felt they were not
20 taxable on, and the City of Ketchikan won that.

21 MR. BERGER: I wonder if we could
22 just do this now, I'd like to ask Ralph Johnson to talk about
23 IRA's. There's a couple of reasons for that, they fit not only
24 into this triumvirate of, or these four or five possibilities we
25 have, but I've found in the villages that people keep talking
about IRA's, and some of you here take dim view of IRA's, so I
think this would be a good opportunity to kick them around, and
see how they take it. Just before we do this --.

MR. FESSLER: I am most anxious
to have the -- the contribution I would like to make after
Ralph's. But, I would like at some point if it becomes
convenient to recur to the topic of cooperatives, because I felt
that yesterday, we went over them relatively rapidly. They are



1 matters of potentially significant interest, and there is also an
2 opportunity of a political window right now, in that the
3 cooperative statute is under review by the body which the
4 legislature charges with looking at them. And, so if there is a
5 constituency of potential users of the statute, now is an
6 appropriate time to alert everybody to that fact, so that you can
7 be in on the ground floor of taking a look at the cooperative
8 statute understanding what existing law looks like, what its
9 perceived strengths and weaknesses are and what the opportunities
10 are to change it.

11 MR. BERGER: Excuse me Dan, I
12 think we should do that now because cooperatives seem to me to
13 follow logically from non-profits, and you're the expert on this,
14 if that's all right with you Ralph.

15 MR. R. JOHNSON: Sure.

16 MR. STRONG: Absolutely all
17 right, but still would like to have is this conflict of interest
18 thing ...

19 MR. FESSLER: And, so at some
20 point when you decide that that's germane, I think we should have
21 that conversation. But, yesterday, we talked about non-profits
22 and we saw that non-profits themselves are sort of a house
23 divided. There are two types of entities that are organized as
24 non-profits, they have certain attractive features because to a
25 greater extent than profit-seeking corporations, there is
historical experience with restricting entry by defining the
qualifications of members. There is also -- they are less
subject to takeover in the sense that some states (but
unfortunately not Alaska) provide by statute that non-profits can
only merge with or consolidate with other non-profit entities.
And, if that happened to be the reformed content of Alaska law,
then any candidate to take over the corporation would have to
also be a non-profit entity. And so, you can see that certain



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1 suitors in the marketplace are disqualified. The biggest problem
2 with non-profits is this, what Monroe eluded to, their essence is
3 that they cannot make distributions to members. So that there
4 cannot be "dividends" the way in which a member got a benefit out
5 of associating with a non-profit was receiving the services which
6 the non-profit provided and theoretically they would be provided
7 at a cost which would be less than if you had to buy it from a
8 profit-seeking corporation on the theory that the profit-seeking
9 corporation has as an element of its cost structure,...

(NOVEMBER 16, 1984)

(OVERLAP TAPE, SIDE A)

10 MR. FESSLER: (Continued)...the
11 service on its non-debt capital the dividends it's paying to all
12 those passive shareholders.

13 MR. BERGER: Yeah, Dan, you say
14 that a non-profit cannot distribute dividends it cannot, I take
15 it, distribute land either.

(NOVEMBER 16, 1984)

(TAPE 10, SIDE A)

16 MR. FESSLER: No, it cannot make
17 distributions in cash or in-kind. It can, however, make services
18 which would be below cost, and there are some questions that have
19 been raised about non-profits that then open the facilities which
20 they operate to non-members, charge those non-members a higher
21 amount than they make available to members and whether there were
22 problems with the statutory prohibition on non-profit
23 corporations "making a profit". It's an area that is under
24 reform, there is being circulated now a draft of the revision of
25 Alaska's non-profit law by the Alaska Code Division Commission.
I would urge you to get a hold of it, and look at it. It's got a
commentary that is hopefully designed to explain the law in
English, rather than just plain legislate to people so that they
can't see what's going on. The law became the subject of a major



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1 hearing in the State last year in which it was attacked with
2 vigor by religious corporations on the ground that they didn't
3 like the disclosure requirements that were put in the Act,
4 because for the first time, you had to make disclosure to members
5 and there was a greater disclosure obligation to State. So,
6 that's basically where non-profit laws are. One other way in
7 which non-profits have as a rule that differ from profit-seeking
8 entities, generally when you vote in a corporation that is
9 organized under the for-profit laws, then you vote at the
10 shareholder level. You vote not on the notion that one
11 shareholder gets one vote, it's weighted voting, and so the
12 shareholder who has the largest numbers of votes casts those
13 shares. A shareholder who has an insignificant number of shares
14 has a rather insignificant voice in what decisions are made. In
15 non-profit corporations, since they don't have shares, the idea
16 is one member, one vote, and that is a basic political quality of
17 the non-profit that you would want to be aware, and you would
18 want to look at.

14 MR FESSLER: Now what about
15 co-ops? I indicated yesterday that the law on cooperatives in
16 the State of Alaska is very, very, it's an undeveloped area. We
17 have two basic co-ops statutes: Title 10 Section 15, Title 10
18 Section 25. 25 deals with what are called telephone and
19 telegraphic cooperatives, and they are not under review at all.
20 The other deals with all other cooperative ventures, it is under
21 review. There is a working paper that has been prepared which is
22 a public document for the Code Revision Commission (which costs
23 the State of Alaska money and it belongs to every citizen of the
24 State of Alaska, if they'd like one), which talks about what the
25 basics of co-ops are, what our statute looks like, analyzes it
section by section, and gives you some basic views as to what the
section is, in terms of fitting in and how it would compare with
a profit-seeking corporation, and how it would differ from a
non-profit corporation. It is designed to give you a sort of



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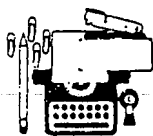
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1 bird's eye view of what distinguishes cooperatives from other
2 forms of enterprise. Cooperatives are corporations, this is a
3 point that we must not lose sight of. Therefore, the assets of
4 the cooperative are deemed to be the assets of the artificial
5 legal entity called the corporation. They are not the personal
6 assets of members. Members have no right to use those personal
7 assets, because the, other than as is permitted by the legal
8 entity which they own together called the cooperative. So, a
9 cooperative has one basic area of attraction. It preserves a
10 communal attitude toward assets, as opposed to an individual
11 attitude. There are individual rights, but they are within the
12 context of this communal umbrella. And, that is a very
13 attractive feature and has been for three hundred and some odd
14 years that cooperatives have been used for a variety of purposes
15 among English-speaking people. Cooperatives were started as an
16 attempt to gain economic self-sufficiency. Cooperatives were
17 intended to be closed, not open societies. They were used in
18 primarily -- had been used in this country by agricultural
19 people. They had their greatest heyday in the United States in
20 the upper tier states of the mid-west. States like the Dakota's,
21 Wisconsin, Minnesota, had great experiences in, had had
22 hundred-year experiences with cooperatives. The notion was that
23 farmers would get together and they would try to control the
24 circumstances under which they sold their grain. And those were
25 called production co-ops. Their object was so that the farmers
didn't sell as individuals, but sold as a group so that they
could collectively bargain with buyers for better terms. Later
on, cooperatives became not, in addition to that they said "well,
we'll hold certain facilities which we need as in a community
sense". So, they would build grain elevators, they would build
flour processors so that they could eliminate middlemen. They
wouldn't have to go to local bankers to borrow money because
they'd start savings institutions of their own. They wouldn't



1 have to go to the local grain operators as a separate business
2 person, they'd have their own grain elevator. And all of these
3 things they would vend to themselves at cost. That's the key to
4 a co-op, that its economic activities are theoretically done at
5 cost to members. There is no profit motive within the co-op, but
6 the co-op is organized to benefit its members, it's run by its
7 members and it tries to draw a wall around the activities of the
8 co-op, and then it can deal as a very tough cookie with
9 outsiders. But internally, the theory was that it worked by and
10 for members. They did not allow shareholders, shares were deemed
11 to be in no way involved in co-ops, you were memberships. Later
12 on, the idea of membership shares were set out when people wanted
13 to have pieces of paper that were evidencing their status in the
14 co-op. Memberships normally dies with the member. I've heard it
15 stated several times here that, that might be a desirable thing.
16 Well, you can't inherit a membership in a co-op, it dies right
17 along with the member and reverts to the co-op. Could they get
18 investment from outside? How do you if you want to go outside to
19 get people to invest, how could you do it? Well, you could sell
20 what was called capital stock to outsiders, to non-members, or
21 members themselves could own capital stock. But, the key to
22 capital stock was capital stock couldn't vote. In other words,
23 it could not participate in the control and management of the
24 entity. If you had very economically important assets you could,
25 in effect, borrow money from capital stockholders by setting out
a statement that you would pay them a certain fixed amount, and
it was by contractor-share indenture that you did that, and many
cooperatives have that. The directors, however, at the co-op had
to be members. Capital stockholders had classically no right to
be represented on the board at all, and that was a very important
idea. Later on, when the law was changed in certain states, so
that co-ops began to allow non-member representatives of the



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1 capital shareholders on the board, co-ops began to decline.
2 Because then the distinction between co-ops and any other type of
3 corporate entity became blurred and when it became blurred, there
4 wasn't a vision to be captured any more, and the thing began to
5 wither and die. So, the basic thing with co-ops is to recognize
6 that in 1959, Alaska borrowed Oregon's statute, and we never gave
7 it back. I mean, we still got it. It is a bare bones co-op
8 statute enacted by a state which was never a big player in the
9 world of cooperatives, and Oregon was not a state in which there
10 had been a lengthy political history with cooperatives. Right
11 now, there are five states that one could look at to see what is
12 right and wrong with cooperatives, how the experiments have run
13 well, or have tracked badly. You look at the Acts of the
14 Dakota's, you look at Wisconsin, you look at Minnesota and more
15 recently look at California, because co-ops have become very
16 important in California, only they're growing as agricultural
17 co-ops, again consumer cooperatives are being added. But, when
18 you look at what is done in those states, and look at what we
19 have in Alaska, the biggest fear I would have is counseling
20 lawyers, advising the client to forms of co-ops. We have a
21 skeletal statute, the statute that shows the corrupting
22 influences of many ideas that were sort of tried and failed.
23 And, it isn't cleaned up in any sense, and so before you start
24 organizing or thinking seriously about co-ops, look carefully at
25 what they are, in potential, legally.

For instance, the classical way to protect a co-op is
to say that it cannot merge, it cannot consolidate and it cannot
sell all of its assets to anything other than a co-op. And to
protect your members by saying that those members automatically
become members of the successor entity. Ironically, Alaska has



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1 no such protection. Alaska has a bizarre feature of its Act
2 which says that co-ops can merge or consolidate with
3 profit-seeking corporations. So, are they a good candidate to
4 resist takeover? No, they are not a good candidate to resist a
5 takeover. Can you get the legislature to pass a co-op statute
6 looking like the Wisconsin or Minnesota Acts that have those
7 carefully drawn provisions and protections built in? I'd say the
8 political climate is ripe that you probably could. But, you
9 should have an interest, you have an ability here as citizens of
10 Alaska to write the charter of what co-ops would be like and then
11 having influenced the formation of the law, make a decision. You
12 don't have to go to Congress on that, the legislature itself is
13 set up to study mechanisms to look into it, and they'll be public
14 hearings on this held. There has been a very useful AFN
15 dialogue, two of the attorneys who made the most significant
16 contributions, Bart and Liz are seated at the table. Similar
17 instructions could be given to your attorneys to cooperate.
18 There are many people here who could cooperate in this co-op
19 thing. Co-ops have a lot more to offer than I indicated
20 yesterday because I was warning you about what is, but it isn't
21 necessarily what might be. Co-ops could become very useful
22 because the mentality of a cooperative is that it was an entity
23 run by and for its members. It was a closed entity, there were
24 restrictions on the transfer of co-op memberships as a rule, they
25 were not the exception. You are not trying to go in and fight
the battles as to whether or not you can justify this, and that's
always been the norm, that you couldn't transfer the matter. And
so, co-ops do have, in at least, in a potential, in a
well-crafted statute, that would answer your questions and not
leave you open to a lot of doubt as to what your future would be
co-ops might well have a lot to offer.

MR. BERGER: Could I ask a
question, Dan, just interrupting you. One of the things that



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1 people are concerned about here is that land, and we are talking
2 about land being held by a co-op. A corporation, Native
3 corporation, transfers its land to the co-op and for the moment,
4 we are assuming that it can do that without running into
5 problems. The concern appears to be that land, traditionally
6 used communally, should be passed on from generation to
7 generation. So, what about admitting to membership each
8 succeeding generation, can that be done through a co-op?

9 MR. FESSLER: If the articles of
10 the co-op ... the articles of the co-op are where you define the
11 qualifications and circumstances under which people become
12 members and you would sit down literally with a blank piece of
13 paper and your idea, and you'd have no legal restrictions.
14 Co-ops traditionally have been able to confer membership upon
15 people because of their future participation in carrying out the
16 collective endeavor of the co-op, rather than selling them a big
17 share of stock. So, a co-op in that sense would be very, very
18 traditionally utilized for the purpose that you envision.

19 MR. BERGER: Yes, Dolly, then
20 Rosita.

21 MS. GARZA: I worked some with
22 fishermen co-ops and one of the questions I have is what happens
23 when a co-op goes defunct, say fishermen get discouraged because
24 they are not able to influence the prices, the equipment that
25 they bought is outdated. Can the co-op be dissolved or --?

MR FESSLER: Yes, the co-op can
be dissolved Dolly, but again, and this is the point that was
made yesterday by several people here, Glenn among others. A
co-op is no guarantee that there will be a bright economic
future, and the assets which the co-op has to the extent they
ever become obligated to third-party creditors, in the event the
co-op is insolvent, can be reached by those third-party



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1 creditors. So, I mean, merely by saying that we will transfer
2 our Native lands and put it in the hands of a co-op, we are not
3 assuring in any sense that those lands would never be subject to
4 creditor claims. A co-op is not a panacea, but a co-op is a
5 vehicle that would look a lot more familiar as I am beginning to
6 get the picture, of what the values of the culture are. A co-op
7 would have been a far more familiar room to walk into than a
8 corporate board room of a profit-seeking corporation. Many of
9 the features of a co-op would have given you the impression that
10 "gee, I've been here before, it's, the furniture looks familiar".
11 Co-ops have some interesting attributes.

12 MR. BERGER: You are saying that
13 closed membership and the restrictions on transfer of
14 membership---

15 MR. FESSLER: And in a properly
16 drafted statutory scheme, a way of preventing us from being taken
17 over by some fundamentally different entity that becomes
18 interested in our assets and comes along and says, "here is a
19 sweet deal for those of you who are alive, you zap we've got it.
20 You see, you can't sell memberships in a co-op.

21 MR. BERGER: And you can admit to
22 membership succeeding generations without---

23 MR. FESSLER: You certainly can.

24 MR. BERGER: Consideration.
25 Bart, you wanted to say something, and then Rosita.

MR. GARBER: Understanding that
the statute is fairly narrow right now. On the side of
accommodating individual interest and perhaps future economic
development, what are the limitations in the co-op for making
distributions or the limitations in a co-op of creating funnel
corporations or funnel businesses that they can give individual
rights to, or else make monies out of, in order to have some
economic development of lands? I realize that the co-op has this



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1 purpose of delivering services. Is there the possibility of a
2 co-op either in a -- in and of itself or through a group that it
3 might form to have some kind of profit motivation?

4 MR. FESSLER: Co-ops were so far
5 more intelligent than non-profit corporations, which hard to try
6 and figure out, since they were "forbidden" to make profits which
7 has never been wholly true. How do you, as a business person,
8 plan and set your price schedule so that you won't drag in
9 anything that might be called a profit? Co-ops go out and in
10 their operations have no restriction on making profits. But the
11 essence was that at the end of the accounting period the co-op
12 would distribute the profit to the members. Now, you want to
13 think about that. They have just as non-profit corporations are
14 forbidden to make distributions, and profit-seeking corporations
15 have the question of distributions to shareholders, yes or no
16 within the business judgment of the directors. Co-ops were
17 legally obligated to make the distributions. But that was of net
18 profits, and I mean if you had taken money out and invested it by
19 buying another fishing boat or you'd invested it in -- by
20 building a grain elevator, then co-ops could increase and expand
21 their economic base. They didn't have to just pay all the money
22 out to individuals as members. So, there was a lot of
23 flexibility, but no they are under the general legal proscription
24 that anything which is net of their business expenses represent
25 profits, and profits go to members, that's what a co-op is all
about.

MR. BERGER: Subsidiaries.

MR. FESSLER: Alaska statute
would be silent on the question, so we could sit down with a
blank piece of paper and draft that.

MR. GARBER: I asked you that
because I want to know about the typical reason for using child
corporations or subsidiaries is to reduce the element of risk



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1 with regard to a certain amount of assets that you want to set
2 out, so if you have a co-op you got all your subsistence lands,
3 but you identified a hundred acres down on the river. You want
4 to make an industrial development, but you only want to risk that
5 hundred acres. That would be the place where you'd want to make
a subsidiary----

6 MR. FESSLER: Surely, and there
7 should be nothing to prohibit you from doing that, and then you
8 enter into contractual relationships between the two
cooperatives.

9 MR. BERGER: Could I ask a
10 question? Where spawning new legal entities like made here, and
11 it's...but there are the...let's suppose the village corporations
12 wanted to think seriously about turning their subsistence land
13 over to cooperatives, and that seems to be what many people have
14 in mind, or to a non-profit or an IRA or whatever, but let's say
15 cooperative, now, Bart just asked you, "well, if there is a risk
16 taking activity, a business activity that can be undertaken on
17 the land, can you turn that over to a subsidiary?" Well, you've
18 already got existing corporates structures out there for profit
19 corporations all over the place. The landscape is I won't say
littered, but loaded with...and...can the cooperative then make
the same arrangement with an existing for-profit village
corporation that it could with a subsidiary in the way that you
just discussed with Bart?

20 MR. FESSLER: It wouldn't be so
21 clear under existing Alaska law because our statute is silent on
the relationship with cooperatives.

22 MR. BERGER: Oh, I see.....

23 MR. FESSLER: Alright, but the
24 fact that the statute would currently permit cooperatives to
25 merge or consolidate with profit seeking corporations, which I
think is an extremely dangerous idea, and is out of [place] with
the better drawn statutes in sister states; but, that as you



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1 revisit that, there would be nothing to prohibit you from saying
2 they could enter into contractual relationships with such
3 entities. I mean, I want you to understand that from my
4 perspective -- and I was characterized yesterday by Claude as a
5 -- as a person who is a complete outsider, and I preferably
6 accept the characterization -- it sounds to me like the
7 cooperative in many of the things I have listened to is better
8 suited to be the village corporation than merely the residual
9 entity to which the village corporation has tried to convey the
10 village lands. That people would be happier and existing in the
11 cooperative that it does not exacerbate the "mine and thine"
12 dichotomy that instead things are regarded as ours, and imposes
13 less of an institutional challenge to traditional values. But, I
14 mean that's the perception of the person who's got a two day old
15 notice of traditional values.

16 MR. BERGER: Right, we'll let
17 Rosita, you wanted to add to that.

18 MS. WORL: I had a question, and
19 I think Tony raised it some of the first day, and that is well
20 Native communities are also interested in continuing their
21 federal trust relationship. And, we noted that corporations are
22 whatever tribal organizations and/or tribal entities in that they
23 could contract for services or government programs under 93-638,
24 and now the questions is not where the trust relationship extends
25 through corporations, but it does seem that it would be important
for the corporation -- for communities to maintain this
corporation or unless there was an amendment, I guess a
Congressional amendment that transferred whatever rights or
recognitions that corporations has -- have as a Native entity, it
would have to be a Congressional amendment to make the
cooperatives that -- new entity. If it didn't happen I would --
it would seem that we would have to have maintained the
corporations for the purpose of 93-968. And then there might



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1 also -- and this is the problem I think that communities are
2 having, is that they have so many different organizational
3 entities in the villages to protect, you know relationships --
4 federal relationships -- and then to do the kind of businesses
5 that they want to do. So, it would seem we would -- we might
6 have corporations, we might have IRA's, we would have city
7 councils, and then we would also have cooperatives. Now, the
8 questions is, I guess it would take a Congressional...

9 MR. BERGER: David Case.

10 MR. CASE: Correct me if I'm
11 wrong, but my understanding is that a cooperative can, a profit-
12 making corporation can convert itself into a cooperative by a
13 two-third shareholders vote amending the articles.

14 MR. FESSLER: What we'd do is
15 we'd set up the -- we'd incorporate a cooperative or a
16 cooperative is a corporation, and then you would merge the
17 existing village corporation into the cooperative corporation.
18 So, that in a merger you'd begin with Corporation A and
19 Corporation B, and only one of them is destined to survive. And
20 that would become the cooperative, it wouldn't necessarily add to
21 the landscape, it could change it.

22 MR. CASE: The current statute in
23 Alaska, I believe, permits a profit making corporation to amend
24 its articles and become a cooperative. Simply by amending its
25 articles of incorporation.

MR. FESSLER: It may well --
there is so much flexibility incumbent in current Alaska law as
to be frightening.

MR. CASE: Well, I'm not sure
that's a good idea or a bad idea, but it seems to be possible to
convert the profit corporation, as things now stand, into a
cooperative without dissenters' rights and through a vote of the
shareholders.



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1 MR. FESSLER: One thing that I
2 want to point out to you is that -- cooperatives are also managed
3 by a board of directors; in that sense they are like a
4 corporation. One of the things that is very useful is in a
5 cooperative that only members can be directors. That can be a
6 useful thing and a non-useful thing, if you want to bring
7 somebody in for their expertise. There can be officers of the
8 cooperative who are not the members and that the directors of
9 cooperatives and non-profits have the same fiduciary obligations
10 and they would have the same conflict of interest questions that
11 are related to your existing profit-seeking board.

12 MR. BERGER: Could I ask David to
13 answer your question, Rosita?

14 MR. CASE: Saying that it is and
15 -- I think that's correct -- but that comes from just reading
16 this fairly brief vision of the cooperative statutes which I was
17 surprised to see.

18 MR. BERGER: What about
19 Rosita's....

20 MR. CASE: It doesn't get away
21 from the problem of creating new institutions. And also, I think
22 that is a very good point you make about the present definitions
23 in federal law which may come into questions if you no longer had
24 a village corporation or a tribal government and then you don't
25 have the Self Determination Act clearly applicable to the new
organization. So, what you've got is, you suggest, is many
organizations sticking around for different purposes. And it
would be better probably to have them consolidated.

MS. GARZA: Dolly and then Tony.

MS. GARZA: When you were
initially talking about corporations and their potential for
changing to a cooperative you had mentioned the fear, and I
thought you were suggesting that it was the counseling lawyers



1 themselves. But I have two questions. One is, if a corporation,
2 say, develops a cooperative for the purpose of putting the land
3 in a separate entity, and then the corporation decides five years
4 down the line that they want that land back, can they get it
back?

5 MR. FESSLER: No, if the land was
6 somehow transferred to and became in the eyes of the law the
7 legal property of the cooperative then it would require a
8 reconveyance from the cooperative to the corporation. Now, if
9 you are talking about the same human beings being the beneficial
10 owners of both the corporation and the cooperative, that ought
11 not to pose a problem. But, if you ever have two different sets
of equitable owners then for the first time you are gonna have a
genuine problem.

12 MS. GARZA: Okay, the second
13 question is, say, that the corporations decide to change to a
14 cooperative. Under a cooperative will that body be required to
15 distribute all the profits annually, or can they maintain some of
it for future investment.

16 MR. FESSLER: That is an
17 important question, and there had been cases in the United State
18 in the nineteenth century that suggested that if you hadn't
19 committed the "profits" that they were then to be distributed.
20 The better reason cases, and you could handle this by having the
21 statute defined what the distribution obligation of the
22 cooperative is, all right, is that they should obviously be
23 allowed to maintain reserves for planning, and what I'm trying to
24 say is that the existing directors by making plans for the
25 business expenditure of what would otherwise be cooperative
receipts can convert them out of being regarded as for profits.
But, you'd then have to turn around and distribute, but you begin
with an idea that in a profit seeking co-op -- profit-seeking
corporation it's purely the business judgment of the directors as



1 to whether they'll ever distribute any of the profits in a
2 non-profit corporation, you lock yourself into a setting where
3 you are not supposed to distribute any. In a cooperative, you
4 are supposed to distribute all net profits, but there is a lot of
5 -- of manipulation that can go on as what is ascertained to be
6 a net profit. Flexibility, my counsel tells me, is the word that
7 I should have been searching for. Yeah.

8 MR. BERGER: Tony and then Glenn.

9 MR. STRONG: Thank you.

10 The one question I want to pose on the backdrop of
11 cooperatives is something that was discussed a little bit
12 earlier, and that is say, a cooperative has been set up by a
13 village corporation and they have a tremendous amount of pressure
14 on them to have some personal use of the land, like the Shaan
15 Seet has taken. How would that fit within the rubric of a
16 cooperative?

17 MR. FESSLER: A cooperative can
18 make distributions to its members in kind, and it can also make
19 distributions in partial liquidation.

20 MR. STRONG: Can it at the same
21 time make -- use the land for -- can they allow members to use
22 the land without making a distribution of that land into the
23 member?

24 MR. FESSLER: I would assume that
25 they could and it would be wise -- I don't think I've ever read a
cooperative statute that is clear on that because you understand
that the traditional cooperative was talking about farm lands and
the farms were generally owned by the individual farmers, who
then joined the co-op. And, so the co-op was an amalgamation of
property that was individually owned. We're coming from the
opposite perspective. We're coming from a communal asset that
will be placed under the thing. And, it would be wise for the
statute to make it very clear that it could. The point I keep



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1 wanting to say is that there is an obvious tendency to some
2 members of this group and it may be absolutely necessary to favor
3 making arrangements with the federal government as the best way
4 to go about resolving the problems which you are now beginning to
5 experience. And, that may ultimately have to be done. But, I'm
6 saying don't overlook the possibility that there may already be
7 within your hands tools that you can use to fashion solutions
8 that are more to your liking, or more to your utility or benefit
9 that do not require you to go to the federal government. And in
10 this instance, with a cooperative statute that is already on a
11 legislative agenda for reform, is being written on a blank piece
12 of paper by individuals whose interest is in trying to do what's
13 best for Alaska, you have an opportunity to design the erector
14 set. And at lease to participate in that, there is very little
15 vested in...about cooperative right now.

16 MR. BERGER: I think Glenn and
17 then Dolly.

18 MR. FREDERICKS: I'm going to ask
19 on dissenters rights. Do they -- if we were to change over, do
20 the dissenters then -- like -- would stop the process or are
21 there dissenters rights in the co-op.

22 MR. FESSLER: Alaska's statute is
23 totally silent on the topic. And, one of the things you fear is
24 there is also a provision that says, to the extent that they're
25 compatible with for-profit corporations, any holes in this
bare bone statute are to filled in by reference to the
profit-seeking corporation, and so... .

MR. BERGER: We'd have to write
it in. No -- no I think you dissenters.

MR. FESSLER: If you are in a
cooperative, and the cooperative goes through an organic change
are there dissenters' rights?



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1 MS. E. JOHNSTON: I thought your
2 question was when you change from the corporate form to the
3 cooperative form, are you stuck with the dissenters' rights at
4 that point.

5 MR. FESSLER: And, you may well
6 be. Because if you go about it by a merger of the existing
7 corporation to the other...the question which Glenn poses is, is
8 there a way to sort of transmute the for-profit corporation into
9 a cooperative corporation and not say that you every engaged in a
10 merger or consolidation, and that I'm not sure of.

11 MR. BERGER: I think dissenters'
12 rights, to something we have to return to, Glenn, and I think it
13 is an important subject, and Elizabeth spoke very forcefully
14 yesterday to the effect that it just couldn't be dismissed. And,
15 I think we should return to it, but maybe that's something we
16 should return to along with the whole question of soliciting
17 proxies, 'cause that's all tied up with it. And, perhaps we
18 could return to that this afternoon and spend the morning on
19 these various entities that, once they are holding the land, well
20 if you've gone through all that agony what have you got? And, I
21 think that's what we are struggling with now. Elizabeth and then
22 David and then Dolly. Sorry.

23 MS. E. JOHNSTON: At risk of
24 being shot, I would like to say one thing about a corporation
25 which is, I was wondering as I've been listening to the discus-
sion this morning, I would like to just pose something, throw it
out or nor, particularly have it commented about, but just have
you think about it. I would like to assume, for purposes of my
hypothetical...which does not involve the village corporation,
that we were successful in going to Congress and getting some
mechanism for continuation of restricted stock, okay, I'd just
like to assume that in my example. And I was wondering about the
possibility of retaining, in instance where the land is -- has --



1 the bulk of it or that a very important use of this surface land
2 was related to the subsistence purpose and goal, leaving that in
3 what I would refer to as the parent corporation which already has
4 all of the rights and [indulgences] that Rosita referred to as to
5 the status in terms of the tribal status and this type of thing.
6 And, also already has tied to it the options of the land bank
7 protection. And, transform over or transfer over into the
8 subsidiaries the for -- what we would traditionally think of the
9 for-profit activities, the things that Glenn's village
10 corporation has that are like the real property in Anchorage for
11 making money and these kinds of things. If you did -- so many
12 times when people have talked about these transfers, they keep
13 talking about transferring the land, and if the, you transferred
14 the land into a subsidiary posture, indeed it could be taken if
15 you had business risks and losses at the parent level, and took
16 your risk-making activities and put them in the subsidiary and
17 then did your right corporate veils between, your land would be
18 protected from the losses at the for-profit level. Now... .

19 MR. BERGER: Sorry, what in
20 between? Did you say "corporate veil"?

21 MS. E. JOHNSTON: That corporate
22 veil, yes.

23 MR. BERGER: Alright, okay.

24 MS. E. JOHNSTON: Okay. The --
25 so I just want to suggest that even in the corporate format there
are ways to move -- to move things around, but I understand that
for purposes of discussion I have assumed restricted stock at the
parent level.

MR. BERGER: I think you are
right to insist that we consider that whole range of
possibilities, although it seems regrettable, we were making so
much head way.



1 MS. E. JOHNSTON: It was only a
2 footnote.

3 MR. BERGER: I'm sorry, Dolly and
4 then Roland.

5 MS. GARZA: On the net profits,
6 under cooperative, -- let me start again. With the corporation
7 the board members determine the dividends in Southeast there
8 somewhat annually for several of the village corporations, and
9 the board members look at what the investment potential is for
10 the next year and then try to see how much money we've got and
11 then make a dividend with what we feel we can -- under a
12 cooperative would there be greater influence by the membership in
13 saying, "listen we really don't like your investment potential
14 and we want all of the net profits to come to use and we don't
15 want to invest you further?" My concern is, there are share-
16 holders are potential members who are not interested in economic
17 development, they're interested in dividends and the largest
18 possible dividends.

19 MR. FESSLER: The directors of a
20 cooperative are elected by the members and from the ranks of
21 membership. So if you had a political division in the ranks of
22 your members wherein a majority of the people favored the notion
23 of not saving, but distributing the individuals, then a
24 cooperative would be a device wherein you would be making no
25 investments and you would be making short term distributions.
That, of course, is possible in the profit-seeking corporation as
well if you lose the majority constituency to people who want to
elect directors who favor maximum dividend policies as opposed to
the retention of earnings. But you are absolutely right to be
concerned that one characteristic of the cooperative is a bias in
favor of distributions, and that is not a bias or an inertial
that is built into the basic notion of a profit-seeking
corporation. Because the notion of -- the reason there is a bias



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1 in favor of distributions and cooperatives is because it's our
2 money, and we are the members and we are the cooperative and
3 there are no third parties. The reason there is no such bias
4 within the notion of a profit-seeking corporation is because the
5 shareholder in large corporations such as General Motors, are
6 generally not the people who work for the corporation, they are
7 not the people who consume its products, they are the people who
8 put money at its disposal for their own private purposes. And
9 the idea is that they're "owners" too, but in a much more
10 restricted and distant past, or theory and that they should not
11 have the same right to insist upon dividends. There is not right
12 to insist upon dividends in a corporation, just equal treatment
13 of the board and its business, discretion decides that there
14 shall be. In a corporation you begin with the assumption that
15 there is an annual obligation to yield over to the members as
16 theirs any net profits. But -- that -- that again you could
17 design a statute in such a manner in Juneau, not Washington,
18 D.C., that would reach a reasonable accommodation on that ground.

19 MR. BERGER: Could I -- could I
20 just suggest that how we manage our timetables, I'll come to Bart
21 next -- but before lunch I'd like to Ralph to talk about IRA's,
22 then we can come back and muse about it all.

23 MR. GARBER: Can you ask for
24 waivers so that Ralph could do that?

25 MR. BERGER: Yeah, I said before
lunch, yeah. Okay, Bart will waive, and -- then after lunch we
will talk about the getting them from A to B, and the problem of
soliciting proxies and so on. All right, Ralph, you're by
popular demand.

MR. R. JOHNSON: I should say
that I won't be as -- extensive about IRA's because many of you
know more about them than all of us know about co-ops. And, it's



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1 been very instructive to hear -- so much more background about
2 co-ops.

3 Nonetheless, there are certain attributes of IRA's that
4 are especially significant here. As I understand from David
5 Case, there are about seventy-one IRA's in Alaska. There are, in
6 addition, a number and I don't know the number of traditional
7 governments that are recognized and, of course, there are quite a
8 number of traditional governments that are not recognized.

9 Whether that recognition is key, I'd rather deal only with those
10 that are officially recognized at the moment. Most of what I say
11 about IRA's will also apply to traditionals. At the present
12 time, it seems clear from what's been said that -- the village or
13 regional corporations could transfer their assets to an IRA. I
14 suppose in most cases we're talking about a transfer of assets
15 from a village corporation. Now, first thing to realize is that
16 this is a transfer of land that is held under ANCSA. It would
17 not automatically put the land back in trust. That may or may
18 not be desirable, I am simply stating a fact that the transfer of
19 the land to an IRA would not automatically put it back in trust,
20 and the current Secretary -- current administration has generally
21 taken the position that they will not accept ANCSA land back in
22 trust. If it were put back in trust, then that sets up a whole
23 different set of attributes of that ownership. It makes it clear
24 that it is not subject to state taxation. It makes it clear that
25 the federal government has a legal obligation to manage that
trust and some other things. But right now I am only concerned
about land that would be transferred to an IRA still under the
ANCSA rules and not going back into a trust status. Now one of
the most important things that I'll be talking about is the fact
of sovereign immunity. And sovereign immunity is one of those
oddities that we've all talked about but three sentences about
it. It comes from an old English concept, it's not in the
Constitution of the United States, it's common law concept that



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1 was brought here from England. It applies to protect the federal
2 government, the state government and the tribal governments from
3 any suit unless those governments consent to the suit. It has
4 grown in great disfavor in recent years, in the United States.
5 There are many, many, many statutory and judicial, essentially,
6 waivers of sovereign immunity in the federal and state arena.
7 But, it is a concept which is still very much alive, it does
8 serve as a tool for the IRA's if they wish to use it. The IRA is
9 usually divided into two entities. One is the governmental side,
10 the other is the corporate side under the 1936 amendment, the
11 Alaska IRA.

12 I assume that the land that we are talking about
13 transferring would be transferred from the village corporation to
14 to the governmental side of the IRA. If it were transferred to
15 the corporate side of the IRA, then there probably is no
16 sovereign immunity because generally there is a waiver of
17 sovereign immunity called the sue-and-be-sued clause that exists
18 in the corporate side of the IRA. Now, if it was, it now has
19 been transferred to the IRA to the government side of the IRA,
20 and that government side has not waived its sovereign immunity.
21 A P.S. to that, an important P.S., cases decided since 1980
22 indicate that the government of the IRA can waive its own
23 sovereign immunity. Prior to 1980-1981, it was widely believed
24 that only Congress could waive an IRA's sovereign immunity. I
25 should say the same thing about a traditional government. That
since 1980-1981, it seems clear a case in the Ninth Circuit and
some language in the U.S. Supreme Court Opinions that the govern-
ment can itself waive its sovereign immunity if it wishes to do
so. It can waive that sovereign immunity in a special case with
regard to a specific piece of land or a specific transaction, or
it can waive its sovereign immunity generally. That's the option
of the IRA government to do that, it's within its choice.



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Now, do states taxes apply to the land that is now owned by the IRA government? The answer is, yes, they apply, but the state can't get the -- at it because they can't sue the tribe, sovereign immunity. They're stopped, they can't sue the tribe either an IRA or traditional tribe, unless that sovereign immunity is waived. I'll beg off on one other aspect of that. States have become increasingly aggressive about pursuing land that is not in trust on reservations or in Indian Country. And it's conceivable that they could pursue the land in a special kind of action. A suit against the land itself, called an interim action, but suit against the land itself, not sue the tribe. I can't answer you as to whether the state could get at the land that way, I don't know of any cases in the United States which have permitted it. But, at least that's -- that is an outside possibility. Can the tribal government, IRA or otherwise, voluntarily convey the land? And the answer is almost surely no, and that's because the statute that started, called the Non-intercourse Act, which started in 1790 and have been reaffirmed and are still very much alive. That an Indian tribe, IRA or traditional, cannot convey land without the consent of the United States. It is, whether or not it is held in trust, it simply cannot convey the land unless there is also consent by the United States. Now, a solicitor, Clyde Marks, in 1981, said that's not true. I think that Mark, Garber and David Case and I all agree that the solicitor is wrong, but you should realize that the solicitor is a former friend of mine before I decided that. And he was a law professor before that and some other things. But, in any event, that particular solicitor decided that the tribe could convey land aside or outside the limitation of the Non-intercourse Act. There is no judicial determination of that question yet.

MR. BERGER: The solicitor might conceivably, or it is not inconceivable that he is right.



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1 MR. R. JOHNSON: That's right.
2 No, it's...yeah, it's inconceivable. In any event, we will leave
3 the disagreement where it lies. We are three to one here against
4 him.

5 Bankruptcy, the IRA government cannot go bankrupt. It
6 will continue on, it may incur far more debts than it has assets,
7 but it's not subject to "going under" so to speak. It may have
8 trouble getting money, but it's not going to go through
9 bankruptcy. Takeover, there is no way that an IRA government can
10 be taken over. It's chartered under federal law, and there is no
11 way under federal law it can be taken over; it's a sovereign
12 government. It has attributes of sovereignty. The same thing is
13 true of a traditional government, whether recognized or not.
14 There is no takeover possibility for that. The members control
15 it. Fractionalization, if the land is in a, this is a problem
16 that we were talking about this morning in various contexts. It
17 would eliminate the problem of fractionalization because
18 membership in the IRA is determined by "Indians", or
19 "Nativeness", however the definition of that IRA is set up. If
20 you're quarter-blood...

21 (NOVEMBER 16, 1984)

22 (OVERLAP TAPE, SIDE A)

23 MR. R. JOHNSON: (Continued)...or
24 more and the descendent of a member, well then you are a member.
25 But it's not a question of fractionalization interest. Powers of
distribution -- an IRA is a typical government, it can
distribute...

(NOVEMBER 16, 1984)

(TAPE 10, SIDE B)

MR. R. JOHNSON: (Continued)...
its assets, it can use the assets for the common good, it would
be limited by the Indian Civil Rights Act, by the concept of
equal protection. It could not give all away, all the assets to



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1 the Jones family and leave out all the other people in the
2 community, but it could do things on the basis of need, of health
3 considerations, of need for economic development, and so forth.
It could act, in other words, as any government can act.

4 MR. BERGER: Monroe, would you
5 like to go on from there?

6 MR. PRICE: No, I just wanted to
ask Ralph what that government... .

7 MR. R. JOHNSON: Under what?

8 MR. PRICE: Governments of lands
9 unless you'll be leaving that for the... .

10 MR. R. JOHNSON: I didn't speak
11 to the governments questions, but the IRA, you're asking how it's
governed, I mean... .

12 MR. PRICE: Governments of the
13 land. You may be preempting the sovereignty question, that is to
say... .

14 MR. R. JOHNSON: I am not sure
15 what you mean.

16 MR. PRICE: The government as
government over the lands that are subject to the IRA.

17 MR. R. JOHNSON: I was leaving
18 that question if the transfer of the land goes to the IRA, it's a
19 very interesting sub-question and that is whether the IRA then
20 has jurisdiction, governing powers over that land, and I guess my
21 initial assumption is that, if the IRA now has governing powers
22 over village owned land, then it continues to have that governing
23 power, and as a first run at it, if the IRA government does not
24 now have jurisdiction -- governing jurisdiction over village
25 owned lands, then it probably won't acquire that by the transfer
of the land to the IRA unless the land is somehow pulled back
into trust by the government. Now, that's the first time I sort
of anticipated that question, so if you or David or some -- Bart



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1 have some comments on it, but that's a governing question that we
2 really weren't planning to go into depth on today.

3 MR. PRICE: All I'm saying is I
4 guess I thought it was usually a clear an explicit discussion to
5 which I wouldn't add anything. I think the hard and
6 controversial question is probably the governing one.

7 MR. BERGER: David and then Tony
8 and then Bart.

9 MR. CASE: Well, the -- I don't
10 think I agree with Ralph on the effect of the tribe owning the
11 land, it may well make a difference. It seems to me it might.
12 The questions that keeps, that is constantly raised, and I think
13 that I'm not sure it's the hardest question, maybe the governing
14 question is the tough one, but as far as all the things that
15 Ralph have said about IRA's the -- I guess the question that
16 keeps coming up (I think I know the answer, but I'm not the
17 court), is whether these villages in Alaska are tribes at all,
18 and that's the question that the state, over the years, has
19 always raised as being the question. And, of course, if they are
20 not tribes then all of this -- the federal law that would
21 normally apply, doesn't.

22 MR. BERGER: Well, forgive me, is
23 that an open question in the minds of scholars and those
24 practicing in the field?

25 MR. CASE: It's not in the minds
of all the scholars I know of. It's not an open question, but it
is and has been in the past at any rate, been argued in the
argument of the State of Alaska. Its Attorney General at any
rate. Now, with that, it really gets us a farther afield; I
think. Maybe we should just flag that point. It is being raised
as an argument and I guess one has to give it some credence. The
other thing you mentioned about recognition there 71 IRA's and
the list of Native entities that are recognized in Alaska is 197



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1 long, and there are relatively few villages that are not on the
2 list.

3 MR. STRONG: Yes, the -- I have a
4 couple question of Ralph -- I believe I have the answer, but I
5 think I'd like to have the answer stated for other people as
6 well. And you did talk about the powers of distribution -- that
7 would have much powers of distribution much like any other
8 government, but can IRA's make special distributions to for
9 instance, elderly? Can they make special distributions to the
10 young people? Can they set up a program of educational benefits
11 to whatever class of people -- can they set -- treat people by
12 separate classifications? Where they see there is a public
13 purpose to it.

14 MR. R. JOHNSON: I don't know of
15 any reason why they can't. I, in the -- if you consider an IRA
16 like -- unless there is some explicit limitation in the 1936
17 Indian Reorganization Act, and I know of none, then the only
18 limitation is the Indian Civil Rights Act which requires an
19 application of equal protection principles, and that really -- we
20 are not going into that. That doesn't really limit it so that
21 the IRA government can act like the United States government,
22 which provides medical benefits to people over 65. It provides,
23 it could if it wished to do so on the grounds of greater need. I
24 suppose it could distribute money, cash to people over 65. It
25 could contribute not only health care, but housing opportunities.
It could do whatever it was appropriate, and the only real
constraint on that is that there be some rational basis for that.
I'm sure you know this, but I mean I am just repeating what I
think it the general knowledge about the way a government can
operate. And there surely would be a rational basis for treating
the elders in a different way then treating the younger people.

MR. STRONG: I asked this
question on the basis that it's raised, having worked with



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1 shareholders for quite some time and going to a lot of share-
2 holders meetings at...often...invariably they ask the question
3 how can we? Why haven't you done something for the elderly?
4 And, who can we -- what can we do for the elderly, and I think
5 that's something that's real important and I don't know how to
6 put this against cooperatives. I don't recall the discussion on
whether cooperatives can put separate classifications. I think
that ought to be discussed later, not right now.

7 MR. BERGER: Could I, Dan, you
8 might just flag that for the afternoon session, whether they can
9 be discriminatory, that's not the right word, but separate
10 classifications of benefits for people in cooperatives. But,
11 could I ask a question about the mechanics of this? If a village
12 corporation were to transfer its land to an IRA then in the
13 normal course, assuming the Secretary were willing to accept the
14 land in trust so that he became the legal trustee, holding the
15 land for the benefit of all members of the village or whatever,
16 that's one way in which the assignment would be made, the IRA
corporations, are they legal entities?

15 MR. R. JOHNSON: Oh, they are
16 definitely legal entities.

17 MR. BERGER: So, an alternative
18 wouldn't -- it wouldn't attract the protection of sovereignty, it
19 wouldn't attract sovereignty, but you could transfer to the IRA
20 corporation -- I don't, at the moment, I'm not -- well if you
21 transfer it to the IRA and the Secretary says, "well, I won't
22 accept this", where are you then, what's the legal state of
23 affairs, who is standing with this agreement or this deed?

22 MR. R. JOHNSON: I'll take a
23 first shot at it, and then others can add to that, and that is
24 the IRA -- let's talk about the Yakima Nation in the State of
25 Washington may decide to buy land in the city of Seattle. They
own an office building in the City of Seattle that's not in



1 trust, it's simply owned by the Yakima Nation, and they hold it
2 fee simple. The difference in this case would be that the land
3 would still be subject to whatever constraints that apply out of
4 ANCSA itself, but aside from that, it would be owned by the IRA
5 government as a government and would have all those powers that a
6 governmental has over land. But, it owns the land as fee simple
7 land. It is not subject to taxation because the state can't sue,
8 the state is barred from suit against the tribe by the sovereign
9 immunity. So... .

10 MR. GARBER: You said it was
11 subject to taxation, but there's no... .

12 MR. R. JOHNSON: I said it was
13 subject to taxation, I mean the tax law is presumably still
14 applied, but they can't do anything about it. Maybe that's just
15 lawyer talk. But -- they can't collect. The reality is that the
16 state can't collect the money because they can't file suit
17 against the tribe.

18 MR. BERGER: Well, so that if
19 the... .

20 MR. R. JOHNSON: Now, they could
21 file suit against the tribal, if it were a tribal corporation, an
22 IRA corporation and, that held it, then presumably it has a sue-
23 and-be-sued clause in it. It has a waiver of sovereign immunity
24 clause and it would be subject to suit.

25 MR. BERGER: Could I just ask --
go back to the question I asked -- and forgive me. The Yakima
Nation buys this building in Seattle, and they don't even want to
write to the Secretary and say, "You hold it in trust for us."
They don't want their IRA corporation to hold it; well, who is
registered, or if you have the Torrens System in Washington
State. Who is there on the register of title? What does it say?

MR. R. JOHNSON: It says the
Yakima Nation.



1 MR. FREDERICKS: Can I address
2 your question? There is a distinction. The Secretary only has
3 the authority to say whether he will take it in trust. The title
4 switches over to the tribe, they can go out and buy whatever they
5 like and it will be held privately by them. The distinction that
6 Ralph was talking about, the IRA corporation versus the
7 government is an important one, it's the Section 16, it acts as a
8 government with sovereign immunity. Section 17 is a federal
9 corporation, just like federal banks or federal railroads or
10 others. The federal government has a corporation.
11 Unfortunately, the experiences in Alaska is that that distinction
12 has not been drawn by the tribes. So that you don't have to go
13 as far as Yakima to find a tribe who owns land in a village, in a
14 town. My own IRA owns lands in Anchorage, a number of
15 properties, and I called our attorney this morning just because I
16 don't participate in the IRA corporation, they/we have not yet
17 drawn a distinction there and so there is a concern and I don't
18 know if we have had a slip and fall, or a tax levy or anything to
19 find out. Ask the question who owns it; the sovereign immune
20 government or the non-immune Section 17 corporation. So, there
21 is a concern there if you want to do -- if you do want to go to
22 the IRA format, that there is going to have to be some slicking
23 up of the system.

18 Now, there is one other question I'd like for you to
19 address, so Ralph, with your experience with other IRA's in the
20 Lower 48, with regard to distribution, because that's a very
21 large concern among Natives in Alaska, is that its IRA's are
22 typically kind of oriented to home and one of the aspects about
23 ANCSA is freedom of mobility, decide to be able to participate in
24 the benefits of the Act, regardless of where you are, sometimes
25 runs askew when you get into IRA's who traditionally think of
those who are living in the village. What are the experience
with IRA's in the South about making certain that distributions



1 go to people on and off reservation or if there is that problem?
2 And, also who is a member subject to the benefits? You mentioned
3 one quarter of blood, is there the possibility, even though the
4 federal government won't recognize you as an Indian with less
5 than quarter, can the tribe recognize you for benefits with less
6 than a quarter?

7 MR. R. JOHNSON: Well, yes, the
8 general membership of Indian tribes in the Lower 48 is determined
9 by the tribe itself, and that runs any where from a 32nd to a 50
10 percent whatever, and descent, certain lines of descent and so
11 forth, but that's determined by the tribe. And presumably that
12 can be determined and changed by the tribe from time to time,
13 although in practice I think there is almost no change, because
14 it is a very fought over kind of fact. The only constraint that
15 I know that, and I can't give you a lot of examples of practices
16 where there have been distributions, either in kind or in cash,
17 but I can say, I think, that the only real constraint on that
18 there not being anything in the IRA itself. The only real
19 constraint is the Indian Civil Rights Act. And, let me add
20 another thing about that. The Indian Civil Rights Act -- let me
21 draw that for a moment. The Indian Civil Rights Act says that
22 there is a concept of equal protection that you can make any
23 classification of distribution to some people and not others as
24 long as that classification is reasonable and rationally based.
25 The elder, for example, or whatever you want, some rational
basis. Someone might question a classification that excluded
participation by all non-resident people, but I suspect that
classification would still be upheld if there is some reason for
recognizing that the people who still live on the traditional
land should be given some benefit. Whereas those who don't
shouldn't be given that benefit. Now the Indian Civil Rights Act
also provides for a review by federal courts of equal protection.
It's just issues of, certain kinds of issues, but the only issue
that can get into federal court is one involving the confinement



1 of someone, habeas corpus. You can only get a federal court
2 review if someone is confined. What I am saying is that if you
3 decide within the tribe to give certain benefits to the elders
4 then, you cannot ever get a federal court review of that
question. Because you cannot confine the elders.

5 MR. FREDERICKS: That's the
6 reason I think the Natives are very -- as me -- very leery of
7 that because you are telling us all these losses, we didn't have
8 no input you know. You can't even agree among yourselves what it
9 is, and for us to do these things without settling these things
10 first is asinine. You know that, we can jeopardize our whole
11 thing. What if the courts say, "Well, you don't have no
12 sovereignty rights." Then where the hell are we? I mean, you
13 guys talk among yourselves, it's fascinating for me to go out to
my village and try to tell the people, "This law says you can do
it, but maybe you can't do it." Maybe not, the Congress has to
say it. Why, they'd throw me out.

14 MR. R. JOHNSON: That is I think
15 you make a very good point, but you are already in the thicket.
16 And, it's a question of -- I agree that you may not have chosen
to be in that predicament.

17 MR. FREDERICKS: Before we jump
18 into...you know...let me understand it first, then I can make my
19 decision on that. But, when you talk like that, hell, I don't
know what you're talking about, you know.

20 MR. STRONG: I understand Glenn's
21 confusion, I think that the lack of participation of Alaska
22 Natives in the tribal governments ideas over time has caused a
23 lot of confusion. A lot of the people in Alaska don't realize
24 that these rights are already existing. That they can exercise
25 those rights without any federal statute being passed, all they
need to do is act, and I think that's becoming more and more of
an understanding of the Native community here in Alaska and the



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1 more it become an understanding, I think the more it's accepted.
2 But, there are a couple of other things that I wanted to address
3 in terms of IRA versus other forms of holding land.

4 You made a distinction earlier about the Yakima tribe
5 owning land right down in Seattle versus, well you just made that
6 distinction holding it down there. And, I think that there might
7 have been a different result if the land that was held by the
8 tribal government, whether it's down in Yakima or held up here in
9 Alaska, whether that land was held contiguous to the village or
10 held some place far away, as Bart both pointed out down here in
11 Anchorage, there is another aspect of IRA's that needs to be
12 raised again, and that is that the government form of IRA's that
13 we have are throughout the Lower 48 as well as up here in Alaska.
14 The IRA governments can create a statute which authorizes
15 corporations to be set up through the government of the IRA's so
16 that, in other words, you can have a corporation authorized by
17 the tribal government rather than authorized through the state
18 courts.

19 MR. R. JOHNSON: That's true, and
20 both points are quite valid. I mentioned the Yakima Nation
21 owning land in Seattle. It's quite different, yet the Yakima
22 Nation purchases Black Acre which is on the Yakima reservation,
23 but for many years has been owned by a non-Indian on the
24 reservation. They simply buy it back and put it in tribal
25 ownership. At that point, it's owned by the tribe in fee simple,
it didn't automatically go back in trust, but it's within Indian
country. And, it's subject to many governmental powers of the
Yakima Nation. They have the powers of zoning, of control of
that land, that they would not have if the land is over in
Seattle.

MR. BERGER: Tony, could I just
ask you a question about Klukwan? There is an Indian reservation
that was transferred to the village corporation and then



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1 transferred from the village corporation to the traditional
2 government. What happened?

3 MR. STRONG: There is a lot of
4 confusion about what happened to Klukwan, and I'll try to give a
5 brief history of it, so that it's understood, and that is during
6 the passage or process of the Claims Settlement Act coming into
7 fruition up here in the state, Klukwan wanted to retain its
8 reserve status. It had been making statements to the elected
9 leaders with Tlingit and Haidas, saying, "We want to retain our
10 reserve status." Nothing became of that, they become a little
11 bit upset for it, they -- that was one political thing that they
12 were concerned about. Then they also looked at participation in
13 the Claims Settlement Act and realized that if they were to take
14 participation that they had -- let me back up a little bit, they
15 had 893 acres already. They owned that in both surface and
16 subsurface rights. It was held in trust prior to the 1971. If
17 they were to participate in the Act, they would lose the
18 subsurface rights. It was important to them that they retain the
19 subsurface rights. By the way, there is a lot of misconception
20 about whether or not that reservation continues to exist. The
21 Claims Settlement Act revoked all reserves in the state except
22 for Metlakatla. Klukwan was a -- was formerly a reservation,
23 it's no longer a reservation. But, it does hold its land. The
24 Claims Settlement Act, as you understand, takes the subsurface
25 and gives it to the regional corporation and then the village
keeps the surface estate. Klukwan didn't want to lose that
subsurface estate, there was a real important economic reason for
it, as well as the social reasons for it. One is that --
subsurface estate in Klukwan at 893 acres held is made up of iron
ore, and there was a lease that was held on it. They were very
aware of the iron ore that they held. It was held in a couple of
different leases. U.S. Steel held the lease for a while and then
it was transferred to Mitsubishi, then transferred back to the



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1 U.S. Steel, and it was worth \$50,000.00 a year in revenues to the
2 village. If they were to participate in the Act, they would have
3 that subsurface just wiped out from them-completely and all the
4 land around Klukwan had already been patented out to private
5 individuals. So, that all they had is a -- as a selection right
6 -- was the mountain tops and the Chilkat Valley. All the rest of
7 the land had already been patented out. So what they were ending
8 up having to write for was a lot less than they had in the
9 beginning, if they didn't participate at all. So they initially
10 just rejected the Claims Settlement Act. Well, they, a lot of
11 people from Klukwan said, "Let's participate, let's find out how
12 we can participate." They just went down and got an agreement
13 with the community of Hydaburg that they would be allowed to
14 select some land, three or four hundred miles away from the
15 village of Klukwan, down on Long Island. They got an agreement
16 with those people down there on a social level. Went to Congress
17 and said, "We'd like an amendment to the Act so we can
18 participate." They pointed out the problems they faced, the
19 Chilkat Indian Village was involved in that process. Klukwan,
20 Inc., was incorporated as a reality, and then they had an
21 agreement with Congress that, in the statute, that when Klukwan,
22 Inc., got its land, its 2340, it included that 893 acres, but
23 immediately upon receiving that title Klukwan, Inc., would
24 quitclaim that 893 acres back over to the Chilkat Indian Village,
25 So, therefore, now that 893 acres that was held prior to the
Claims Settlement Act in as a reservation is now held as fee
simple title by the Chilkat Indian Village.

MR. GARBER: Does that include
subsurface to get from Sealaska also?

MR. STRONG: Both surface and
subsurface as well, and the land, the money that was received by
Sealaska Corporation then going to be held by, well, the money
that was held by the leases had to be put in trust during the



1 time they were trying to determine who was owning, who was going
2 to ultimately own the subsurface. That money was also turned
3 over to Chilkat Indian Village.

4 MR. GARBER: What were the
5 lengths in those leases. I mean that would have been a pre-
6 existing right, the Klukwan anyway, wouldn't it under the Act?

7 MR. STRONG: Well, I don't recall
8 what the length of the lease was, I think it was on a year-to-
9 year lease. But, there is another aspect of IRA's here in the
10 state that I forgot to mention before and it's really related to
11 an issue that was raised here and that is, I think just virtually
12 every IRA constitution here in the states says that membership is
13 by those people who reside in the village and they have
14 provisions in that if it's common, if it's a lot like the one we
15 have in Klukwan, it means that anybody who moves out of the
16 village is no longer a member, but they can acquire membership by
17 moving back.

18 MR. BERGER: Could I just ask a
19 question about the IRA's? What was it that all of you spoke
20 about IRA's said, that the point on which there was disagreement
21 was whether or not the solicitor was right, the solicitor for the
22 Department of Interior, was right in expressing the opinion in
23 1981 that even without Secretarial approval an IRA could assign,
24 sell, lease property? That was the point of disagreement was it?
25 So there's no misunderstanding, were there other points of
disagreement that I missed?

MR. CASE: Well, he was caught in
a jam there as I understand. If he said that they couldn't
freely convey and that the Non-intercourse Act did not apply to
them, he would be implicitly saying that there was an assumed
trust, and he didn't want to say that there was a trust
relationship with regard to lands conveyed to tribes in Alaska.



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1 So he was caught in a policy jam for him, which still exists as
2 far as we're concerned.

3 MR. BERGER: All right, leaving
4 that aside, and it's an important question, then do you all agree
5 that the IRA is the conveyance taken in by the IRA itself and not
6 the IRA corporation -- there is immunity from suit for taxes
leaving -- is that something that -- is agreed on?

7 MR. PRICE: I assume there's
8 agreement on it, but you can go further than that because there's
9 specific language in Section 16 of the IRA which says that, and
10 this is conveyed to an IRA reorganized government is the power to
11 prevent the disposition of its land or other assets without its
12 consent. And that may have been included to limit the power of
13 the Secretary to deal with the lands of the tribe, but at the
14 time that had been a problem prior to 1934 -- 1936. But the
15 language seems to go broader than that and it'd really be a
16 statutory re-statement of sovereign immunity. And so it seems to
me that you have a couple, you don't have to just rely on the
common law doctrine of sovereign immunity to get to the...you
have a statutory language that would seem to pretty clearly
protect IRA lands much the same way sovereign immunity does.

17 MR. BERGER: Dolly, did you have
18 a question?

19 MS. GARZA: No.

20 MR. BERGER: Monroe.

21 MR. PRICE: I just want to say
22 this would be part of the conflict that might raise in this and
23 that is that to the extent of that a Native corporation wishes to
24 engage in development of the property, the sovereign immunity
25 provision can be harmful. It is very helpful, but it is also
something which is sometimes an obstacle and obviously, in the
dealings with banks or with anyone else the effort is to try to
insure that there is some ability to hold the corporation



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1 accountable in some way. So that entities that have, that are.
2 IRA's have had difficulties and have had to try to circumvent
3 them, and have sometimes succeeded in circumventing them to
4 assure that they can be used. So, that's sort of a general
5 problem in the Act. The more general -- okay, I'll stop there.

6 MR. BERGER: Well, this is your
7 chance.

8 MR. PRICE: Okay, I just wanted
9 to say something really in response to Glenn, and that is that
10 the...what we've been doing, it seems to me, in describing all of
11 these entities is in a sense playing, this is a bad metaphor, but
12 I'll try it anyway, tailor, by saying, "Here's what shoes look
13 like, here's what gloves look like, here's what a hat look like."
14 Without saying, the other way of looking at it is to say, "What
15 kind of animal is it that we are trying to outfit?" What are the
16 -- we are looking at a kind of external set of vehicles rather
17 than an internal set of needs. And, I think what's interesting
18 about the Klukwan settlement or other settlements, including the
19 Cook Inlet settlement, you had a corporation saying, "Here are
20 our needs, here is how we want to tailor them." "We will develop
21 devices that meet what we think are necessary for us?" And it
22 seems to me that one of the various difficult questions for each
23 Native corporation is to say, "What is it that we think is right
24 for us?" And then either, "How do we manipulate these external
25 devices and the collection of them?" Or "How do we create some
hybrid?" And, one of the problems with that is, "what tolerance
of pluralism are we going to have?" That -- and I'm not sure
what the answer to that is.

MR. BERGER: Yeah, that's the
whole question as to what extent can people around the state make
their own choices. Tony and then Elizabeth and then Bart.

MR. STRONG: I did have -- I
thought that important, that the problem of getting some kind of



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1 working relationship with other corporations and banking
2 institutions as being an important problem for -- wanting to have
3 some kind of economic development taking place in the Native
4 community and my recommendation a couple of days ago that we
5 consider transferring lands to Native governments and that in
6 that transfer the corporations reserve an exclusive right of
7 development, and I think that's what -- that was the idea I had
8 mind and that is that they make sure that they have some develop-
9 ment. Something they could take to the bank, so to speak, and
10 say, "look we want to develop, we want some capital for develop-
11 ment and do we have an exclusive right of developing the lands
12 here that are owned by the tribal government?"

13 MR. PRICE: Wouldn't an exclusive
14 right of developing make it harder? I mean it's the sovereign
15 immunity question that the bank will want to know whether it
16 can...it's got recourse. And if the nature of the transaction is
17 that they've got the exclusive right to development and no one
18 else can do it, or that that's the only thing they are bargaining
19 with, it may not give the bank the recourse necessary to make the
20 loan.

21 MR. STRONG: My thinking was that
22 that exclusive right was a bargainable thing that they had. They
23 can mortgage that with exclusive right.

24 MR. BERGER: Dolly and then
25 Marlene and Elizabeth.

MS. GARZA: I'd like to bring up
what Glenn had brought up. It seems like that we have come here
as Natives concerned about our corporations and we've been
corporations for over ten years now. And, there are some prob-
lems with ANCSA and there are some problems with how the corpora-
tions are structured and our ability to work with them. And so
now we are sitting here trying to learn about other options that
we as board members or a[s] corporation people may go



1 back to our shareholders and discuss it with them. But, like
2 Glenn said, all we are going to do is go back there and tell them
3 about all the questions, that the co-ops would work if legal
4 changes were made. You know, that the non-profits would work if
5 there were major structural changes in some legal system some
6 where. And, because of that, because of all the questions, I
7 think that corporations will be very -- especially the smaller
8 ones, very hesitant to change to any other system because of the
9 fear of what we may be getting into because those legal questions
10 haven't been answered, and because the answer may greatly affect
11 the value of that type of an entity in terms of replacing the
12 corporations.

13 MR. BERGER: Well, no doubt
14 that's true, I think though, that we would be foolish if we
15 didn't expose these questions and say these are real questions.
16 And you should not make up your mind until you are aware that
17 these questions have to be faced and answered, and it may be that
18 in the end you'll say, "We are not to do anything. The questions
19 are too forbidding." But seems to me it would be altogether a
20 mistake to pretend there are no questions and just go ahead and
21 do whatever comes to mind. And, for my purpose this is clearing
22 the underbrush I want to know -- I've been out in the villages
23 and people say, "Let's have an IRA, let's have this, let's have
24 that." Well, I have asked you people here 'cause I would like to
25 know, can those people go ahead and make those choices or are
they just going to run into a lot of problems? And, if there are
problems, how can they be overcome? By the way, we spent the
last -- yesterday talking about the AFN resolutions as a basis
for discussion and they are a good basis for discussion. And
Marlene, your turn.

MS. M. JOHNSON: I am a board
member of an IRA, so I am enjoying this. We also own fee simple
land in the village.



1 MR. BERGER: What IRA is that?

2 MS. M. JOHNSON: The Hoonah
3 Indian Association. That, of course, we are fortunate at this
4 time the City of Hoonah does not have the ability to tax
5 anybody's property because ninety percent of the community is in
6 trust status, period, and it would be discriminatory to tax the
7 skew on a fringe. But, our documents, organic documents are so
8 antiquated that right now I don't think it's a realistic idea to
9 turn them over, at least in our areas, and I've looked at all the
10 documents in Southeast and they are all the same. They were
11 proposed by the Bureau of Indian Affairs back in 1934, 1935 and
12 1936 when most of us were chartered and -- they -- we tried ten
13 years ago by proposing new documents to the Secretary and got no
14 response five years ago again. I don't think that they're --
15 really the atmosphere in D.S. is that -- would like to change it
16 to the benefit of the Native communities. And, I think that's
17 going to be a major hurdle. Right now before we can do anything
18 according to our organize document, we must get the head teacher
19 of the BIA to approach, we don't even have a head teacher of the
20 BIA; we are a city school district.

21 But these things we can't even get written out of our
22 documents and I think there is a lot of major hurdles that have
23 to be taken on before the IRA's are a vehicle. I think the
24 governments of the tribe, and we assert our governing powers
25 right now that are not compatible with our organic documents, and
are waiting for someone to challenge us, which they haven't, but
I think that's a major problem if we are going to take this major
asset of the corporations and transfer them. There is also the
problem of the "must be a resident to be a member." We have
members that are not shareholders and we have many shareholders
that are not members, and that's going to create a problem.

MS. JOHNSTON: Actually, I just
had a question for Ralph, for point of information. And



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1 Marlene's it seems to me, referred to the same area that I wanted
2 to ask about, which is assuming that the U.S Government doesn't
3 accept the land in trust that transferred back to the IRA. What
4 would be the role of the BIA be then, and then contrast that with
5 assuming that the U.S. Government did accept the land in trust,
6 what would be the role of the BIA in that circumstance?

7 MR. R. JOHNSON: I'm going to
8 defer to David, I think he has worked more in his share in
9 Alaska.

10 MR. CASE: The role of the BIA,
11 it isn't in trust, is spelled out in a number of statutes [and]
12 regulations that it has the usual kind of powers the BIA has to
13 approve leases and other transaction on the land. That may or
14 may not be substantial impediment any more to development,
15 economic development of the property because of the last few
16 years of the self-determination policies.

17 If the land is not held in trust, then my understanding
18 of the law is that the tribe is free to do as it wished. The
19 Non-intercourse Act seems to say that's not so, if it is
20 implicitly held in trust, it's owned by the tribe. But the
21 Secretary takes the position in Alaska as the solicitor that
22 doesn't apply, and so when they have been asked to apply, the
23 regulation of the Department to controlling and leasing and
24 whatnot on tribally owned land in Alaska even when this was an
25 oil lease worth several millions of dollars the BIA refused to
treat it as trust land, and the result was the tribe did as it
wished, and negotiators cut its own deal with the oil companies.
So, that's where it seems thing seem to stand, you want to add
something, Bart?

MR. GARBER: Tony, if you got
something else on this, go ahead.

MR. STRONG: I did have a
response to the question that Marlene was raising about the



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1 organic documents, and I think it is an important issue. As it
2 does affect the ability of the councils to receive land and what
3 to do with it after they do receive it.

4 She's told us that they've tried several times to have
5 the organic documents amended, and the Secretary has refused to
6 act. I have an example I used from a previous occasion, --
7 talking with the Gila River tribe. The Gila River tribe had
8 such, had an organic document that they wanted to amend and make
9 it more up-to-date so that they would be able to work with it a
10 lot more and get more of the things that they'd like to have done
11 with the community. They had sent it over to the Secretary of
12 Interior and waited for approval, and they didn't get approval
13 and they just kept waiting for it, took them a long time to come
14 to the realization that they had another avenue. The avenue that
15 they ended up using was putting in -- I mean they wrote their
16 organic document the way they'd like to have it, they put in a
17 provision for Secretarial approval that gave the Secretary ninety
18 days to respond and if they didn't respond in ninety days it
19 became an act of -- I mean it became a reality to the rest of the
20 world. In fact, the bureaucracy are so slow that they, the
21 Department of Interior, couldn't react in ninety days, they knew
22 that in advance, and so they have an organic document that
23 excludes any participation from the Secretary of Interior in
24 making decisions on internal government of their tribe. And, I
25 think that that can be done up here in Alaska, just as well as it
can be done down in the Gila River reservation.

MR. GARBER: Judge Berger,
because I'm not going to be able to continue this afternoon, and
there is going to be important discussion, I recommend you come
-- I'd like to thank you, and then also go back on one point.
And that is addressing a little bit what Dolly says about the lack
of, because of the uncertainty, people are going to not want to
move from what we have right now. And part of what I wrote my



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1 paper about was for that exact concern. Also, because of the
2 different reasons where you may not want to take an IRA is
3 because you haven't been able to make that document fit what you
4 want. Partly, I also wanted to say that I don't know if we have
5 in our corporations right now, if you want to actually add up the
6 amount of legal talent that's been put towards IRA's versus
7 towards corporations, I am going to tell you that the bill is
8 much high with regard to ANCSA corporations, and it's not exactly
9 that we've got the panacea that we want right now also.

10 What I'd like to see, though, is that we get away from
11 trying to polarize the things and find out exactly what it is
12 that each one of us wants, and to be able to take some of the
13 risks to move one way or the other, and not simply say, "well,
14 good if you want to be a tribe, have at it, or but, leave us
15 alone with what we've got." There is a built-in mechanism with
16 ANCSA that may create it. And, just like what you said, Dolly,
17 just because of uncertainty, but also because of the workings of
18 a corporation where in time a management for one reason or
19 another, because of the need for continuity in management, may
20 lack that will to change, just because of being comfortable with
21 what is there, I think that we should be looking rather at what
22 we want and make 1991 something that is a positive factor.
23 Borbridge, the one I talked about before, has said 1991 can be
24 used as a lever to get change that we want to see in the Act.
25 Among ourselves if there is a lack of will on the part of some of
us for one reason or another, 1991 can be used positively like
that, and I would look at the full spectrum. Look at each one of
these individuals characteristics of these entities that we've
seen, pick out what we want, pick a suit and maybe take it off
the rack, and... but not get stuck with just a blue and then you
have red pants or something. Make it so that it fits right and
don't get stuck with pre-conceived notions, yes, IRA's don't fit
us right now, but God knows that ANCSA corporations don't exactly



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1 fit us right now either. So, we've got to gain some amount of
2 bravery to pursue whatever it is each one of us are destined to
3 want to have there. With that you know if you have that.

4 MR. BERGER: Well, Bart, thank
5 you for your paper to being the discussion. I think we all find
6 it a means of getting rolling on this subject. Just before we
7 adjourn, I think Roland and Rosemary want to speak and Evelyn
8 Hash-Pete wanted to say something too before we adjourn, so
9 perhaps we can go in that order.

10 MR. SHANKS: Well, I just wanted
11 to take a couple of minutes to kind of sum up and almost follow
12 on the heels of what Bart was just saying.

13 I think that, if nothing else, we've discovered over
14 the last couple three days that there is no easy answers. I mean
15 there are no cut...we are gonna have to go to the tailor and
16 build something that works. And, like every good wardrobe you
17 are going to need more than one. You are going to need more than
18 one option. He's going to hate the fact that he thought of that
19 metaphor, I mean he is just...by the time we get through with it,
20 he's going to have...not only did he write the Cook Inlet land
21 agreement, but he came up with this awful metaphor about clothes.
22 But, anyhow, there are, I think we need to recognize the fact
23 that under current corporate statues, you know there are a lot of
24 protections that are already available to the skillful
25 corporation manager. I mean, our corporation obviously does not
take risks back into our parent corporation; as Liz suggest, we
have a development corporation in which we are joint venture
partners with some other folks, and we want to do a subdivision
or a shopping center, we take the land and we wend it over there,
and that's the group that you know absorbs all the risk. So
there are ways that skillful people can you know, a skillful
corporation manager can go through that now. The real problem is
that we have some corporations that have not reached that level



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1 of sophistication yet. And, I'm afraid that, you know, those
2 corporations particularly are looking for some kind of corporate
3 structure or some kind of situation, be it corporate,
4 cooperative, IRA or whatever, that is totally, completely
5 bomb-proof, as far as losing their land. Well, I guess I'd like
6 to run up a red flag, and that is there is no such thing as a
7 bomb-proof situation. If you think that IRA's are federal
8 trusts, or bomb-proof, I suggest you go talk to some of the
9 tribes in the Lower 48 who were terminated. You know nothing is
10 forever, nothing is bomb-proof. Everything is going to take
11 diligent effort and diligence, following by the people involved
12 to make sure that it work, no matter what the structures may be.
13 I think we've also come to the point where it is very obvious
14 that we need a variety of options. Not only do we need a variety
15 of options which different corporations may use, but I think we
16 also need a variety of options that one single corporation can
17 use. I can see a village coming up to the point where they have,
18 like our village, a development corporation, an IRA which is
19 dealing with part of the land, and maybe a cooperative that is
20 dealing with part of the land also. I think we need to look at
21 mixes of the options within a single village, as well as a mix
22 within the entire ...

(NOVEMBER 16, 1984)

(OVERLAP TAPE, SIDE A)

19 MR. SHANKS (Continued):...I don't
20 think that we have the luxury of having "no action" as an option.
21 I think that, in some cases, villages that are existing now,
22 village corporations will do well, they will continue on into the
23 future. They'll become a significant part of Alaska's economy
24 and the social...

(NOVEMBER 16, 1984)

(TAPE 11, SIDE A)



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MR. SHANKS: (Continued)...

1 fabric, and they will serve their villages well. Other villages,
2 I'm afraid, are not in that situation and "no action" is not just
3 an option, I don't think for those villages. To return to what I
4 said before, I think that no matter what structure or no matter
5 what option we structure, or what option or structure a village
6 chooses to use, the only thing that is going to protect that
7 village into the future is diligence and perseverance on the part
8 of those village members. I mean, they are going to have to
9 watch what's going on. They are going to have to pay attention
10 to what is happening, not only to them and their village, but
11 also to the village corporation, and corporations structured
12 within state and federal law. It's going to be an ongoing duty
13 and burden to, you know, keep observing what is happening so that
14 essentially they don't end up getting worked into a corner. And,
15 I think that despite all of our moving toward trying to find the
16 bomb-proof structure and developing lots of different options, I
17 think that the only thing that is going to insure that lands
18 which village corporations or the Native corporations received
19 under the Claims Act, remains in Native hands, is a true
20 dedication by those Natives involved, that that is what's going
21 to happen. I think that with that basic dedication by the people
22 involved, I think that we can orchestrate and build structures
23 that will let it happen. But, without that basic dedication, I'm
24 afraid no structure is going to protect them and carry them
25 forward.

MR. BERGER: Well, we've looked
at the for-profit corporation the non-profit, the cooperative,
and the IRA, and to use Elizabeth's expression, I hope I won't
get shot for this, but in December we're bringing some people
here from the Lower 48 and from other countries to talk about the
devices they've used, the legal mechanisms they've used. Maybe
none of these alternatives that we've discussed is adequate;



1 let's see what other people are doing. And, it's important
2 enough to make sure we look at all of those alternatives. Rose
Marie, you're next.

3 MS. MAHER: I really appreciate
4 the opportunity to come here because I haven't participated very
5 much, but I have learned a lot just by listening. The Doyon
6 region has very few IRA's, they are mostly traditional counsels.
7 And, I would like to point out that it's very important to get
8 all the questions out before you act, because I learned the hard
9 way. The State told the Community of Northway that there was
10 money available for community projects that the unincorporated
11 community aid, and that the village counsels did not qualify for
12 that money. Even though Northway is 80% Native people and 20%
13 White, they were not incorporated, so they didn't qualify for the
14 money. So they said we had to set up a non-profit corporation
15 for this money specifically, which we did. And then some more
16 money came along from the State and they said, "okay we no longer
17 recognize the village council. The non-profit is the only
18 corporation we will recognize for State money." So there are
19 twists that you have to look at before you act, and now the
20 traditional council is upset with me as the president of the
21 non-profit, but we try to work together. We have a standing
22 resolution that we will not take any money if the village council
23 wishes. The corporation can say we don't want money, but we want
24 the village council to have this money. So, it's important to
25 look at all the issues before you act.

MR. BERGER: yeah, I think we can
all say amen to that. Evelyn Hash-Pete, you badly want to say
something, you can take Paul's seat there and use that microphone
if you wish.



1 MS. HASH-PETE: I'd like to say
2 that the framework of what all of you are talking about is
3 already in place. And, that we have two ice ages, and this
4 government we are talking about has been in effect and in
5 practice that the Land Claims Settlement Act has a section called
6 valid existing right, which means all rights prior to Statehood,
7 prior to Columbus, prior to Adam and Even, which in our language
8 we call recent history. Those governments that have been in
9 existence for these many, many, many thousands of years is the
10 law. We are the law, and when I say, I'm always saying the law
11 of the land shall prevail, that's just what I mean. All of these
12 things that have been used to fool us for how many years now, two
13 hundred years and the last forty years or thirty years. The Land
14 Claims Settlement Act and all of these things that they just keep
15 sending on each single issue go to court, settle it in court, on
16 each single issue. But, we already have our own laws, as Native
17 people, and we still own Alaska, we still have our traditional
18 borders, and this is all nice. I'm glad you're talking about it,
19 but the truth is, the law of the land shall prevail. Thank you.

20 MR. BERGER: Just before we
21 adjourn for lunch, I know some of you are leaving and I want to
22 thank all of you who can't return after lunch for coming, and to
23 say that if you are still in town, we are having a reception at
24 the Commission offices at five, and everybody of course at the
25 roundtable is invited, and all the folks in the audience are
invited too. That's at five o'clock this afternoon at our office
which is at 429 "D" Street. Well, anyway, I think just about
everybody knows where it is, and you're invited at five for a
reception there. Could I thank Bart again for his paper and if I
may thank now all the attorneys. I mean, we all go in for this
attorney bashing, it's not just Alaska, it's everywhere and they
take it in pretty good humor, but all of the attorneys here have
been ... well, I was one, and then I became a Judge and now I'm



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1 an attorney again. I'm just kind of getting used to the ... but
2 I think that all the attorneys here have laid it on the line and
3 haven't pulled their punches, and that really helps. It helps me
4 and it should help all of you. Look, this afternoon when we come
5 back, we can continue and I hope that ... I'll be here and I hope
6 that Dan and Elizabeth will be here to talk about how you get
7 these things from the corporations over to "X", wherever it's
8 going, and I hope Elizabeth will talk about some of the problems
9 regarding corporate disclosure, proxy solicitation, because she
10 is the great expert in the State on the subject, and I want to
11 find out more about that. And, so it's 12:50 P.M., why don't we
12 come back at 2:15 P.M. and we will carry on from then until we go
13 to the reception.

14 AFTER LUNCH

15 MR. BERGER: Can we just take our
16 seats. Well, maybe, maybe we could get underway again. Some of
17 the participants can't be back this afternoon, so I think we'll
18 start now.

19 Just a couple of announcements,
20 I'll remind you again of the reception at the Commission's office
21 five o'clock this afternoon, to which you are all, of course,
22 invited. The footnotes to Bart Garber's paper are available at
23 the desk at the back. You'll recall that when he presented his
24 paper, he said the footnotes would be coming, and they are here,
25 and so you can pick up the footnotes there. And some people have
asked about transcripts of what's been said at this meeting, and
I'm told the transcripts will be available by Christmas. Which
means if you will, would want to order, just send an order in
writing to the Alaska Native Review Commission and I think you
would get those transcripts early in the New Year. So, so I
think that we are now in a position to return to the discussion
and it seems to me that we had looked at these possibilities
transferring land from corporate, from Native corporations, to



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1 the Land Bank, to non-profits, to cooperatives and to IRA's, and
2 even to traditional councils, and I think that it might be a good
3 idea, if you don't mind, if we go back to a couple of questions
4 that it seems to me should be ... should not be forgotten, and
5 one is, can the corporations do this? What kind of vote, what
6 kind of a mandate do they need from their shareholders, etc. etc.

7 We discussed this yesterday morning when we talked
8 about the first of the AFN resolutions. It may be worth
9 returning to for a minute or two, and then after that we'll ask
10 Elizabeth to talk about well, what, when you go get that mandate,
11 what do you have to tell the people? And recent legislation in
12 Alaska, some lawsuits apparently shed light on that subject, and
13 let's just cover that particular ground before we run out of
14 time. So, if you don't mind, I think we've all kicked these
15 entities around, and let's go on from there. Dan and Elizabeth,
16 anything further you want to say about obtaining a mandate from
17 the shareholders to transfer land or other assets you talked
18 about earlier, a major corporate event, and organic change, and
19 so on and so forth? Anything in light of what was said this
20 morning that should be mentioned. Perhaps you might just repeat
21 the basic themes.

22 MS. E. JOHNSTON: Okay, the basic
23 themes I tried to talk about before were, since whether we are
24 talking about a continuation of restrictions on stock whether we
25 are talking about a merger of the corporation with some other
entity, whether we are talking about a transfer of all of the
assets, or in some of the villages cases, what would be
substantially all of the assets to another entity. These are
major significant corporate events. What Dan Fessler referred
to, I believe it was yesterday, as organic changes, and these are
the kinds of events that the board could not do on its own. The
board would act first to vote on what to take to the share-
holders, and then the shareholders themselves would vote on the



1 choices. I think that not only is that the thrust of corporate
2 law, but I think it is really the thrust of the promise that's
3 been made by the Native leaders to their shareholders, that this
4 would happen. The second thing, though, in that, in that step
5 which becomes a crucial question is, once your shareholders are
6 voting, and of course, they are voting by numbers of shares, what
7 numbers of shares it takes to pass something. And, if you are
8 dealing with just normal corporate matters, it really usually
9 just takes a majority of those present by person or by proxy.
10 If, however, you are dealing with a major corporate event, there
11 are different statutes you would look to to tell you what the
12 standards were for passage. When the Native community had wanted
13 to make it easier to achieve mergers, they sought and got from
14 Congress a provision on mergers which said that the vote for
15 approving mergers was a majority of the outstanding shares, a
16 middle ground. Some of the Alaska State statutes for certain
17 events require two-thirds the outstanding shares. In terms of
18 anti-takeover devices, when you are trying to prevent something,
19 when you as the corporation and shareholders all agree you are
20 trying to prevent something, you can have super majority
21 standards too. So, there are a whole range of possible
22 standards, and that becomes an important question.

MR. CASE: These requirements are
spelled out by statute, correct? Are there any common law
requirements of a similar nature, or is it all statutory?

MS. E. JOHNSTON: In the area of
disclosure, I am aware of common law requirements, but not so much
in this other area.

MS. GARZA: So for something
major, does it require that two-thirds vote?

MS. E. JOHNSTON: Under State
law, yes. But, I think one of the things as one considers
options in trying to craft legislation, that you can consider is



1 having, you know, a lesser standard than two-thirds. Because as
2 Charlie, I believe it was, pointed out yesterday, that in some of
3 the Native corporations to get even a fifty-percent participation
4 is a very difficult thing. Much less to get fifty percent all
5 voting the same way. So, on one hand you have a sort of a
6 reality pushing you, and on the other hand you have what is good
7 corporate governance, not to set your standards so low, that if
8 Liz Johnston just votes alone, that's what happens, and you'd
9 never want that incidentalness.

10 MR. BERGER: When you talk about
11 fifty percent, do you mean fifty percent of the warm bodies or
12 fifty percent of the proxies.

13 MS. M. JOHNSON: I used two terms
14 and they are different from each other. One, I used the term,
15 "majority of those present by person or by proxy," that's what it
16 takes to just do the run-of-the-mill things. And, then I used
17 the phrase "majority of the outstanding shares", and of course,
18 that means if there were five hundred thousand shares issued in
19 Bristol Bay, it would take two hundred and fifty thousand, plus
20 one, voting yes for a major change, if that were the standard.

21 MR. BERGER: Two hundred and
22 fifty thousand persons in person or by proxy.

23 MS. E. JOHNSTON: Yes.

24 MR. BERGER: So you could
25 theoretically have Liz Johnston there with all the proxies.

MS. E. JOHNSTON: Oh, yes.

MR. BERGER: And, that's all
you'd need?

MS. E. JOHNSTON: Yes, but it,
you can see that's a higher standard, okay yes. But,
mechanically, okay no, some people have a lot of trouble with
that, I'm sorry.

MR. CASE: Are dissenters rights
in this same category, of requirements in order to make changes,



1 is that of the same category as these voting requirements you
2 mentioned?

3 MS. E. JOHNSTON: Historically,
4 when you went back in corporate law, you had in old corporate
5 law, you had a system where if you were going to make major
6 organic changes, it took everybody voting the same way. And,
7 what happened was, there would be, you know, ninety-nine people
8 wanting to go one way and one guy saying "ha ha ha ha, have I got
9 a deal, I'm going to hold up now, is you'll just kick me under
10 the table, five thousand, ten thousand, whatever it is
11 sweetheart, I'll vote the way you want me to." And, so corporate
12 law changed so there couldn't be any holdup to reduce it from a
13 hundred percent voting one way to two-thirds or you know some
14 lesser standard. But, in order to balance, then, what happens to
15 those who are legitimate, people with a legitimate desire to go a
16 different way, they put in dissenters' rights. It was a
17 balancing effort, and in Alaska State statutes, the dissenters'
18 rights do exist for certain types of events. If you were under
19 just Alaska State law, it would be, you would have dissenters'
20 rights in the merger area, you would have dissenters' rights in
21 the sale of all, or substantially all, of the assets.

22 MR. CASE: And, again, these are
23 exclusively statutory requirements, there is no such thing as a
24 common law dissenters' right.

25 MR. JOHNSTON: I hesitate to
answer on that, I don't know the answer.

MR. BERGER: Well, they are there
anyway in the statute.

MS. E. JOHNSTON: Yes,
definitely.

MR. FESSLER: They're in the
statute? Now a question was raised earlier in a discussion
between David Case, Elizabeth and myself, about could you simply
by amending the articles of incorporation of an existing Alaska



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1 profit-seeking corporation, sort of transmuted into a cooperative
2 corporation?

3 MR. BERGER: Converted, whatever.

4 MR. FESSLER, Converted, whatever,
5 alright. Now that's a specific question, and you would think
6 that by consulting the laws of Alaska, we should be able to give
7 you a specific answer. I will now read you the law. The law is
8 found in Section 10, Chapter 5, 207 of the Revised Alaska
9 Statutes, The Right to Amend the Articles of Incorporation. "A
10 Corporation may amend its articles of incorporation from time to
11 time in any and as many respects as may be desired, so long as
12 its articles of incorporation, as amended, contain provisions
13 which might be lawfully contained in the original articles of
14 incorporation at the time the amendment is made, and, if the
15 change in shares or rights of shareholders, or an exchange or
16 reclassification or cancellation of shares or rights of share-
17 holders is made, to provisions necessary to affect the exchange
18 reclassification or cancellation." Now what does that mean?

19 Well the biggest question, it seems to me, is it, would
20 not be legal to organize a corporate entity under Chapter 5 of
21 Article 10, as a cooperative. If you want to organize a
22 corporate entity as a cooperative, you do that under Chapter 15.

23 MR. BERGER: Which is the cooper-
24 ative statute?

25 MR. FESSLER: Which is the
cooperative statute. So when the statute says a corporation may
amend its articles from time to time, so long as its articles of
incorporation as amended contain provisions which might be
lawfully contained in the original articles of incorporation, you
could not have such provisions lawfully in the original articles
of incorporation of any entity formed under Chapter 5. So, I
think in order to become a cooperative, one would have to go
through the more tedious process of setting the cooperative up as



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1 a corporate entity under Chapter 15 of the statutes, and then
2 merging the existing Chapter 5 corporation into the Chapter 15
3 corporation. That would require observance of the procedures for
4 an organic change, and it would appear to entail the recognition
5 of dissenters' rights. That would be the most conservative, that
6 would be the worst case scenario.

7 MR. BERGER: To the question, can
8 you convert a Native corporation into a cooperative, the answer
9 is no.

10 MR. CASE: Well, I'm sorry, I
11 disagree with the statute. There is another statutory provision
12 that I, I can't cite it to you, but it's either in the cooper-
13 ative provisions or another provision of the profit-making
14 corporate code. I can only say I've read it, and may be I
15 misread it, and I wouldn't ... the gist of which is, you can
16 convert ... there is special provision to convert a profit
17 corporation into a cooperative with a two-thirds vote by amending
18 the articles of incorporation.

19 MR. FESSLER: While there is no
20 question that you can, well, I don't know of anyone that talks
21 about converting it, you can clearly change, if you observe the
22 two-thirds voting requirement, you can effectuate the organic
23 change to merge or consolidate with and have the resulting
24 corporation be a cooperative corporation.

25 MR. CASE: That's correct, and
the only difference I can see in the other provision which I can
recall, is that there were no dissenters' rights specified.
That's why I was interested as to whether there was such a thing
as a common law dissenters' right.

MR. FESSLER: I don't know and I
am simply unaware of what would not deny the potential existence
of such a statute. I don't know of such a statute.



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1 MR. BERGER: In those AFN
2 opinions, those legal opinions, wasn't there some reference made
3 to it there? Is that where you, I see. Elizabeth, you are not
4 aware of such a provision either, right?

5 MS. E. JOHNSTON: I am not aware
6 of such a provision, but that doesn't mean David's not correct at
7 all, it just means that it's true that I'm not aware of such a
8 provision.

9 MR. CASE: I guess you know with
10 folks such as you, I'm not going to say that I'm right, ha ha.

11 MS. E. JOHNSTON: Why not, it
12 happens to me in the office all the time.

13 MR. BERGER: Well, does that, we
14 spent a lot of time yesterday on this question of the mandate
15 from the shareholders, could we move on and ask Elizabeth to talk
16 about, so sorry, Dan, go ahead.

17 MR. FESSLER: There is one point
18 that we ought not to lose track of. If the statute that you are
19 referring to is in existence, fine. If it is not in existence,
20 or does not have the content that memory serves, then should it
21 be thought advantageous, and determined advantageous, by you as
22 the clients to have such a provision, then the very body that
23 either has or has not created such a state exists and is sitting
24 right down there in Juneau, and you've got an agenda of something
25 to ask them for. That certainly requires an act of Congress.

MR. BERGER: Well, I think that
point is well taken Ralph.

MR. R. JOHNSON: I just want to
come back a little bit more global of one thing that was not
repeated this morning in that context, and that is that the
corporate form and the co-op form are the products and are
protected by and are articulated by state law. If the State
Legislature should change character as the State becomes more



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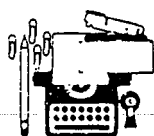
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1 urban over the next ten, fifteen, twenty, thirty years, then the
2 legislature can change the rules of the game, and one then has to
3 decide whether the forum of the state legislature is better than
4 the forum of the Congress of the United States. And, I don't
5 want to make a big issue of that now, but a lot, that certainly
6 is a background factor to keep in mind. I can assure you that
7 the people in the State of Washington, the Indians in the State
8 of Washington would much prefer, infinitely prefer, to deal with
9 Congress than with the Legislature of the State of Washington. I
10 can't say that that's true here, I know that population
11 percentage of Natives here is much greater, the economic power's
12 much greater, that sort of thing. But, in the State of
13 Washington the State Legislature has not demonstrated any recep-
14 tiveness to Indian concerns.

15 MR. BERGER: And the public has
16 recently by a slim margin voted against the perpetuation of the
17 rights conferred by the Boldt Decision; I understand.

18 MR. R. JOHNSON: An initiative
19 was passed by the people, the State of Washington, to overturn
20 the Boldt Decision. The initiative is unconstitutional, but it
21 does indicate what the majority of the people, the State of
22 Washington, informed or uninformed, did. Congress won't do that,
23 Congress won't go along with it, but the State of Washington did.

24 MR. BERGER: Well while it may be
25 that out of all of this, and we are not here to pass a resolution
or to make up our minds, but I think this menu that we've got
laid before us given -- a -- we might in the end have a situation
in which it seems right that Alaska Natives should, some of them,
be able to choose the cooperative, others might choose IRA,
others might say, we'll take our chances with a for-profit
corporation right down the line. Others might do this, others
might do that. But, at least we are gaining an idea of what has
to be done in Juneau and Washington, to make that range of



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1 choices available to people. And with seven years to work on it,
2 I would think these problems are not overwhelming.

3 MS. MAHER: Yes, I, we are going
4 to have to be leaving about three-thirty, and I was wondering if
5 we could get into the discussion that I don't remember the
6 gentlemen down here wanted to talk about the conflict of
7 interest, and also with proxies. 'Cause we will be leaving in
8 about half an hour.

9 MR. BERGER: Okay, could we, if
10 you could, Elizabeth, could you deal with proxies them, and then
11 we'll try to deal with conflict of interest, if that's okay.

12 MS. E. JOHNSTON: Everyone here is
13 experienced with the idea that when you are going to hold a
14 shareholders' meeting, that you can hold a shareholders' meeting
15 not only involving the people that are physically present at that
16 meeting, but also by proxy. By someone else giving the proxy
17 holder the power to vote for them, and this is generally the way
18 you are able to get a sufficient amount of participation in your
19 meeting to go ahead BBNC has fifty-three hundred shareholders,
20 they are located, fifty three hundred, they are located only
21 sixty percent within the region, forty percent outside. They are
22 located all over, having proxies is obviously a very convenient
23 device. At the same time, when you are going out to go solicit
24 proxies, there are certain things that should be told to share-
25 holders. How are you going to vote the proxy, perhaps is a
useful thing. Before the proxy regulations were in place, I
remember very vividly within the Bristol Bay region a lady who
was a dissident, and she solicited seventy thousand shares, which
is a nice round number, and then she discovered that her own son
was running on the management slate. Those were, by power
substitution, signed over to the son. I would like to think
that, much to the surprise I assure you, of the people who had



1 given that lady their proxies, because of course, they wanted to
2 vote against the management slate, that was the whole purpose.

3 I think under the set of proxy regulations that would
4 not be appropriate. You must talk with people frankly and in
5 above-board fashion what you are going to do with their proxy.
6 And you show this to them, and you don't bring something up cute
7 at the end. You don't run out and solicit a lot of proxies and
8 then bring up a new subject at the annual meeting, and then use
9 the proxies in a way you have not let people know that's going to
10 happen. It's just an issue of fair play. So in the area of
11 voting for directors, you reveal to people a little background
12 about the directors, and you reveal to people who you are going
13 to vote for in the area. When you get in terms of proposals,
14 however, before the annual meeting, that often gets more complex
15 because there is a lot of discussion about what you must reveal.
16 And, of course, if you are in the position of management
17 soliciting, you have an even heavier burden. Because you have
18 the responsibilities of the annual report too. I remember, Larry
19 Carroll shared this with me, there was one corporation who wanted
20 to continually have everybody come and "vote for me, vote for me,
21 vote for me, I am a wonderful management. Oh, by the way, you'll
22 get your annual report after the annual meeting is over." I
23 assure if I did that to you, you might vote for me, but if you
24 saw the results of my management, you might not.

19 So, management has an additional burden of making sure
20 that the annual report is out, and shows that to people. But,
21 when you are actually, before any proxies are solicited by
22 management, there is one exception to that, which would be if a
23 dissident group starts soliciting, okay, management doesn't have
24 to sit back and wait.

24 MR. BERGER: Can I just
25 intervene.

MS. E. JOHNSTON: Yes.



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1 MR. BERGER: I notice dissident
2 is always used to describe those who oppose management. Is that
3 a term of art, or is it something that's crept into the ...?

4 MS. E. JOHNSTON: It's probably
5 crept into the vocabulary, and it is probably a preferable term
6 for me to use in lieu of what I might use as a member of manage-
7 ment. So, it's I mean, I mean it, however, as a descriptive
8 term. I could talk about a non-management slate if that would be
9 appropriate.

10 MR. BERGER: No, no, carry on.

11 MS. E. JOHNSTON: In general I agree
12 with you, with the idea that management must send out an annual
13 report. In other words, show people where they are, what they're
14 doing, how they performed before they solicit proxies. There is
15 one exception to that rule, which is if the dissident or non-
16 management slate were to begin soliciting much earlier. Manage-
17 ment is not required to sit there until they can put their annual
18 report together before they go out and solicit too. The proxy
19 rules are not set up to create a distorted advantage to one side
20 or the other. The harder area, however, actually for telling
21 shareholders what's going on in the annual meeting is when you
22 get to specific proposals, which, of course, is the area we've
23 really been talking about for two and a half days. Specific
24 proposals presented to the shareholders that they would vote on
25 that would not be advisory, but that would be mandatory, and it
would strengthen or weaken, it would alter or keep the same the
entities that they are now dealing with. And, I urge you to
think in terms of that when you do present these to your share-
holders, that you should take great care in disclosing to them
the consequences of the choices before them.

Each, although as Glenn pointed out, the discussions in
the last two and one-half days have talked a lot about things
that are uncertain. They've talked about different entities



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1 having certain positive things and certain negative things. I
2 don't think there is any entity we've talked about that couldn't
3 say there were certain positive things to be gained by this and
4 certain negative things. I think that, bearing that in mind,
5 that it would be very important that whatever choices each of you
6 ultimately ends up doing, [is presented] for your shareholders
7 consideration. As I say, at a real vote where we're talking
8 about an operative meeting now, of shareholders, that you would
9 lay out for them, the pluses and minuses. In other words, don't,
10 don't slip into the salesman routine, where you say you this is
11 the greatest thing since sliced bread. The trail of Native
12 corporation is strewn with the bodies of Native corporation
13 management that tried to do that. In some cases, the corpor-
14 ations have been able to interchange management and carry on in a
15 more productive way. And I would mention the Aleuts as an
16 example of that. They had a very early case, and it was under
17 common law, even before the proxy regulations were in place, that
18 talked about the fact that there must be truth telling to share-
19 holders about management's representations.

20 But a more recent case, and more, if you like,
21 disastrous or costly case, I would almost say a no-win case, was
22 the Koniag case. As many of you know, it was dragged through the
23 court system for years. It ended up in literally millions of
24 dollars in attorneys' fees and I would like to think that Koniag
25 will recover from that lawsuit, but I don't know that they will.
And, so I think that the, not just the pure heart ... true, start
with the pure heart, the idea that you if you are presenting
choices to your shareholders, they have a right to know among,
between those two choices what would be the pluses and minuses
about staying where you are, what would be the pluses and minuses
about the new choice?

For example, we talked, and I'm only going to use this
one example, but it's one that has bothered me, which is, we know



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1 right now, we've got corporations with kind of a cluster of
2 membership. I mentioned that at BBNC some people live even
3 outside the region. So, we've got a tremendous pattern of range
4 where people live. We also know at present at BBNC we've got
5 both Native and non-Native membership, although the non-Native
membership is a very low figure today.

6 Okay, suppose we were to switch over and present to the
7 shareholders a choice of an IRA. I think it would be very
8 important, then, to make sure, and not only have established the
9 way we've all been talking about so that it's clear who would be
10 the members of the IRA, but you would make sure that that was told
11 to your membership so that if you were suddenly switching from a
12 system where people did or did not reside, or where everybody, no
13 matter where they resided, the mobility thing, that Bart was
14 addressing applied, as opposed to the IRA situation where maybe
15 mobility is not the same thing. Whatever the rules are, just
16 help your shareholders see the pluses and minuses of each choice,
17 and don't shade it by your own preferences. And the Koniag
18 lawsuit, as I say, has been disastrous in the sense of what the
19 end result of it is. Because management did not reveal a couple
20 of things, they were important things. Again it was not that
21 anybody was particularly applying securities laws, but those were
22 certainly used by way of analogy. And, what happened was indeed
23 a positive, perhaps changing Koniag's management, but only after
24 bleeding the corporation dry. And I, so I suppose in this, in
25 this sense, I'm at one with Dan Fessler, by saying nothing beats
preventive law, and. I think that if you can realize just that
you are taking a major proposal to the shareholders and can make
sure that you get help in thinking through and making sure you
list for them the differences between the two choices. It's just
an extremely important step, and again it is a fair step.



1 MR. BERGER: Could I ask a
2 question, John Taylor and David Case, but before either of you,
3 could I ask a question of Elizabeth.

4 These choices are going to be made by the shareholders,
5 and they are choices that may have far-reaching implications for
6 future generations of Native people, and we all, we've all been
7 talking about, well, making those choices within the present
8 corporate structure. Ninety-two makes a proposal, another group
9 opposed to management may make a proposal. They go around
10 competing for proxies, come to the meeting and vote the ...

11 MS. E. JOHNSTON: I think if the
12 competing group made a proposal, you'd have a problem... Because
13 if you are talking about an organic change, usually that comes
14 out of the board of directors, which, you would have to follow
15 your scenario, which you would have to have as a change of the
16 board for the competing proposal to come forward.

17 MR. BERGER: All right, so you
18 got a proposal from the board, but some may have, with choices,
19 suppose the board said, "do you want to go IRA? Do you want to
20 go co-op? Do you want to do this or stay a corporation, or put
21 so much land in", or suppose it was perfectly straightforward?
22 We've got ...

23 MS. E. JOHNSTON: It's got to be,
24 if you're going to count the votes, because your suggestion would
25 mean you never end up with the right affirmative votes to go
anywhere. You know, it would be like do you want "A" or do you
want "B", to be able to do it right.

MR. BERGER: Let's say do you
want "A" or do you want "B". Now, you turn up at the meeting,
and there are maybe a hundred shareholders in person, and they
have a majority of proxies one way or the other. Okay, this may
sound heretical, but, and is not provided for under the law, but
since these people, these shareholders are making a very



1 important decision ... some, is it morally appropriate even to
2 consider a referendum ballot. Now, I know that's not necessarily
3 done, but that's where you had a valid ballot box in each
community.

4 MS. E. JOHNSTON: Okay, I would be
5 very concerned about the control of the ballot box in each
6 community, but let me perhaps answer what I think is your
7 concern. If a proxy is prepared properly when you are dealing
8 with a major proposal for shareholders, there are really two sets
9 of documents to go out. One is the proxy statement, what is all
10 the verbiage and all the explanation, and the other is the card
11 itself, and if you're giving shareholders a major choice, let's
say just proposal number 1, yes or no. Yes, we want to keep the
corporate structure, you know, yes, we want to go IRA, I mean
those are the two clear choices.

12 There is a place on the proxy card for people to vote,
13 and that becomes a directed proxy. So, the proxy holder who has
14 that proxy, that you know, let's say I become the proxy holder.
I can't vote that proxy any way I want. I must vote it the way
15 that shareholder marked it. Okay, so that becomes, I believe the
16 equivalent of what you are suggesting.

17 MR. BERGER: The equivalent of a
mailed ballot.

18 MS. E. JOHNSTON: That's exactly
19 right, and it just is, it really is on a proposal issue that this
20 happens. That's much harder to do when you are dealing with
21 directors and cumulative voting, which is why you see a lot more
22 verbiage clustered around that. But when you are dealing with
23 proposals, you definitely not only can have, but should have a
directed ballot, or directed proxy which is the equivalent of the
vote.

24 MR. BERGER: Well, that's ... I'm
25 glad I asked that question. John Taylor and then David and Tony.



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1 MR. TAYLOR: Elizabeth, Daniel,
2 there are some other issues embedded in what you've been talking
3 about that I think may be of interest to us right here.

4 Under the proposed new legislation that you helped put
5 together, Dan, and what you were talking about, Elizabeth, there
6 is some shifts in the deadlines for proxies, and proxy state-
7 ments, and getting voter lists out, and getting access to share-
8 holder lists. There is also some changes in the lengths of
9 times, I believe, that we are playing with here. The real
10 question is, assuming that we are going to have corporations
11 surviving beyond 1991, might there not be some differences that
12 we may want to look at in those time lines, and different manage-
13 ment options as to when they have to start doing some of this to
14 be in a much more protective position that we are right now? I
15 know under the new corporate statutes, we got a little more
16 leeway, and there are some differences there, but the question
17 always comes up, for instance, in cumulative and non-cumulative
18 voting. There may have to be a switch to protect you, and now we
19 are trying to look out for minorities issues sometimes. We may
20 want to turn around and put it all to protect a majority. How
21 about in this proxy area. Are there some areas that we ought to
22 look at that we may want to shift into a little later on.

23 MS. E. JOHNSTON: That is really a
24 tough question for me to answer. As I've thought, as I've tried
25 to think through, as you know, in talking to me, I've always
thought of the "belt and suspenders" approach, which is how we
would do certain things in federal law and at the same time we
would do certain things in state law so that if anyone found
something else would cover us ... and, okay, all I meant was I,
in terms of looking at the state law issue, I had only looked
really at a narrow number of options that are traditional in the
anti-takeover area, such as super majorities. Such as having,
making sure that if someone owned more than a hundred shares that



1 it wouldn't be one-share, one-vote. Those are the two, ability
2 to change your articles so that when you were considering mergers
you could consider non-monetary considerations.

3 Anyway, in some ways I know these, these words are just
4 rolling off people's backs. All I'm suggesting to you, John, is
5 that I had never really ... I don't have an answer for you,
6 because I've never set back and analyzed a change in these other
aspects, and how that would work.

7 MR. TAYLOR: Well, some of Dan's
8 new proposals in the new proposed corporate statutes do make some
significant shifts in the time lines, and I was just wondering
9 whether, Dan, you've had a chance to think through it...

10 (NOVEMBER 16, 1984)

11 (OVERLAP TAPE, SIDE A)

12 (INFORMATION NOT FOUND ON OVERLAP
TAPE AS SPECIFIED ON GUIDE SHEET, EVEN AT HIGHEST VOLUME, TAPE
13 CAN'T BE MADE OUT).

14 (NOVEMBER 16, 1984)

15 (TAPE 11, SIDE B)

16 MR. TAYLOR: (Continued)...
Enforcing those or how the state law may want to change a little
17 to be much more defensive.

18 MR. FESSLER: Well, I'm not
positive that I'm tracking what you're asking me. One thing that
19 the proposed new corporation code would do which is not found in
the other one, the existing law, which I think would be an
20 advantage to anybody concerned with corporations, it standardizes
21 time requirements on notices to shareholders. Notices must be
22 given a minimum of twenty days prior to the corporate action that
23 you proposed to take, and it cannot be more than sixty days prior
to the corporate action. It's abusive if you want until the last
24 minute to mail something to someone knowing they're not going to
25 get it. It is uniquely abusive if you mail me something six



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1 months ahead of time, as an invitation to a party, for I shall
2 surely lose track of the date and lose the invitation and won't
3 show up. So the Act standardizes that, and you don't have
4 whereas the current statute has different time frames for
5 different actions, and people have to worry about whether this is
6 a ten and fifty day requirement, a twenty and fifty day require-
ment, there would be standard requirements, and I think that will
make life a great deal simpler.

7 With respect to proxies, the Act does not attempt to
8 substantively interfere with the legislation that Elizabeth was
9 primarily responsible for. It does clarify the nagging question
10 of when a proxy is irrevocable. It says that proxies have no
11 life beyond eleven months, so that no one can sit there and say
12 "well, I have, for a second annual meeting, your proxy." The
13 proxy cannot last beyond eleven months, for periods of revocation
14 it ties them to specific interest and makes clear when it is that
15 that proxy can be revoked. It clarifies such things as, if the
16 proxy, the person who gave the proxy actually shows up in person
17 at the meeting, the fact that she has walked in the room revokes
18 the proxy, and she can vote her own shares. I mean, a lot of
19 questions which at the present time are left in a sort of vacuous
20 state, we don't know the answer in Alaska. An attorney, or
21 indeed a far better idea than an attorney, a director of a
22 corporation or a shareholder, an officer of the corporation could
23 look at the law and read it, and say, "yes, if you come to the
24 meeting, you can vote your shares in person." It also says that
25 the, if you've given more than one proxy, the proxy which was
given last in time controls, and yet it is a much more detailed
provision than existing law in, in those areas. It does not deal
with the disclosure requirements. What the new act would do is
to make it easier for shareholders to gain access, meaningful
access, to the books so that they could see who the other share-
holders were, where they lived, it streamlines the circumstances



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1 under which shareholders have a right to inspect those books, and
2 I think it puts in meaningful consequences, if they are denied
3 those rights.

4 MS. E. JOHNSTON: The thing is,
5 the question that John raises, goes sort of to the, the center of
6 the conundrum. As long as we assume that what we've got is
7 almost, if you like, a closed system where you are dealing with
8 Native shareholders, that anything that is pro-shareholder rights
9 tends to be something that most of us would be for, and say, in
10 the long run would be for the health of the corporation. For
11 example, I recall that in the present proposal there is a
12 proposal to remove directors without cause. That is a
13 pro-shareholder provision, and that is pretty good corporate
14 governance, but it's a pro-shareholder provision. It is not a
15 pro-management provision. That works fine as long as we, as long
16 as we think of the fact that the corporations would have Native
17 shareholders. But, what John is raising and the part I feel I'm
18 stumbling over, is the question as if you have in some fashion,
19 alienable stock and you begin to see the encroachment of others,
20 and your balance within your shareholder community is shifting,
21 then how do you start to re-think these things.

22 For example, if I'm setting up a bunch of anti-takeover
23 devices, I'm not talking about now within the Native community,
24 I'm trying to help one Native faction over another Native
25 faction, that's not what I mean, but I'm trying to help Natives
within Bristol Bay keep control over those other guys, what the
heck am I doing having the provision that's required by state
statutes that says directors can be removed without cause.
Because everybody knows that one of the nice devices for
retaining Native control and director control is to have
staggered terms. And, so you have this, it's a tension, and he's
shifting the time frame on us. We are fine as long as we're
thinking everybody's within the Native community.



1 MR. STRONG: And, that's the same
2 issue I brought up on cumulative and non-cumulative voting. We
3 are continuing to back ourselves into the position of protecting
4 the minority, when in fact, in seven years, that may be the worst
thing in the world to be doing.

5 MR. FESSLER: But in that
6 context, I would point out to you that the ... that the pending
7 Alaska Legislation on cumulative voting does not make cumulative
8 voting mandatory, and it makes it something which depends upon
9 the provisions of the articles of incorporation. In other words,
10 there is great stress under the proposed statute in the content
11 of the articles of incorporation, and those articles can be
12 amended. But in order to make those changes, one would have to
13 amend the articles, which does require shareholder participation
and it requires telling shareholders the truth under your proxy
rules as to exactly what it is that's being proposed, and you
have to count the ballots both for and against the thing.

14 MS. E. JOHNSTON: I knew there was
15 something I had left out.

16 MR. FESSLER: One matter on
17 proxies that you ought to be aware of, which startled me when I
18 read it: under existing Alaska cooperative corporation statutes,
proxies are not allowed. You can't vote by proxy in a
cooperative corporation.

19 MR. BERGER: So, you have to have
20 everybody ...

21 MR. FESSLER: That's, that's
22 whether you are thinking of this as good news or bad news the
23 telegram is not over. That is ten point one five, point one
24 three zero. You can't use proxies, but you can submit to share-
25 holder for decision by written ballot any proposal. So you can
use ballots, but you don't have the specter of my going to you
and saying "Tom, let me have your proxy so that I can attend the



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1 annual meeting and cast it." Ballots can be submitted which you
2 then mail in and we have to open the ballots, then we have to
3 count them. But nobody can walk into the room and say, "I have
4 the right to cast sixty percent of the votes of this business,
5 because the proxies are in my purse." It doesn't work in co-ops,
6 in Alaska.

7 MR. BERGER: Could I just ask
8 you, Dan, to comment on what Elizabeth said about the directed
9 the proxy, that is, if management sends out a choice between
10 co-ops and IRA's or is it this or is it that? She said that
11 well, the only thing that you can do if you are soliciting
12 proxies is get the person to actually mark his "X" on the choice
13 he favors, that's a directed proxy, so it is the same thing,
14 really, as a mailed ballot. Exactly what the law requires of
15 cooperatives, do you agree with that?

16 MR. FESSLER: Yes, although, as I
17 understand it, and I have not read the proxy rules, if they are
18 like the federal proxy rules that are sent out, you have to give
19 the shareholder one of three choices. If you give a proposal,
20 you have to provide for the shareholder to vote yes or no. Or,
21 the shareholder can simply give the proxy solicitor a blank power
22 to cast the vote as that person chooses without directing the
23 person at all. But, you must give the proxy giver the right to
24 pre-ordain how you are going to vote on that matter. I assume
25 that's what your state statute does as well.

MS. E. JOHNSTON: Okay, the proxy
regulations provides that if you are sending out a proxy where
there is going to be the choice between approval or disapproval
of a certain matter, that you must provide boxes for the share-
holder to make that choice. Now what usually happens too, is
that shareholders who choose not to make that choice, and here it
is not written this way, okay and it's just following SCC
practice. Really, it's made up, if you like, it's not really in



1 the state proxy rules. You can put in bold type below, you know,
2 if Tony doesn't make the choice, this is how management will vote
3 this proxy. I mean, you reveal right on the face of it how
4 management is going to go. If the shareholder does not direct
it.

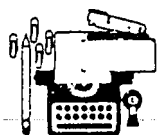
5 MR. BERGER: Well, tell me what
6 happens and I want to come to Claude because he has to leave, but
7 let me ask you this question, Elizabeth. If you got approved or
8 disapproved conversion of forty thousand acres of land to a co-op
9 or transferred to a co-op, and management comes to a village and
10 says, "okay, we've got everybody to mark their choices, and we
11 are taking these back to the meeting," and then the dissents, God
12 forbid they'd come along the next day and get them to mark one.
Okay, it is the second in time that counts. And, then management
comes back the next day and so on... .

13 MS. E. JOHNSTON: Yes, that's right,
14 sure. I mean, I know why should only one side have their voice
heard, I mean that's... .

15 MR. BERGER: Claude and then --
16 Claude has to leave in a few minutes.

17 MR. DEMENTIEFF: Yes, I do. I'd
18 like, before I leave, I'd like to add one more little element to
19 this proxy discussion. Rose and I both have observed on one
20 occasion after the proxies were due by a certain date, at the
21 annual meeting on the floor, a number of people picking up
22 ballots, after registration, that were signed. Mostly from the
23 elders, because the elders didn't quite understand the issues,
and they trust somebody to vote for them. Now, my understanding
of that practice is that ballot in that type of a practice, just
a signed ballot on the floor, in effect, makes a proxy? Is that
correct, and is that legal?

24 MR. BERGER: You mean the elder
25 is there in person?



1 MR. DEMENTIEFF: The elder is
2 there in person, but doesn't vote the ballot, gives it to another
3 and just signs the ballot. The ruling under that situation at
4 that meeting was that the time and the due date for proxies had
5 passed, and that a ballot on the floor could not in effect be a
6 proxy. However, they were still voted, they were still ballots.

7 MS. E. JOHNSTON: I think if I were
8 carefully handling such as a situation as that, and I had, say
9 myself at the meeting, and Dan's at the meeting and wanted to
10 integrate our, you know, each of us had the power to vote, I
11 don't care if whether it's our own shares or some other people's
12 shares too, that what I would do is make sure that Dan was in the
13 same room with me, and I added our numbers together and figures
14 out what would be to our advantage, and I explained to to Dan,
15 and Dan did his own voting. Because, what he, theoretically what
16 somebody is doing by giving you the ballot is saying -- you know,
17 "I want to contribute to your side." Well, that's fine, but I
18 think the purist way to handle it is to say, "you know, Dan and I
19 should be together in the same room," and figure it out and I'll
20 show him what I think is good, and Dan can say, "okay, yeah, I
21 want to vote to way or not," and he marks it. It's his ballot.

22 MR. DEMENTIEFF: That did not
23 occur in this particular instance. My question was, after the
24 due date of the proxies, that that ballot in such a situation
25 indeed turned into a proxy of a certain kind on the floor, an
undirected ballot.

MR. BERGER: Rose Marie, did you
want to add something to that?

MS. MAHER: Let me add to what
Claude was referring to --. The -- the shareholders present at
the meeting were approximately three hundred, so -- you could say
that this practice had a substantial effect on the election of
the directors at that meeting. The elders, most of them, did not



1 understand the voting system and so they gave their ballots to
2 someone they trusted that would vote the way they felt was good
3 for the corporation, and it had a substantial effect on the
4 voting. It wasn't just -- you know ten people -- here we are
5 talking about hundreds of people.

6 MS. E. JOHNSTON: I understand
7 exactly what you are saying, and I understand that it would, I've
8 certainly been at annual meetings -- in addition to Bristol Bay's
9 where it's had an impact. I've seen other annual meetings where
10 it's had an impact, and I am just saying to you what I know. I
11 know I'm not answering your question, but I'm saying the best
12 practices would be to avoid, again I'm in preventive law, but to
13 avoid the question you are raising by gathering the people who
14 are pro-one side or another. Whatever side that is, and -- and
15 see what numbers you've got, figure out how to vote it and ask
16 the people to vote their ballots that way. That would be the
17 best way to do it, and the -- the trick is to make sure that as
18 you are having your discussions it's not infiltrated by the other
19 side who, of course, would be delighted to know how you're doing
20 your cumulative balloting. Okay.

21 MR. BERGER: Tony, Marlene and
22 then Dan and David, or forgive me. You'll, on this point, yes,
23 exactly I'm the point.

24 MR. STRONG: As I understand the
25 proxy regulations, or the rules about voting, and perhaps I'm --
I'm perceiving it too closely to the corporation I used to work
with on proxies. Is that the rule on proxy voting is that --
they have to be -- you can vote by proxy, or show up at the
meeting in person? So that these people who showed up in the
meeting were there in person, regardless of how their ballot got
to the ballot box and was placed in it? They were voting in
person, they'd gotten a ballot, they'd signed off for it, and
when they walked in the door, the elderly people, and if they



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1 were at the meeting in person then they in fact voted in person,
2 rather than by proxy. So, -- although they, in fact, themselves
3 did not place the ballot in the ballot box, they were voting in
4 person because they were present at the meeting, and that's how
5 they become participants in the annual meeting. There is a
6 couple other smaller points that I wanted to address. Something
7 that Daniel was talking about, or Elizabeth, I was talking about
8 earlier, and about when the annual report has to be provided to
9 the shareholders and their casting of their -- or before you
10 start requesting ballots from them. As I understood again, this
11 is really a nitpicky point, I guess lawyers have license to do
12 that. And, that is that my understanding of the rules requires
13 that the annual report not be mailed out after the -- request for
proxies, so that they can both be mailed out at the same time,
but they can be mailed out at different classes of mail. The
annual report might get there perhaps two weeks after the proxy
request gets there.

14 MS. E. JOHNSTON: The case law had
15 dealt with that and therefore SCC I think even wrote into their
16 proxy regulations which -- this lawyer felt was a bit nitpicking
17 -- that you had to -- if you were going to send them out at the
18 same time, you had to send them out by the kind of class of mail.
19 That meant that the proxy wouldn't get there two weeks before the
20 annual report, fair is fair again. And I think, even without the
21 rules, if they're, an Alaska court saw -- an obvious policy of a
management to be cute, and send out -- you know -- the annual
report by pack mule, but to send out the -- proxy by a plane, and
hand deliver it, the Alaska court would do something.

22 MR. STRONG: There was one other
23 small point about the location of shareholders, and this really
24 addresses this -- earlier question. I don't know if it was
25 answered fully by Elizabeth, it might have been, but -- on
setting up a ballot box in the community would be real difficult



1 in some respects to do that for some corporations, because I know
2 at Sealaska that, having managed that process for them for a
3 couple of years, that some of our shareholders -- I certainly
4 remember one of them being in Oslo, Norway, and another one being
5 out in Bangkok, Thailand, and it would have been rather
6 difficult...

7 MR. BERGER: You wouldn't be
8 willing to travel there. Well -- the only point I'm asking you
9 to think about, not now but in the future, is this. You had an
10 election here last week for presidents, pretty importance
11 decision, and everybody cast one ballot, there are no proxies and
12 so on. Yeah, well, thanks for coming Claude, and Rose Marie if
13 you have to leave too, thanks for coming. Marlene, you had a
14 point to make --.

15 MS. M. JOHNSON: I was going to
16 speak to the general election just held. Which there was a lot
17 of interest, because of a number of -- local races also. And, --
18 in our area we had what we considered a fairly heavy turn out,
19 and we had fifty-nine point five percent. In the village -- in
20 the village I'm from we had sixty percent even, and if you took
21 the non-Natives who voted, I would be sure that that's about a
22 hundred percent of them that voted. You take the percentage of
23 Natives and shareholders, you know you would have a much smaller
24 percentage, and this was in something -- you know something that
25 was rather important to everyone.

MR. BERGER: That was a good --.

MS. M. JOHNSON: Yes, we had a
very close race for our House seat, which there wasn't a lot of
interest in.

MR. BERGER: Elizabeth, then
David and then Dolly.

MS. E. JOHNSTON: I just wanted to
comment on the ballot box situation, because in living in Alaska



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1 for ten years, -- as a matter of fact, I believe after this last
2 general election there was actually an editorial in the Daily
3 News complimenting the State because at last they'd held an
4 election that hadn't been challenged in the courts. In other
5 words, the State has an elaborate and expensive machinery out in
6 the Bush for the ballot boxes, for the custody of those ballot
7 boxes, for the custody of the ballots, for treating the ballots a
8 certain way, for making sure that they are not altered, for
9 making sure that they are not conveniently lost, etc.

10 And -- I would just hesitate as a corporation to try to
11 set up such a parallel system in each of the communities. I am
12 concerned again about preventive law, and I -- we handle it by
13 having them sent to the accounting firm that does the accounting.
14 So for example, it does mean -- and this was sort of established
15 in one of the cases that Cook Inlet had, that it's very good
16 practices to make sure that the non-management slates or the
17 dissent ballots do not go into the corporate headquarters of the
18 corporation where they then -- whether they are altered or not,
19 you are vulnerable to that charge. So, we just handle it by
20 having, "I don;t touch those things, I don't see those things."
21 You know -- I see the numbers and the numbers are produced not by
22 our own staff, but by a third party who is paid out of the
23 corporations treasury, and it just concerns me the idea there
24 would be ballots boxes in each community.

25 MR. CASE: I guess it's fair to
say that in the -- Presidential election or the latest legisla-
tive elections, there is no court -- there is not disclosure
requirement of honesty and fair play that we have with proxy
solicitation, correct.

Well, my question really is -- is there any -- no, no
-- this leads to something I hope. At the -- is there, is any
requirement for disclosure and fair play and all the rest for
people who are voting in person at the annual meeting?



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1 MS. E. JOHNSTON: Basically, if you
2 have done a good job in your proxy statement, which means you've
3 revealed to the shareholders what's going to be voted on at the
4 annual meeting and you've disclosed to them the pluses and
5 minuses of it, you have already disclosed what should be dis-
6 closed, and what usually happens at the annual meeting is people
7 getting up and talking about their feelings, and since it's not
8 if you like the solicitation of proxies, it usually doesn't seem
9 to fall under the commercial speech standards. It's my under-
10 standing you will have a little flexibility.

11 MR. CASE: But, is there a
12 disclosure requirement, though, that whereby someone could
13 challenge the vote at an annual meeting if it were strictly a
14 personal vote by the members there, and there were no proxies,
15 let's say?

16 MS. E. JOHNSTON: Well, I guess I
17 don't -- let's see -- I will tell you the only case I can think
18 of in this State was the Aleut case and, granted, it did involve
19 the solicitation proxy, but it also involved sort of a letter --
20 a chatty little letter for management on how well they were
21 doing, and the judge basically said -- I thought rather nicely,
22 that management had used the definition of net profit and how
23 well they were doing, that no lawyer, no accountant and no
24 soothsayer would use. It was totally out of whole cloth, and so
25 basically, the judge threw it out.

MR. CASE: All right, now, if we
were having, Dan mentioned that, there could be no proxy solici-
tations for co-ops, it had to be by mail ballot. Do the proxy
solicitation requirements, or is there anything like them to
cover ballots by mail for cooperatives if that's the procedure
that's used?



1 MR. FESSLER: There is nothing in
2 the existing Alaska corporation statute on co-ops that deals with
3 that topic at all.

4 MS. GARZA: I had a question on
5 proxies. Is there a way that shareholders can develop their own
6 proposal as a proxy, say that Shaan Seet chooses to do nothing
7 but remain a corporation and is not interested in being an IRA or
8 a co-op, and there is a large body of shareholders who disagree
9 with Shaan Seet's policy, can they develop a proposal and submit
10 it?

11 MS. E. JOHNSTON: I think as the
12 majority of the shareholders, or the shareholders in such a
13 situation have a couple of things they can do.

14 The first thing they can do on the discovery that
15 management or the directors in place are not presenting for their
16 corporation the alternatives that they wanted presented. Then,
17 that of course would become if you, almost like a platform for
18 running an alternative, directors slate. And that one of the
19 promises of the alternative director slate would be, "when we
20 are, we will present to you for your mandatory vote, you know,
21 alternative "A", "B", and "C", or whatever they are; that's one
22 approach.

23 The second approach is, it seems to me, that share-
24 holders could present a proposal, but at that point, it would be,
25 as I understand corporate law, just at the level of an advisory
vote, rather than the mandatory. Because, to get to the
mandatory stage, you've got to go through the directors first,
and then to the shareholders. But, it would be, it would be one
of the thing; I guess I think Charlie alluded to it, that if you
like the board would ignore that peril. I mean if you got the
kind of vote that you're suggesting, even though it would be an
advisory you know, seems to me management would be forced to
present to your, for your consideration management also, of



1 course, could put out in their proxy statement the reasons they
2 might be against the alternative and talk about it that way too,
3 but you wouldn't be left without recourse, it seems to me.

4 MR. BERGER: I -- that's a very
5 important question, and I didn't altogether follow the answer.
6 The management, if they decide to put the thing to IRA, yes or
7 no, you get your directive proxy. Now, if a group, a minority
8 group in a corporation were faced with a situation which manage-
9 ment refused to do anything. They said well, we're a corporation
10 and we'll take our chances in 1991, and they wanted to put, let
11 us say so many acres of land in a co-op or an IRA. They really
12 can't do that, is that what you're saying, that they really can't
13 put that to the membership, to the shareholders?

14 MS. E. JOHNSTON: They can put it to
15 the shareholders, but if they put it just straight to the share-
16 holders that way, it seems to me it would just, maybe in the
17 advisory posture, rather than the mandatory. And, this gets
18 back, maybe to the whole thing, Dan, when he was giving the
19 overview of corporations talked about by and large certain
20 decisions are left to the board of directors. And, one of the
21 problems is that many of the organic changes, the initial thrust
22 of whether to present it to the shareholders or not is considered
23 to be a board of directors decision. But I am not suggesting
24 that that means the shareholders are without recourse. It means
25 it just isn't as smooth and as clean. What you do -- there are
two alternatives of what you could do. One, you could follow a
little along the lines Dolly raised, which is, if I were running
a non-management proposal, I would do a proxy solicitation, I
would do my proxy statement, I would present the, whatever the
alternative proposal was, and it might be advisory, but I'm
suggesting if I were to garner enough votes, you know, that board
would ignore it at its peril. That is one possible approach to
take. A second possible approach to take is to say, "darn it,



1 you know we've waited for this board to move and we waited for
2 this board to move and we waited for this board to move, and this
3 is the third year I've waited for this board to move and they
4 have done nothing, I am going to run an alternate slate. And,
5 that alternate slate is going to be before these proposal," and I
6 would explain the proposals and explain again, carefully, the
7 positive and negatives of those proposals and get a different
8 slate in, and that group would then have promised as part of
9 their approach to present it to the shareholders.

10 MS. GARZA: An advisory proxy.
11 Say some shareholders started it and they developed their own
12 proxy, what's to say that it would be a requirement of the
13 corporation to even look at the proxy or to have it tallied or
14 voted or anything?

15 MS. E. JOHNSTON: You know, it
16 really doesn't matter whether I'm the one soliciting the proxy,
17 whether you are the one soliciting the proxy. Those proxy or
18 proxies given by shareholders, all shareholders have a right to
19 be heard. I unfortunately, a lot of shareholders have forced me
20 to recognize that when I didn't want to hear it. But, there is
21 no question that the corporation is obligated to take those
22 proxies into account, and the only way they can successfully
23 ignore them is that somehow they were able to launch an action
24 with the State and say that you had solicited them under false
25 and misleading circumstances, and get the State to void them.
Okay, which is a different kind of action you know, but they just
can't slip them in the drawer and ignore them, I mean it is not
-- it is illegal for them to just slip them in the drawer and
ignore them.

MS. GARZA: Okay, if they develop
their own proposal and proxy, could they also develop their own
dates, to say okay, I'm going to send these to all the share-
holders because I'm going to send it out to them, I'm going to



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1 give them self-addressed envelopes so they could send them back,
2 and that, can they decide the date? Okay, then on January 1, we
3 are going to open these proxies, we are going to count them, and
if management's out then management's out.

4 MS. E. JOHNSTON: Dolly, would you
5 run that for me a little again?

6 MS. GARZA: Okay. What Marlene
7 said was, you have to call a special meeting, but would that be
8 necessary? Could they just vote all the proxies by mail and send
9 them back into the corporation, and with that proxy solicitation
10 on that proxy say, okay, this proxy is for option "A" or "B" and
11 that these proxies will be opened on such a date and create their
own date rather than waiting for the corporation to create a date
or a special meeting.

12 MS. E. JOHNSTON: I've got it now,
13 thank you.

14 As I understand it, what you're talking about is sort
15 of can you -- can you hold sort of a plebiscite any date you
16 want, and usually your -- the whole purpose of proxies that
17 they're voted or counted or come into the hopper into the picture
18 at a shareholders meeting, and this could be your regular annual
19 meeting which follows a cycle. Or, if it's something the way you
20 are talking about, you could to through the right procedures and
21 Dan, maybe you remember this, I don't, the steps for shareholders
forcing a special meeting to be called, I've lost those in
the.... Ten percent of the shareholders, why don't you fill that
in, Dan, but I'm saying that right, Dolly, that it's got to be
tied to a shareholders meeting.

22 MR. BERGER: I'm sorry -- Tony,
23 were you next, and then David has a point he wants to raise.

24 MR. STRONG: I -- somewhat
25 related to this the issue of independent proxy solicitations,



1 rather than any other term that likes to be used. No indepen-
2 dent. It makes no political statement, just independent.

3 I'm curious, I need to ask both either Dan or Elizabeth
4 about this one issue. Can a non-shareholder collect proxies as
5 an independent and go in and cast them, of course, solicit them
6 from shareholders, and go in and be authorized to go in and cast
7 them at an annual meeting, and even, perhaps, have his or her
8 campaign obviously disclosing it to the shareholders, where he is
9 getting his campaign funds from? I'd like an answer to that.
10 Depending on your answer, I want another question, a follow up
11 question on that.

12 MS. E. JOHNSTON: I think both Dan
13 and I would agree that in general corporate law the answer to
14 that is yes. A non-shareholder can be a proxy holder, however,
15 because of the nature of Native corporations, many have struggled
16 with that very issue. Not only the issue so much of shareholder
17 versus non-shareholder, but even more narrowly the issue of
18 Native versus non-Native. Maybe the person is a shareholder but
19 a non-Native or maybe the person is a Native and a school teacher
20 in the area but a non-shareholder. You know various corporations
21 have struggled with that, and come out with different cuts, Tony,
22 and to my knowledge, there is no case law on it. I will tell you
23 that in our corporation that way I ended up slicing it, I do not
24 suggest to you that it is the right way, I ended up slicing it by
25 saying what I cared about rather than substituting my own
judgment for the person, the Native shareholder chooses to vote
his shares, if he wanted to choose a teacher who is non-Native,
who is coming to the -- you know, to town to the meeting, why
should I substitute my judgment for that? So I said that you
look to the beneficial ownership of the shares, and if that, in
effect -- who the shareholders was and if that shareholder was
Native he -- and an adult, he could choose any proxy holder he



1 had wanted. But, other Native corporation have sliced it
2 differently, and put it in their bylaws.

3 MR. CASE: Yes, I understand that
4 now. That does bring to mind another scenario, and I'd like to
5 have it responded too, and that is -- is this really goes toward
6 corporate takeovers and Native management of the corporation, or
7 at least Native perception of having some kind of control over
8 what the general populations of Natives having control over what
9 the corporation does. And that is, is I'll paint the scenario.
10 A non-shareholder has a desire to go in and bring in a bunch of
11 new directors, running an independent campaign and to replace all
12 of the board slate and is able to obtain from a developing
13 company, an oil company or whatever, a substantial amount of
14 dollars to do it. No one is in the campaign's proxy contest that
15 could amount to about ten thousand dollars per individual
16 independent trying to get on a board of directors. Ten thousand
17 dollars' expenditures for the campaign. Say they'll able to get
18 a war chest together of -- for six candidates -- sixty thousand
19 dollars or eight thousand dollars to stick on to run a real
20 healthy campaign, those people who are -- who they'll be getting
21 on to be their candidates have made a promise to their developer,
22 the oil company. I will open up all of our lands for you, to
23 make sure that you have an access to, and we'll make a deal. And
24 they disclose that to the shareholders, we have Sohio backing us
25 in our efforts to have our slate. Is there any response to that?
Seems to me that's possible under existing law.

MS. E. JOHNSTON: I picked up the
Monroe Price technique. I think that's not only possible but I
think that the protection you have, such as it is, is the fact
that the money backing has to be disclosed. Again, in the CIRI
case when Bruce Kendall was financing and backing and it just
happened to have an outstanding lawsuit with CIRI and he was, of
course, in great hopes that if the people he backed for the board



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1 won, that that lawsuit would be dropped, so he was financing it,
2 and the court clearly held disclosure, and you're saying there
3 should be disclosure. I think that at least so far, and it may
4 change in the future, but is we were to talk as of today, I think
5 in the Native community, there would be a lot of hostility toward
6 somebody who was running for the board with Sohio money backing
7 them. Or, you know, a proxy holder gathering proxies with Sohio
8 money backing them whether that person was Native or non-Native,
9 and if you add the non-Native in to top it off, I think you've
10 got a real losing combination there. I don't think that that the
11 solicitation would be successful. I may be wrong, but I guess I
12 am just speaking out a gut feeling of what I see.

13 MR. STRONG: I wasn't trying to
14 decide whether it was a Native running or non-Native. Even a
15 shareholder who is running for as an independent, and being the
16 proxy holder, can actually use that procedure and end up without,
17 with somehow indirect control by a fairly large corporation, who
18 might be Sohio who's put together a committee to elect.

19 MS. E. JOHNSTON: Absolutely, and
20 as I say at least the protection exists right now for disclosure.
21 I think there's always been the threat and always the fear that
22 there would be straw men, that there would be Natives who would
23 agree to pursue the interest of other interests and whatever they
24 themselves personally think or what they think in their own
25 convictions is for the good of the whole. And, that they would
owe -- there's always been the fear that, as the honey pot gets
desirable, that they would be strong.

MR. STRONG: I brought that up
because to me that kind of indirect control can take place
whether it's an IRA or a non-profit or a cooperative or corpora-
tion.

MS. E. JOHNSTON: I agree with
you, Tony, as I say the only thing I can think of is the fact



1 that the disclosure to some degree does cut against it, unless
2 somebody is doing the fraud thing, which is what Bruce Kendall
3 tried to do.

4 MR. BERGER: Daniel Fessler was,
5 really had a reaction here.

6 MR. FESSLER: I think that we
7 should equate all of the form. I think, I don't know about the
8 IRA's, I mean that's why the rest of you are here, and Ralph's
9 here to just abuse me of a huge void of ignorance.

10 But, of the three of you are talking about, profit-
11 seeking, non-profit and co-ops, it would seem that the co-op
12 would be the one that would be naturally the hardest one to
13 subvert. First of all, because under the Alaska corporations
14 code, there's no requirement that the directors be shareholders.
15 There is in ANCSA, but I mean, if at some point those things
16 begin to expire and the ANCSA corporations begin to be treated
17 more and more like regular profit-seeking corporations, under the
18 concept of non-profit corporations there is no requirement in
19 state law that the directors have to be members. But, there is a
20 state law requirement that you can only have members as directors
21 of co-ops, and I mean you can have support, but just looking at
22 the three candidates for state law, "which is the hardest one to
23 subvert from without?" would be the co-op.

24 MR. STRONG: I think that that
25 also leads us into, I would like to hear more discussion now on
the issue of conflicts of interest.

MR. BERGER: Could I, just before
we do that, Tony, David Case wanted to raise a point about
discussions of the value of land, if land is going to be trans-
ferred from the Native corporation to an IRA or a co-op or
something else. Given what Elizabeth has said about disclosure,
David.



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1 MR. CASE: Well, after Koniag is
2 the problem with valuing Native land simply an unleapable barrier
3 to effective disclosure.

4 MS. E. JOHNSTON: How about a
5 yes/no answer? Okay, remember in the Koniag case one of the
6 things that was going on were, some of the shareholders in
7 village corporation who, if you know, took some kind of educated
8 guess on the value of what they would be giving up per share by
9 this merger going through because it was a -- it was one of those
10 "one share for one share" mergers. In other words, there had
11 been no effort by the management of Koniag to do an appropriate
12 share/exchange ratio. After all, if you've got a dollar in
13 assets, and I've got five dollars in assets, and you come to me
14 and you say, "Liz, let's put them all together and we will each
15 walk out with an equal number of share," I might do it, but it's
16 nice if I know that up front, because there might be some other
17 things in the equation. You have agreed to manage the assets for
18 both of us, and so I say, "that's a fine deal." So, -- but in
19 the Koniag situation what happened was that many of the
20 shareholders were not aware that they were giving up much more
21 value than they were receiving, although they were receiving the
22 same amount of shares back.

23 Now, if I understand what you are proposing, you know,
24 some of the discussion's been going on a transfer of land to
25 another entity where the quote "parent itself" wouldn't own the
entity, but rather the shareholders would own the entity. You in
a way, have a different posture. You, I think, would have to
disclose things to the shareholders. You might have to disclose
things about the difficulty of management or the greater or
lesser degrees of protection that we are involved in the new
entity. But, maybe it's arguable that value isn't the issue
because the shareholders aren't losing some kind of value. It's
being, to use the favorite phrase, "to date, transformed,



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1 transmuted, converted", but it's -- you're not somehow changing
2 the value so that you have a lesser thing.

3 MR. BERGER: I wonder if we could
4 have a little discussion on Tony's point about conflict of
5 interest, and then there are some folks here representing share-
6 holders in prison that wanted to say a few words on their behalf,
7 I think they are still here. But, maybe we could spend a few
8 minutes on Tony's point about conflict of interest.

9 MR. FESSLER: If you wish to pose
10 the question, counsel, I'll start my answer.

11 MR. STRONG: I'll try to restate
12 as I understand it grow over time, because I've, having worked
13 with and been at a lot of shareholder meetings, it seems
14 invariably the issue of conflict of interest comes up in this
15 regard. There are village corporations that have operations in
16 -- they own the subsurface, or they own the surface state and the
17 regional corporation owns the subsurface. There is village -- I
18 don't know how that's relevant, but there is village corporations
19 directors who are also regional corporation directors or there
20 are village corporation officers who are also regional corpor-
21 ation directors or officers. In other words, there is, with the
22 limited number of talented bodies out there, there is going to
23 be, inevitably, a group of people who are in conflicting, playing
24 conflicting roles, and I don't have an easy answer for that kind
25 of situation. I don't know of there is one.

MR. FESSLER: The question of a
conflict of interest is very vexing, and one of the biggest
problems with existing Alaska corporation law is, there are no
statutory provisions on conflicts of interest, and so begin
without guidance, which is found in the law of most other states.
The conflict of interest problem arises from an assumption, which
is a common law assumption, that a director owes to the corpor-
ation on the board of which he or she sits, what is called both



1 "a duty of care" and "a duty of loyalty". The conflict of
2 interest is primarily a manifestation of the common law idea of a
3 duty of loyalty. The director is supposed to deal, in exercising
4 the authority of the office of director, in such a manner as the
5 director, in good faith, believes is in the best interest of the
6 corporation, and is to be guided by no other perceptions of
7 interest or advantage in making up his or her mind. So that the
8 director's loyalty is owed to the corporate entity, not to the
9 shareholders that elected the director, not to the family, not to
any -- certainly not to any personal advantage which the director
might perceive as being obtained, but is owed, in theory, to the
corporation.

10 Well, how can an individual serve on the board of two
11 corporations, and if those -- well, there is no problem so long
12 as the two corporations do not deal with one another. But, if
13 the two corporations deal with one another, and I happen to be
14 serving the board of each, how can I, on behalf of the corpor-
15 ation that is the buyer in the transaction, devote my single-
16 minded loyalty to seeking out terms most advantageous to the
17 buyer, while at the same time, acting as a director of the
18 corporation that would be the seller, those terms which are most
19 advantageous to the seller, and what is essentially an
20 adversarial negotiation. Now, as I say, Alaska law doesn't solve
21 the problem, and that's a great difficulty, because a director
22 worries about the potential of being accused and sought to be
23 personally liable for violating a standard which is articulated
24 in some after-arising judicial opinion. The proposed provisions
25 of the corporation code pending in the legislature which will be
re-introduced in January, contain provision which you'll want to
look at, Section 478.

Section 478 is entitled "Director Conflict of
Interest". It divides conflict of interest into two categories,
what are called conflict...



(NOVEMBER 16, 1984)

(OVERLAP TAPE, SIDE A)

THERE IS NO TRANSCRIPTION ON THE OVERLAP TAPE.

(NOVEMBER 16, 1984)

(TAPE 12, SIDE A)

MR. FESSLER: (Continued)...show interest in the transaction, but the impediment is that I serve on the boards of two corporations that are in this transaction. Then that is also perceived as a conflict of interest, but not nearly as potentially serious a conflict of interest. There are different standards for validating the transaction, depending upon whether the difficulty is that the director has a primary conflict of interest, or merely this institutional secondary conflict of interest, the common director problem. Where you need answers, you need answers to the following questions. Can such a director attend the meeting, can the attendance of the director be counted in ascertaining whether each quorum of the board is present? Can such a director participate in the discussion of the proposition? And, finally, can such a director vote on whether the board approves or disapproves the transaction, and have that vote counted? Now, those are the classical questions which the law has wrestled with. The statute seeks to answer every one of them. Yes, whether or not the problem is that the director has a personal primary conflict of interest or merely the secondary common directorship conflict, the director may attend the meeting. Yes, the director's presence may be counted in ascertaining the quorum. Yes, the director may participate in discussing the transaction. Can the director vote? Yes. Can the director's vote be counted? No, never. The vote of the interested director or the vote of the common director can be cast, but it cannot be counted in determine whether or not a majority of the board, a majority of the forum has assented.



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1 Now, this is a choice between two different state law
2 policies, and the law must come down on one side of this issue or
3 the other. The worst thing is to leave you stranded with one leg
4 over each side of a barb wire fence. Either you say that the
5 tainted director is not to darken the door and be present, and
6 there is a body of state law that says that's what you do. The
7 tainted director stays away, doesn't participate, can't be
8 counted, can't vote. The framers at the co-division commission
9 is recommending that we follow the provisions that are common in
10 most states today, which is to say, "no, it's far, far better
11 that the director be present and participating and able to answer
12 questions," because the transaction cannot be validated unless
13 you can prove that the rest of the directors did not have any
14 form of conflict of interest, were fully informed of the conflict
15 of interest of their colleague, either by the colleague or had
16 prior personal knowledge of all the material facts, and in that
17 informed frame of mind, voted in favor of the transaction out of
18 what they believe was the pursuit of the best interest of the
19 corporation. So, that's the basic scenario on conflict of
20 interest. If the new Alaska Corporation Code Section 478 were
21 adopted as part of this as an omnibus bill, or if this were
22 lifted out and it were there, because you have no answers to
23 these questions, the transaction can be validated, depending upon
24 whether there is a primary or secondary cause of action and there
25 are different rules, and I can go into those if it would be
helpful. If it's a primary cause of action, the transaction is
validated either by having the shareholder approve it, in which
case, if they are fully informed of the director's personal
material financial interest, they can nevertheless validate the
transaction, and in that instance the transaction is immune from
attack. If the shareholders can't and the shares owned by the
interested director cannot be voted, or if you try and validate
it at the board level, then you have to have a disinterested



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1 majority of the board to approve the transaction with full
2 knowledge of all of the details of the conflict of interest and,
3 in the event of any judicial challenge to that transaction, the
4 party who had the material financial interest has the burden of
5 proving that the transaction was fair and in the best interest of
6 the corporation on the date it was authorized. So the statute
7 makes it clear that the interested director has the burden of
8 ascertaining, and bearing, and convincing a court that it was
9 fair. If it is not challenged, if nobody litigates, you never
10 get to that second part. If the only problem is a common direc-
11 torship, the director does not have a material financial
12 interest, but is on the board of two corporations and they're
13 dealing, then a dis-interested majority of the board is competent
14 to validate the transaction, and it's immune from assault and
15 litigation. Presuming that there has been full disclosure of the
16 -- that situation. So that you do now have the potential for
17 having statutory situations, and my only point is that the law on
18 these very important and recurrent problem areas ought to be set
19 out, so that people can know what it is in advance.

20 MR. BERGER: And, you have set it
21 out in the new proposed... .

22 MR. FESSLER: Section 478 sets it
23 out. That's the draft which is going to be reintroduced in the
24 new legislature early on in the...

25 MR. BERGER: Dolly, and then
Elizabeth, and then we'll hear from the folks representing the
shareholders in prison.

MS. GARZA: Okay, this was
brought up at our village corporation one time, and what was
brought up was that they felt that Shaan Seet should pass a
proposal that stated if a board member is a village corporation
board member, they cannot be the original corporation board
member. We were immediately told by a lawyer that you could not



1 do that because you are denying a shareholder a right, is that
2 true?

3 MR. FESSLER: The way to do it,
4 Dolly, if a corporation wanted to have that policy, you put a
5 provision in the articles which can set the qualifications for
6 directors. I mean, I can't over emphasis the degree to which you
7 have freedom. You can say that directors have to be over the age
8 of forty, and they can't be over the age of eighty. I mean you
9 can put provisions in, you can also put provisions in that no one
10 can be a director of this corporation who occupies the position
11 of director, officer, of any other corporation. In the absence
12 such provisions in the articles then it would be difficult to see
13 how a corporation could sort of, after-the-fact say, "no, you
14 can't, you can't sit on the board", if the shareholders had
15 elected the person to be a director. But you can clearly handle
16 that problem and anticipate it right now, without even the
17 adoption of this statute. Because this statute permits the
18 corporation's articles to set the qualifications for directors.

19 MS. GARZA: And, those articles
20 can be amended?

21 MR. FESSLER: They can certainly
22 be amended, all it requires is that what you do is that the board
23 frames the terms of the amendment, the amendment is submitted to
24 the shareholders and it much gain a two-thirds concurrence, and
25 at that point you have amended your articles.

MS. BERGER: Elizabeth, we will
give you the second to last word here.

MS. E. JOHNSTON: Tony, this is
sort of in response to you in particular, just that although Dan,
in his answer, dealt with transactions, it has been our exper-
ience at Bristol Bay that it is not transaction so much that you
are worried about, as it is if you get a directors -- we have
twelve directors. If all twelve of them are in a situation where



1 they occupy both village corporation board positions, and then
2 also regional corporations board positions, when it comes to the
3 kind of things not so much transaction, but where you are setting
4 policy like 14(f), or relationships of surface or subsurface, the
5 kind of thing that cuts across all villages, if you were trying
6 to turn to your board and look to them and say, "where are the
7 disinterested directors?" you wouldn't find any. And, because of
8 the relationships of the, because of the way the assets worked
9 under the Act and the many inter-relationships that regions and
10 villages have had, Bristol Bay did go ahead with the policy and
11 the qualification and, as Dan said, you can't make it retro-
12 active, but you can make it for future that our directors do not
serve on both village and regional boards. It was just a way of
cleaning it up, and it made it simpler because we would look
around at certain times and not have disinterested directors no
matter how you sliced it.

13 MR. BERGER: Would you like to
14 make your presentation, now then, give us your name again if you
15 don't mind, and pull the mike towards you --.

16 MS. JACOBSEN: Thank you. Can
17 you hear me now?

18 MR. BERGER: A little closer, I
19 think.

20 MS. JACOBSEN: Okay. There. My
21 name is Desa Jacobsen. I act as the advisor to the Spiritual
22 council which is situated within the penal institution located
23 out in Palmer. I began working with them quite by accident, by
24 going out to see another resident, and I looked around and
25 noticed that there were a lot of Native men in there. More than
I expected, so after going to their meetings, their statement
besides, "who is this Berger fellow and what is sovereignty?" was
that they had poison inside them that they wanted identified and
extracted because they knew if this did not happen, once they



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1 left the penal institutions they would return and unfortunately
2 more people would be hurt in the process.

3 We are asking for a traditional healing methods in lieu
4 of chemical therapy. By traditional healing methods we find that
5 frozen fish and seal oil are instant antidepressants. And
6 traditional healing methods such as talking circle, as opposed to
7 court ordered occasional psychiatric tests and psychics, and of
8 course, well-meaning students who come out to finish their term
9 papers who use the residents as guinea pigs. We also found some
10 alarming facts, and that is two young men who were released from
11 a penal institution from one village are -- that are doing
12 reasonably well -- just -- or two were released and five more
13 from the same village came in to take their place, not to mention
14 the other men that were already in there. Now, if this keeps up
15 there will be on one left to guard the village but elders and
16 children, and women, while we as women find this as no problem,
17 we function better if our men are around us.

18 We also were informed by Joan _____? from the
19 Norton Sound Health Corporation that it was calculated how much
20 we drink as Native people, when we drink and the drugs we take,
21 and this was times into the number of alcohol and drug-related
22 murder, suicides, accidental deaths, rapes, and so on. And, they
23 calculated that, unless we stop now, in twenty-five years or less
24 every Native man, woman and kind will be dead, and I heard this
25 four years ago. The resolutions that were passed at AFN can be
supported by the six studies that were done by the judicial
system here, that says that Native people get twice the
sentencing and twice the fine for the same goodies that are
committed by everyone else, and we want to know why. They also
said that some of the acts that they committed did warrant
incarceration for the safety of their village, or for themselves.
But they're all alcohol related, violent deaths. We have found
that the men in here are not raised by criminal Native families



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1 to become criminals, that is not possible. They are hunters and
2 whalers and men who fish to feed their families who got drunk,
3 and made a tragic mistake.

4 The cancer that they were able to isolate and which we
5 want to take steps to eradicate now is anger turned into very
6 hideous rage. And once they consume alcohol, unfortunately, this
7 comes out, not only very inappropriately, but very dangerously.
8 While this seems like a well meaning program and it's grass roots,
9 and for the love of God, the fresh air, we've run into a few
10 obstacles, and that is the ceremonies that are done that are
11 traditional that are healing, that work are not recognized by the
12 clergy. We were told to go in there and make the men accept the
13 Lord Jesus Christ as their personal Savior, and they'll be
14 healed, and our argument was while we recognize that our common
15 denominator with that pale-face, bearded healer is that we are
16 villages and that the healing that we want to introduce in that
17 penal system is pre-missionary, and they do not understand that.

18 The residents there formed a Spiritual Council in the
19 hopes of taping all of their session to offer that finished taped
20 to the sovereignty of Akiachak and hopes that it would be
21 endorsed and sanctioned and introduced to the AFN Convention.
22 That way, they said, they could help their own people in the
23 village, more or less, on the same theory as the "sacred
24 straight" film done in the penal institutions in the Lower 48.

25 We also ran into what we call -- promulgate, where the
guards had taken the tapes that we had made -- we have our own
video equipment and since you cannot buy or sell spirituality,
this healing would be at no cost to anyone, and everyone would
benefit. The guards took the tapes and erased them, we have
documents that, where they denied the men, the fact, denied them
their right to organize as a spiritual counsel because we deal
with what Kubler Ross deals with and that's four quadrants of the
human being, their spiritual, emotional, physical and



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1 intellectual quadrants all require healing, but this cannot be
2 done in a penal institution where there are no viable or
3 culturally relevant healing programs. What we are saying is,
4 unless these poison are extracted and unless rehab is really
5 introduced, we are going to send those men back out into the
6 villages ten times worst than when they got in there. I, we can
7 learn to control their anger or say that it's okay, they'll be
8 okay. The acts that they committed were usually against women
9 and children or people in their own family. While the men are in
10 prison, the treatment that they get is classified as
11 psychological abuse. I specialize in the dynamics and politics
12 of sexual assault and violence, and it's documented what they do
13 to the men. Once we went to into the library and on the
14 blackboard in six-inch letter said this is communication saying
15 it is plain enough English so you Eskimos will know to put your
16 chairs away after the meeting. Now while the Aleut brethren are
17 in there not understanding what's on that blackboard they say,
18 "you big woman." I know what that means, and I'm offended, and
19 I'm not a prisoner. We don't think that we could have started at
20 a better place than to come before the Berger Commission, and
21 besides that no one else will listen to us. We've been placed
22 last on everyone's agenda, because people are, for one thing,
23 glad those men are in there because they hurt a lot of people in
24 the process. And once they are in there they're forgotten, and
25 their biggest complaint is the only time we ever see our so
called Native leaders is when they come here to get my proxy, and
then we never hear from them again. We are asking for further
endorsement of those resolutions, so we can complete our follow
up work, and we are asking that the penal institutions either be
reformed or made better, or for Pete's sake, close them down and
put the men back in the villages where they can be dealt with at
the hands of their traditional councils. We know of the Molly
Hootch case, and one of our residents happens to be Michael



1 Hootch, and we are prepared to take such measures. We are also
2 asking you if you have -- I know that everyone in the Alaska,
3 especially Native people, have been touched by, in some way or
4 another, by an act of violence, and if all of those men are in
5 there that means all of us are in there too. Without us women
6 out there picking berries, it's jut frozen tundra, and without
7 them men fishing out there, all these stacks of paper and all of
8 these fancy words that you talk here are meaningless. Because,
9 what good are they without human beings to sanction them? If the
10 men were here, I am certain that they would address you in the
11 spirit of gratitude and humility. We are not asking for any
12 kind of a program based on hatred or revenge, but humanity. And
13 these are not based on emotions, but reality. What we could do
14 is present the Berger Commission with our nasty little packet
15 with all our nasty little facts about that nasty little prison,
16 and we want it to end, and we thank you for this opportunity.

17 MR. BERGER: Well, thank you, Ms.
18 Jacobsen.

19 This Commission is established by the ICC, the Inuit
20 Circumpolar Conference and the World Council of Indigenous People
21 and my report goes to them next summer. It will, of course, be
22 made public and sent to everyone who has participated, but it
23 should be understood that I have not been appointed by the United
24 States Government or by the Government of Alaska so that I, apart
25 from the mandate I have from those two Native people organi-
zations, I am not, I haven't been asked by the State to consider
the condition of its Native inmates, but I appreciate your
coming, and -- insofar as it may lie within my mandate, you can
rest assured I'll give every consideration to the things you've
said.

MS. JACOBSEN: I thank you very
much, and if there is some information we can give you, we will



1 be happy to do that. And the men also asks for a special request
2 that you come out there and address them.

3 MR. BERGER: Okay, we will try to
4 work that in, I'll, pardon me.

5 MS. JACOBSEN: They meet on
6 Monday and Saturday.

7 MR. BERGER: Well, Saturday
8 sounds promising. Well, I think we should -- I'm kind of
9 exhausted and I think we should adjourn. I'll just thank you all
10 for coming and invite you to the Commission offices for a
11 reception and get together, and I do appreciate all that you have
12 said, and it's been very useful to me, so thank you all.

13 MS. HASH-PETE: Into our tribal
14 government. Okay, all of this corporation the -- ask the
15 corporations, the BIA Act of 1934, IRA, and all of these self
16 determination -- what's new? I mean I don't know what the new
17 acts are now that are designed to help us govern ourselves right.
18 As Sheldon Katchatag said, "none, the ANCSA vehicle is not
19 working." None of these vehicles are working. Our indigenous
20 tribal government, the law of our land shall prevail. Our men
21 shall hunt, and our women shall gather berries and sew. And we
22 shall have complete dominion as we always have. You won't find
23 the solution here, it has to be done in the villages, and I
24 commend you, Mr. Berger, or Honorable Berger, I think you are
25 very fair, and I thank you that we have at least this audience of
people, but the tribes, the villages shall determine their own
destinies, and that's that. The way these men are suffering the
way we women are suffering without our places to stay, without
anything, you know, no hunter. We can't take it anymore, it's
not working. Give us back, with your commission, I know you will
help us.

MR. BERGER: Well, thank you --
for what you said and I, perhaps I should add that these meetings



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1 are very good, and I find them very helpful, but I have been
2 going to the villages and spent most of my time there because
3 it's kind of like a cold shower after one of these legal
gatherings, so I will see you back at the office.

4 END OF TAPE

5 (TAPE 12, SIDE A)
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