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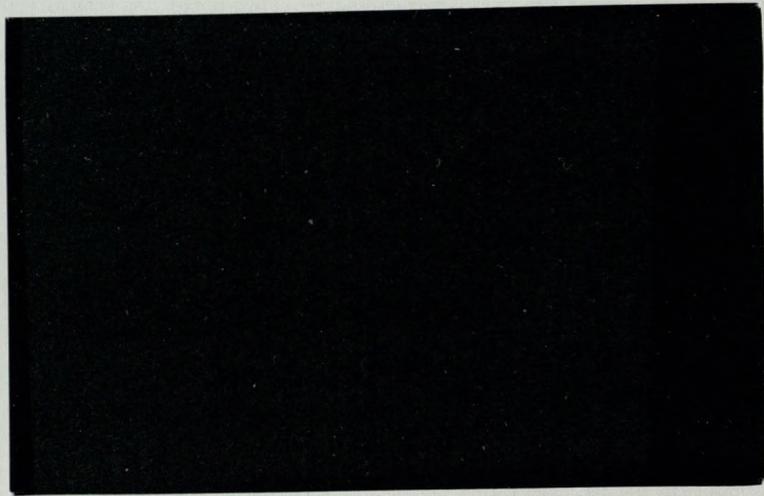
PAPER FOR ROUNDTABLE DISCUSSIONS

NOVEMBER 14 - 16, 1984

ANCHORAGE, ALASKA

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Bart K. Garber
Assistant Professor, Alaska Native Studies Program
University of Alaska, Fairbanks

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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ROUNDTABLE DISCUSSION PAPER
ANCSA & 1991

Bart K. Garber
November 14-16, 1984

I. Introduction

"For Alaska Natives, 1991 has come to represent the future of their traditional relationship to the land." /1 1991 also represents an accumulation of complaints and misgivings about the manner in which the land claims of Alaska Natives have been settled.

This paper reviews the notion of 1991, its historic origins and present components. The discussion focuses on more philosophical aspects of the notion of 1991. In particular, the paper highlights values in conflict: How do Alaska Natives, individually and through their tribal and corporate institutions, intend to balance individual and group rights, if at all? The paper adopts this approach on the premise that discussion and debate of conflicting Native values will lead to a way to preserve Native land and the values it represents.

II. Notion of 1991

A. Twenty Year Restrictive Period

"1991" started as a reference to the date after which ANCSA corporation stock may be sold by shareholders and when increasing quantities of undeveloped ANCSA corporation land will become subject to local and state property taxes. At the present, Native corporation stock can be alienated through inheritance, pursuant to a court decree (for separation, divorce, or the payment of child support), or to avoid professional conflicts. Non-Natives can become shareholders under one of the transfer exceptions but may not vote the stock until 1991.

In 1980, the Alaska National Interests Land Conservation Act ("ANILCA") amended the stock alienation and property tax provisions.^{3/} Now corporations and their shareholders can extend the non-Native voting restriction beyond 1991. Extending the voting restriction allows the remaining Native shareholders to remain in control of the corporation until a majority of the voting stockholders are convinced to extend voting rights to the non-Natives. New

safeguards have also been made available at the option of the corporations and their shareholders in the form of "first rights of refusal" to buy stock offered for sale by a shareholder undeveloped ANCSA lands to run from the date of conveyance instead of the date ANCSA passed (1971). The safeguards are an attempt to maintain the current level of Native control of ANCSA corporations and land.

B. Related 1991 Issues

The notion of 1991 has expanded to include other issues related to the ownership and control of ANCSA corporations and land. One issue involves the current enjoyment of Settlement Act benefits by "New Natives" and elders. Another concerns the allocation of control over adjacent surfaces and subsurface estates between village and regional corporations.

"New Natives" refers to young Native children born after December 18, 1971. These children were not eligible for enrollment under ANCSA and, consequently, do not participate in the direct benefits of the Settlement Act including the receipt of stock and money from the Alaska Native Fund.^{4/} New Natives only obtain stock through inheritance.

A strong sentiment exists among Natives to provide special benefits for Elders who have not gained financially from the Settlement Act. Low earnings and state law restrictions against distributions to select groups of shareholders have prevented corporations from making such payments in the past.

Regional corporation and village corporation conflicts over the ownership and right to use adjacent surface and subsurface estate have sensitized the corporations to the impact of the split estate in development projects within the village area. Neither party has tested the full scope of ANCSA provision which gives the village an apparent veto power over local subsurface development.^{5/} The burden is reciprocal. Villages must pay for the use of gravel even when located within the village.^{6/}

C. Native Aspirations and Congressional Purpose for a 20-Year Restriction

The system of village and regional corporations in ANCSA came out of the house bill, H.R. 10367.^{7/} Actually, most of the house and senate bills contained a period of restriction on the alienation of corporate stock that

fluctuated between 13 and 20 years before coming to rest at 20.8/ Some bills explained the need for the restriction as the time it would take to pay out the money proceeds of the settlement.9/

The concept of a corporate settlement vehicle in which stock trading is prohibited for a set period of years first appeared during the Governor's Task Force on Native Land Claims. The Task Force included representatives from the Alaska Federation of Natives, the State of Alaska, and the Federal government. The task Force sought to draft legislation that would be acceptable to the Natives, the State and the Interior Department.10/

The Task Force Reported back to Governor Hickel in early 1968. The report recommended a settlement oriented toward economic development. Natives were to receive land and money through village and regional business corporations organized under state law. Village groups also could organize or continue to operate as Indian Reorganization Act corporations under federal law. Stock in the state corproations--

"were not alienable by the first holder, except at death, and successor holders must be descendants of those on the original roll alienable, subject to any "close corporation" provisions in the articles and by-laws [of the corporation.]"11/

The drafters of the legislation explained that the 100 year period was necessary to allow the tribal entities time to gradually transform into "ordinary business corporation[s] with shares that are fairly alienable."12/ The private business corporation format was expected to allow Natives to gradually enter the American society, to preserve Native and non-Native mobility (Natives did not have to remain in the village to participate in the settlement), to avoid a settlement based on a reservation system, and to allow Natives to escape the management oversight of the Bureau of Indian Affairs and the Department of Interior.13/ The State was expected to ease the transition by modifying its corporate laws to accommodate "the peculiar nature of these corporations, but anticipating gradual conversion into an ordinary business corporation."14/ Natives did not want more unprofitable Federal management of their affairs.15/

Willie Hensley, the Task Force Chairman, implied that the restrictive time period would provide an opportunity for Natives to develop the leadership and educated persons who would enable the Native corporations to succeed in managing the resources under the settlement, to become more self-sufficient, and to participate in the modern economy./16

In summary, the restriction period on stock alienation probably was intended to allow time to complete transfer of all land and monies required by the Settlement and thereby consolidate corporate assets and activities before opening the corporations to the full brunt of market competition. Such consolidation ensures that the market value of corporation stock more accurately reflects the fair value of the corporate assets if the shareholders or corporation desire to sell stock. The shareholders also would receive all initial distributions from the Alaska Native Fund. Finally, the restrictive period allows Natives, individually and as corporate bodies, time to familiarize themselves with the cash economy and business operation and regulation of State corporations before putting the stocks of the corporation at risk.

D. 1991: The Settlement Act and Self-determination

Native leaders saw the claims settlement as a way to attain economic self-sufficiency. They soon saw that the federal government like to call economic self-sufficiency -- self-determination. But self-determination under ANCSA has a narrower meaning than what Federal Self-determination policy has come to be known.

"Self-determination" is a term that has been used to describe the most recent era of federal Indian policy. Instead of breaking up the land base and membership of Indian tribes, its members, and the federal government, the United States now seeks to promote Native self-government and economic self-sufficiency while maintaining the "...Federal government's unique and continuing relationship with a responsibility to the Indian people..."^{17/} Among the law passed during this time have been the Indian Self-Determination and Education Assistance Act of 1975^{18/}, the Indian Financing Act of 1974^{19/}, the Indian Health Care Improvement Act of 1976^{20/}, the Indian Child Welfare Act of 1978^{21/}, and the ANCSA in 1971.

Cohen attributes the development of the idea of Indian self-determination to Indian tribes.^{22/} In 1961, following a gathering of sixty-seven tribes in Chicago resulted in the policy regarding tribal government:

"The Indians, as responsible individual citizens, as responsible tribal representatives, and as responsible tribal councils, want to participate, want to contribute to their own personal tribal improvements and want to cooperate with their Government on how best to solve the many problems in a businesslike, efficient, and economical manner as rapidly as possible." ^{53/}

Economic development and self-sufficiency also formed the core element in the Task Force Report and the AFN's comments on the need for a settlement act. Task Force Chairman Hensley commented further:

"Another objective in the route [the Task Force has] taken is to simplify the administration process. We feel that the objective of the Interior Department and the Bureau of Indian Affairs is to allow their clientele [Alaska Natives] to be more self-sufficient...The Task Force further believes that the use of corporate form of organization would enable the village and regional groups to participate in modern economy. 24/

Emil Notti, President of the Alaska Federation of Natives, added:

"...There is a strong feeling among the Native people in Alaska, that they want to have control of their own destiny..."25/

President Nixon firmly established ANCSA as an example of the federal government's continuing commitment to Indian "Self-Determination Without Termination" in his special Message to Congress in July 8, 1970:

"We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that the Indians can become independent of federal control without being cut off from the federal concerns and federal support." 26/

In May of 1971, the Alaska Federation turned again to the concept of Native self-determination to ensure regional corporation involvement in the settlement.

"The 12 regional corporations epitomize the principle of self-determination. I cannot overemphasize our commitment to that principle. We are a coalition of distinct ethnic groups, each different from the other in the past and in the present. But we have a common interest, a fair and just land claims settlement, and a common problem, and imposed dependence of our culture by a different society. We want our children proud of their heritage, their language, their family and friends, and of themselves. They will only retain their pride if they have the opportunity to work toward their own development within the structure of their own institutions...In this way we can maximize the involvement of Native people in a learning and development process..."27/

Self-determination, however, has two aspects--one is tribal government development, the other is economic development. In Alaska, both sides of the policy are at work. ANCSA represents a special kind of Native economic self-determination. ANCSA can be viewed as benign in its effects on the tribal self-government aspect of self-determination policy. It was a land settlement with no specific reference to tribal autonomy nor with any assigned role for tribes. At worst, ANCSA can be viewed as damaging to tribal self-determination in that it denuded Native governments of their traditional lands in the name of economic self-determination.

ANCSA provides the framework for self-determination by the individual Native and, derivatively, self-determination by the corporate body of Native individuals under State law--through their respective ANCSA corporations. Shareholders in ANCSA corporations can freely alienate their stock after the initial twenty-year holding period. Before 1991, shareholders determine who inherits their interest in the corporate assets (stock). Finally, Native shareholders participate indirectly in the management of the corporation by voting their shares and directly if elected to the board of directors.

ANCSA corporations operate in the mainstream of the United States economy relatively unaffected by limitations applied to other Indian enterprises under federal law. The corporate boards must answer their individual Native and non-Native shareholders under state corporate law standards. However, since traditional and IRA tribal groups (as entities separate from their individual members) did not receive stock in ANCSA corporations, ANCSA corporate boards are not accountable to them for corporate activities that may affect the traditional lands of the tribe.

Despite relative freedom afforded Native shareholders and corporations to pursue their economic goals, the following discussion suggest that ANCSA is not true self-determination. If Native determination of their own destiny endures as ideal as it did during the claims struggle, then the limited parameters of ANCSA should not deter Natives from seek variations on, or alternatives to, ANCSA.

The Settlement Act is not real Native self-determination--the attainment of absolute tribal autonomy and Native economic self-sufficiency without federal involvement.^{28/} ANCSA is more accurately described as a settlement compromise under which Natives are allowed to pursue their social and economic goals within limits established by Congress and the State (primarily under its corporate laws).

ANCSA, the federal law, imposes limits on the option available to Natives in determining their own destiny as the following examples illustrate. The period of time corporations are protected from outside influence was reduced to 20 years from an initial expectation of 100 years.^{29/} The choice of settlement vehicles failed to include IRA or federal corporations which were requested by villages and some regions until late in the drafting process.^{30/} Finally, the overriding affect of ANCSA is to integrate Natives into mainstream when some may not want to integrate.

Limitations also arise under the state laws. Individual rights attached to stock ownership under state law together with federal restrictions on stock transfer prevent ANCSA corporations from allowing New Natives to participate in the settlement except by inheritance.^{31/} "Buy out" rights, protecting shareholders dissenting in referendums required to authorize extraordinary dispositions of corporate property, probably prevent an ANCSA corporation from conveying corporate assets to an alternative entity for safe keeping even if any shareholder dissents since ANCSA stock cannot be bought back by the corporation until 1991.^{32/} Moreover, Native shareholders frequently find that many of their social and economic objectives fall outside those allowed a corporation by state law due to limits on expenditures for-profit corporations can safely make for charitable purposes.^{33/}

Frequently the limitations put on Natives by ANCSA and state must seem manifestly unfair to a Native observer. Why? The answer often lies in older notions of communal property rights.

III. Conflicts in Values

A. The Ideological Core of 1991 Tensions

Tensions created by 1991 may result from the conflicts in values the various solutions raise: How will Alaska Natives individually and through their tribal and corporate institutions balance individual and group rights, if at all?

For instance, issuing New Natives stock for free or for less than fair value (absent approval of a substantial majority of the shareholders) conflicts with notions of individual private property as reflected in the corporate model. As a general rule shareholders have proportionate interests in the earnings, net assets and control of a for-profit corporation. In the absence of a good business reason for doing so, a shareholder could sue to enjoin the distribution or to recover damages if the price for the shares was inadequate.^{34/} In comparison, if a New Native

met the membership requirements of a tribal group or non-profit corporation, membership in the group normally could not be denied by other members on the basis of diminution of value of the existing members interest in the tribal or corporate property since these rights normally are not protected.

Cohen's Handbook of Federal Indian Law offers a brief explanation of tribal property--the traditional manner of land holder practiced by Alaska Natives--

"...Tribal property is a form of 'ownership in common;' it is not analogous to tenancy in common, however, or other collective forms of ownership known to Anglo-American private property law because an individual tribal member has no alienable or inheritable interest in the communal holding. Rather, tribal property interests are held in common for the benefit of all living members of the tribe, a class whose composition continually changes as a result of births, deaths, and other factors. The manner in which a tribe chooses to use its property can be controlled by individual tribal members only to the extent that the members participate in the governmental processes of the tribe..."^{35/}

Title to tribal property, therefore, is held by the tribe and not by the members individually. Individual members are legally incapable of conveying any particular tract of tribal land and have no vested right in any specific part of the tribal property.^{36/} Thus, unlike their corporate shareholder counterparts, tribal members could not claim a pro rata proportion of the proceeds of a sale of tribal assets or other distribution of tribal assets unless provided for by tribal law (in which case participation is conditioned upon membership). An individual tribal member's interest in tribal property is personal, i.e. the right is born and dies with the member. Children of tribal members participate in tribal property only if they are also members.

Private property belongs to an individual (including corporate persons)--who has the exclusive right to sell or otherwise alienate the property and to determine who uses the property--and is protected from being taken for public purposes. ^{37/}

The Settlement Act instilled the expectation of private property rights in Native individuals by providing for the issuance of stock in state business corporations which would operate under normal conditions by 1991. Corporate shareholders only own stock and the rights bound up in the stock. Shareholders control the use of corporate property and participate in distributions of corporate

assets as a consequence of holding stock in the corporation. Shareholders are said to hold interests in corporate property derivatively.

In the limited case of derivative participation, tribal member interests in tribal property and shareholder interests in corporate property are similar. Critical differences exist between the two interests. As stated above, corporate shareholders possess interests proportionate to their shares in the corporation with respect to earnings, net assets and control which are enforceable in court. In layman's language, this means that a shareholder can "(a)...throw out management; (b) ...sue management for the misuse of power, gross mismanagement, fraud, or dishonesty; and (c)...sell his shares."^{38/} Tribal members cannot sell or transfer their limited interest in the tribal property--theirs is a personal interest that lives and dies with them. Restraints on alienation or corporate stock, on the other hand, are allowed only if adopted for a lawful purpose and so long as they are not unreasonable.^{39/} Restraints on alienation that last only a limited period of time have been upheld as a reasonable but an absolute restraint has been declared void.^{40/}

To summarize, the Settlement Act preserves the notion of private property rights. With little faith in federally supervised property, Native leaders opted for parity with non-Natives in land tenure and saw in ANCSA an alternative through stock ownership in landed corporations. With thousands of years of experience in holding communal property and relatively little experience living with private property, it is no wonder that conflicts arise between the new land tenure under ANCSA and the older notions of communal property.

B. The Fear of 1991

In varying degrees, attachments to both private property and communal exist side by side in the Native community. This situation often results in polarization between purists--one firmly convinced of his individual right to private property, the other equally entrenched in communal values. This is only one manifestation of the tension created by 1991 and conflicting values. Many Natives, perhaps most, fall between the two extremes. Their conflict is internal. How can they accommodate their feelings for communal and individual rights. The complex structure of ANCSA compounds the tension--what can an individual shareholder do?

The increasing awareness of the limited choices available to Native individuals and groups under ANCSA style self-determination added to the catalyst of 1991

results in enormous tension. Natives fear the loss of their homelands. The loss of homeland relates directly to the perceived loss of traditional government power which may rely, in part, on the preservation of a Native controlled territory. There is the obvious concern for the loss of control over the ANCSA corporations and their assets if a majority of Natives sell their stock in 1991. Less obvious, is the loss of Native political and economic power should the corporations fall into non-Native hands.

Indians in the south faced similar conflicts when their reservations were first broken up by allotment then reconstructed under the Indian Reorganization Act. Sometimes the reaction to the IRA were peculiar but understandable. Individual allottees, traditional and acculturated, balked at the idea of converting their individually held allotments into interest in communal property. The traditionalists did not want to give up old tribal grounds that they had faithfully protected only to share the allotments with members who had sold theirs (they equated the sale with selling out the tribe). The traditionalist had little faith that the federal government would protect the tribal property. It was the federal government which had allotted them in the first place. Alterior motives also will be attributed to those who propose solution to 1991.

The recent convention discussion on 1991 in Anchorage and in smaller groups around the State clearly show that Natives are responding to the 1991 challenge. The ways to respond to the challenge of 1991 and the prospective alternatives to ANCSA, if alternatives are desired, will reflect an accommodation of conflicting values as occurred when the Settlement Act initially passed.

- 1/ "1991: The Challenge That Must Be Met," Tundra Times 26 Sept. 1984.
- 2/ 43 U.S.C. § 1601 - 1628 (1982) ("ANCSA").
- 3/ §§ 904, 907, 1401, Pub. L. No. 96 - 487, 94 Stat. 232 (1980) (ANILCA).
- 4/ ANCSA § 1604 .
- 5/ Id. at 1613(f).
- 6/ See, Chugach Natives Inc. vs. Doyon, Ltd., 588, F.2d 723 (9th Cir., 1978).
- 7/ H.R. Rep. No. 92 - 746, 92nd Cong., 1st Sess. 39 (1971) ("Conference Report").
- 8/ See e.g., H.R. 7039, § 9(e)(4) reprinted in U.S. House, Committee on Interior and Insular Affairs Hearings before the Subcommittee on Indian Affairs on H.R. 3100, H.R. 7039, and H.R. 7432. 92nd Cong., 1st Sess., May 1971, p. 17, 27, ("House Hearings on H.R. 3100, H.R. 7039, H.R. 7432").
- 9/ See e.g., Arctic Slope Native Association Outline of Proposed Bill to Settle Alaska Native Land Claims, reprinted in, u.S. Senate, Committee on Interior and Insular Affairs, Alaska Native Land Claims, Hearing on S.35 and S. 835, 92nd Cong., 1st Sess., February, March 1971, p. 373, 374. ("Senate Hearings on S.35, S. 835").
- 10/ See Statement of William L. Hensley, A Representative in Alaska Legislature, U.S. Senate, Committee on Interior and Insular Affairs, Alaska Native Land Claims, Hering on S.2906, 90th Cong, 2nd Sess., February 196, p. 62, 64 ("Senate Hearings on S. 2906").
- 11/ See, "A Report of the Governor's Task Fore on Native Land Claims", Juneau, January 10 - 16, 1968", Senate Hearing on S. 2906, p. 74, 75. ("Task Force Report").
- 12/ See, Cmments by Barry Jackson, Senate Hearings on S. 2906, p. 89.
- 13/ Id., at 90.
- 14/ Task Force Report, Senate Hearings on S. 2906 at 78.
- 15/ See, Statement by Emil Notti, President, Alaska Federation of Natives, Senate Hearings on S. 2906, p. 33.

- 16/ Statement by William L. Hensley, Senate Hearings on S. 2906, p. 65.
- 17/ Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 - 450n, 455 - 458e, 450a(b) (1982); See also, David Stanway Case, Alaska Natives and American Laws, (Alaska Native Studies Program, University of Alaska,) (Publishing Date, December, 1984,), p. 4450. ("Case").
- 18/ Id.
- 19/ 25 U.S.C.A § 1451 et seq.
- 20/ 25 U.S.C.A § 1601 et seq.
- 21/ 25 U.S.C.A § 1901 et seq.
- 22/ Felix S. Cohen's Handbook of Federal Indian Law, 183-184, (Charottesvile, Virginia: Michi, Bobbs and Merrill Law Publisher, 1982 ed.) ("Cohen").
- 23/ Id.
- 24/ Statement by William L. Hensley, Senate Hearings on S.2906, p. 65.
- 25/ Statement by Emil Notti, Senate Hearings on S. 2906, p.33.
- 26/ Special Message to the Congress on Indian Affairs, (1970) PUB PAPERS, 564, 566 - 567 (Richard M. Nixon).
- 27/ Don Wright, President, Alaska Federation of Natives to Representative James A. Haley, 14 May 1971, House Hearings on H.R. 3100, H.R. 7039, H.R. 7432, p. 245, 246.
- 28/ Vine Deloria, Jr., Nations Within, (New York: Pantheon Books, 1984) ("Nations").
- 29/ Supra note 11.
- 30/ See e.g., Arctic Slope Native Association Proposal, Supra Note 9.
- 31/ ANCSA § 1606 (3)(A).
- 32/ A.S. 10.45.435; See also, Case at 23.
- 33/ H. Henn, Law of Corporations, (Westlaw Publishers, 1970) p.350 - 351. ("Henn").

34/ Id. at 320.

35/ Cohen at 472.

36/ See generally, Cohen at 605 - 611.

37/ Black's Law Dictionary (re. 4th ed., 1968) pp. 1382 -
1383.

38/ Henn at 289 n.2.

39/ Id. at 553.

40/ Id.

