The Alaska Native Claims Settlement Act After 1991: Looking Forward to the Future

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THE ALASKA NATIVE CLAIMS SETTLEMENT ACT AFTER 1991: LOOKING FORWARD TO THE FUTURE?

I. INTRODUCTION

On December 18, 1971, President Nixon signed into law the Alaska Native Claims Settlement Act1 (ANCSA) in the hopes of providing a better life for Alaska Natives.2 The terms of the agreement provided the Native Alaskans with fee simple title to forty-four million acres of land through the formation of twelve regional corporations,4 as well as 962.5 million dollars.5 In addition, ANCSA provided for cer-

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2. The term Alaska Native refers to a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakta Indian Community) Eskimo, or Aleut blood, or combination thereof. 43 U.S.C. § 1602(b) (1982). Eskimos and Aleuts are referred to as Alaska Natives, although ethnologically, they are not American Indians. However, they have always been referred to as Alaska Natives and treated as such for purposes of federal Indian policy. D. GETCHES & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 774 (2d ed. 1986). The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he or she claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. 43 U.S.C. § 1602(b) (1982). Throughout this comment, these groups will be referred to collectively as Alaska Natives, Natives, and Native Alaskans.

3. Fee simple title to land is one in which the owner is entitled to every right in the property, including the unconditional power to transfer it during his lifetime, and descending to his heirs and legal representatives upon his death intestate. BLACK'S LAW DICTIONARY 615 (6th ed. 1990).

4. ANCSA, supra note 1. A regional corporation is defined as an Alaska Native regional corporation established under the laws of the State of Alaska in accordance with the provisions of ANCSA. 43 U.S.C. § 1602(g) (1982).

5. The monetary portion of the settlement was distributed to the twelve regional corporations through the Alaska Native Fund, established under ANCSA. The money was to be deposited from the United States Treasury Fund to the Alaska Native Fund over a period of twelve years. It was then to be disbursed directly from the Alaska Native Fund to the regional corporations. 43 U.S.C. § 1605 (1982), S. REP. No. 201, 100th Cong., 1st Sess. 21, reprinted in 1987 U.S.
tain restrictions regarding the alienability of corporate shares received by Alaska Natives that are to remain in effect until December 18, 1991. For twenty years, Alaska Natives are to be the only shareholders in the regional corporations which were set up for the purpose of protecting their land. In exchange, all Native claims to aboriginal title of the land, and all prior hunting and fishing rights that the Natives claimed were extinguished.

Rather than achieving a seemingly complete victory, ANCSA was riddled with shortcomings. In response to Congressional recognition of these shortcomings, President Reagan, in 1988, signed into law the 1991 Amendments to ANCSA (1991 Amendments). The 1991 Amendments provide the Natives with a variety of options to extend control over their corporations—and thus over their land—beyond 1991, when current alienability restrictions limiting transfer of the corporate shares are set to expire.

Although the 1991 Amendments are critical to the future of Native control over the regional corporations, which in turn control the land allotted the Natives under ANCSA, they fall far short of their expectations. The 1991 Amend-

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6. ANCSA, supra note 1.

7. Aboriginal title refers to a type of title based upon continuous use and occupancy of land by aboriginal peoples. It is title held subject to the will of the sovereign and is not protected under the United States Constitutional due process provision. The sovereign alone has every right to completely extinguish aboriginal title without compensation or to convert it in whole or in part to a full title in fee simple. H.R. REP. NO. 523, 92d Cong., 1st Sess. 2, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 2192, 2198.


9. An alienability restriction is a provision in an instrument of conveyance that prohibits the grantee from transferring or selling the property that is the subject of the conveyance. Most alienability restrictions are unenforceable as against public policy and the law's policy of free alienability of land. BLACK'S, supra note 3, at 1314. The 1991 Amendments include provisions which restrict the alienability of corporate shares held by Native Alaskans. Among these restraints include the fact that if any stock is transferred in accordance with a last will and testament or under the laws of intestacy, it shall only carry voting rights if the new holder is a Native. In addition, if the decedent has no heirs and no will, the stock shall revert back to the regional corporation. Another restraint includes a provision that disallows stock or dividends to be sold, pledged for collateral, or subject to a lien or judgment. 1991 Amendments, supra note 8.
ments represent an attempt by Congress to preserve Native control beyond 1991 by giving each of the twelve regional corporations one of three options to prolong their control of the land. However, the 1991 Amendments merely postpone a solution to the land claims dispute. Neither ANCSA nor the 1991 Amendments accomplishes the purpose that Congress had intended: ensuring complete and continued Native control of the corporations that control their land.¹⁰

Congress must implement an amendment to ANCSA and the 1991 Amendments in order to solve the problem of continued Native corporate control. An effective amendment to the existing legislation would provide for a complete restraint on alienation¹¹ to the subsurface¹² lands controlled by the twelve regional corporations. In 1991, alienability restrictions will expire, enabling Native Alaskans to sell their individual shares in the regional corporations. This creates a grave threat of takeover of every regional corporation by non-Natives, especially by large petroleum companies who wish to gain control of the land in order to exploit it for its rich natural resources. Parties seeking the wealth of the rich Alaska land will be able to pay a high price for these shares, and thus stage a takeover.¹³ If the Natives lose control over the regional corporations, they will lose control of the land that belongs to these corporations.

This comment proposes that Congress enact legislation allowing each shareholder to freely alienate his shares to the surface rights to the land, while providing that each regional corporation retain title to the subsurface rights. If petroleum companies and other large companies acquire these shares, they would be free to extract the natural resources beneath the surface, subject to certain restrictions implemented by each corporation. The companies would then be required to pay royalties¹⁴ back to the corporations on the value of the

¹⁰. See supra note 1 and accompanying text.
¹¹. See supra note 9 and accompanying text.
¹². The term subsurface is used to describe something located or concealed beneath the surface of the ground. WEBSTER'S THIRD NEW WORLD DICTIONARY 2281 (15th ed. 1966).
¹⁴. A royalty is compensation for the use of property, usually natural resources, paid by a percentage of receipts from the use of the property or as a determined fixed amount per unit. BLACK'S, supra note 8, at 1330.
resources that are extracted from the land. A provision in the statute would provide that these restrictions will not violate any laws against perpetuities.  

Part II of this comment examines the original intent of Congress in passing ANCSA. It then discusses the problems that the 1991 Amendments sought to resolve. Part III analyzes various problems within the 1991 Amendments. Finally, Part IV proposes an amendment to the existing legislation that would assure continued Native control over their corporations and thus over their land well into the future.

II. BACKGROUND

A. U.S. Acquisition of the Territory of Alaska

When the United States acquired the Territory of Alaska from Russia in 1867, the Treaty of Cession from Russia (the Treaty), gave the United States title to all lands not then individually owned. By the terms of the Treaty, the United States promised to treat the indigenous population in Alaska the same as the inhabitants of the United States and its territories. Native tribes, according to the Treaty, were to be subject to such laws as the United States would implement.

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15. The rule against perpetuities stands for the principle that no interest in property is good unless it must vest, if at all, not later than twenty-one years, plus a period of gestation, after some life or lives in being at the time of creation of the interest. J. Gray, The Rule Against Perpetuities §201, at 191 (4th ed. 1942).


17. The Russian government was eager to dispose of this land, which seemed to consist of useless rock and ice. Russia's finances were thin, and the prosperous fur trade was diminishing. England had already colonized Canada, and the Russians were fearful of another Crimean War. Accordingly, Czar Alexander was skeptical of having a base so close to the British, so he distanced his forces. Meanwhile, the United States was fighting the Civil War. A Confederate vessel reached Alaska, causing considerable damage to Union whaling vessels. When President Lincoln heard that France and England planned to recognize the Confederacy, he turned to Russia, which was willing to send a fleet of vessels to the American harbors as a friendly gesture. Russia expected the United States government to pay for this support. When the Civil War ended, the United States was unable to repay Russia, and agreed instead to purchase Alaska. The property which now comprises the state of Alaska was purchased for $7,200,000, less than two cents an acre. E. Bright, Alaska - Treasure Trove of Tomorrow 14-16 (1956).

from time to time, although aboriginal title was not extinguished.20

With the Act of May 17, 1884,21 (the Act), Congress stated that Alaska Natives in possession of land should not be disturbed, and that they should be entitled to remain living on the land. The Act did not, however, grant them title to that land.22 Rather, Congress, through the Act, reserved the right to grant title to the land for future legislation.23 In 1971, Congress stated,

It has been the consistent policy of the United States government in its dealings with Indian Tribes to grant to them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the lands by placing such lands in the public domain, and to pay the fair value of the titles extinguished.24 Nevertheless, before 1971, Congress had enacted no legislation that gave the Natives title to the lands which they used and occupied.25 With little information on the distant territory, Congress deferred consideration of issues on Alaska Native land ownership for many years.

B. Land Ownership and the Discovery of Oil

In 1958, when Alaska became a state, settlement of the Native land claims dispute was imperative. The Alaska Statehood Act of 195826 granted the new state of Alaska the authority to select and receive title to more than 103,000,000 acres of public lands that at that time were unoccupied, clearly the largest grant of land to any new state.27 The land that was occupied by Native Alaskans was not granted to the state as public land, thus the state was required to

20. E. BRIGHT, supra note 17, at 14-16.
22. Id.
25. However, the Natives have maintained, as far back as 1867, that they rightfully own this land. T. BERGER, VILLAGE JOURNEY 22 (1985).
27. D. GETCHES, supra note 2, at 775.
disclaim any right that it had in it.28

At this time, aboriginal title to the land had not been extinguished. The right to grant title to the land was merely reserved for future legislation. However, because the lands were considered by the state to be economically advantageous,29 tension heightened between the Natives and the state of Alaska. The Natives wished to preserve their aboriginal title, whereas the state asserted that the lands were so economically important that the state must obtain title.

The Alaska Statehood Act required the state of Alaska to disclaim, or refuse, any right to lands to which the Native Alaskans may have any title or right.30 This requirement served as a bar to state selection of lands that were subject to aboriginal title, which amounted to virtually all the land in the state.31

Meanwhile, the discovery of oil in Prudhoe Bay off the Northern Coast of Alaska intensified the conflict that had existed since the time of statehood. The discovery of oil was the single most important catalyst to the passage of land claims legislation. Petroleum companies needed a means to extract the newly discovered oil, but Native title to Alaskan land made it virtually impossible for the companies to capitalize on their discovery.32 Without the right to construct a pipeline to extract and transport the oil, a vast quantity of oil remained untapped. It was believed at the time that the extraction of Alaska's oil could solve the nation's threatening energy crisis. Thus, a quick settlement of Native claims was imperative.33

Further, the oil companies wished to explore the newly

28. See supra note 26 at §4 and accompanying text.
29. D. GETCHES, supra note 2, at 775.
30. See supra note 26 at § 4 and accompanying text.
31. D. GETCHES, supra note 2, at 775.
32. D. GETCHES, supra note 2, at 776. The United States could not afford to wait until the Native land claims dispute was resolved to tap into the Alaskan oil reserves. It was crucial that the United States act quickly, for in 1972, the Arab countries had cut off oil supplies to the United States, in an attempt to change American foreign policy towards Israel. For this reason, pressure mounted to develop domestic energy reserves. By the winter of 1973, the United States debated the energy crisis, and the American citizens began to realize, for the first time, that the end to inexpensive and unlimited energy supplies had drawn near. W. HUNT, supra note 18, at 150.
found oil field without a barrage of legal problems. By allowing for this exploration, the Alaska state government stood to gain substantial revenue from royalties and taxes from the oil produced. This set the framework for the Natives to offer a proposal for settling the Native claims dispute.

In 1969, a joint venture between Atlantic-Richfield, British Petroleum, and Humble Oil, known as the Trans-Alaska Pipeline System (TAPS), applied to the U.S. Department of the Interior for a permit to construct a nine hundred mile pipeline, stretching from Prudhoe Bay on the Arctic North Slope, to Valdez on Prince William Sound. This application put great pressure on Walter J. Hickel, Alaska’s then-governor, to grant the permit. However, conservationist groups applied pressure to deny the permit, for fear of hazardous environmental exploitation.

Despite pressure from the various conservationist groups, the Department of the Interior and the Trans-Alaska Pipeline System slowly removed legal obstacles that stood in the way of the oil extraction project.

On September 19 (1969), the various Native villages claiming land over which the pipeline would pass waived their claims to the right-of-way. On September 30 the Department of the Interior published the first of many sets of stipulations for construction of the pipeline, said to be the most rigid governmental controls ever imposed.


35. Various companies had been exploring the North Slope for some time. TAPS, organized for the purpose of developing the Arctic oil field, wanted to limit its disclosure on the discovery, though it was optimistic that the oil field would be the forerunner of additional discoveries that would make commercial production of the oil possible. In early March, 1968, Atlantic-Richfield had announced that its discovery well flowed oil at a rate of 1,152 barrels per day. On June 25, they announced the discovery of a second well, located approximately seven miles southeast of the first oil field. C. Naske, supra note 33, at 248, citing Fairbanks Daily News-Miner, August 2, 1968.

36. C. Naske, supra note 33, at 251.

37. C. Naske, supra note 33, at 251-52.

38. C. Naske, supra note 33, at 252. Included among the conservationist groups who opposed the construction of the pipeline was the Sierra Club, who had been urging the formation of the Gates-of-the Arctic National Park in Brooks Range. The various conservationist groups argued that once development began, there would be no end to the destruction of the natural beauty of the state and the result would be irreversible harm to the fragile environment. W. Hunt, supra note 13, at 146-47.
on a private construction project.\textsuperscript{39} By mid-1970, construction plans for the pipeline were temporarily suspended, as the oil companies realized that it was essential for the Native land claims dispute to be resolved before the pipeline could be constructed.\textsuperscript{40}

At the same time, the new state of Alaska began to select its lands in compliance with the Alaska Statehood Act. From the beginning, the selection process was confronted by resisting Native Alaskans. They were determined to retain aboriginal title to their land, as it was essential for their hunting and gathering needs. With the discovery of the 9.6 billion barrel oilfield and the need for petroleum companies with exploration rights\textsuperscript{41} to construct a pipeline to export and transport the oil, these petroleum companies put Native title to land in jeopardy.\textsuperscript{42} The Natives filed blanket claims on all public lands, yet the state was granted title to all land chosen. Incensed, the Natives united together and protested.\textsuperscript{43}

During the 1960's, political pressure in response to the Statehood Act was rapidly increasing. Various Native Alaskan groups organized themselves into political pressure groups. In 1967, twelve regional associations had organized themselves into a single statewide group, the Alaska Federation of Natives.\textsuperscript{44} The AFN recommended at their first convention

\begin{quote}
39. Implementation of these controls was to be carried out by the Bureau of Land Management (BLM) personnel in the field. C. NASKE, \textit{supra} note 33, at 253, citing M. BERRY, \textit{The Alaska Pipeline: The Politics of Oil and Native Land Claims} 111 (1975).

40. C. NASKE, \textit{supra} note 33, at 255.

41. \textit{See supra} note 35 and accompanying text.

42. C. NASKE, \textit{supra} note 33, at 249. Various oil companies had explored the North Slope, and the news that a substantial flow of gas was found in the Arctic indicated the optimism of oil and gas development. Atlantic-Richfield's discovery was a lucky one, for it was the result of a 1966 decision to randomly drill a well on the North Slope lease that it had acquired in a state sale. C. NASKE, \textit{supra} note 33, at 248.

43. C. NASKE, \textit{supra} note 33, at 258.

44. T. BERGER, \textit{supra} note 25, at 23. The Alaska Federation of Natives [hereinafter AFN] is a group formed by Alaska Natives to defend their rights and claims to the benefits to which they are entitled under the United States and Alaska state laws. The AFN also functions to educate the public about Alaska Natives, to preserve Native culture, and to secure a just solution to the Native claims controversy. In addition, the AFN seeks to promote the general health and welfare of the Natives through a variety of social and health programs, and it seeks to promote continued loyalty to Alaska and the rest of the United States.
\end{quote}
that the Department of the Interior freeze all disposals of federal land pending a land claims settlement. The AFN also persuaded the Secretary of the Interior to consult the Natives before passing any law that attempted to settle the land claims dispute.\textsuperscript{45}

In 1968, Secretary of the Interior Stewart Udall, pressured by the Natives,\textsuperscript{46} informally suspended the state's land selection processing until the Native claims controversy was resolved.\textsuperscript{47} In 1969, the freeze was made official by an executive order.\textsuperscript{48} This action taken by Stewart Udall gave impetus to the idea that it was crucial that the Native land claims dispute be settled immediately.\textsuperscript{49}

C. \textit{The Implementation of the Alaska Native Claims Settlement Act}

Signed into law by President Richard M. Nixon on December 18, 1971, the Alaska Native Claims Settlement Act,\textsuperscript{50} (ANCSA), finally removed the lingering cloud that Native claims had cast on all land titles in Alaska. The implementation of ANCSA was an effort to end the decade long struggle of the Native Alaskans to gain title to their land. According to the terms of ANCSA,

The Act extinguished all claims of the Alaska Native people to the ownership of land and hunting and fishing rights based upon aboriginal use and occupancy, including the Prudhoe Bay oilfield, the Trans-Alaska Pipeline corridor, and much of the land which had previously been selected by the State of Alaska pursuant to the

\footnotesize{554} W. STURTEVANT, INDIANS, Vol. 6 (rev. perm. ed. 1981); M. BERRY, \textit{supra} note 39, at 47.
\footnotesize{45.} T. BERGER, \textit{supra} note 25, at 23.
\footnotesize{46.} T. BERGER, \textit{supra} note 25, at 23.
\footnotesize{47.} The amount of land area affected by Secretary of the Interior Stewart Udall had greatly increased due to claims filed by the Natives that ranged from a 640 acre claim by Chilkoot Village to nearly 58 million acres claimed by the Arctic Slope Native Association. Many of the land claims overlapped, amounting to over 380 million acres, which is more than the total land area in the state. \textit{Comment, The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination}, 66 OR. L. REV. 207 (1987); C. NASKE, \textit{supra} note 33, at 198.
\footnotesize{49.} T. BERGER, \textit{supra} note 25, at 23.
\footnotesize{50.} ANCSA, \textit{supra} note 1.
Alaska Statehood Act.\textsuperscript{51}

To compensate the Alaska Natives, the state of Alaska was geographically divided into twelve regional corporations, within which were contained numerous village corporations.\textsuperscript{52} ANCSA provided these corporations with title to forty-four million acres of land, amounting to a mere ten percent of Alaska's land mass.\textsuperscript{53} The federal government, after its passage of ANCSA and the Alaska National Interest Lands Conservation Act (ANILCA)\textsuperscript{54} In 1980, retained 197 million acres of land, amounting to roughly sixty percent of the state. The state of Alaska was granted 124 million acres, amounting to roughly thirty percent of the state.\textsuperscript{55}

Furthermore, to compensate the Alaska Natives for the 321 million acres of land conveyed to the state and federal government, ANCSA established the Alaska Native Fund, into which $962,500,000 would be deposited from the United States Treasury Fund. The money was then to be disbursed directly from the Alaska Native Fund to the regional corporations.\textsuperscript{56}

\begin{itemize}
  \item \textsuperscript{51} S. Rep., supra note 5, at 3269.
  \item \textsuperscript{52} A village corporation is defined as "an Alaskan Native [v]illage [c]orporation organized under the laws of the [s]tate of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of [ANCSA]". 43 U.S.C. § 1602(j) (1982). The regional corporations were organized to take title to the subsurface estate in the lands conveyed to the village corporations, and fee simple title to the acreage divided among the regional corporations. The Natives, by receiving shares in the regional corporations, control all decisions that affect the land owned by their regional corporation. The typical regional corporation shareholder owns one hundred shares in the regional corporation. The typical village shareholder owns one hundred shares in his village corporation, as well as one hundred shares in the regional corporation to which the village corporation belongs. Id.; 43 U.S.C. § 1606(g) (1982 & Supp. V 1987), 43 U.S.C. § 1607 (1982).
  \item \textsuperscript{55} T. Berger, supra note 25, at 24.
  \item \textsuperscript{56} 43 U.S.C. § 1605(a) (1982). Section 1605(a) states: There is hereby established in the United States Treasury an Alaska Native Fund into which the following moneys shall be deposited:
    \begin{enumerate}
      \item $462,500,000 from the general fund of the Treasury, which are authorized to be appropriated according to the following schedule:
        \begin{enumerate}
          \item $12,500,000 during the fiscal year in which this chapter becomes effective;
          \item $50,000,000 during the second fiscal year;
        \end{enumerate}
    \end{enumerate}
D. Native Village and Regional Corporations

ANCSA provided for the establishment of twelve regional corporations and over two hundred village corporations, each composed of, as far as practicable, Natives sharing a common heritage and a common culture. In order to qualify for benefits under ANCSA, the Alaska Natives were required to organize the regional corporations under the "business for profit" laws of the state of Alaska. The two hundred village corporations within the boundaries of the regional corporations are not subsidiaries of the regional corporations, rather, they are independent. Those who live in villages defined by ANCSA received stock in both their village corporation and the regional corporation to which it is situated. Because most Natives do not live in villages, not all shareholders of the regional corporations own shares in the village corporations. Natives living in villages were given the option of forming a nonprofit corporation or a for-profit corporation. A nonprofit corporation would be unable to enjoy the monetary benefits of ANCSA. Because forming a for-profit corporation would entitle the villages to

(C) $70,000,000 during each of the third, fourth, and fifth fiscal years;
(D) $40,000,000 during the period beginning July 1, 1976, and ending September 30, 1976; and
(E) $30,000,000 during each of the next five fiscal years, for transfer to the Alaska Native Fund in the fourth quarter of each fiscal year.

(2) Four percent interest per annum, which is authorized to be appropriated, on any amount authorized to be appropriated by this paragraph that is not appropriated within six months after the fiscal year in which payable.

(3) $500,000,000 pursuant to the revenue sharing provisions of section 1608 of this title.

57. See supra note 4 and accompanying text.
58. See supra note 52.
60. Natives who do not live in a village and are nevertheless identified with a region become shareholders only in that regional corporation. These Natives are known as at-large shareholders. T. BERGER, supra note 25, at 24.
61. A non-profit corporation is one that is organized for other than profit-making purposes, and one in which no part of its earnings is distributed to its members, directors, or officers. Rather, the profits are kept within the corporation itself. BLACK'S, supra note 3, at 1056.
the monetary benefits of ANCSA, every village chose to form a for-profit corporation. 63

ANCSA required the Secretary of the Interior to prepare a roll of all Alaska Natives who were alive on December 18, 1971, the date of ANCSA's enactment. 64 These Natives were each given one-hundred shares of stock in their geographically-defined regional corporation. Those residing in a village corporation were given one hundred shares in their village corporation as well. This was a one-time distribution of shares. Those born after December 18, 1971 are only able to receive these shares through inheritance. 65

Natives not permanently residing in the state were allowed to join a thirteenth corporation located in Seattle, Washington. 66 This corporation is known as the Thirteenth Regional Corporation. 67 Shareholders of this corporation did not receive title to land, but received a pro-rata share of the $962.5 million, 68 which was split between the thirteen corporations in an amount based upon Native enrollment. 69 The Alaska Native Fund 70 distributed the monetary portion of the settlement to each regional corporation, according to its number of shareholders. ANCSA provided that the United States Treasury was to distribute $462.5 million to the regional corporations over an eleven year period. The remaining $500 million was to come from a revenue-sharing plan 71

63. T. Berger, supra note 25, at 25.
64. 43 U.S.C. § 1604 (1982). A total of 80,259 Alaska Natives claiming to have at least one-quarter Native blood were placed on the roll. S. Rep., supra note 5, at 3270.
67. Id.
68. T. Berger, supra note 25, at 24. See also supra note 56 and accompanying text. The monetary portion of the settlement was distributed annually to the regional corporations through the Alaska Native Fund over a period of twelve years. Each regional corporation was required to distribute a portion of the cash settlement to individual shareholders in the regional corporations, as well as a portion to the village corporations. S. Rep., supra note 5, at 3270.
69. 43 U.S.C. § 1605(c) (1982).
70. See supra note 56 and accompanying text.
71. The revenue-sharing plan provided that the $500 million was to come from a 2% royalty on production of minerals including oil, and a 2% royalty on all rentals and bonuses from the land in Alaska that was granted to the state of Alaska in the Alaska Statehood Act, as well as land within the state to which the federal government retained title. This land, however, excluded Naval Petroleum Reserve No. 4 on the North Slope. The terms of ANCSA further require the
that covers profits from all minerals, including oil, that would be extracted from the Alaska land retained by both the federal government and the Alaska state government. Furthermore, each regional corporation was to distribute among the village corporations included within its boundaries "no less than 50 percent of its share of the $962.5 million monetary award, as well as 50 percent of all revenues received from the subsurface estate."\textsuperscript{72}

Distribution of land awarded to the Natives under ANCSA had also begun by mid-1972. Villages were to be the first to pick the land, choosing out of 100 million acres set aside to be allotted to them based upon enrollment.\textsuperscript{73} In total, 22 million acres were to be chosen by the villages.\textsuperscript{74} Those villages with an enrollment of between twenty-five and ninety-nine would receive 69,120 acres.\textsuperscript{75} Those with an enrollment of one-hundred or more were allotted 161,280 acres.\textsuperscript{76} The villages were to make these selections over a three year period. After the village corporations made their selection, the regional corporations would make their selection over a four year period.\textsuperscript{77} The settlement provided that the village corporations held fee simple title only to the surface lands.\textsuperscript{78} The regional corporations, on the other hand, owned fee simple title to the surface and subsurface area of the regional corporations, and the subsurface area of the land belonging to the village corporations.\textsuperscript{79}

Congress, through the enactment of ANCSA, recognized that a fair and rapid settlement of all Native claims disputes was vital. It intended that the settlement be accomplished

\textsuperscript{72} C. Naske, \textit{supra} note 33, at 209. However, this provision does not apply to revenues received from the regional corporations' investments in business ventures. \textit{Id.}
\textsuperscript{73} 43 U.S.C. § 1613 (1982).
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.}
\textsuperscript{78} 43 U.S.C. § 1613 (1982).
\textsuperscript{79} \textit{Id. See also} text of note 52.
rapidly and efficiently.\textsuperscript{80} By 1987, however, nearly nine million acres of land still had not been transferred to the regional corporations from the Bureau of Land Management.\textsuperscript{81} This is in part due to the complex process of transferring land to the corporations.\textsuperscript{82} A greater cause of this delay is, however, the tremendous expense incurred by each regional corporation stemming from litigation involving the land settlement portion of ANCSA.\textsuperscript{83}

\section*{E. ANCSA Before 1991}

Title to the land selected by each regional corporation was received in fee simple.\textsuperscript{84} However, ANCSA provided for certain restrictions affecting control of the corporations that hold title to this land. Each corporate share given the Natives contains a restraint on alienation effective until December 18, 1991, twenty years after the passage of ANCSA.\textsuperscript{85} Between December 18, 1971 and December 18, 1991, the

\begin{itemize}
\item \textsuperscript{80} 43 U.S.C. § 1601(a)-(b) (1982).
\item \textsuperscript{81} C. Naske, \textit{supra} note 33, at 215. The Bureau of Land Management is a federal agency formed to manage the national resource lands and their resources, amounting to some 450,000,000 acres. It also administers the mineral resources connected with acquired lands and the submerged lands of the Outer Continental Shelf. The Bureau of Land Management was established on July 16, 1946, with the consolidation of the General Land Office (created in 1812), and the Grazing Service (formed in 1934). Black's, \textit{supra} note 3, at 197.
\item \textsuperscript{82} For example, because not enough lands were available for regional and village corporation selections within the Cook Inlet region, Congress, in 1975, passed an omnibus act which became law in 1976 and was known as the Omnibus Act of 1976. The purpose of this legislation was to clarify the intent of Congress in passing ANCSA, and to rectify some injustices that stemmed from its passage. The Omnibus Act authorized a complicated exchange of lands among the Cook Inlet Region, Inc., the state of Alaska, and the United States, as a means of satisfying the Cook Inlet Region's land entitlement under ANCSA. The Omnibus Act spelled out various requirements that were to be satisfied before land exchanges could be made by the executive branch of the federal government. 1976 Alaska Sess. Laws 19, 1976 Alaska Sess. Laws 240.
\item \textsuperscript{83} M. Berry, \textit{supra} note 39, at 240-41. The terms of ANCSA are very ambiguous, and, as such, much litigation ensued. Millions of dollars have been spent on the litigation of disputes. Lawsuits have ranged from the delineation of land-selection boundaries between regions, and eligibility of tribal groups to be called village corporations, to splitting of revenues between corporations from the sale of timber and mineral resources, and proxy battles within the corporations. T. Berger, \textit{supra} note 25, at 31.
\item \textsuperscript{84} D. Getches, \textit{supra} note 2, at 778. See also \textit{supra} note 3 and accompanying text.
\item \textsuperscript{85} ANCSA, \textit{supra} note 1.
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shares cannot be sold, pledged for collateral, or made subject to a lien or judgment.\textsuperscript{86} Similarly, the stock contains voting rights only if owned by a Native.\textsuperscript{87} This voting restraint operates to restrict the voting rights of non-Natives who acquire the shares through inheritance. However, Natives who acquire shares through inheritance receive voting rights.

In addition, during this initial twenty year period, Native regional and village corporations are not subject to state and local property taxes on these lands, unless they are leased or developed.\textsuperscript{88} Originally, the period for tax exemption was to expire on December 18, 1991, \textquotedblleft[b]ut in 1980 ANILCA extended the exemption period to (a) 20 years from the vesting of the title pursuant to ANCSA or (b) the date of issuance of an interim conveyance or patent, whichever is earlier."\textsuperscript{89}

On December 18, 1991, ANCSA requires that all shares be called in.\textsuperscript{90} New stock will be issued on January 1, 1992 which will be devoid of all current alienability restrictions. The shares will represent title in fee simple, and they will be freely alienable by each shareholder without the consent of any other shareholder. Similarly, they may be pledged as collateral or sold whenever and to whomever the shareholder so desires.\textsuperscript{91} Again, those born after December 18, 1971 are ineligible to receive the new shares of stock.\textsuperscript{92}

F. Flaws Within ANCSA

The U.S. Senate, before the passage of the 1991 Amendments, acknowledged four major problems with the future of ANCSA: First, Congress recognized that, by 1991, the stockholders in both the regional and village corporations will not have gained sufficient experience to enable them to function as corporate shareholders controlling a business entity when their stock will become freely alienable.\textsuperscript{93}

\textsuperscript{88} 43 U.S.C. § 1620(d) (1982); D. GETCHES, supra note 2, at 778.
\textsuperscript{89} D. GETCHES, supra note 2, at 778.
\textsuperscript{90} Note, \textit{Settling the Alaska Native Claims Settlement Act}, 38 STAN. L. REV. 227, 228 (1985)
\textsuperscript{91} \textit{Id}.
\textsuperscript{92} 1991 Amendments, supra note 8.
\textsuperscript{93} The passage of ANCSA has virtually destroyed the Alaska Natives' subsis-
Second, Congress noted that the shareholders will not have enough money and resources to remain economically capable of surviving, and, as a result, the Natives' shares will be lost through insolvency.\textsuperscript{94} Third, the Senate recognized that the Natives are concerned that those born after December 18, 1971 are not shareholders in the corporations, and thus cannot participate in decisions that will affect the future of the land. In 1991, it is projected that the number of non-shareholder Natives will equal that of the shareholders.\textsuperscript{95} This change is certain to create division and conflict within the family and the community.

Finally, while some regional corporations are stable, other corporations, especially the village corporations, are on the way to becoming insolvent.\textsuperscript{96} These struggling village corporations may either lose their shares involuntarily or may be forced to sell their stock to avoid bankruptcy.\textsuperscript{97} Although
tence economy, the Natives' hunting and fishing culture which has been a part of their society for many generations. Natives now must learn to think and live as non-natives if their corporations are to survive. They constantly struggle to save their culture and to make a smooth transition into society. T. BERGER, \textit{supra} note 25, at 19. Furthermore, many Native shareholders will not have received sufficient experience in handling corporate activities. Many believe that since the shares of stock represent their personal stake in the land claims settlement, this inexperience will only harm them when their shares may be sold on the open market. S. REP., \textit{supra} note 5, at 3270-71.

\textsuperscript{94} S. REP., \textit{supra} note 5, at 3271. Village corporations with one-hundred shareholders received approximately $80,000 from the initial distribution of allocated funds. The Alaska Native Foundation has calculated that it costs roughly $70,000 annually for a village corporation to conduct typical corporate duties and functions. Over ten years, most villages have received a total of less than $200,000 from the Alaska Native Fund, which is an insufficient amount to support the rising operating budgets of the village corporations. A study carried out in 1974 by the Department of the Interior calculated that villages with fewer than six-hundred shareholders would have insufficient capital to succeed. Of over two-hundred village corporations, only eight have more than six-hundred shareholders. Most of these village corporations, therefore have been grossly undercapitalized since their formation. BERGER, \textit{supra} note 25, at 163.

\textsuperscript{95} BERGER, \textit{supra} note 25, at 99. Congress conferred shares on all Natives claiming one-quarter Native blood who were living on December 18, 1971, the date of ANCSA's enactment. These Natives were to be the only shareholders to receive shares. All Natives born after December 18, 1971 were excluded from the issuance. Many believe that, within a profit-earning corporate system, it is impractical to have a continuous process of enrolling infants to share in the issuance, as this would reduce the value of existing stockholders' shares. \textit{Id.}

\textsuperscript{96} See \textit{supra} note 94 and accompanying text.

\textsuperscript{97} Telephone interview with Margaret Nelson, Lecturing Professor of Anthropology, University of Washington, (December 22, 1989). \textit{See also supra} note 94 and accompanying text.
some regional corporations have succeeded in advancing the Natives needs, some village corporations, undercapitalized to begin with, have never received a significant sum of money.  

G. The 1991 Amendments to ANCSA

The Alaska Native Claims Settlement Act Amendments of 1987 which came to be known as the 1991 Amendments, was signed into law by President Reagan on February 3, 1988. The purpose of Congress in enacting the 1991 Amendments was to provide each regional corporation with several options in order to ensure continued ownership and control of the lands granted them under ANCSA. Congress restated in the 1991 Amendments its policy reasons for enacting ANCSA in 1971, namely, the need for a rapid, fair and just settlement of the Native land claims dispute. Congress realized that it was time that ANCSA was amended to ensure the Alaska Natives continued participation in decisions affecting the future of their land.

Section 1606 of the 1991 Amendments authorizes each regional corporation to amend its articles of incorporation to authorize the issuance of stock other than Settlement Common Stock. The new stock will be called Replacement Common Stock. Each regional corporation may choose to provide whether or not the stock contains such rights as voting rights, dividend rights, and liquidation preferences. The regional corporations are also free to restrict the issuance of such stock to include only those born after December 18, 1971, Native elders, and those who were eligible but did not receive settlement common stock in 1971,

98. See supra note 94 and accompanying text.
100. 1991 Amendments, supra note 8.
102. 1991 Amendments, supra note 8.
104. S. Rep., supra note 5, at 3275.
because they had not enrolled in the corporation for which they were eligible.  

The 1991 Amendments also allow each regional corporation to amend its bylaws to include a right of first refusal. This gives the corporation or a member of an individual shareholder's family the first right to buy his or her stock, and so to keep stock ownership in the hands of the selling shareholder's family or the corporation itself. Section 1607(h)(2) of the 1991 Amendments provides that if a shareholder should die with no heirs, the stock will transfer back to the issuing corporation and will automatically be void. This provision also provides that "[t]he issuing Regional Corporation shall have the right to purchase at fair value Settlement Common Stock transferred pursuant to applicable laws of intestate succession to a person not a Native or a descendant of a Native after February 3, 1988." In order to exercise this right, the corporation must first amend its articles to include this provision, and must also give the recipient fair notice and a chance to first offer

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107. Id. 43 U.S.C. § 1606(h)(3)(D) (1982 & Supp. V 1987). Section 1606(h)(3)(D) states: Prior to the date on which alienability restrictions terminate, a [r]egional [c]orporation may amend its articles of incorporation to impose upon Replacement Common Stock one or more of the following:
(i) a restriction denying voting rights to any holder of Replacement Common Stock who is not a Native or a descendant of a Native;
(ii) a restriction granting the [r]egional [c]orporation, or the [r]egional [c]orporation and members of the shareholder's immediate family who are Natives or descendants of Natives, the first right to purchase, on reasonable terms, the Replacement Common Stock of the shareholder prior to the sale or transaction of such stock (other than a transfer by will or intestate succession) to any other party, including a transfer in satisfaction of a lien, writ of attachment, judgment execution, pledge, or other encumbrance; and
(iii) any other term, restriction, limitation, or provision authorized by the laws of the [s]tate.
108. Id.
111. Id. Section 1606(h)(2)(B) provides that the regional corporation has the right to purchase such stock if the corporation amends its articles to authorize such purchase, and gives the person receiving the stock written notice of its intent to purchase within ninety days after the date that the corporation either determines the decedent's heirs in accordance with the laws of the state of Alaska, or receives notice that such heirs have been determined, whichever occurs later, and the person receiving the stock fails to transfer the stock back to the corporation within sixty days of receiving this notice.
the stock to a Native. If a non-Native receives the shares, he or she receives no voting power.\footnote{112} Included within the 1991 Amendments is a settlement trust option.\footnote{113} Under this option, a regional corporation may transfer a portion of its assets out of the corporate form by conveying them to a trust in accordance with the laws of the state of Alaska.\footnote{114} In order to implement a trust, approval of the shareholders in the form of a resolution is necessary to convey all or substantially all of the assets, including stock, into the trust.\footnote{115} However, this option provides that no subsurface estate in land may be conveyed into the settlement trust.\footnote{116} This provision further states that each regional corporation establishing a settlement trust shall have exclusive authority to appoint and remove trustees.\footnote{117}

Congress, in providing each corporation the opportunity to implement a trust, intended to promote the health, education, and welfare of the trust's beneficiaries, and to preserve Native heritage and culture.\footnote{118} These state-chartered trusts have no power to transfer lands and are not subject to the rule against perpetuities.\footnote{119}

The 1991 Amendments further amend ANCSA to require that if any amendment shall be adopted by a regional corporation, there must be an amendment in its articles of incorporation that allows for this.\footnote{120} Should the board of directors of a regional corporation initially approve an amendment to the articles of incorporation, the proposed amendment must then be presented to the shareholders to

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119. 43 U.S.C. § 1629e(b)(4) (1982 & Supp. V 1987). The establishment of a trust is intended by Congress to be a land protection option, used to permanently insulate land and other assets transferred to a trust from business risks undertaken by the corporation. Thus, Congress believed that it was essential to include a provision providing that the rule against perpetuities will not be violated. S. REP., supra note 5, at 3285.
\end{flushright}
be voted on at the next shareholder meeting. In order to approve an amendment to the articles of incorporation, a majority of the total voting power of the corporation is necessary.

H. Options to Preserve Native Control Over Corporations

A significant provision of the 1991 Amendments provided each regional corporation with a choice between three options to extend the restrictions on alienability that now expire on December 18, 1991. These three options are the opt-out procedure, the recapitalization plan, and the opt-in procedure.

Under the opt-out procedure, a regional corporation is permitted to extend the current alienability restrictions by amending its articles of incorporation. This procedure allows the corporation to either set a specific date when the restrictions will expire, or specify that expiration of the restrictions will be automatic upon the occurrence of a certain event, for example, a vote by the shareholders at a specified date in the future. Should a regional corporation decide to implement the opt-out procedure, it must be voted upon once before December 18, 1991.

An alternative procedure available to each corporation is the recapitalization plan. Should a regional corporation adopt this plan, it must amend its articles of incorporation to allow for this option. The objective of the recapitalization plan is to restructure the corporation by extending the alienability restrictions.

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121. Id.
122. The articles of incorporation may be amended, however, to require a number greater than a majority of the total voting power of the corporation, but this number may never be more than a two-thirds majority of all voting shares. 43 U.S.C. § 1629b(d) (1982 & Supp. V 1987).
123. See supra note 9 and accompanying text.
ability restrictions on the shares for a period of time up to fifty years. Like the opt-out approach, a certain date for the expiration of restrictions may be specified, or it may be determined by the occurrence of a specified event (subject to a later majority vote to remove the restrictions). Under the recapitalization plan, a regional corporation is authorized to issue different classes of stock, which may carry different voting rights. The shareholders of the regional corporations wishing to implement this plan must approve it by a simple majority on or before December 18, 1991.

Yet another procedure implemented by the 1991 Amendments is the opt-in approach. By implementing this option, a board of directors may vote to extend alienability restrictions if they voted to do so not later than February 3, 1989, one year after the passage of the 1991 Amendments. This option is open to all regional corporations and any village corporation within the Bristol Bay and Aleut Regional corporations. If the board of directors adopted this resolution before February 3, 1989 and a simple majority of shareholders approved, the restrictions on alienability will extend for any specified period of time up to fifty years. If the board of directors does not adopt this resolution and the shareholders do not vote on it, the restrictions will automatically terminate on December 18, 1991.

Each of these plans allows the Alaska Natives to extend the current alienability restrictions on their shares of stock. The 1991 Amendments are an attempt by Congress to ensure continued Native control over their corporations that hold title to the land granted them through the passage of

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133. Id.
ANCSA. Though the corporations have several options from which to choose, there is skepticism and uncertainty as to whether any single option will provide the Natives with the protection that they need.

The issue of continued Native control over the corporations and thus over the land that was granted to the corporations in 1971 is far from over. The following analysis will discuss the reasons why ANCSA has failed to meet its goal by examining the failure of the regional corporations. It will then analyze the opt-out approach, the recapitalization plan, and the opt-in approach made available to each regional corporation through the 1991 Amendments, and discuss why these options do not fulfill the original intent of Congress. The focus will then shift to the examination of a proposal which will assure continued Native control over the regional corporations that hold title to the land, thus fulfilling the aim of Congress in settling the Native land claims dispute.

III. ANALYSIS

Although Native control over the regional corporations that hold title to land granted them may be extended through the implementation of the opt-out procedure, the recapitalization plan, or the opt-in procedure, no option is a complete solution, for none of these options solves the threatening problem. Rather, they merely postpone it until a future date. Many of these undercapitalized corporations must devise a plan to extend Native control permanently, in the most efficient method, and as quickly as possible. Continued Native control over the regional corporations, and thus over the land which rightfully belongs to the corporations, is the key to the preservation of the Natives' identity.

With the passage of ANCSA, Congress bestowed shares of stock on all eligible Natives alive on the date of enactment, to the exclusion of all others. Natives born after December 18, 1971 do not share as full partners in the Native claims settlement with those born before the passage of ANCSA. In order to participate in the settlement, those born after December 18, 1971 may only receive shares in the cor-

poration through inheritance. Inclusion of the younger Natives in this manner will not take place for some time. This concern has a polarizing effect on Native village life and family life as well. Some members of the family and village are shareholders, while others are not, by virtue of their date of birth. “Testimony submitted to the Committee projects that in 1991 the number of Alaska Natives born after the enactment of ANCSA will equal one-half the number of Alaska Natives currently included in the settlement.” As the years pass, the number is bound to increase.

More important, however, is the fact that December 18, 1991 will soon be upon us. The regional corporations have been in operation for nearly twenty years and are now firmly established in Alaska's economy. Though many problems exist, each corporation has in some way contributed to diversifying Alaska's economy, chiefly through outside investment. Part of the reason for these large corporate investments is the fact that ANCSA provided a twenty year tax delay on all undeveloped Native lands. Because this created an incentive to keep their own lands undeveloped, many corporations have invested their capital in outside sources. After 1991, however, this tax benefit will no longer be available. Much of the undeveloped land will become taxable

143. S. Rep., supra note 5, at 3271.
144. C. NASKE, supra note 33, at 214. Most corporations have invested capital into a variety of holdings. For example, Doyon, Ltd. has invested a large sum of money into a historic hotel and shopping complex in Lahaina, Maui, Hawaii. The Bristol Bay Native Corporation acquired Peter Pan Seafoods and the Anchorage Westward Hotel, the largest purchase of any regional corporation. The purchase price amounted to approximately $18 million. The Sealaska Corporation bought the Alaska Brick Company of Anchorage, which includes a concrete-block operation, a barge operation, and an import-export branch which receives building products from Japan. This new acquisition raises a revenue of between $11 million and $12 million a year. Id.
145. Congress amended ANCSA in 1980 to extend the tax exemption period for undeveloped land from twenty years to twenty years after the date on which the corporation received title to the land. Since many corporations received their land after 1971, their tax exemption period is extended until twenty years after this date. Most of the land will become taxable in the 1990s, however. 43 U.S.C. § 1620 (1982 & Supp. V 1987).
146. Because of the twenty year tax benefit for this undeveloped land, Section 21(d) of ANCSA implicitly assumes that twenty years after the date of conveyance to the corporations, all undeveloped land belonging to the regional corporations
in the 1990s, encouraging widespread land development by the regional corporations. A monetary incentive to keep the land undeveloped no longer exists.

This poses a great problem for those villages and/or regional corporations which wish to retain large portions of their land in an undeveloped state so that their shareholders may continue to live there on a subsistence basis. If this is the native corporation's decision, then the land will be producing no income, and after twenty years a substantial tax might force either the sale of the land or its appropriation by the government.\textsuperscript{147}

ANCSA further provided that if regional corporations explore and extract subsurface resources, permission from the individual village corporation where the land is located is necessary.\textsuperscript{148} Because the regional corporations are designed to operate at a profit, it will be necessary for each corporation to develop its land through exploration. The villages, on the other hand, wish to preserve their land for subsistence economies. The continued development of the land by the regional corporations perhaps cannot recede after 1991, and the conflict that presently exists between the regional corporations and the village corporations will extend well into the future.\textsuperscript{149}

Although these concerns are significant, the greatest threat to continued Native control over the regional corporations that control their land will stem from large petroleum and other companies wishing to gain control of the land for the value of its rich natural resources. If the large petroleum companies and various other companies succeed in acquiring

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including tens of millions of acres of land which is only valuable as a wildlife habitat needed to support the continuation of the Native Alaskan subsistence economy, will be sufficiently adapted into the non-Native business economy to generate sufficient revenue to pay taxes on this land. If the land is not sufficiently integrated, ANCSA assumes that the Native corporation which owns the land will be able to pay the property taxes with money earned from other sources. S. REP., supra note 5, at 3271. In addition, the land belonging to the regional corporations is not protected from the possibility of being seized to pay creditors in bankruptcy proceedings, nor is it immune from being lost through adverse possession. \textit{Id.}


\textsuperscript{148} ANCSA, \textit{supra} note 1.

\textsuperscript{149} F. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 756-57 (1982).
the land, it will be exploited for profit. Although the regional corporations, like outside investors, may wish to develop the land through exploration, the extraction process by Native controlled corporations may be less harmful than extraction by non-Native controlled corporations. Prudent and conservative regulations are more likely to be implemented by Native controlled corporations, as most Natives have a strong interest in preserving the land for their descendants.

More importantly, however, is the fact that the Natives will be unable to regain ownership of the land, and it will be eternally lost. If the petroleum companies rightfully own the land and utilize it profitably through continued extraction of natural resources, they will be unwilling to sell it back to the Natives. If, however, the companies strip the land of all subsurface resources, the land will be without value, for it will be useless for any purpose.

Similarly, profitable regional corporations may be the targets of a takeover bid by investors seeking to enter new markets. Unprofitable corporations may not be safe either, as they may find it necessary to liquidate their assets in order to avoid insolvency. Shareholders may sell their shares at distress prices if they see little prospect of significant capital gains or dividends.¹⁵⁰

None of the options given to the regional corporations to extend alienability restrictions are sufficient to avoid these shortcomings. ANCSA and the 1991 Amendments have largely failed to achieve what Congress had intended in settling the Native land claims dispute: a fair and equitable settlement in order to preserve Native control over the corporations that hold title to the land given them through ANCSA.

A. Corporate Failure

At the time ANCSA was enacted, little thought was given to the existing way of life of the Native Alaskans. Congress found it easy to set up a law that provided for the land awarded to the Natives to become privately owned through corporations. However, the Natives have never functioned in societies like those of non-Natives in the rest of the United States. The only economy with which they are normally famil-

¹⁵⁰ D. GETCHES, supra note 2, at 817.
iar is their subsistence economy. With the implementation of the various corporations, the Natives were thrown into a completely foreign system. If the Natives wished to preserve title to their land, they quickly had to learn to function as corporations, which was a completely new idea to the Natives.

Similarly, what seemed to be an enormous amount of money was in reality very modest. Because of the pipeline construction, the national inflation had accelerated in the state of Alaska, and the spending power of the dollar had decreased by about one-third by the time the Natives had received the monetary portion of their settlement.

On a statewide basis, ANCSA's cash settlement amounted to about $12,000 for each shareholder, but individual Natives did not receive this sum. The at-large shareholders, who do not live in the villages, each received $6,525. Most village shareholders received a total of $375; but after 1976, the Alaska Native Fund made no further payments to villagers.151

B. *The Opt-out Procedure*

Congress, realizing the urgent need for extension of the alienability restrictions included in the provisions of ANCSA, gave each regional corporation the option of implementing an opt-out procedure.152 Under this approach, all current alienability restrictions will remain in effect unless a majority of shareholders, before December 18, 1991, votes to remove such restrictions.153 If the shareholders vote to remove the restrictions, the shares will become freely alienable.

Although this proposal may seem to solve the problem, in reality, it falls far short of its goal. Making the option to remove restrictions available to the individual corporations could prove to be disastrous. Many regional corporations may effectuate this option, because the dire economic position of the corporations will force the Native shareholders to invite outside investment in the corporation, in order to

151. *T. Berger, supra* note 25, at 27.
generate income from within the system.

Since most of the corporations have not regularly paid out dividends, the shareholders have owned the stock in the regional corporations for nearly twenty years with no realizable benefits. When the restrictions are lifted in 1991, the threatening possibility of a simple majority of shareholders who are willing to sell their stock will arise, as a demand for the stock already exists. If the Natives need or want the income, there is no incentive to restrain them from selling their shares. As one Native believed, "[s]ometimes people believe in a general principle and yet . . . when they're in a tough spot, they might do something because they just don't have any choice."\(^{154}\)

Constant tension exists regarding the concerns of the Natives. On the one hand, the Alaska Natives wish to preserve their ancestral land for future generations. They can only accomplish this goal by maintaining Native control over the corporations that own the land. On the other hand, the Natives feel that these corporations were set up for their aid and benefit. Many Natives believe that a corporation going increasingly into debt cannot benefit its shareholders. Most have received no benefits from their regional corporation.\(^{155}\) For these reasons, many wish to sell their stock while the value still remains.

The opt-out procedure creates a struggle within the corporations, between those shareholders who wish to maintain

\(^{154}\) T. BERGER, supra note 25, at 106 (quoting Alaska Native Eunice Nesseth, Kodiak).

\(^{155}\) Each individual regional corporation has a different style of operation and diverse forms of investment, as well as different amounts of legal fees. For example, the Cook Inlet Region, Inc. has paid a tremendous amount in legal fees, as it has encountered difficulty in the land selection process. However, it has invested in many successful hotels and warehouses, and has participated in joint-venture projects to develop coal lands. The Calista Corporation and Ahtna, Inc. have both used their money wisely, investing it in hotels and negotiating joint ventures for pipeline work. Doyon Ltd., the largest regional corporation, has concentrated on developing natural resources, and has constantly operated at a profit. On the other hand, the Southeast Alaska Corporation has been a cautious investor, though still operating at a profit. In 1980, Ahtna, Inc., Aleut Corporation, Arctic Slope Regional Corporation, Bristol Bay Regional Corporation, Cook Inlet Region, Inc., Doyon, Ltd., NANA Regional Corporation, and Sealaska Corporation have all operated at a profit. The Bering Straits Native Corporation, Calista Corporation, Chugach Natives, Inc., Konig, Inc., and the Thirteenth Regional Corporation have all operated at a loss, ranging from ($245,000), to ($7.3 million). T. MOREHOUSE, supra note 34, at 190-91.
control over their corporation and thus preserve the land for future generations, and those who would prefer to sell their shares because their corporation has never benefitted them. Perhaps if more corporations succeed and begin to pay dividends, the shareholders would gain a renewed faith and confidence in their corporation, and would not sell their shares to outside investors.

However, even if the corporations prospered and even if dividends were paid out, there will always be a reason for some Natives to wish to sell their stock. The most important reason stems from the 1971 passage of ANCSA itself. The Alaskan Natives have not acquired sufficient experience in handling corporate activities and the ways of a culture to which they were largely unaccustomed before 1971. Because the Natives belong primarily to subsistence economies, they have not functioned and cannot be expected to function with the attitudes of shareholders of profit-making corporations. It is for precisely this reason that the corporations have failed.

If a simple majority of shareholders lets the option expire because they believe the corporations have failed them, Native control of that corporation will be forever lost. This loss of Native control frustrates the entire purpose behind ANCSA and the 1991 Amendments: a rapid and efficient settlement in order to preserve Native control over the corporations that hold title to the land given them through ANCSA. If a majority votes to implement the opt-out procedure, the same majority will themselves sell their shares. This vote will put a majority of the stock, and hence the control over decisions that affect the land, into the hands of new owners.

It is very likely that these new owners will be non-Native individuals or large non-Native controlled corporations, especially petroleum companies. Because these investors are generally more economically sophisticated than are the Natives, both individual investors and large corporations will be willing and able to offer a high price for the shares. In addition, Natives discouraged by the corporate system may sell their shares at distress prices. Furthermore, the opt-out approach could create disparity between regional corporations. Because each of the twelve

156. T. BERGER, supra note 25, at 104-05.
157. See supra note 97 and accompanying text.
regional corporations has the option of implementing this procedure, some corporations may adopt it while others may not. The corporations operating at a significant loss will be most likely to implement it. Therefore, after 1991, the result may be that some corporations will have continued complete Native control, while others may not.

Most Native leaders feel that the sale of land should be the exception and not the rule. Many strongly feel that the land allotted them should never be sold. If individual regional corporations allow non-Natives to buy control of Native corporations, the Native land claims settlement would then become a non-Native land claims settlement. Clearly, this will affect all regional corporations, whether or not they choose to implement the opt-out procedure. Because the opt-out procedure may be voted upon generally every two years, there is the additional danger of constant change within the statewide regional corporate system. This uncertainty in itself undermines the original goal of Congress, namely, a rapid and efficient settlement of the land claims dispute.

Once the shareholders have voted on and approved an amendment before December 18, 1991, the corporation may

158. The Thirteenth Regional Corporation does not share in the land portion of the settlement under ANCSA. T. Berger, supra note 25, at 24. Because of this, these options do not apply to it.

159. Shively, supra note 147, at L-8.

160. § 1629c(b) provides that only one amendment to terminate alienability restrictions may be considered and voted on prior to December 18, 1991. If an amendment to terminate alienability restrictions is considered, voted on, and rejected prior to December 18, 1991, then subsequent amendments to terminate alienability restrictions after December 18, 1991 shall be voted on not earlier than five years after the rejection of the most recently rejected amendment to terminate restrictions if the amendment was submitted by the board of directors of the corporation on its own motion. If an amendment was submitted by the board of directors of the corporation pursuant to a shareholder petition, then a new amendment may be voted on not earlier than two years after the most recently rejected amendment to terminate restrictions. If no amendment to terminate alienability restrictions is considered and voted on prior to December 18, 1991, then amendments to terminate alienability restrictions after December 18, 1991 shall be considered and voted on not more than once every five years in the case of an amendment submitted by the board of directors of the corporation on its own motion, and not more than once every two years in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition.

amend its articles of incorporation once again to reimpose restrictions at a future date by a majority vote of the shareholders. What the Natives were given through ANCSA, complete ownership in the corporations that control the land, will be lost forever. Moreover, a corporation that has constantly operated at a loss and whose shareholders have voted to implement the opt-out procedure may, with new investors, become very successful and begin to operate at a profit. The individual corporations may even start to pay out dividends. Once this procedure is implemented, however, the Natives cannot regain sole ownership of the corporation. Rather, they must share in the ownership and the profits with the new investors, as it will be virtually impossible for them to generate sufficient capital to repurchase the shares from non-Native owners.

C. The Recapitalization Plan

In addition to the opt-out procedure, the 1991 Amendments provide each corporation with an option to implement a recapitalization plan which Congress believed would aid in preserving the alienability restrictions provided in ANCSA. Congress allowed the regional corporations the option of issuing different classes of stock in accordance with this plan, which would carry with it disparate voting rights.

162. 43 U.S.C. § 1629c(b) (1982 & Supp. V 1987). See also supra note 160 and accompanying text. However, if a regional corporation has previously opted out of continuing alienability restrictions, it is likely that those who voted in favor of opting out would have already sold their shares to non-Natives. Non-Natives who own shares in the regional corporations and who now have voting power are unlikely to vote on an amendment to reimpose restrictions, for it is their interests that would be adversely affected.


164. S. REP. supra note 5, at 3282.

165. A corporation may adopt a recapitalization plan by amending its articles of incorporation to extend restrictions indefinitely, or for a period of fifty years or less with an option to extend this period. There is no limit on the number of such amendments that may be approved. In order to implement this plan, the regional corporation must amend its articles of incorporation to provide for this before December 18, 1991. If an amendment is rejected by a majority of the shareholders, subsequent amendments may be voted on each year. A corporation that votes to implement the recapitalization plan may amend its articles of incorporation at any time to terminate the plan. 43 U.S.C. § 1629c(c) (1982 & Supp. V 1987).
This new stock issuance, called a recapitalization, is a common way for corporations to restructure their capital. Though a majority of shareholders may at any time terminate the plan, fundamental problems arise once a corporation issues a new class of voting stock. The stockholders will find themselves in grave danger of losing control to outside investors, such as large petroleum corporations, if voting alienable stock is issued to Native shareholders. It is unlikely that a majority will vote to issue a new class of non-voting alienable shares, as such shares will be unmarketable, particularly for those who seek the shares in order to extract the subsurface estate in the land. If the shares have no voting power, they will be of no value to a potential investor in such a situation. This is particularly threatening to those Native corporations with a high density of natural resources, such as the Arctic Slope Regional Corporation, NANA, Inc., and Doyon, Ltd., as the stock of these prosperous corporations will be in great demand. The petroleum companies will exploit the land for monetary gain if they are given the right to do so. More importantly, if these companies and other outside investors gain a majority of the voting stock, they will gain control of the corporations, and thus control all decisions regarding the use of the land owned by these corporations. Once this happens, even should the Natives vote to terminate the recapitalization plan, the regional corporations will find it virtually impossible to call in the outstanding class of shares created by this plan, particularly if non-Natives constitute a majority of voting shareholders.

As with the opt-out approach, Natives who are discouraged with the failure of the corporate system may vote for the recapitalization plan. Since the corporations may vote on the proposal until December 18, 1991, it remains to be seen how the individual corporations will act. Perhaps it will depend upon the recent progress of the activity and investments of each individual corporation. However, once the shareholders adopt this plan, and once a new class of voting stock is created, it will be extremely difficult to remove such shares.

166. If the shares have no voting power, they will be of no value to a potential investor in such a situation, as all decisions affecting the future of the land will be made without their consideration.

restraints. If outside investors constitute a majority of voting shareholders, perhaps an amendment to reinstate alienability restrictions will never be implemented. Most importantly, even should restrictions be reinstated, there will always be the new class of shares outstanding, which cannot disappear with an amendment. Congress, however, mistakenly reasoned that this recapitalization plan would enable Native shareholders to maintain voting control while at the same time providing for stock liquidity.168

Perhaps if petroleum companies and other outside investors acquire shares of stock and exploit the land, the corporations would become more profitable and would be in an economically more advantageous position than they were before the plan was implemented. The Natives, many of whose corporations have never operated at a profit,169 would be encouraged by the new revenue entering the corporation, perhaps for the first time in twenty years. Many of these Natives will not wish to vote for an amendment to terminate the recapitalization plan, as long as they are sharing in the wealth by receiving dividends. There is imminent danger that disaffected Natives will vote for an amendment to initiate the recapitalization plan, even at the expense of the Natives losing control of the corporations that control the land. For these reasons, the recapitalization option falls far short of fulfilling the goal of Congress in striving to permanently settle the Alaska Native claims dispute.

D. The Opt-in Procedure

In addition to the opt-out approach and the recapitalization plan, Congress has given each regional corporation the option of adopting an opt-in procedure170 in order to extend Native control over the corporations for another fifty years. Once again, the original intent of Congress is not satisfied in providing the Natives with the option of prolong-

168. Should a corporation wish to issue new shares of stock, those existing shareholders would be forced to share the land expressly reserved for them under the terms of ANCSA. Should the shareholders approve of this option, a new class of alienable voting stock may be issued, replacing the original common stock issued in 1971. 43 U.S.C. § 1629c(c)(9) (1982 & Supp. V 1987).
169. See supra note 155 and accompanying text.
ing their control in this manner. It is clear that through the enactment of ANCSA, Congress hoped to settle the Native claims dispute permanently, rapidly and efficiently.\textsuperscript{171} However, this option, like the opt-out procedure and the recapitalization plan, does not achieve the goal that Congress had intended. Rather, it simply postpones the solution to the problem that ANCSA had tried to permanently settle in 1971. In 1971, Congress adopted a temporary solution to the Native claims dispute. Twenty years later, Congress is once again faced with settling the dispute.

The establishment of regional and village corporations by ANCSA to benefit the Natives has failed. Because of the economic failure of many of these corporations, the implementation of the corporate system has resulted in many discouraged and disheartened Natives. Many of these Natives, perhaps a majority, will not wish to vote to extend these restrictions. If they are to survive, a change in investment is needed by these corporations that would result in the generation of capital. This is the only way that the Natives see to change the direction of the corporations. The safest manner in which the Natives will be able to effectuate this is to allow in new, experienced investors, including corporations, who will be able to generate capital and make a profit. The opt-in approach fails to protect Native interests, because the failure of the corporate system implemented by ANCSA has given the disheartened Native shareholders the incentive to let the alienability restrictions expire. This would create an irreversible loss, a result that Congress had not intended.

The opt-in procedure applies to all regional corporations, and to village corporations, urban corporations\textsuperscript{172} and group corporations\textsuperscript{173} within the Aleut Corporation and

\textsuperscript{171} 43 U.S.C. § 1601(a)-(b) (1982).
\textsuperscript{172} The term "urban corporation" describes an Alaska Native corporation organized under the Alaska state law "as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of an urban community of Natives in accordance with the terms of [ANCSA]." 43 U.S.C. § 1602(o) (1982 & Supp. V 1987).
\textsuperscript{173} A "[g]roup [c]orporation" is an Alaska Native Group Corporation "organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of a Native group in accordance with the terms of [ANCSA]." 43 U.S.C. § 1602(n) (1982 & Supp. V
Bristol Bay Region. The option is only available to a corporation whose board of directors elects to avail the corporation of the opportunity.\textsuperscript{174} Should it do so, the shareholders must affirmatively vote to extend the restrictions beyond 1991.\textsuperscript{175} If a majority does not vote to extend the restrictions, they will automatically expire on December 18, 1991.\textsuperscript{176}

If the shareholders do not vote to extend restrictions before December 18, 1991, they will not have a chance for another vote.\textsuperscript{177} This option is indeed a threatening one. As aforementioned, many Natives are disheartened and discouraged with the corporate system. Many wish to sell their shares and finally receive some capital from their ownership, which they should have received had their corporations been profitable. After twenty discouraging years, many Natives see 1991 as a time to finally make their ownership benefit them. The only way the Natives believe that this will happen is for them to have liquid stock. Many wish to have the option to sell their shares if they so choose, and finally receive the return that they had hoped for long ago.

Many Natives, however, realize that if they sell their shares for money, and thus completely relinquish their interest in the corporation, they will have nothing left from the settlement. They will no longer be tied to the land that they believe is rightfully theirs, hence nothing will be left for their children. Many Natives do not wish to see control of their land slip through their hands because of some hasty or short-sighted decisions. Once they lose their ownership interest in the corporations that control their land, the cultural identity that they have struggled to maintain will be lost as well.

With each of the three alternatives provided to the regional corporations, the problem lies in the 1991 lifting of the restraints on alienation. Undoubtedly, if the Natives'
stock becomes freely alienable, there will be an abundance of ready buyers. Alaska, because of its wealth of natural resources, has the richest land in the United States. Investors are eagerly awaiting December 18, 1991, and they will be willing to pay an extremely high price if they must to acquire control of these valuable lands.

The Natives willing to sell their shares are also awaiting the day that the restrictions will be lifted. December 18, 1991 will be for them a day of dubious salvation; the day that they will sell their shares, and with them, everything that their ancestors have founded and fought to keep.

IV. PROPOSAL

Another Congressional amendment to solve the critical problem of Native corporate control is vital. The greatest danger to the continued Native land ownership is the threat of corporate takeover by powerful non-Native investors, especially large petroleum corporations, who wish to exploit the land for their own profit. Once they gain control of the corporations, they will control all decisions that will affect the future of the land and the Natives will have lost control of the land forever.

This problem poses a conflict between individual Native rights and group rights. Clearly, some Natives wish to be able to sell their stock and receive any monetary benefits that will be realized upon its disposition. However, one must view the Alaska Native Claims Settlement Act as a settlement not exclusively for those alive on December 18, 1971, but as a settlement based on years of Native land occupation, and one that was designed to serve future generations of Alaska Natives.\textsuperscript{178} If one views ANCSA in this light, it is clear that further restrictions ought to be placed on the future disposition of stock to non-Natives.

The corporate form of ownership may be successful if sufficient capital is generated through the leasing of subsurface estates in the land owned by the corporations. Because oil and other natural resources have an extremely high economic value when extracted, the subsurface rights in the land are the most valuable to the Natives. The capital paid into

\textsuperscript{178} Shively, \textit{supra} note 147, at L-8.
the corporations in the form of royalties can then be reinvested in the corporations to provide for the health, education, and welfare needs of the Native shareholders.

Though the purpose of the settlement trust option set forth in Section 1629e is to promote the health, education, and welfare for its beneficiaries, it does not provide for the adequate generation of capital to be able to succeed at this endeavor. Congress must enact legislation that will accommodate the wishes of the Alaska Natives, while at the same time solve the problems that have been created through the 1971 passage of ANCSA. This remedy should take the form of a further amendment to ANCSA that would allow each shareholder to freely alienate his or her interest to the surface rights to the land, should the shareholder so choose. Furthermore, this legislation must also provide that a Native shareholder may never alienate his or her shares to the subsurface rights.

The legislation should allow all non-Native investors who acquire shares to be free to extract the natural resources from beneath the surface. Clearly, the companies would be subject to certain restrictions implemented by each corporation, as the subsurface rights would still be controlled by the Natives through their ownership in the individual corporations. Regulations restricting subsurface extraction are necessary to ensure that the natural resources will not be completely exhausted, and land would not be rendered useless. This amendment would accomplish the original purpose of ANCSA: a fair, rapid, and just settlement of the Native claims controversy.

An effective amendment would read as follows:

179. It is the capital generated from the extracted subsurface resources that will enable the corporations to produce income. This income will enable the corporations to revive and prosper. Because of this, it is necessary to provide for the lease of these subsurface estates.

180. The restraints on alienation imposed upon the Natives will not be held to violate the equal protection principles of the Fifth Amendment of the United States Constitution. Such challenges to the manner in which the federal government deals with American Indians have been uniformly rejected by the United States Supreme Court. It has been held to be sufficient that a classification is rationally related to Congress' trust responsibility to the Indians generally. Morton v. Mancari, 417 U.S. 535 (1974), Alaska Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

1. Section 1629c of the 1991 Amendments is hereby repealed with respect to the subsurface rights to land owned by village and regional corporations. Section 1629c shall still apply with regard to surface rights of all land. Alienability restrictions to surface land shall continue until terminated in accordance with the procedures established in this section. No such termination shall take effect until after December 18, 1991.

2. Alienability restrictions to subsurface estates in land owned by the regional corporations shall continue in perpetuity. Regional corporations may, however, lease the rights to subsurface land, subject to such restrictions as each corporation shall implement by a vote of the shareholders in accordance with § 1629b.

3. Regional corporations leasing the rights to subsurface land may require the lessee to pay royalties to the lessor corporation, either through a percentage of the amount of land use or a percentage of the value of materials extracted. The method of royalty payment shall be set forth in an amendment to the articles of incorporation, to be implemented by a vote of the shareholders in accordance with § 1629b.

4. Each regional corporation, by a vote of the shareholders in accordance with § 1629b, may amend its articles of incorporation to require that all royalties paid into the corporation for the extraction of natural resources by lessees shall be reinvested to promote the health, education, and welfare of the corporate shareholders, and to preserve the heritage and the culture of the Native shareholders. This amendment shall not discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the regional corporation.

5. Each regional corporation may amend its articles of incorporation by a vote of the shareholders in accordance with § 1629b to allow for the issuance of new stock to those born after December 18, 1971, who are living at the time of the amendment. Subsequent amendments allowing for the issuance of new stock may be considered and voted on not earlier than five years after the date of the previous amendment. The amendment may provide that the new stock will be issued without compensation to the original stockholders.

6. The interests created by the proposed amendments shall not be held to violate any laws against perpe-
If a certain monetary amount, set forth in the articles of incorporation, is reinvested into the corporation and used to promote the health, education, and welfare of the Native shareholders, the corporations will operate at a maximum efficiency level. Because of the vast quantity of natural resources that would be extracted, an ever increasing amount of revenue would revert to the corporations. This, clearly, will put the staggering corporations back on their feet and renew the Native's optimism that has long been missing.

V. CONCLUSION

The passage of ANCSA and the 1991 Amendments brought new hope to the Alaska Natives. The Natives believed that the federal government granted them the land to which they were entitled, once and for all settling the difficult Native land claims controversy. Twenty years later, however, the Natives recognize that ANCSA has failed them. The purpose of Congress, they realize, is at odds with their own goals. Understanding this, through the 1991 Amendments, Congress gave the individual regional corporations one of three options to maintain the corporate form of ownership and to extend Native control over their corporations: the opt-out procedure, the recapitalization plan, and the opt-in procedure. However, each of these options fails to fulfill the original intent of Congress. The lifting of the restraints on alienation will certainly subject this land to loss, unless Congress prevents this through permanent legislation. The Natives do not wish to keep alive the possibility that their land may someday be forever lost. They seek the security of knowing that they will always be able to keep their land, and will be able to pass it on to their children, for the majority of Natives view the settlement as one that was designed for future generations of Alaskan Natives. As one Native pleaded, "We are not begging. We're asking for respect for our land, for our people. We were brought to this island many years ago. Please don't take it from us."\footnote{T. BERGER, supra note 25, at 18.}

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