1306 SCRA SB 802

1306

29.53.020 (k)(3)

Page 2, lines 10-14:

This paragraph is simply a rewording of certain language from ANCSA Sec. 21(d). The term on line 13, "...subject to the provisions of this subsection." was included so that no individual provision could necessarily reinstate the exemption. For example, if a lease were terminated, but the property were still to be "developed" (as described in 29.53.020 (k)(1)) the exemption would not be reinstated.

The Department feels it is necessary to define the term "exploration" within the bill, and suggest the following language be added under 29.53.020 (k)(4):

For purposes of this section, the term "exploration" shall mean the examination and investigation of undeveloped land ~~believed to contain~~ to determine the existence subsurface non-renewable resources.

Letter of Intent
for
CS SB 802(Finance)

Section 21(d) of the federal Alaska Native Claims Settlement Act (ANCSA) provides that lands conveyed to Native corporations under that bill are exempt from local property taxes for a period of 20 years after conveyance.

A number of Native corporations and local governments have indicated that clarification of this exemption is essential to provide guidance to local governments and to assure that the objectives of the section 21(d) exemption are achieved. Senate Bill 802, as amended by the Finance Committee, provides the framework for implementation of that federally-mandated tax exemption.

The ANCSA tax exemption on Native corporate lands terminates when those lands are "developed." Sections (2) and (4) of SB 802(Fin) provide that the activities of surveying of land, construction of roads and provision of utilities to corporate land do not in themselves constitute "development." Rather, land served by roads and utilities would lose its exemption only if a condition of productive present use is created without requiring substantial further modification of the property. This definition will enable corporate land managers to provide the required infrastructure to its holding without threatening its tax exemption, even if, under some circumstances, a corporation might receive revenues incidental to construction of roads or utilities. At the same time, local governments are guaranteed that the corporate property, just as other private landholdings, will be contributing tax revenues to compensate for the public services provided to their property as productive development takes place.

During testimony on this bill, the broader issue of the general taxation policy of forest lands was raised by representives of the ANCSA Corporation timber owners. Those testifying proposed that a severance tax was a more appropriate tax policy on property devoted to an activity of statewide significance than local property taxation. Further, the extremely long "dormant" period between timber sales raised questions on how property should be taxed that only earns revenue once every 60 to 100 years.

Placing a severance tax on timber requires a comprehensive State tax policy. Important issues to be resolved before implementing such a policy would include the equitable treatment of timber owners and operators on federal and state lands, as well as private owners of timberlands. Also, an evaluation of whether a local or state tax structure could best address any increased local government costs due to timber development needs to be carefully considered.

Finally, all timber interests affected by this proposal need an opportunity to make their views heard. During hearings on this bill, testimony on the severance tax proposal was offered only by ANCSA Corporations holding timber lands. Future hearings on this proposal will allow other industry representatives an opportunity to comment.

While outside the scope of SB 802 (which clarifies an existing, temporary federal exemption) this larger issue of forest land taxation needs further legislative consideration.

Senator Don Bennett, Co-Chair
Senate Finance Committee

Alaska State Legislature

House of Representatives

Albert P. Adams
Chairman
Committee on Finance

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State Capitol
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HOME - DISTRICT 21
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Official Business

TO: Representative Terry Martin, Chairman
House Labor and Commerce Committee

FROM: Representative Albert P. Adams, Chairman
House Finance Committee

DATE: March 18, 1982

SUBJ: HB 885, "An Act relating to tax exemptions; and providing for an effective date"

I have introduced this bill to clarify the term "developed," which is not explicitly defined in the ANCSA Act of 1971, or the amndments made to it by ANILCA of 1980. Passage of this bill is very important to Native corporations and local governments. If this issue is not settled through legislation, it will be resolved in court, at great expense to all concerned.

Section 21(d) of ANCSA, as amended, provides a tax moratorium on ANCSA lands for a period of twenty years. However, this exemption is lost when the land is "developed." Since the term "developed" is not defined in the act, different definitions are being used by different local tax assessors. Cook Inlet Native Corporation, for example, has land in both the Municipality of Anchorage and the Mat-Su Borough, and is taxed differently by each.

Some assessors claim that ANCSA lands are subject to local taxation when conventional developments such as construction of roads, surveying, and the provision of utilities are made on the lands. Congressional intent holds that taxation does not become effective until some form of economic development which produces income from the land is made. The legislative history of ANCSA and ANILCA shows that Congress intended the taxability of ANCSA lands to be linked to the generation of income, thereby providing the revenues necessary to pay property taxes without risking loss of the lands. I believe this bill defines the term as closely to Congressional intent as possible.

A committee substitute has been drafted by the Senate Community and Regional Affairs Committee, to be considered later this afternoon. I would propose that this committee substitute be accepted by House Labor and Commerce. The substitute rephrases section 1 (1) and deletes reference to platting and to forest lands.

(1) The term "developed" shall mean a purposeful modification of the property from its original state which effectuates a condition ~~for~~ of gainful or productive present use without further substantial modification. Surveying, construc on of roads, providing utilities or other similar actions normally considered to be component parts of the development process, but which do not create the above condition, do not constitute a developed state within the meaning of th s sub-section. Developed property, in order to remove the exemption, must be developed for purposes other than exploration, and be limi ed to the smallest practicable tract of the property actually used in the developed state.

copy to
Shellus
at Cape Fox

THE TAX EXEMPTION OF NATIVE LANDS UNDER SECTION 21(d) OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT†

Monroe E. Price*
Richard R. Purtich**
D. Gerber***

INTRODUCTION

The terms under which federal land patented to Native Americans is taxable by state and local governments traditionally have been determined by treaty and by federal legislation. The process of distributing land to Native Americans has almost always been accompanied by a tax moratorium, but the length and scope of the moratorium has varied. Often the power of a state to tax has been linked to the power of the individual Indian owner to sell land patented to him.[1] In many cases, state or local governments have been permitted to tax a leasehold estate but not the underlying fee during the period the land has been held in trust.[2] The duration of the moratorium has varied, but historically the expiration of the moratorium has been linked to the massive

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† An earlier version of this Article was prepared as a study for the Joint Federal-State Land Use Planning Commission for Alaska. The authors would like to thank the numerous persons who advised the authors in the preparation of this article. In particular, the authors wish to acknowledge the assistance of Edward Burton and Barry Jackson of the Alaska Bar, and Professor Richard Maxwell of the UCLA School of Law.

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1. *See, e.g.*, 25 U.S.C. § 348 (1970).

2. *See, e.g.*, Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949); *cf.* United States v. City of Detroit, 355 U.S. 466 (1957).

movement of land or interests in lands from Indian to non-Indian hands.[3]

The Alaska Native Claims Settlement Act[4] contains an unusual tax provision. Section 21(d) of the Act provides:

> Real property interests conveyed, pursuant to this chapter, to a Native individual, Native group, or Village or Regional Corporation which are not developed or leased to third parties shall be exempt from State and local real property taxes for a period of twenty years after December 18, 1971: *Provided*, That municipal taxes, local real property taxes, or local assessments may be imposed upon leased or developed real property within the jurisdiction of any governmental unit under the laws of the State: *Provided further*, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation.[5]

In a long and detailed act, this exemption language takes up only a few lines. Yet it has within it enough pitfalls and conundrums to concern the Natives as well as the state and local governments for as long as the exemption endures. First, the exemption period is unusually short within the tradition of individually held Indian land.[6] As a result, the level of apprehension over potential tax liabilities is quite high among the Natives who will have lands patented to them under the Act. Second, the not too distant termination of the exemption, when coupled with unanticipated delays in the patenting of land to those Native entities authorized to receive them under the Act,[7] has affected Native strategies with respect to land use. There is a shorter period of time than originally planned during which to build the expertise and funds necessary to meet tax obligations that might be imposed. Third, the exemption in ANCSA is not tied to a prohibition on alienation of the land, but rather to a prohibition on the sale of stock in Native Corporations that receive the land.[8] In the past, the tax ex-

3. *See* F. COHEN, FEDERAL INDIAN LAW 25 (Univ. N. Mex. reprint undated). *See also* notes 87-88 & accompanying text *infra*.

4. 43 U.S.C. §§ 1601 *et seq.* (Supp. 1975) [hereinafter cited as ANCSA].

5. 43 U.S.C. § 1620(d) (Supp. 1975).

6. Under the General Allotment Act, 24 STAT. 388 (1887), *as amended*, 25 U.S.C. §§ 331-58 (1970), allottees were assured that their land would remain tax exempt for at least 25 years. 25 U.S.C. § 348 (1970). The President is empowered to extend the trust period—with its tax exemption—at his discretion. In practice, trust periods have frequently been extended. *See, e.g.*, Exec. Order 10191, 15 Fed. Reg. 8889 (1950); *see also*, United States v. Gilbertson, 111 F.2d 978 (7th Cir. 1940).

7. *See* note 19 *infra*.

8. ANCSA, §§ 7-8, 43 U.S.C. §§ 1606-07 (Supp. 1975).

emption of Indian land held in trust has been extended merely by prolonging the trust period.[9] But any change in the form or period of the Alaskan exemption is likely to alter significantly the basic structure of the institutions receiving land under the Act. Fourth, the exemption provision, though brief, is composed of sufficient ambiguities and possible inconsistencies so that difficulties are bound to arise in its administration.

How Section 21(d) is interpreted may affect the tax strategies of the state as well as those of the local governments. It may lead to the establishment of more local taxing authorities in the state or to a curb on the expansion of the number of local governments. Varied interpretations of the provision will have an impact on land use planning in the state. Since the vast majority of privately held land will be in Native hands for the foreseeable future, Section 21(d) is an integral part of the constraints on state and local tax policy.[10]

Because the exemption is such a critical part of ANCSA and because it has important implications for the financing of both Native Corporate and government activities, a study of the provision is essential. The effort here is to provide a textual analysis of the statute in the context of possible legislative goals, and to suggest how varying interpretations accommodate those objectives. Attention is given to how the varying interpretations may influence Native Corporate behavior with respect to the affected lands. After attempting to place the tax-related impact of the Act on Corporate behavior in the context of other influences on land management and use, this Article will discuss strategies for improved administration of the exemption and possible alternative approaches to achieve the apparent objectives of the exemption.

I. Legislative Goals

The sparse legislative history of Section 21(d) provides little guidance regarding Congress' perception of the property tax ex-

9. *See, e.g.*, 25 U.S.C. §§ 348, 391 (1970) (patents to be held in trust and continuance of restrictions on alienation in patent).

10. One difference between ANCSA and its predecessors is the predominant emphasis in the Act on land use planning, primarily in Section 17, 43 U.S.C. § 1616 (Supp. 1975). The Act in general seeks to harmonize state, federal and Native interests to take into account the impact of the settlement on land use patterns within the state. Whether consciously planned or not, the exemption will affect the way in which the settlement influences land use decisions. After the conveyances are made under the Act, the federal government will retain approximately 61 percent of the land in Alaska, the state will own 28 percent, while the remaining private ownership will be less than 1 percent. In view of the substantial land holdings of the Native Corporations, the manner in which the Native Corporations manage and develop their lands becomes of great statewide significance. The exemption of Section 21(d) may be perceived as lessening the pressure toward "premature" development.

emption for ANCSA-conveyed lands. There are only four versions and few formal comments from which analytical implications can be drawn.[11] The drafts had two basic areas of variation: the duration of the exemption and the nature of the tax-exempt interest in land, including the type of government entity authorized to tax. One House bill included no limit on the duration of the exemption.[12] Other proposals contained fifty year[13] and twelve year[14] periods. The twenty year period adopted in the Act[15] appears to be a brokered compromise.

The other area of important variation involved the nature of land use exempted and the type of government authorized to impose a tax. S. 835[16] contained a very broad exemption for all lands conveyed under the Act, with no trigger for terminating the exemption based on either the development of the land use or the existence of a leasehold interest. In this sense, the exemption would have been much like the exemption that exists under Public Law 280, where states have jurisdiction to tax the leasehold interest but not the underlying estate.[17] Only a Native Village organized as a governmental unit under the laws of Alaska could have taxed the underlying fee and it could have taxed only individually owned land.[18]

The final version includes language terminating the exemption where land is developed or leased and broadening the range of governmental entities with taxing authority to include any gov-

11. S. 35, 92nd Cong., 1st Sess. § 27(f) (Jan. 25, 1971), *amended* S. 35, 92nd Cong., 1st Sess. § 27(f) (Oct. 21, 1971); S. 835, 92nd Cong., 1st Sess. § 18(c) (Feb. 17, 1971); H.R. 7039, 92nd Cong., 1st Sess. § 18(c) (Mar. 31, 1971); S. Rep. No. 92-405 (Oct. 21, 1971).

12. H.R. 7039, 92nd Cong., 1st Sess. § 18(c) (Mar. 31, 1971).

13. S. 835, 92nd Cong., 1st Sess. § 18(c) (Feb. 17, 1971).

14. S. 35, 92nd Cong., 1st Sess. (Jan. 25, 1971).

15. ANCSA, § 21(d), 43 U.S.C. § 1620(d) (Supp. 1975).

16. S. 835, 92nd Cong., 1st Sess. § 18(c) (Feb. 17 1971).

17. Pub. L. 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (now codified, as amended, in scattered sections of 18, 25 U.S.C.). Public Law 280 permits states to assume limited civil and criminal jurisdiction over Indian reservations. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975).

The language "under the laws of the State" presents further problems of exegesis. First, does this clause refer to the local jurisdiction unit, i.e., that the jurisdiction has to be duly created under the laws of the state? Or does it mean that the local taxes may be imposed only "under the laws of the State?" If the clause has the latter meaning, did Congress intend that there must be specific state legislation authorizing the imposition of local taxes upon Native land conveyed pursuant to the Act? *Cf.* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

18. The individually held land that was to be taxable was that land which was to be reconveyed by the Native Village Corporations to individual Natives. *See* S. 835, 92nd Cong., 1st Sess. § 12(a)(2) (Feb. 17, 1971); *see also* note 36 *infra*.

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ernmental unit organized under the laws of the state. If the final version is read in a way that effectively terminates the exemption for a substantial portion of the valuable land conveyed under the Act, this change could be viewed as an enormous one, altering in a major way the scope of the exemption. However the introduction of the clause triggering termination of the exemption for developed or leased land renders the exemption inconsistent with prior acts of Congress, suggesting that the clause should be read narrowly.[19]

In the course of parsing Section 21(d) reference to the tradition for exempting Native American lands from state and local taxation is helpful.[20] That experience provides some sense of the role that exemptions were meant to play when federal legislation changes the trust status of lands and begins the process of converting trust holdings into fee simple title.[21] The exemption in the traditional context has had several distinct justifications: a) as a symbol of the separation of the Indian land from the non-Native political entity within which the land is located;[22] b) as part of the compensation for the liquidation and settlement of claims;[23] and c) as a necessary ingredient in a federal policy providing a period of time for a Native owner to adjust to the economics of the mainstream system.[24]

The peculiar circumstances of ANCSA suggest that not all the justifications listed above are applicable in the Alaska context. The draftsmen of ANCSA were generally hostile to exemptions. Section 2 of the Act, the listing of Congressional findings, provides that "the settlement should be accomplished rapidly . . . without adding to the categories of property and institutions enjoying special tax privileges . . . ."[25] Thus the legislation does not use the exemption as a symbol of the separation of the conveyed land from Alaska state and local government.

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19. *Cf.* Bryan v. Itasca County, 44 U.S.L.W. 4832 (June 15, 1976). *See also* text accompanying note 41 *infra*.

20. *See, e.g.*, 43 U.S.C. § 348 (1970).

21. *See* ANCSA, §§ 11-14, 43 U.S.C. § 1610-14 (Supp. 1975).

22. The New York Indians, 72 U.S. (5 Wall.) 761 (1867); The Kansas Indians, 72 U.S. (5 Wall.) 739 (1867).

23. *See generally* Barker, *The Indian Claims Commission—The Conscience of the Nation in its Dealings with the Original American*, 45 N.D.L. Rev. 325 (1969).

24. *See* 18 Cong. Rec. 190 (1886) (statement of Rep. Thomas Skinner).

> [The Indians'] land is made inalienable and non-taxable for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property.

Id.

25. ANCSA, § 2(b), 43 U.S.C. § 1601(b) (Supp. 1975).

The Section 21(d) exemption obviously provides some additional measure of compensation to the Natives by shielding ANCSA-conveyed property from taxation. If the property were not exempt from taxation it would be less valuable. There is evidence that the moratorium on taxation was a bargained-for compensation and part of the liquidation of the Native claim.[26]

Section 21(d), as part of the Alaska Native Claims Settlement Act, is most clearly a provision implementing the policy of gradual adjustment to the economic mainstream. The twenty year moratorium on taxation of undeveloped and unleased land serves as a period during which the Natives can experiment in financial and real estate transactions and achieve managerial capability, without fear of immediate tax burdens arising from their ownership of vast tracts of undeveloped land. Furthermore, the tax moratorium permits the Natives to pursue a traditional subsistence lifestyle, at least temporarily, without the need to exploit hunting grounds in order to raise revenue for taxation. An exemption is also important because of the danger of foreclosure for nonpayment and the possibility of rapid movement of land ownership from Native to non-Natives.[27] While there may be a certain inevitability to such changes in ownership, it seems proper for there to be an appropriate pause before the diminution of Indian holdings occurs. The exemption has historically been the means of creating such a pause.[28]

II. Textual Interpretation of Section 21(d)

Section 21(d) is fraught with numerous interpretative problems. The basic exemption clause[29] appears to conflict with the first proviso,[30] and the effect and function of the second proviso[31] is puzzling. Also unclear is whether the exemption is alienable to non-Natives or even other Natives to whom the land was not originally conveyed. In addition, the language of the statute and its legislative history do not indicate whether development or leasing of a part of a conveyed tract makes the whole taxable, nor whether the loss of exemption resulting from such use of ANCSA-conveyed land is permanent or temporary. Furthermore, the very terms "development" and "leasing" create their own problems of

26. *See* note 48 & accompanying text *infra*.
27. *See* text accompanying notes 87-88 *infra*; Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 959-60 (1972).
28. *Id.*
29. *See* text accompanying note 32 *infra*.
30. *See* text accompanying note 33 *infra*.
31. *See* text accompanying note 42 *infra*.

definition. In trying to resolve these issues one must look to the objectives that ostensibly can be attributed to the exemption and to the sparse formal legislative history that does exist.

A. *The Conflict Between the Basic Exemption of the First Clause and the First Proviso*

The most immediate problem in the interpretation of Section 21(d) is that of reconciling possible conflicts between the first clause and the first proviso. The first clause provides:

> Real property interests conveyed, pursuant to this chapter, to a Native individual, Native group, or Village or Regional Corporation which are not developed or leased to third parties, shall be exempt from State and local real property taxes for a period of twenty years after December 18, 1971. . . .[32]

The first proviso contains the following language:

> *Provided*, That municipal taxes, local real property taxes, or local assessments may be imposed upon leased or developed real property within the jurisdiction of any governmental unit under the laws of the State. . . .[33]

Several questions arise from these seemingly conflicting provisions.

The threshold question is whether the provisions are redundant or whether they serve distinct functions. Two major differences between the two provisions should be noted. First, the basic exemption clause provides that developed or leased property is subject to "*State and local*" real property taxes, whereas the first proviso states that developed or leased property "*within the jurisdiction of any governmental unit under the laws of the State*" is subject to taxation. It is possible to interpret "any governmental unit under the laws of the State" as including the jurisdiction of the state itself, thereby making the two provisions redundant. However, if it is assumed that Congress intended some distinction between the two terms then it is reasonable to conclude[34] that "any governmental unit" means any constituent jurisdiction within the state smaller than the state itself.

The importance of the distinction is to be seen in light of the second difference between the two provisions, i.e., that the first clause provides that land conveyed under the Act is exempt unless "developed or leased to *third parties*" while the first proviso includes no third party requirement for overcoming the basic exemption. From this distinction it can be concluded that state

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32. 43 U.S.C. § 1620(d) (Supp. 1975).

33. *Id.*

34. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.12 (Sands 4th ed. 1974).

real property taxes can be imposed on Native Corporations' ANCSA lands only if the lands are leased to third parties, while local taxes can be imposed on such leased land regardless of the identity of the lessee.[35]

Once it is decided when a third party lessee is required in order for leased Native-owned ANCSA lands to be taxable, still unresolved is the issue of what constitutes a third party. For instance, all Natives as a class may automatically be outside the class of third parties; leasing to a Native individual, group or corporation would therefore not constitute leasing to a third party. This conclusion would facilitate desirable management patterns for undeveloped land, for it would permit Native Corporations to lease their lands to other for-profit or non-profit Native Corporations, or to Native individuals, without triggering state tax liability. If such an interpretation were adopted, the question that arises is how "non-Native" a Corporation may be before it becomes a third party under the Act. For example, would 51 percent Native ownership of a corporation leasing from the Native fee owner be sufficient to avoid third-party status?

An alternative definition of "third party" might be any entity or individual to whom real property interests are not directly con-

35. The legislative history of Section 21(d) supports such a conclusion. Section 27(f) of S. 35, the first Senate version of ANCSA, provided:

> [M]unicipal taxes or assessments may be imposed upon *individually* owned real property within its jurisdiction by any Native Village incorporated as a governmental unit under the laws of the State of Alaska.

S. 35, 92nd Cong., 1st Sess. § 27(f) (Jan. 25, 1971) (emphasis added). This language indicates an intent to allow Native Villages incorporated as municipalities to tax those real property interests reconveyed to Native individuals under the provisions of Section 14(c)(5) of ANCSA, 43 U.S.C. § 1613(c)(5) (Supp. 1975), and perhaps also ANCSA-conveyed land that is sold to non-Natives. A third party requirement for taxation of land would be inconsistent with such a scheme that apparently allows for the local taxation of ANCSA land reconveyed to Native individuals. The present language of Section 21(d) does, however, require development or leasing to trigger the exception to the basic tax exemption. With respect to the Native Villages incorporated as municipalities this is an important change of stance. Apparently expanding the scope of local taxing jurisdictions allowed to tax Native ANCSA lands to include more than just Native Village municipalities, Congress added the qualification that such lands must be developed or leased as a check on the scope of permissible taxation.

It should be noted that the language in Section 27(f) of S. 35, which corresponds to the first clause in Section 21(d), did *not* mention development or leasing as an exception to the basic exemption from state and local taxation. Section 27(f) of S. 35 provided, in relevant part:

> Real property interests conveyed, pursuant to this Act, to a Native individual, group, Village, Corporation, or any Native organization, shall be exempt from State real property taxes for a period of twelve fiscal years after the effective date of this Act . . . .

S. 35, 92nd Cong., 1st Sess. § 27(f) (Jan. 25, 1971). It is possible that the authors of S. 35 considered the subsequent provisions regarding leaseholds, easements, profits, rents, and similar interests to provide a more refined concept of taxability that would furnish a fairer means of revenue collection where there is development or leasing of those Native lands conveyed under ANCSA.

veyed pursuant to ANCSA. Thus, Native Corporations who receive patents directly and individual Village Corporation shareholders to whom patents are reconveyed under Section 14(c)[36] would not be "third parties," at least with respect to such lands they receive by patent. Under this interpretation, a Native Corporation's land might be considered to be leased to a "third party" if leased to a Native individual not enrolled in that Corporation, on the theory that such an individual is a third party with respect to the initial conveyance of the underlying fee interest to the Corporation under ANCSA.

With respect to the taxation of developed real property, yet another issue arises. That is, does the third party requirement of the first clause modify the references to both developed and leased land, or only the reference to leased land? Under the latter construction, developed land would be taxable by the state regardless of who develops it. By adopting the former construction, ANCSA-conveyed lands would be exempt from state real property taxes unless developed *by* or leased to third parties. The former interpretation would supply a coherent theory to the statute. It would remove the exemption when the exploitation of the resource is pursued by non-Natives (or at least by persons other than

36. 43 U.S.C. § 1613(c) (Supp. 1975). That section provides:

> Each patent issued pursuant to subsections (a) and (b) of this section shall be subject to the requirements of this subsection. Upon receipt of a patent or patents:
>
> (1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business or as a subsistence campsite, or as headquarters for reindeer husbandry;
>
> (2) the Village Corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied by a nonprofit organization;
>
> (3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs. *Provided*, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres;
>
> (4) the Village Corporation shall convey to the Federal Government, State or to the appropriate Municipal Corporation, title to the surface estate for existing airport sites, airway beacons, and other navigation aids, together with such additional acreage and/or easements as are necessary to provide related services and to insure safe approaches to airport runways; and
>
> (5) for a period of ten years after December 18, 1971, to review and render advice to the Village Corporations on all land sales, leases or other transactions prior to any final commitment.

Id.

the Native owners to whom the land was originally conveyed pursuant to ANCSA) and retain the exemption when the Natives themselves sought to improve the land. This construction would also be far more consistent with prevailing case law in many jurisdictions.[37] Furthermore, if it is determined that the threat of heavy taxes to be imposed after 1991 forces Native Corporations into rapid, unplanned development of their lands to build up a fund out of which they can pay future taxes, then the third party requirement may be the preferable interpretation. Such a reading of the third party requirement would permit greater profit rates, and therefore require development of less land in order to pay future taxes.

This discussion has assumed thus far that the first clause and first proviso are not redundant. If, however, it is concluded that they are duplicative, then it is possible to read into the first proviso a third-party requirement for development or leasing in the case of taxation by "local" jurisdictions. But the legislative history of Section 21(d) indicates that Congress did not intend that Native Villages incorporated as municipalities be deprived of tax revenues from those lands conveyed under ANCSA which are developed or leased.[38] In early versions of the Act,[39] it was provided that real property interests within the jurisdiction of a Native Village incorporated as a municipality could be taxed, and there was no mention of any requirement that such property be developed or leased.[40]

A plausible interpretation of the development and leasing requirement is that all land conveyed to Native Corporations or other qualified recipients is exempt unless development or leasing occurred prior to the passage of the Act, or perhaps prior to the conveyance of the land. Such an interpretation has a number of conceptual and practical virtues. The most important is that it is an easy standard to apply. The question of what constitutes developed or leased land, the meaning of the term "third party," and the issue of defining the scope of the termination of the ex-

37. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

38. *See* text accompanying note 35 *supra*.

39. *See* S. 35, 92nd Cong., 1st Sess. § 27(f) (Jan. 25, 1971); S. 835, 92nd Cong., 1st Sess. § 18(c) (Feb. 17, 1971); H.R. 7039, 92nd Cong., 1st Sess. § 18(c) (Mar. 31, 1971).

40. The fact that the change in the statute has the potential to increase enormously the pre-1991 taxability of Native lands suggests some caution and constraint in the interpretation of the first proviso. Given a tradition that statutes affecting Indian land are to be construed strictly in favor of the Indians, Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 CAL. L. REV. 601 (1975), it is possible to argue that the "third party" qualification should be read into the first proviso, even at the risk of rendering it possibly redundant.

emption when development or leasing takes place would diminish in importance under such a restrictive interpretation. The interpretation may also be more consistent with the overall Native social adjustment purpose of the statute. Native Corporations would not be constrained in their economic decisions by variant views of the consequences of a particular kind of land use determination. The statute could be interpreted as providing a twenty year period during which the Native Corporation would be able to experiment and develop management expertise free from the burden of local government taxation. The leasehold would, under the second proviso, be taxable to the lessee, but the underlying estate would remain exempt for the twenty year span.[41]

B. *The Effect of the Second Proviso*

The second proviso states:

> *Provided further*, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. . . .[42]

The major function of this proviso seems to be to make clear that the value of these designated interests is to be subject to a

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41. Another important influence to be considered involves the relationship of Section 21(d) to Section 21(e). The latter Section provides:

> Real property interests conveyed pursuant to this Chapter to a Native individual, Native group, or Village or Regional Corporation shall, so long as the fee therein remains not subject to State or local taxes on real estate, continue to be regarded as public lands for the purpose of computing the Federal share of any highway project pursuant to Title 23, as amended and supplemented, for the purpose of the Johnson-O'Malley Act of April 16, 1934, as amended (25 U.S.C. 452), and for the purpose of public Laws 815 and 874, 81st Congress (64 Stat. 967, 1100), and so long as there is also no substantial revenue from such lands, continue to receive forest fire protection services from the United States at no cost.

43 U.S.C. § 1620(e) (Supp. 1975).

Two important facets of the relationship should be noted. First, Section 21(e) draws the distinction between the fee and the interests in the fee, a distinction that is only implicit in Section 21(d). The implication is that there may be some circumstances in which the fee remains exempt even though there are interests other than the fee involved. Second, the continuance of the exemption renders the state (and perhaps municipalities) eligible for greater federal funds. The incentive to trigger the end of the exemption is diminished by the public lands characterization of exempt land. It may well be that the benefits to the state will be greater if the land remains exempt while the benefits to the local government are greater as the land loses its exemption. Conceivably the state might want to develop pass-through formulae for federal funds attributable to public lands so as to make the state and the local government's interest congruent. Of course, the land loses its public land status when it is "subject" to tax, whether or not it is in fact taxed. A state or local determination that the land was not subject to tax would not be binding on the federal government in its interpretation of how to apply the public lands formula under the relevant named legislation.

42. 43 U.S.C. § 1620(d) (Supp. 1975).

tax which may be levied upon the owners of these interests. The proviso further suggests that it is possible for the underlying fee to remain exempt even though the other interests are taxed. This provision is harmonious with judicial resolutions of controversies in similar contexts involving Indian land in other states.[43]

While the usual easement or right-of-way is not likely to produce revenue, the typical leasehold is. If a lease is in existence at the time of patent to a Native entity, the lease is subject to taxation and the Native patentee succeeding to the fee interests of the state of the United States under Section 14(g) of ANCSA[44] would seem to be disqualified from the basic exemption of Section 21(d) so far as the lands subject to the lease are concerned.

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43. *See, e.g.*, Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). The court in *Agua Caliente* held that where Indian allottees own trust fee interests in real property, only the leasehold interests owned by the lessees are subject to taxation. The court dismissed the argument made by the Band that the imposition of taxes on the lessee's possessory interest effectively deprived the Band of full beneficial use of their land. Without the tax, the Band argued, the lessee would be willing to pay more rent to the lessor Band. The court further dismissed, as being overruled, the language of Justice Holmes in Gillespie v. Oklahoma, 257 U.S. 501 (1922):

> "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the powers to make them" . . . .
> . . . The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.

44. 43 U.S.C. § 1613(g) (Supp. 1975). That section provides:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permittor, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement.

Id.

What then is the purpose of including leases within the second proviso? One possibility is that the second proviso covers the taxation of leaseholds created after the conveyance of lands to Native Corporations, providing for taxation of the leasehold estate with the underlying estate still immune. On the other hand, that proviso, unlike the first, makes reference to taxing under "State or local law." What it lacks is the singling out of real property "leased to third parties" found in the basic exemption. The distinction is important if land leased to third parties loses its exemption no matter what date the lease occurs.[45] Land leased to third parties would then be excluded from the basic exemption. Arguably, the proviso allowing taxation of leaseholds is intended to permit taxation where the land is leased to Native entities. Whether such leased land necessarily would be "developed" within the meaning of the basic exemption is unclear. It is possible that a lease by one Native entity to another might be utilized for subsistence or hunting purposes and that such uses would not constitute development under the Act. The value of the leasehold would be taxable to its owner, however, and the rents would be taxable when received by the Native entity holding the reversion. The distinction between lands leased to third parties and lands leased to a Native entity is thereby obliterated, although the value of the reversion in the leasing entity would not be taxed under such circumstances because it would still fall within the basic exemption.

The second proviso makes the most sense under the broad reading of the principal exemption clause under which all lands conveyed are exempt until 1991 unless they were developed or leased to third parties at the time of conveyance.[46] If this interpretation is adopted, then there is truly a basis for the second proviso. It assures that notwithstanding the exempt status of the lands themselves in the period prior to 1991, any possessory interest, whether entered into before or after 1971, is taxable to its holder. Indeed the existence of the second proviso strengthens the argument for interpreting the principal clause expansively.

On the other hand, if this broad reading is not given to the underlying exemption, perhaps a rule of *ejusdem generis* could be applied to determine the kinds of interest in land that might be created in third parties which would be consistent with the retention of the exemption. Interests similar to "easements and rights-of-way" could be created without being classified as "development" of the property. Further guidance is found in the last

45. *See* text accompanying note 41 *supra*.
46. *Id.*

sentence of Section 21(d), which ensures that income from certain property interests would be taxable when received. Again, the question arises as to what property interests are referred to in the last sentence. It would be odd if the sentence clarified the status of income derived from land that was no longer exempt because it had been developed or leased to third parties. The only apparent reason for including developed or leased property within the meaning of "such property interests" in the last sentence would be that there might be developed property or property leased to third parties which is not taxed because it is not within a taxing jurisdiction. But assuming that the last sentence applies to the revenue received from lands that continue to be exempt, additional light is shed by the character of the revenue expected to be produced from tax-exempt lands. Under this view, property that is not developed or leased to third parties, and hence tax exempt, may nevertheless produce "rents, royalties, profits and other revenues."

C. *The Alienability of the Section 21(d) Tax Exemption*

There will be many reconveyances of lands originally conveyed to Native Corporations pursuant to ANCSA. The Act imposes no restriction on the alienation of land conveyed to the Native Corporations. While Section 21(d) contains exceptions to the basic exemption, possibly making the lands conveyed under ANCSA subject to state and local taxes if subsequently developed or leased to third parties, there is no indication whether the sale of such land terminates the exempt status of such lands.

It might well be concluded that a subsequent conveyance of the fee interest in real property originally conveyed pursuant to ANCSA terminates the exemption of that real property. Such an interpretation of the statute would obviously affect the kinds of transactions Native Corporations may enter into consistent with maintaining the exemption. The most frequent problem of this sort might involve the use of lands in development corporations or subsidiaries of Native Corporations.

On the other hand, in order to accommodate greater flexibility in managing Native lands without triggering the end of the tax exemption, Section 21(d) might be interpreted as providing that the exemption continues to attach to the lands so long as they are in control of the patenting Native Corporations, groups or individuals and the land involved is not developed.[47] This construction

47. Of course such an interpretation ultimately necessitates a definition of how much control over a joint venture must be vested in the patenting Native lands in order for the exemption to continue.

would widen the range of allowable kinds of Native Corporate transactions.

This interpretation is supported by the statement of the principal draftsman of the statute, who has indicated that the intent was to make the exemption freely transferable with the sale of the land.[48] Under his view, the exemption was linked to the economic productivity of the land. So long as it was not developed or leased to third parties the exemption would remain, whether or not ownership rested in the hands of the original Native patentee. This view is consistent with the compensatory nature of the Act, in that it makes patented land more attractive to non-Native purchasers. The Natives could obtain the full value of the settlement either by keeping the land themselves or by selling it.

However, if the main purpose of Section 21(d) is to provide relief for the Native Corporations by means of a special moratorium addressed to the need to build managerial capability, then it makes less sense for the exemption to be alienable to non-Natives. Tax exemptions traditionally were designed not to provide economic benefit to the Native holders of the land, but rather to provide an opportunity for economic growth by the Native managers of the land without the constraints of state and local tax policy.[49] Within this traditional context it is unusual for the exemption to follow the Indian owner to a non-Indian patentee.[50] In the past, Congress has authorized taxation where the trust over property is eliminated and sales have occurred or could occur.[51]

Nevertheless, since the tax burden is an impetus to rapid and perhaps unplanned land development, the federal and state governments may have wished the moratorium to cover all ANCSA-conveyed undeveloped land across the board, regardless of whether it was in the hands of either the original patentee or a non-Native. In this way the exemption could play a statewide land use planning role, for no matter who owned the land there would be no pressure from taxation to develop it hastily. Given that ANCSA places into private ownership 40 million acres of formerly federally owned land, perhaps it is desirable that the exemption be transferable to non-Natives.

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48. Interview with Barry Jackson, principal legislative draftsman of Section 21(d), ANCSA, Aug. 5, 1976.

49. *See* United States v. Rickert, 188 U.S. 432 (1903).

50. For a discussion of the historic relationship of local property taxes to trust land, see United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938). *See also* Ward v. Love County, 253 U.S. 17 (1920).

51. *See generally* Brown, *Taxation of Indian Property*, 15 MINN. L. REV. 182 (1931); Note, *State Taxation of Indian Reservations*, 1966 UTAH L. REV. 132. The fact that ANCSA stock is inalienable complicates the application of traditional principles.

D. *The Effect of Development or Leasing of Part of the Lands Conveyed to a Corporation Upon the Exemption of the Whole*

Assuming that post-conveyance development or leasing triggers taxability, there is a question as to the scope of lands made taxable. The language of Section 21(d) does not make it clear whether the development or leasing of a part of the land conveyed to a Native Corporation, group, or individual will make the entirety of such lands subject to taxation before 1991.

The most plausible reading of Section 21(d) is that the development or leasing of a part of the lands conveyed to a Native Corporation subjects to taxation only that land which is developed or leased. Under such an interpretation, a Native Corporation would be able to develop or lease only so much as is reasonably necessary for its investment and social welfare purposes, and such as would fit into a rationally ordered, comprehensive plan for development. Effect would therefore be given to the apparent purpose of the Section 21(d) twenty year grace period from taxation.[52]

Unfortunately, other problems arise in discerning what part of the lands are developed or leased. Such problems are closely tied to the questions of what development and leasing mean in the context of Section 21(d). For instance, suppose a Native Corporation creates a recreational tourist facility in a wilderness area and the Corporation "develops" only 40 acres within a 2,000 acre tract of wilderness land which the Corporation owns. The "development" on these 40 acres consists of the construction of a hotel, a restaurant, several pools for swimming in summer and ice skating in the winter, and a parking lot. The remaining 1,960 acres are not in any way improved, yet they are open to the use of hikers who are patrons of the facilities on the 40 acre development. It is uncertain whether the remaining 1,960 acres are taxable because "developed" or "leased," insofar as permitted access to them is a right-of-access paid for as part of the payment for the use of the facilities in the 40 acre development. Neither the language nor the legislative history of Section 21(d) resolves these issues, though common sense suggests the more limited termination of the exemption.

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52. If Section 21(d) is construed to mean that active disposition of any part of the lands conveyed to a Native Corporation make the whole taxable then substantial development and leasing would be necessary to justify any such use of the land at all. Thus it would be wise for a Native corporation to formulate a comprehensive development plan before exploiting any of the land. This planning process could take many years, during which the Natives could not benefit from their resources, except insofar as exploration rights and lease options can be negotiated—provided these are not considered development or leasing under Section 21(d). *See* text accompanying note 57 *infra*.

Another important question arises with regard to the exploration for oil. Suppose three oil wells are drilled on a 1,000 acre plot owned by a Native Corporation, resulting in two dry wells. Assuming that oil exploration qualifies as development, various alternatives arise in determining which land is "developed." One extreme is to consider as developed the entire tract on which the drilling equipment rests. Other definitions of the developed portion of the land might be the acreage under which the deposits exist, the acreage actually used for drilling and access to all drill holes, or only the land used for drilling and access to successful wells. Again, these questions are not answered by the language of Section 21(d),[53] but an expansive definition of development would be inimical to the purposes of the Act.

E. *The Permanency of the Exemption Termination for Developed or Leased Land*

Also unsettled if post-conveyance leasing or development terminates the exemption is the issue of whether any leasing or development episode, no matter how short, permanently exposes the fee interest to taxation. For instance, does leasing of ANCSA-conveyed land for three years to a third party for use as a recreational snowmobile track cause that property to lose forever its tax exempt status? Broadly speaking, development of land usually is considered permanent in nature, for once land is graded, levelled, or a structure is built upon it, the change is in a metaphysical sense irreversible. Consequently, development may cause the permanent loss of the tax exemption. Leases, on the other hand, are not in and of themselves permanent transmutations of the fee interest in land.[54] The easiest case occurs when a Native owner leases the land to a third party for ninety-nine years for the construction of a building but there is a default after three years without construction.

One of the objectives of the exemption is to encourage the development of management skills in the Native community through various business approaches to land. The twenty year moratorium can be seen as an opportunity for Native Corporations and individuals to gain managerial and investment experience. The exemption should be construed in such a way that is consist-

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53. In all these cases, the general therapeutic rule of resolving statutory ambiguities in favor of the Natives is to be applied. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404 (1968).

54. In some cases what is termed a lease, such as mineral extraction rights, might also be a development. In such cases the characterization of the transaction would have a crucial effect on whether the transaction makes the land subject to state taxes.

ent with the notion that mistakes may be made in the first years of ownership. There will be burdens enough that flow from such a beginning. But the exposure to taxability of any land that is the subject of unfulfilled development or leasing should not be one of them. It would also be wrong to construe the provision so as to discourage short-term transactions. Such transactions particularly suit the toleration of learning that partially underlies Section 21(d).[55]

F. *"Development and Leasing"—Problems of Definition*

Other issues arise in the definitions of development and leasing, especially if courts reject the view that the only development or leasing which eliminates the exemption is that which occurred prior to the passage of ANCSA or prior to the conveyance of ANCSA lands.[56] There is the danger that if a Native Corporation permits any productive use, even an uneconomical one, the termination of Section 21(d) would be triggered. It would be uneconomic to use the land for any purpose where the net return is less than the tax imposed.

If Congress intended that the purpose of ANCSA was to permit the Natives to enter the economic mainstream gradually, then some uses of land that might be characterized as "development" under an assessment definition should not end the tax exemption under Section 21(d). A fishing camp, subsistence camp, or residential dwelling for a cash poor Native family demonstrates the difficulties. All these might be characterized as "development" of lands, but use of land in this manner might be uneconomic given a sufficiently high tax rate. Given the average annual income of a rural Native family, even an extremely modest tax might be a substantial burden.

The word "lease" is a term of some ambiguity when used with reference to transactions involving lands of mineral potential. The oil and gas "lease" is not in property theory a true lease, for it is in form the grant of a determinable fee in the oil and gas

55. Development poses problems somewhat different from option-leases that have not resulted in mining structures. Certain developments leave a permanent trace even if abandoned. The future taxability of the land may be adversely affected.

While it may be desirable to allow the exemption to be revived after abandonment of real property, such as a temporary housing campsite for oil pipeline construction workers, it might not make sense to revive the exemption for land from which coal has been removed or land from which all timber has been logged. To allow revival of the exemption in these kinds of land development may encourage hasty exploitation of such resources in order to defeat rather than postpone taxation.

56. *See* text accompanying note 41 *supra*.

for a primary term of a fixed number of years and so long thereafter as the "leased" substances are produced. It does produce some revenue prior to production of minerals and payment of the designated royalties. This revenue is in the form of bonuses, which operate as a down payment for the "lease," or, more accurately, the conveyance. So-called "delay rentals" are also provided for in most oil and gas leases. These are payments made for the right to delay the drilling of the first well. The transaction is clearly a mechanism of development. The land is not developed, properly considered, until the actual work of exploration begins, and perhaps not until production is commenced. Whether the imposition of taxation could be held off by structuring the transaction as a conveyance in perpetuity—leaving out the language of determinable fee—with an ostensibly perpetual royalty reserved to the Native landowner seems very doubtful. Such transactions have been held to be "leases" under federal income tax law[57] and the same judicial tendency to look to the reality of the transaction ought to be expected here. Thus, it might be anticipated that the exemption would be lost at the time the land is conveyed for oil and gas development with a royalty interest reserved. Another possibility would be a joint venture arrangement in which an undivided interest is conveyed to the oil company in return for a purchase price and a right to share in the net profits. Since the language of Section 21(d) is subject to the interpretation that the exemption follows the land into non-Native hands, such a transaction might allow the exemption to be retained while the exploration process goes forward.

In making selections under the Act some exploration permits have been granted with options in the permittee to lease later a specified acreage to be located in the area selected by a particular Native entity. Much of the above analysis seems applicable to such transactions. The permit itself could be considered an easement under the second proviso of Section 21(d). If it results in a lease by exercise of the option, the legal effect would be the same as if the lease had been given without the preliminary exploration permit and option.

Where the taxation of minerals is concerned, several methods have developed among the states. Some jurisdictions have applied the usual ad valorem systems despite the complications of valuation where partially developed oil and gas fields are the subject.[58] Others have adopted the so-called "in lieu" production tax, which is a set sum imposed on each unit of production withdrawn

57. *See* Campbell v. Fauken, 267 F.2d 792 (5th Cir. 1959).
58. *E.g.*, TEX. CIV. STAT. tit. 122a, art. 4.02 & 22.01 (Vernon 1969).

from particular acreage.[59] This kind of tax would not create problems since its imposition would occur only after the land was "developed" within the meaning of the Act.

III. Section 21(d) and Corporate Behavior

Concerns about Section 21(d) and the exemption of Native lands from state and local taxation go far beyond ambiguities in the statute. Native Corporations have exhibited great fear that the lands which they receive under the Act will pass from Native ownership as a result of substantial tax burdens that will be imposed in 1991.[60] Native Corporate responses to the tax threat may be affected by two somewhat independent aspects of the exemption. First, there is the administration of the exemption prior to its termination. Whether land will be exempt whatever use is made of it by Native Corporations prior to 1991, or whether leasing or development before or after conveyance will expose the land to taxability, will influence to some extent what a Native Corporation does with its land. Second, there is the question of the imminence of the exemption's wholesale termination. Native Corporations seem to feel that the proximity of 1991, given the federal government's lassitude in the conveyance of lands,[61] means that there will not be an adequate opportunity to provide the revenue base and the entrepreneurial experience necessary to sustain exposure to the taxing jurisdictions. Whether real or not, these concerns must be understood to determine what kind of legislative or administrative action is warranted on the state and federal levels.

The factors that will enter into corporate decision-making are myriad and unpredictable. The world price of oil, the population

59. *E.g.*, Cal. Pub. Res. Code § 3402 (West 1972).

60. Letter of Barry Jackson to Governor Jay Hammond, Feb. 4, 1975 (copy on file in the office of the *U.C.L.A.-Alaska Law Review*).

61. Of the approximately 40 million acres of land to be patented to the Native Corporations under ANCSA, as of January, 1976 only 106,679 acres of the surface estate in these lands had been patented to Native Corporations. The Corporations had received interim conveyances for an additional 20,878 acres of surface estate. Of the sub-surface estate, 149,465 acres had been patented with another 18,524 granted by interim conveyance. Thus, not even one percent of the land had been conveyed to the Native Corporations. M. Price, D. Gerber & R. Partich, An Examination of Section 21(d) of the Alaska Native Claims Settlement Act, Appendices A & B (report for the Alaska Federal-State Joint Land Use Planning Commission, Feb. 15, 1976). Without clear title to the lands selected, the Native Corporations are constrained in their ability to enter into transactions to develop, lease or otherwise exploit their selected lands. It was estimated early in the administration of ANCSA that it could be from 10 to 30 years before the task of surveying all the Native-selected lands, allotments, village townships and other land claims under ANCSA would be completed preparatory to granting patents. Alaska Native Management Report, Nov. 14, 1972, at 2. Now there are indications that substantial acreage will soon be patented or granted by interim conveyance. Interview with Ted Berkland, Director of the Bureau of Land Management, Aug. 5, 1976.

expansion in Alaska as a whole, the evolving attitudes of shareholders toward management in Native Corporations—all these may have a more significant impact on corporate strategy than varying interpretations of institutional relationships under the Act or alternative interpretations of the exemption provisions. But some alternate interpretations of the statute clearly mesh with other elements of corporate strategy. An interpretation that terminates the exemption when lands become developed or leased is an additional restraint on economic development strategies. Furthermore, the failure of the exemption to extend beyond 1991 imperils the subsistence strategy. Given the sizable tax burdens after 1991, and given the difficulty, in some cases, that the Regional Corporations will have in being able to meet those tax burdens even with an intact accumulated income from Alaska Native Fund reserves, there is a great likelihood that the voices for subsistence will not prevail.

A. *Influences on Native Corporate Land Use Decisions Not Directly Related to Taxation*

The effect of Section 21(d) on Native Corporate planning cannot be precisely delineated because the Corporations have not yet formulated comprehensive long range plans for financial investment and land development. The Native Corporations do not now have clear marketable title to the vast majority of the lands they have selected under ANCSA[62] and they may be uncertain as to the nature of the possessory interests they ultimately will have in their selected lands.[63] In addition, there is insufficient

62. *Id.* There is further doubt about the marketability of the interim conveyances received by the Native corporations. The Department of the Interior holds the view that the interim transfers of Native lands would have the same legal status as tentative approvals on unsurveyed state-selected lands which have been leased in competitive state oil and gas sales. However, there is possibly a difference between the situation of state-selected lands and that of the Native Corporation's lands. While there is specific language in the Alaska Statehood Act establishing congressional intent in allowing tentatively approved land to be sold, there is no such provision in ANCSA. The problem of establishing boundaries on the small tract selections of Native corporations is likely to be more difficult than in the case of state sales of oil and gas in large tracts of land. Alaska Native Management Report, Nov. 14, 1972, at 3.

It is further unclear how the title insurance companies will treat interim conveyances. Title insurance is not normally used in mineral leasing but it is common for title insurance companies to do research in oil and hardrock mineral industries. *Id.*

63. In addition to not having clearly marketable title to ANCSA lands, the interests ultimately to be conveyed are not yet certain. Under Section 17(b) of ANCSA the Secretary of the Interior can reserve public easements identified by the Joint Land Use Planning Commission. 43 U.S.C. § 1616(b) (Supp. 1975). That section provides:

(1) The Planning Commission shall identify public easements across

data regarding the natural resources on ANCSA lands and the potential for their development to accommodate finely tuned plans.[64]

It would be erroneous, however, to consider Section 21(d) as the only important incentive to development. The leaders of the Native Corporations feel pressure from several other sources to develop Corporate lands in order to increase the value of their Corporate stock, which will be alienable after 1991.[65] For in-

lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided*, That any valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

(3) Prior to granting any patent under this charter to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

Id.

The provisions of Section 17(b) are fraught with many interpretative problems. The two most basic questions are (1) whether the easements are to be for access or for use, and (2) whether they should be based on existing use, or on some undefined future need.

On the question of whether access or use is to be determinative of public easement identification, the Alaska Federation of Natives (AFN) has taken the position that access is to be the controlling test. Alaska Native Management Report, Aug. 15, 1972, at 4, col. 1. The Land Use Planning Commission (LUPC), has adopted the view that easements for dam sites, drill sites and other functions not related to access to adjoining public lands were not authorized by the Interior Congress. *Id.*

The AFN and LUPC agree that easements should be reserved on the basis of existing use, not on some vague definition of future need. *See* Alaska Native Management Report, Nov. 15, 1975, at 4, col. 1; Alaska Native Management Report, April 15, 1975, at 4, col. 1. However, future need arguably may be a reasonable basis for the LUPC to recommend reservation of an easement, for the section provides that the LUPC shall identify "public easements which are . . . reasonably necessary to guarantee . . . a full right of public use and access for recreation, hunting, transportation, utilities, docks *and such other public uses as the Planning Commission determines to be important.*" 43 U.S.C. § 1616(b)(1) (Supp. 1975) (emphasis added).

Further support for this argument is to be found in Section 17(b)(2), which requires the Secretary of the Interior to "review statements and recommendations from interested organizations and individuals on the need for and *proposed* location of public easements" (emphasis added), and in Section 17(b)(3), which provides that the Secretary upon consultation with the LUPC shall reserve such public easements as he determines are necessary. 43 U.S.C. §§ 1616(b)(2) & (3) (Supp. 1975).

For further discussion of the problem of Section 17(b) public easements, see Alaska Native Management Report, April 15, 1975, at 7, col. 1.

64. Alaska Native Management Report, July 31, 1974, at 5, col. 1.

65. *See, e.g.*, 1974 Aleut Corporation Shareholder's Report, at 5.

stance, because they are organized as profit-making entities, the Native Corporations feel obliged to increase their stock's value, though this is more true for the Regions than for the Village Corporations.[66]

There may also be pressure from other Regional and Village Corporations. A critical feature of ANCSA is the requirement that 70 percent of natural resources revenue from the ANCSA lands of one Regional Corporation must be shared with the other Regions.[67] Further, each Region is required to share its revenues with Village Corporations.[68] Perhaps Section 7(i) places on each Region a duty to exploit the Region's natural resources. If so, the resource-poor Regional and Village Corporations are likely to bring actions against resource-rich Regional Corporation boards of directors who refuse to extract natural resources in their Regions.

There may also be pressing needs for cash. All the Corporations, to varying degrees, have some concern for bettering the social welfare of their shareholders. For some Corporations the principal means of benefiting shareholders is to generate cash income to be disposed of according to the personal dictates of the individual shareholders. For Village Corporations, particularly, there may be pressure to develop. They receive meager Alaska Native Fund sums and have relatively high cash needs.[69] Corporations which see their role as the vehicle to aid the Native shareholders' assimilation into the mainstream of a modern economy and society may feel compelled to invest their money and ANCSA-conveyed land in financial ventures which have the collateral benefit of stimulating the local economy and providing job opportunities for the Native Corporation shareholders.

In view of the temporary inalienability of corporate stock and of the need to invest distributed Alaska Native Fund money, cash

66. The majority of the lands selected by the Villages, after they were given economic data regarding resources, were chosen to provide for a subsistence way of life. Harrison, *Growth in Alaska* in ALASKA GROWTH POLICY: A DISCUSSION OF ISSUES 10 (1975) (Statement of Sam Kito, President, American Federation of Natives). Some alienation from the land results from the fact that a great number of shareholders in Regional Corporations are not enrolled in Village Corporations, nor, in many cases, are they even residents of the Region. The disattachment from Native lands is also stronger among shareholders in the more heavily developed Regions.

67. Section 7(i), ANCSA 43 U.S.C. § 1606(i) (Supp. 1975).

68. Section 7(j), ANCSA 43 U.S.C. § 1606(j) (Supp. 1975).

A federal district court has held recently that revenues received by a Regional Corporation prior to patent for exploratory rights and options to lease must be divided among the Regional Corporations pursuant to Section 7(i). Aleut Corp. v. Arctic Slope, 410 F. Supp. 1196 (D.C. Alaska 1976).

69. *See* Gormach, *Village Corporation Finances*, Alaska Native Management Report, Mar. 15, 1974, at 4.

income to the shareholders will be lean. Therefore, the creation of jobs and job training programs is an important alternative means of providing immediate pre-1991 benefits to Native shareholders.[70] The development of ANCSA-conveyed lands as housing projects, recreational and tourist facilities, and the exploitation of natural resources are convenient ways to stimulate directly the local Village or Regional economy and create jobs for Native shareholders.

Of course, there are some pressures which militate against development of Native lands. Prominent among these is the desire to maintain large tracts of open space to accommodate a subsistence lifestyle. But the pursuit of subsistence living is seriously hampered by the prospect of future taxation of lands upon which Native shareholders depend for subsistence. If the level of taxation after 1991 is sufficiently high, a Corporation may not reasonably be able to leave undeveloped large expanses of land.[71]

At least one Regional Corporation has expressed an intention to postpone serious exploration of its subsurface resources, its purpose being to discourage rampant land speculation which it feels would drive up land values. Its feeling is that the price of these resources will rise dramatically in the coming years and it plans to sit quietly on these resources. However, it is recognized that the less exploration of resources there is, the less precise and rational land development planning can be.[72]

Sections 7(i)[73] and 7(j),[74] dealing with the sharing among

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70. *See* Schuyten, *A Novel Corporation Takes Charge In Alaska's Wilderness*, FORTUNE, Oct. 1975 at 166.

71. The alienability of the Native Corporation stock in 1991 also seriously undermines the ability of the Native groups to continue a subsistence lifestyle after 1991. If significant numbers of the Native shareholders of a given Corporation sell their stock after 1991, allowing non-Natives to get a foothold in the Corporate structure, the subsistence living will be in jeopardy since non-Natives are unlikely to be aligned with such goals.

72. An additional aspect of the dilemma of whether or not to explore resources is the valuation of Native Corporation lands for purposes of computing basis for tax calculations. The basis would presumably be determined at the time of conveyance to the Native Corporations, and with less exploration and knowledge of land resources the basis as entered on the books at time of conveyance to a Native Corporation is not likely to reflect the true value of the resources when they are later discovered. Thus, the sale of lands with such resources is likely to result in higher capital gains tax payments and, therefore, lower net profit after taxes.

73. 43 U.S.C. § 1606(i) (Supp. 1975). That section provides:

> Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection

Regional Corporations of revenues from certain investments, will also act, to some degree, as a deterrent to land development, perhaps a more potent one than Section 21(d). Under these Sections only 30 percent of the revenues from subsurface and timber resources, plus the Region's share of the remaining 70 percent received by a Regional Corporation for its Section 7(i) natural resources, will be retained by the exploiting Regional Corporation.

B. *The Impact of the Impending Tax*

All of the other influences aside, the most significant concern is the future burden of land taxation. The number of variables—including the extent of taxing jurisdictions, the assessed valuation, and the tax rate—are sufficiently complex so that a sophisticated model would have to be constructed to provide reliable predictions of the potential tax liabilities beginning in 1991. But it can be seen even from a rudimentary analysis that certain Corporations will be subject to greater liability than others and that certain Village Corporations will suffer tax liability far in excess of their income from the Alaska Native Fund. Particularly in the Koniag, Cook Inlet, and Arctic Slope Regions it is likely that a great proportion of the lands conveyed will be in jurisdictions that impose a local property tax.[75] Corporations in the Doyon, Bristol Bay, and Sealaska Regions will also, to a lesser extent, have lands within local taxing jurisdictions.[76] Some Corporations will incur local tax bills in excess of Corporate income, even if all proceeds of the Alaska Native Fund distributed to that Corporation are retained and invested. It is almost as certain that, for some Corporations, the imposition of local taxes after 1991

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shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

[75] 43 U.S.C. § 1606(j) (Supp. 1975). That section provides:

> During the five years following December 18, 1971, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 1605 of this title (Alaska Native Fund), and under subsection (i) of this section (revenues from the timber resources and subsurface estate patented to it pursuant to this chapter), and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsection i to it. In the case of the thirteenth Regional Corporation, if organized, not less than 50% of all corporate funds received under section 1605 of this title shall be distributed to the stockholders.

[76] M. Price, D. Gerber & R. Purtich, An Examination of Section 21(d) of the Alaska Native Claims Settlement Act, 79-82 (report for the Alaska Federal-State Joint Land Use Planning Commission, Feb. 15, 1976).

[77] *Id.*

will mean foreclosure or forced sale of lands received under ANCSA.

Still, a number of factors reduce, for some Corporations, the danger of large-scale foreclosures after 1991. The most important of these is the fact that many lands conveyed or to be conveyed under ANCSA are not within presently existing taxing jurisdictions. A major portion of the state and much of the selected ANCSA land is within the unorganized borough,[77] which has not imposed any real property taxes. Second, there are certain existing state exemptions from local taxation, provided under state laws, which could reduce the impact of taxation after 1991. There are mandatory exemptions for land reserved for nonprofit religious, charitable, cemetery, hospital, and educational purposes.[78] In addition, municipalities may at their option exempt

77. *See* AS 29.03.010-.020.

78. AS 29.53.020. This possibility has not been much explored, particularly as alternative organization structures for Village Corporations. ANCSA allows a Village Corporation to incorporate in two ways: as a for-profit corporation or a not-for-profit corporation under Alaska law. At the present time every Village Corporation in Alaska is organized as a for-profit corporation. It is not clear why this mode was adopted for every Village Corporation.

Clearly there are differences in structure between corporations of the two types. As a for-profit corporation, a Village issues shares of stock to those persons enrolled in the Village. The shareholders elect the Board of Directors, who decide on corporate policy. The directors are obligated to exercise prudent business judgment. They may, of course, declare dividends or other distributions of assets. In 1991, the shareholders of the corporation can sell their stock.

A not-for-profit corporation would be quite different. It ordinarily would not have shareholders. It has a Board of Directors that usually fills vacancies by vote. The Board's obligation is to fulfill the charitable purposes as stated in the corporation's charter. The charter would state, for example, that the corporation was established to assist in the education, housing, employment potential, family strengthening, and cultural support of the descendants of the Native families that have lived in the Village. Anything that the Board authorizes which is consistent with proper charitable purposes would be permissible. The Board can engage in business enterprises that further these goals, or invest in businesses to raise income to achieve these charitable purposes. Since there would be no shareholders in the Corporation, it could assist people who are part of the Village but not "enrolled" in it under ANCSA. Perhaps assistance could be provided to the families of Villages whether or not they are Alaska Natives. This would turn primarily on the nature of the articles of incorporation.

Such a corporation, were it nonprofit, would be like other foundations or charities. It could use its money for scholarships, for housing subsidies, for travel grants, for management training support, etc. It could also, of course, invest its money, buy businesses, or establish experimental agricultural enterprises. There is nothing wrong with a nonprofit corporation investing its money wisely and gaining substantial income in any year. A nonprofit corporation could allocate parts of its land to persons who are within its charitable objectives. Article IX of the Alaska Constitution provides that property of nonprofit corporations will be tax exempt. This would apply after 1991 as well as before. It would mean that the land received by the Corporation could not be subjected to property taxation unless the Alaska Constitution were amended. There are, however, uses of nonprofit land that might open the land to taxation. Generally, if the use of the land is consistent with the charitable purpose, the land is not taxable

from the property tax levy residential property,[79] up to a value of $10,000 per residence. This exemption would assist where mandatorily conveyed land under Section 14(c) of ANCSA[80] would otherwise be considered "developed."[81]

It is possible that the mitigating factors mentioned above will avoid large scale forfeitures or tax-impelled sales of land when the federal exemption is terminated. But the very speculative nature of these factors precludes reliance on them by the Native Corporations. It is possible, for example, that the existence of substantial tracts of privately held lands (by Native Corporations) outside the organized taxing jurisdictions will lead to a statewide property tax so as to provide roughly equitable exposure for all taxpayers. Thus, the current distribution of Native lands within and without taxing jurisdictions is not certain to continue.

The contingent nature of the possibilities of low exposure to taxation is unacceptable if it will frustrate Congressional intent and also force economic activity that is incompatible with rational land use planning. The danger that lands will rapidly pass out of Native hands as a result of state or local taxation has given rise to suggestions that Section 21(d) be amended to extend the exemption. In addition, the Joint Federal-State Land Use Planning

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even if there is revenue. For example, if some of the people of the Village were charged a rental fee to live on the land in order to cover administrative expenses, the land would not be taxable. If, however, a subdivision were created and became a profitable venture, the land would be taxable. But only the land in that venture would be subject to a property tax.

There are, perhaps, psychological differences between for-profit and not-for-profit organizations that transcend the issue of taxation. The for-profit mode of corporate organization contains within it the suggestion that one has to behave in a particular way. The Village Corporations seem to consider it necessary that they seek out joint ventures and other kinds of exotic business arrangements. For-profit corporations often lose money. Not-for-profit corporations can increase in size. But if one is running a not-for-profit corporation one views one's responsibility differently: one views the corporation as a public service organization with serious responsibilities to its clientele, rather than as a money-making business. For an account of the views of John Sackett, Chairman of Doyon, Ltd., see Schuyten, *A Novel Corporation Takes Charge in Alaska's Wilderness*, FORTUNE, Oct., 1975 at 159.

79. AS 29.53.025(a).

80. 43 U.S.C. § 1613(c) (Supp. 1975).

81. AS 29.53.025(a)(3).

A second optional exemption is provided for property used by a nonprofit entity for community purposes. AS 29.53.025(b). The lands conveyed to Native Corporations under ANCSA are particularly well-suited to being characterized as "used for community purposes," especially in the case of lands designated for the maintenance of subsistence lifestyles.

Another optional exemption is provided for "historic sites, buildings, monuments." AS 29.53.025(b)(2)(C). Certain of the Native lands are recognizable as "historic sites" by the very fact that they have been historically used by Native populations and were selected under Section 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (Supp. 1975).

Commission and others have been concerned that the nature of the exemption and the manner of its expiration will interfere with state policies for the use of land. Because these important concerns and apprehensions will undoubtedly be the basis for Congressional scrutiny, it is important to turn, in some depth, to alternative methods of further clarifying or modifying Section 21(d).

IV. Possible Governmental Responses to the Section 21(d) Problems

The likelihood that circumstances will be arranged in a manner totally unfavorable to the Native Corporations is probably low. Nevertheless, the range of hazards is sufficient to render legislative action worthy of consideration. Legislation could confer protection independent of such factors as the location of Native lands, the makeup and structure of local government, and the success of Native investment programs.

Some of the possible legislative responses to the cut-off date provided under Section 21(d) which would alleviate the Native Corporations' fears of huge tax liabilities involve a temporary or permanent extension of the exemption from local taxation; others envisage the imposition of a property tax, but seek to minimize its effect by various devices.

A. *State Legislative and Administrative Clarification of Section 21(d)*

The Alaska legislature can furnish some guidance in the interpretation of Section 21(d). The state, either through the legislature or the Attorney General, could provide an interpretation of what constitutes development or leasing to third parties. It could determine authoritatively that lands not leased or developed prior to conveyance remain exempt until 1991. State legislation could not, of course, reduce the scope of the federal exemption, but a reasonable state interpretation might be embraced by a federal or state court seeking to establish a rule of law. An opinion of the Attorney General would be useful guidance to municipalities and, if reasonably formulated, might prove influential to the courts.

In determining the scope of the municipal power to tax Native lands, the legislature would have the opportunity to identify the kinds of factors that ought to be taken into account in determining whether land is "developed." Such factors might include whether the land is being used for shelter or farming by a Native owner of the land, whether it is being used for subsistence pur-

poses by a Village as a whole, and whether taxation is limited to the specific land developed. State law may also indicate whether the exemption is reinstated if the lease terminates or the development abates. The state legislature might also clarify what sorts of interests in land, particularly those interests relating to mineral development, constitute development or leasing to third parties—thus triggering the first proviso—and what rights are lesser—thus triggering the second proviso but maintaining the integrity of the underlying exemption. The state may here distinguish among exploration permits and extraction programs. The legislature might also distinguish between development that is in existence prior to conveyance and development that is subsequent to selection by or conveyance to the Native Corporation. The state could provide that certain lands that are reconveyed pursuant to Section 14 of ANCSA[82] do not lose their exemption. Legislative guidance as to what constitutes leasing to third parties would also be helpful. For example, the state could provide that certain intra-Native Corporate ventures or agreements, including the establishment of holding companies, would remain exempt from taxation. It could establish a control test for situations where a Native Corporation and a non-Native corporation jointly engage in a transaction which includes ANCSA-conveyed land as part of the consideration.

B *Extension of the Federal Exemption*

A second major area of potentially desirable legislation would involve extending the exemption via federal legislation. Affected Corporations could develop their policies not only on the basis of maximizing profits, but also on the basis of preparing their constituents for ultimate autonomy. As it is, the inevitability of the termination of the Section 21(d) exemption forces Native Corporations to plan according to the conventional profit motive simply to maintain their solvency against what in some cases would be tax liabilities of enormous magnitude. Providing a more lengthy period of exemption will allow the Corporations a chance to direct more of their energies not to ensuring their survival as economic entities, but to advancing the economic status of Alaska's Natives.

The twenty year period that appears in ANCSA is a compromise between proponents of a fifty year period and supporters of a twelve year period.[83] It was selected as a middle ground very early in the legislative history of the bills that led to the enactment of ANCSA. Congressional scrutiny of this particular portion of

82 43 U.S.C. § 1613 (Supp. 1975).
83 *See* notes 12-15 & accompanying text *supra*.

ANCSA does not appear to have been as extensive as that invested in other parts of the draft bills. If further investigation reveals its drawbacks, there need be no hesitation to extend the exemption for an additional term.

Another consideration supporting extension of the exemption is that the period selected is premised upon Native control of the conveyed lands within a short time of enactment of the Act. But patents and interim conveyances are expected to be delayed for considerable periods of time, some even beyond the 1991 date.[84] The identification of public easements,[85] litigation, and bureaucratic intransigence so far have caused an astonishingly slow pace of conveyance.[86] This means that Native proprietors will not have patent title to the land until much later than the 1971 enactment date of ANCSA—in some cases not until the exemption has already expired. They therefore have no means to use the land to generate revenues until much later than assumed. Neither the conveyance of parcels nor their leasing will be really possible in the absence of patents.

A variant of extending the exemption is conditioning the extension upon retention of the restrictions on the alienability of Corporate stock by Native owners. Under ANCSA, the inalienability of stock expires in 1991, the same year that the Section 21(d) exemption terminates. Linking a continuation of the property tax exemption with the maintenance of the inalienability of Corporate stock can be justified as perpetuating what might be called the Nativeness of the land. In other words, the exemption may be necessary because of the danger that the assets that are part of the Alaska Native Claims Settlement Act might rapidly diffuse in the society. Prior examples of distributions of land and assets to Native groups in other states display the legislative concern that is felt when assets too rapidly leave Native hands, partly as a consequence of the termination of trust status. The Menominee Restoration Bill of the early 1970's is an excellent example of the legislative concern over the relationship between an Indian community and its assets. In 1953, the United States Congress agreed that the Menominee Tribe should be free to manage its resources without the restraining federal presence.[87] The incursion of state jurisdiction, including the power to tax, led to a substantial reduction in the tribe's assets and cohesiveness. Concern over the eventual impoverishment of the tribe led, ultimately, to the restoration of

84. *See* note 61 *supra*.
85. *See* note 63 *supra*.
86. *See* note 61 *supra*.
87. Act of June 17, 1954 ch. 303, 68 Stat. 250 (1954).

trust status and the reimposition of the exemption from state and local taxation.[88]

The situation in Alaska is somewhat different. The stock, not the land, is restrained from alienation. But the restraints on stockholder alienation is a critical aspect of the validity of the exemption. So long as stock is inalienable (except through inheritance and certain other limited occurrences), control of the Corporations remains in Native hands and the present inclination not to alienate lands remains as well. In addition, when the stock becomes alienable, important questions will arise as to the equity and purpose of a continued exemption. If, for a particular Corporation, a substantial percentage of the stock is alienated after 1991 the Corporation will no longer *pro tanto* be a Native Corporation. To the extent that the Corporations lose their Nativeness, the moral claim for a policy that preserves a land base is eroded.

C *State Exemption of All Undeveloped Lands*

A third approach to lessening the threat to Native lands would be to eliminate the property tax on all undeveloped lands.[89] State legislation aimed at exempting undeveloped lands from local property taxation is a form of relief principally affecting the Native Corporations, since they will own the great bulk of privately held land in the state, and an even larger share of the undeveloped land in private ownership. In effect this proposal would provide a permanent extension of the Section 21(d) type of exemption, but without the third party requirement found in ANCSA. In addition to relieving immediate pressures on Native Corporations to secure a maximum rate of return on their investments, it would have the longer-range effect of allowing the permanent retention of tracts of undeveloped land as open space. A temporary exemption, no matter how long, provides only a temporary incentive to retain conveyed lands in their undeveloped state. Upon termination of the exemption, the impetus is to make the most of the lands in order to defray as much of the tax bill as possible. To the extent that an open-space policy is attractive in the Alaska context, a permanent exemption of undeveloped land from local taxation is worth considering.[90]

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88 *See* Menominee Restoration Act, 25 U.S.C. §§ 903 *et seq.* (Supp. 1975); GOVERNMENT RESEARCH, FISCAL DATA FOR ALASKA (1975).

89 *See* letter from Barry Jackson to Gov. Jay Hammond, *supra* note 68.

90 A variant of this proposal is the exemption of lands dedicated to subsistence activities, even though they might be considered "developed." *See* Tussing & Jones, *The Economic Effects of a Land Claims Settlement* in ALASKA PUBLIC POLICY 322, 329 (Morrison ed. 1971).

D. *Elimination of the Property Tax*

A more fundamental change in the Alaska taxation scheme would be to eliminate the property tax entirely. Because taxes on property are regressive,[91] even if restricted to developed property, this change would be welcomed by more than just Native land owners. Whether reliance on the property tax can be eliminated depends upon two factors: the availability of alternative revenues, and the expected increase in expenditures by local governments in the years to come.[92] Alaska may be in a position, by virtue of its vast oil and gas reserves, to obtain revenues which make property tax income seem pale in comparison.[93] In 1961 local property taxation brought in $11.9 million; this grew to $17.8 million in 1972.[94] With the additional organization into political subdivisions since 1972, particularly in the North Slope area, and the inevitable increase in market valuations of real property, the figure is bound to increase; nevertheless, it is insignificant compared to the oil revenues predicted for the short term.

E. *Modification of the Existing Property Tax System*

Rather than extending the Section 21(d) exemption either directly or by abandoning property taxation, the state legislature has at its disposal a variety of alternative means for reducing the danger of severe property taxation upon Native Corporations. The state could implement an assessment freeze, locking the assessment level of Native lands at their worth for subsistence activities, unless they are developed. This approach would ensure some local revenues from Native proprietors, but would impose only a minimal risk of confiscation on the Native landowners. Similarly, assessments at market value could be delayed for a period of years after development or leasing occurs. This would furnish a number of years during which embryonic Native developments could be nurtured without being weighted down by a tax burden.

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91. *See, e.g.*, Zimmerman, *Tax Planning for Land Use Control*, 5 URB. LAW. 639, 647 (1973).

92. An excellent sketch of state and local revenues and expenditures in Alaska is contained in UNIVERSITY OF ALASKA, INSTITUTE FOR SOCIAL, ECONOMIC AND GOVERNMENT RESEARCH, FISCAL DATA FOR ALASKA (1975).

93. Oil revenues in Alaska come from several sources: the leasing of state lands for exploration, development and extraction of oil and gas royalties, bonus sales from competitive leasing of state lands, a production tax on oil and gas sold from property within the state, oil and gas property taxes, and a new property tax on reserves. DEPT. OF ADMIN., REVENUE SOURCES OF ALASKA, FISCAL YEARS 1974-1980, 13 (1976); DEPT. OF REVENUE, REVENUE SOURCES, FISCAL YEARS 1975-1977, 4 (1976).

94. FISCAL DATA FOR ALASKA, at 16 (1975).

At the level of more general property tax reform, a tax rate proportional to Native income level could be enacted. Such tax equalization would defeat the conventional criticism of property taxation as regressive, while serving both the need of local governments for revenues and the need of Native Corporations for a relatively risk-free tax environment. A sliding scale based on the ability to pay rather than on the market valuation of Native holdings would be the basis for tax liability.

As another approach, differential taxation similar to the use of special assessment districts could be employed as an exclusive basis for property taxation. A levy would be imposed, under this theory, in accordance with the demand on municipal services, rather than on the basis of assessed valuation. Rural Native lands which place no demands upon the taxing jurisdictions in which they are situated would have no tax liability; lack of development, therefore, would make possible a low tax rate. Since undeveloped lands receive little benefit from municipal services, they should not be burdened with the costs of providing these benefits.

The modifications of the present Alaska tax system discussed here do not exhaust the possibilities. Whether these changes should be made, or whether the other legislative actions discussed above should be taken, ultimately depends on the degree to which Native interests are threatened by property taxation, and on the degree to which federal, state, and local governments feel that Native interests should be protected. It is to be expected that these three levels of government will vary in their concern for preserving Native interests.

Conclusion

This Article has examined numerous problems in the interpretation of Section 21(d) of the Alaska Native Claims Settlement Act and has suggested possible clarifications and modifications of its tax moratorium. However, the complexities of the problem are not exhausted here. Further work is needed in analyzing the precise effect that Section 21(d) will have on Native Corporate land use behavior. At present, the Corporations have not formulated comprehensive, long-range development plans, so it is difficult to isolate accurately the impact of Section 21(d) on land use. In addition, a sophisticated economic assessment of the potential property tax liabilities of the various Regional and Village Corporations is needed to identify the scope of the tax threat to these Native entities. This economic evaluation, when coupled with the analysis provided by this Article, will permit the legislature and the judiciary to make rational decisions regarding the tax exemption of Alaska Native lands.

DEFINITIONS

SEC. 3. For the purposes of this Act, the term—

(a) "Secretary" means the Secretary of the Interior;

(b) "Native" means 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 Metlaktla Indian Community) Eskimo, or Aleut blood, or combination thereof. 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 minimum 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 claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary regarding eligibility for enrollment shall be final;

ANSCA.

(c) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of this Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

(d) "Native group" means any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality;

(e) "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

[illegible] Stat. [illegible].

(f) "State" means the State of Alaska;

(g) "Regional Corporation" means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this Act;

(h) "Person" means any individual, firm, corporation, association, or partnership;

(i) "Municipal Corporation" means any general unit of municipal government under the laws of the State of Alaska;

(j) "Village Corporation" means an Alaska Native Village 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 a Native village in accordance with the terms of this Act.

(k) "Fund" means the Alaska Native Fund in the Treasury of the United States established by section 6; and

(l) "Planning Commission" means the Joint Federal-State Land Use Planning Commission established by section 17.

EXTINGUISHMENT OF SETTLEMENT

[illegible] (a) All [illegible] conveyances of public land and water areas in Alaska [illegible] pursuant to Federal law, and all [illegible] pursuant to section 6(g) of the Alaska Statehood Act [illegible] extinguishment of the aboriginal title [illegible] thereby.

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2650

[Circular No. 2478]

Federal Installations; Implementation of Section 3(e) of the Alaska Native Claims Settlement Act

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking provides the procedures to be used by the Secretary of the Interior to carry out the provisions of section 3(e) of the Alaska Native Claims Settlement Act. The procedure will be used to determine which lands held by Federal departments or agencies were in actual use during the time prescribed in the Act and which such lands were not in actual use and can be conveyed to Native Corporations under the Act.

EFFECTIVE DATE: November 21, 1980.

FOR FURTHER INFORMATION CONTACT: Beaumont McClure, (202) 343-6511

or

Robert C. Bruce, (202) 343-8735

or

Robert Arnold, Bureau of Land Management, 701 C Street, Box 3, Anchorage, Alaska 99513, (907) 271-5070.

SUPPLEMENTARY INFORMATION: On September 18, 1979, proposed rulemaking was published in the Federal Register (44 FR 54254). Comments were invited for 60 days ending November 19, 1979. Written responses were received from the State of Alaska, the Department of Transportation, the Alaska Railroad, Alaska Federation of Natives, Inc., Bering Straits Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Natives, Inc., Ekluta Inc., Gulkana Glacier, Ltd., Holy Cross, Koniag, Inc., Interior Village Association, Northway, Sealaska Corporation, Unalakleet Native Corporation and Yak-Tat Kwaan, Inc. These responses have been reviewed and analyzed.

Generally, those who commented expressed the opinion that the proposed rulemaking was necessary in order to carry out the Congressional intent of section 3(e) of the Alaska Native Claims Settlement Act. This rulemaking sets up the general guidelines under which the Department of the Interior will determine which lands held by Federal agencies are available for conveyance to Native corporations under the Act. It is important to note that the status of each tract will be addressed by the Bureau of Land Management on a case-by-case basis. It is impossible in one rulemaking to take into account all of the individual issues which could affect section 3(e) determinations. For this reason, the final rulemaking does not contain specific examples.

The comments also recommended specific changes that would make the final rulemaking clearer and more understandable. The following discussion summarizes the comments and suggestions received on a section-by-section basis.

Authority

It was suggested that the word "certain" be deleted from the phrase "certain Federal installations in Alaska" as it appeared in the proposed rulemaking. As explained in the section on "lands subject to determination", the provisions of section 3(e) of the Alaska Native Claims Settlement Act and this rulemaking apply to Federal installations located within areas withdrawn by sections 11(a)(1), 16(a), or 16(d) or selected in accordance with section 14(h)(8)(B). Since the Federal lands subject to determination are specifically identified in the final rulemaking, the word "certain" has been deleted.

Definitions

This section received the largest number of comments, generally suggesting that the definitions were incomplete or unclear. After careful analysis and in response to comments, the definitions section of the final rulemaking defines three terms—"holding agency", "appropriate selection period" and "State Director". Other terms which appeared in the definitions section of the proposed rulemaking are now contained in a new section, "Criteria for determination". The term "smallest practicable tract" is contained in the Authority section, which uses that term as it is used in the Alaska Native Claims Settlement Act.

A definition of the term "holding agency" has been added. The term was added in response to a comment that the agency actually controlling the lands may not necessarily be the agency which was using the lands on December 18, 1973. The term "Federal installation" as used in the proposed regulations defined the lands subject to determination and is now addressed in the section on "Criteria for determination".

The term "appropriate selection period" was added as suggested by one comment, in order to avoid the questions raised by § 2653.1(c) (1), (2) and (3) in the proposed rulemaking, which listed specific time periods for selection. Since the Alaska Native Claims Settlement Act itself, its implementing regulations and subsequent congressional enactments, list the appropriate selection periods for Native corporations, it is unnecessary to include that information in this final rulemaking. This will avoid amending the regulations each time Congress acts on selection periods. The third definition added to the final rulemaking is "State Director" which means Director, Alaska State Office, Bureau of Land Management.

Lands Subject to Determination

This section of the proposed rulemaking drew a few comments which pointed out three omissions in the first paragraph of the section. First, there is no mention of Federal department or agency lands located within the areas withdrawn; second, the withdrawal authorities cited should include section 16(d) of the Alaska Native Claims Settlement Act; and third, there is no reference in the paragraph to selections made by the regional corporation for southeast Alaska under section 14(h)(8)(B) of the Act. These omissions have been corrected. The final rulemaking does not include a reference to section 11(a)(3) of the Act as suggested in some comments. This change is not appropriate since determinations pursuant to section 3(e) of the Act do not apply to lands withdrawn under section 11(a)(3). As explained above, several comments questioned the need for stating specific selection periods and this has been deleted.

Criteria for Determination

This section has been added to further clarify the procedures for making a determination and clarify some of the misunderstanding expressed in the comments on the definitions section. Almost all of the comments found the definitions section of the proposed rulemaking unclear. Therefore, the final rulemaking has been redrafted to reflect the three criteria which the Bureau of Land Management will use in order to make a 3(e) determination as to whether the lands are public lands and, thus, subject to conveyance to a Native corporation. These criteria, which were previously reflected but not expressly stated in the definitions section are: (1) Nature and time of use, (2) area to be retained by the Federal agency, and (3) interest to be retained by the Federal agency. Each point will be discussed individually.

(1) Nature and time of use—This criterion derives from § 2655.0-5(a)(1) in the proposed rulemaking and sets out three provisions. The first is that the use must be for a purpose "directly and necessarily connected with a Federal agency as of December 18, 1971". The comments suggested this language would more clearly reflect the intent of section 3(e) than the language in the proposed rulemaking.

The second provision is that the activity must be continuous, depending on the type of use, throughout the appropriate selection period. Two aspects of this provision need to be addressed. The final rulemaking provides that use by the agency during the entire selection period is necessary in order for the lands to be exempt from Native selection. This provision represents a compromise between those comments which favored establishing each agency's use solely on the basis of use on December 18, 1971, and those comments which expressed the view that use at any time during the appropriate selection period and, in some cases, proposed or future use, should make the lands subject to retention by the agency. The provision that use should be continuous, considering the type of use, reflects this compromise.

The third provision is that the agency claiming the land, if different from the agency using the land on December 18, 1971, must have a similar function to that of the original using agency. Again, this portion of the final rulemaking serves to assure that ongoing agency activities are not disrupted, while at the same time precluding Federal agencies performing new and different functions from asserting rights superior to the selecting Native corporations.

(2) Area to be retained by the Federal agency—This criterion derives from §§ 2655.0-5 (a) and (b) in the proposed rulemaking. The first subsection of this section of the final rulemaking states that the area which the Federal agency can retain shall be no bigger than reasonably necessary to support the agency's use. This provision responds to those comments which found inclusion of this provision in the definitions section confusing and repetitive; and further clarifies "smallest practicable tract". The next subsection requires that the tract in question be described in appropriate terms (i.e., by the U.S. survey, smallest aliquot part, metes and bounds or protraction diagram). This provision comes from § 2655.2(a)(2) of the proposed rulemaking and responds to comments which requested an explanation. The third provision lists those types of agency use which fall within the definition of section 3(e), i.e. "land actually used in connection with the administration of Federal installations." This provision is essentially a restatement of §§ 2655.0-5 (a) and (b) in the definitions section of the proposed rulemaking in response to those comments which objected to the inclusion of these items in the definitions section. Improved lands, in subparagraph (A) of § 2655.2(b)(3) are a category of lands that most comments felt qualified as actually being used. Some comments thought subparagraph (B) of that section, concerning buffer zones, should be omitted. However, the regulation reflects the comments which felt that reasonable buffer zones were legitimate actual uses of lands by Federal agencies under the section 3(e) definition. Subparagraph (C) includes unimproved lands used for storage as lands retainable by Federal agencies. It is another clarification of § 2655.0-5(a)(1) of the proposed rulemaking in response to comments.

There were many comments on subparagraph (D) of § 2655.2(b)(3) of the proposed rulemaking concerning gravel. The final rulemaking states that lands containing gravel can be retained by the agency if the use is in direct connection with the agency's purpose. In response to comments which found the proposed rulemaking's "immediate future" standard not justified by the statutory definition nor administratively practical, the Department of the Interior uses the end of the appropriate selection period. This is consistent with the section on "Nature and time of use" as applied to all other Federal lands. Again, this provision reflects a compromise between those comments which indicated the agency's use should be limited to those occurring on December 18, 1971, and those comments which suggested that some uses could extend to an indefinite time in the future.

Subparagraph (E) of § 2655.2(b)(3) is a restatement of §§ 2655.0-5 (a)(3) and (b) of the proposed rulemaking. Agencies will be able to retain lands used by a third party which are directly connected to the holding agency's purposes, but lands used primarily to derive revenue will be available for Native selection.

Although two comments objected to wording in the proposed rulemaking that excludes from lands actually used, those lands which produce revenues for the holding agency if such revenue production can be defined as falling within the mandate of their statutory authority, this language has been retained. The statutory mandates can be interpreted so broadly as to cover almost any kind of revenue production, thereby defeating the intent of the Alaska Native Claims Settlement Act.

(3) *Interest to be retained by Federal agency.* This provision deals with the issue raised in § 2655.2(c)(2) of the proposed rulemaking, namely when easements will be retained and under what authority. In most instances, the holding agency shall retain a full fee interest in the tract; however, the Department has determined that rights-of-way and electronic, light or visibility clear zones may be reserved as easements under section 17(b) of ANCSA and BLM's regulations 43 CFR 2650.4-7. This is consistent with the authority and the intent of section 16(b) of ANCSA and will fully protect the Federal interest. The consultation provisions for section 17(b) easements will govern in the cases where easements are reserved.

Determination Procedures

This section has been amended to remove ambiguities and thus make the procedure easier for the public, Federal agencies and the Bureau of Land Management to understand and follow. Paragraph (a) has been reworked as suggested by comments. It incorporates information contained in the first two sentences of § 2655.2 and paragraphs (d) and (f) of the proposed rulemaking concerning notice, submission of information and time extensions. Two changes were made. At the request of one comment, the information, including maps, should be furnished in triplicate for administrative convenience. As a result of several comments, the final rulemaking provides that the State Director shall provide copies of the information submitted by the holding agency to affected Native corporations.

Another change from the proposed rulemaking is the provision for time extensions of 60 rather than 90 days. Several comments objected to the granting of a 90 day extension saying that it would unduly delay the decision process, while others opposed any extensions. Therefore, the final rulemaking provides for a 60-day extension, which should be adequate for completion of information gathering, yet at the same time reduce the time lag on a determination.

Paragraph (b) of the section in the final rulemaking on determination procedures is essentially the same as paragraph (a) in the proposed rulemaking concerning the information to be furnished by the agency. One change suggested by a comment was that the information be submitted for each discrete tract not subject to a determination. Another suggestion was

that the list of rights, interests, or permitted uses granted to others should include the dates of issuance and expiration. This information should prove helpful in making the section 3(e) determination, and consequently the suggestion was adopted.

Paragraph (c) in the final rulemaking incorporates paragraph (g) of the proposed rule pertaining to Native comments, and provides that Native corporations have the same time period for comments as agencies do to submit information. In order to allow for delays in mailing, the time period commences from the date of receipt of the information by the Native corporation.

Paragraph (d) concerning the burden of proof on the agency is a reworking of paragraph (c)(1), the second and third sentences of paragraph (d), and paragraph (e) of the proposed rulemaking. This stipulation resulted from one comment.

Paragraph (e) is a rewrite of paragraph (h) which clarifies points of confusion on the issuance of decision documents that were raised in several of the comments.

The discussion of whether land should be retained in fee or as an easement as provided in paragraph (c)(2) of the proposed rulemaking has been dealt with in the criteria section.

Adverse Decisions

This section is almost identical to the proposed rulemaking. One addition to paragraph (c) is that the State Director, Alaska, be notified of the Secretary's decision.

Paragraph (b) of § 2655.4 was modified because the comments suggested that baseless appeals might be filed on any determination that was objectionable to a Federal agency or a Native interest. Also, the first sentence was changed to indicate that this provision applies whether the appeal is lodged by an agency or a Native corporation.

Editorial changes and corrections have been made as necessary.

The principal author of this final rulemaking is Beaumont McClure, Alaska Program Staff, assisted by the staff of the Office of Legislation and Regulatory Management, Bureau of Land Management, and Susan Shands of the Office of the Solicitor, Department of the Interior.

Note.—The Department of the Interior has determined that this document is not a significant regulatory action requiring the preparation of a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Under the authority of the Alaska Native Claims Settlement Act of 1971 (43 U.S.C. 1601 et seq.), a new Subpart 2655 is added to Part 2650, Group 2000, Subchapter B, Chapter II, Title 43 of the Code of Federal Regulations as set forth below.

Guy R. Martin,

Assistant Secretary of the Interior.

October 17, 1980.

Subpart 2655—Federal Installations

Sec.

2655.0-3 Authority.
2655.0-5 Definitions.
2655.1 Lands subject to determination.
2655.2 Criteria for determinations.
2655.3 Determination procedures.
2655.4 Adverse decisions.

Authority: Alaska Claims Settlement Act of 1971 (43 U.S.C. 1601 et seq.).

Subpart 2655—Federal Installation

§ 2655.0-3 Authority.

Section 3(e)(1) of the act provides that the Secretary shall determine the smallest practicable tract enclosing land actually used in connection with the administration of Federal installations in Alaska.

§ 2655.0-5 Definitions.

As used in this subpart, the term:

(a) "Holding agency" means any Federal agency claiming use of a tract of land subject to these regulations.

(b) "Appropriate selection period" means the statutory or regulatory period within which the lands were available for Native selection under the act.

(c) "State Director" means the Director, Alaska State Office, Bureau of Land Management.

§ 2655.1 Lands subject to determination.

(a) Holding agency lands located within areas withdrawn by sections 11(a)(1), 16(a), or 16(d) of the act and subsequently selected by a village or regional corporation under sections 12 or 16, or selected by the regional corporation under sections 12 or 16, or selected by the regional corporation for southeast Alaska in accordance with section 14(h)(8)(B) are subject to a determination made under this subpart.

(b) Lands in the National Park System, lands withdrawn or reserved for national defense purposes and those former Indian reserves elected under section 19 of the act are not subject to a determination under section 3(e)(1) of the act or this subpart. Lands withdrawn under section 11(a)(3) or 11(b), except 14(h)(1)(B), of the act do not include lands withdrawn or otherwise appropriated by a Federal agency and, therefore, are not subject to a determination under section 3(e)(1) of the act of this subpart.

§ 2655.2 Criteria for determinations.

Land subject to determination under section 3(e)(1) of the act will be subject to conveyance to Native corporations if they are determined to be public lands under this subpart. If the lands are determined not to be public lands, they will be retained by the holding agency. The Bureau of Land Management shall determine:

(a) Nature and time of use.

(1) If the holding agency used the lands for a purpose directly and necessarily connected with the Federal agency as of December 18, 1971; and

(2) If use was continuous, taking into account the type of use, throughout the appropriate selection period; and

(3) If the function of the holding agency is similar to that of the Federal agency using the lands as of December 18, 1971.

(b) Specifications for area to be retained by Federal agency.

(1) Area shall be no larger than reasonably necessary to support the agency's use.

(2) Tracts shall be described by U.S. Survey (or portion thereof), smallest aliquot part, metes and bounds or protraction diagram, as appropriate.

(3) Tracts may include:

(i) Improved lands;

(ii) Buffer zone surrounding improved lands as is reasonably necessary for purposes such as safety measures, maintenance, security, erosion control, noise protection and drainage;

(iii) Unimproved lands used for storage;

(iv) Lands containing gravel or other materials used in direct connection with the agency's purpose and not used simply as a source of revenue or services. The extent of the areas reserved as a source of materials will be the area disturbed but not depleted as of the date of the end of the appropriate selection period; and

(v) lands used by a non-governmental entity or private person for a use that has a direct, necessary and substantial connection to the purpose of the holding agency but shall not include lands from which proceeds of the lease, permit, contract, or other means are used primarily to derive revenue.

(c) Interest to be retained by Federal agency.

(1) Generally, full fee title to the tract shall be retained, however, where the tract is used primarily for access, electronic, light or visibility clear zones or right-of-way, an easement may be reserved in lieu of full fee title where the State Director determines that an easement affords sufficient protection. Fee or easement is customary for the

particular use and that it would further the objectives of the act.

(2) Easements reserved in lieu of full fee title shall be reserved under the provisions of section 17(b) of the act and § 2650.4-7 of this title.

§ 2655.3 Determination procedures.

(a) The State Director shall make the determination pursuant to the provisions in this subpart. Where sufficient information has not already been provided, the State Director shall issue written notice to any Federal agency which the Bureau of Land Management has reason to believe might be a holding agency. The written notice shall provide that the information requested be furnished in triplicate to the State Director within 90 days from the receipt of the notice. Upon receipt of information the State Director will promptly provide affected Native corporations with copies of the documents. Upon adequate and justifiable showing as to the need for an extension by the holding agency, the State Director may grant a time extension up to 60 days to provide the information requested in this subpart.

(b) The information to be provided by the holding agency shall include the following for each tract which is subject to determination:

(1) The function and scope of the installation;

(2) A plottable legal description of the lands used;

(3) A list of structures or other alterations to the character of lands and their function, their location on the tract, and date of construction;

(4) A description of the use and function of any unaltered lands;

(5) A list of any rights, interests or permitted uses the agency has granted to others, including other Federal agencies, along with dates of issuance and expiration and copies of any relevant documents;

(6) If available, site plans, drawings and annotated aerial photographs delineating the boundaries of the installation and locations of the areas used; and

(7) A narrative explanation stating when Federal use of each area began; what use was being made of the lands as of December 18, 1971; whether any action has taken place between December 18, 1971, and the end of the appropriate selection period that would reduce the area needed, and the date this action occurred.

(c) The State Director shall request comments from the selecting Native corporation relating to the identification of lands requiring a determination. The period for comment by the Native corporation shall be as provided for the agency in § 2655.3(a) of this title, but shall commence from the date of receipt of the latest copy of the holding agency's submission.

(d) The holding agency has the burden of proof in proceedings before the State Director under this subpart. A determination of the lands to be retained by the holding agency under section 3(e) of the act and this subpart shall be made based on the information available in the case file. If the holding agency fails to present adequate information on which to base a determination, all lands selected shall be approved for conveyance to the selecting Native corporation.

(e) The results of the determination shall be incorporated into appropriate decision documents.

§ 2655.4 Adverse decisions.

(a) Any decision adverse to the holding agency or Native corporation shall become final unless appealed to the Alaska Native Claims Appeal Board in accordance with 43 CFR Part 4, Subpart J. If a decision is appealed, the Secretary may take personal jurisdiction over the matter in accordance with 43 CFR Part 4.5. In the case of appeals from affected Federal agencies, the Secretary may take jurisdiction upon written request from the appropriate cabinet level official. The requesting official, the State Director and any affected Native corporation shall be notified in writing of the Secretary's decision regarding the request for Secretarial jurisdiction and the reasons for the decision shall be communicated in writing to the requesting agency and any other parties to the appeal.

(b) When an appeal to a decision to issue a conveyance is made by a holding agency or a Native corporation on the basis that the Bureau of Land Management neglected to make a determination pursuant to section 3(e)(1) of the act, the matter shall be remanded by the Alaska Native Claims Appeals Board to the Bureau of Land Management for a determination pursuant to section 3(e)(1) of the act and these regulations: *Provided*, That the holding agency or Native corporation has reasonably satisfied the Board that its claim is not frivolous.

[illegible]

TESTIMONY OF SEALASKA CORPORATION
BEFORE THE
ALASKA STATE LEGISLATURE
ON
SENATE BILL NO. 802 AND HOUSE BILL NO. 885 "AN ACT RELATING TO TAX EXEMPTIONS; AND PROVIDING FOR AN EFFECTIVE DATE."

My name is Robert W. Loescher, Vice President for Resource Management, Sealaska Corporation. Thank you very much for this opportunity to present comments of Sealaska on proposed legislation Senate Bill No. 802 "An Act relating to tax exemptions; and providing for an effective date."

Sealaska Corporation supports the basic intent of the legislation which is:

- to provide for the exemption from real property taxes certain properties conveyed under the Alaska Native Claims Settlement Act

- to implement the tax exemption required by ANCSA Section 21(d) as amended by ANILCA Section 904, which read as follows:

> PL 92-203 Section 21(d): "(d) Real property interests conveyed, pursuant to this Act, to a Native individual, Native group, or Village or Regional Corporation which are not developed or leased to third parties, shall be exempt from State and local real property taxes for a period of twenty years after the date of enactment of this Act: Provided, That municipal taxes, local real property taxes, or local assessments may be imposed upon leased or developed real property within the jurisdiction of any governmental unit under the laws of the State: Provided further, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation."

"SEC. 904. Subsection (d) of section 21 of the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, 1620(d)), is amended to read: "(d)(1) Real property interests conveyed, pursuant to this Act, to a Native individual, Native Grou: Village or Regional Corporation or corporation established pursuant to section 14(h)(3) which are not developed or leased to third parties or which are used soldely for the purposes of exploration shall be exempt from State and local real property taxes for a period of twenty years from the vesting of title pursuant t- the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier, for those interests to such individual, group, or corporation: Provided, That municipal taxes, local real property taxes, or local assessments may be imposed upon any portion of such interest within the jurisdiction of any governmental unit under the laws of the State so long as such portion is leased or being developed: Provided further, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation."

to define the term "developed" as used in ANCSA Section 21(d) inorder to establish the point in time at which exempted property becomes taxable under State and local governmental authorities.

Of particular concern to Sealaska Corporation and other timberland owners is the application of the propo ed legislation to Forest land throughout Alaska. The proposed language included within the proposed AS 29.53.020 (k)(1) which reads as follows - is acceptable:

"Forest lands, as defined in AS 41.17.950(6), shall be deemed "developed" when gainful or productive present use occurs and the owner of the forest land files a notice of conversion under AS 41.17.110."

The effect of this provision is to exempt developed or

undeveloped forest land unless the landowner notices the State of Alaska pursuant to AS 41.17.110 that he intends to reclassify or convert his forest land after timber harvesting to other uses such as residential, commercial or industrial purposes. The provision in the Forest Resources and Practices Act reads, as follows:

> "Sec. 41.17.110. Conversion of forest land to other uses. An intention to convert forest land to other uses after timber harvesting may be stated in the notification submitted under AS 41.17.090. In that event, reforestation rquirements adopted under this chapter do not apply, except that conversion shall be completed during the time set by regulation for minimum reforestation of the land, and other requirements for revegetation may be imposed to the extent permitted by law. If the commissioner finds at any time that the responsible party has failed to conform to the intent to convert as stated in the notification, the commissioner shall revoke approval of the conversion and require full compliance with reforestation requiremens. (Sec. 1 ch 108 SLA 1978)"

Our concern is that the definition "real property" which is used in ANCSA and Title 29 not include and specifically separate reference or application to "forest land" - where taxation is a consideration. Currently, the definition of these terms in Alaska statutes are, as follows:

> "AS 29.73.010 (13) "real property" means land and improvements and all possessory rights and privileges appurtenant to the property and includes personal property affixed to the land or improvements."
>
> "AS 41.17.950 (6) "forest land" means land stocked or having been stocked with forest trees of any size and not currently developed for nonforest use, regardless of whether presently available or accessible for commercial purposes, and includes any such land under state, municipal, or private ownership;"

Sealaska Corporation wants to make it perfectly clear that it is not opposing consideration of taxation of forest lands at this time or in the future, but is seriously concerned about the basis

or philosophy of any tax program on forest resources considered by the legislature or advanced by timber industry. This proposed legislation "touches the edge" of that discussion in an incomplete manner. By this we mean that:

- forest lands should be treated on a resource severance tax basis rather than on real property basis as envisioned in Title 29.45.010 Municipal Property Tax

- forest lands are a resource of State concern and not a resource which should be dealt with in Title 29 Municipal Governments. Oversight, regulation and any taxation of the forest resource should be administered by State government and not by local governments.

This philosophy is clearly expressed in the legislature's Declaration of Intent AS 41.17.010 of the Forest Resources and Practices Act adopted three years ago, as follows:

> Sec. 41.17.010. Declaration of intent. The legislature declares that
>
> (1) the forest resources of Alaska are among the most valuable natural resources of the state, and furnish timber and wood products, fish and wildlife, tourism, outdoor recreation, water, soil, air, minerals, and general health and welfare;
> (2) economic enterprises and other activities and pursuits derived from forest resources warrant the continuing recognition and support of the state;
> (3) the state has a fundamental obligation to insure that management of forest resources guarantees perpetual supplies of renewable resources, provides nonrenewable resources in a manner consistent with that obligation, and serves the needs of all Alaska for the many products, benefits, and services obtained from them;
> (4) government administration of forest resources should combine professional management services, regulatory measures, and economic incentives in a complementary fashion, and should draw upon the expertise of professional foresters in conjunction with other disciplines;
> (5) under the leadership of the Department of

Environmental Conservation, the state should exercise its full responsibility and authority for control of nonpoint source pollution with respect to the Federal Water Pollution Control Act, as amended; (6) subject to Sec. 307(f) of the Coastal Zone Management Act of 1972 (P.L. 92-583), the provisions of this chapter shall be the basis for forest management standards, policies, and guidelines developed under the Alaska Coastal Management Act. (Sec. 1 ch 108 SLA 1978)

- any forest resource tax program by the State of Alaska should consider, at a minimum, equal assessment or parity between federal and state and even local forest lands in the application of the (PILOT) payment in lieu of taxes by government timberland holders or lease holders and the level of taxes to be applied to private landowners. These resources compete in the market place. It is important not to create an artificially induced disincentive by an inequitable tax program as a part of development of timber resources in Alaska.

Additionally, it is hoped, that in the future if a tax program is designed for forest resources that such a program would recognize and provide credits for those forest land owners who make every effort and investment to meet environmental restrictions and requirements, reforestation and other similar requirements now incorporated in the public laws and are becoming a matter of business practice.

Sealaska Corporation urges your positive consideration of this bill this session. We are available to work and discuss the many aspects of forest land taxation at any time, now or in the future. Thank you.

Kie

Something to think about:

Assume "develop" not to mean physical change or improvement. Assume it to mean the generation of income through use of the land (i.e., farming, foresting, mining...exclusively that sort of development).

When you read sec. 21(d) with that thought in mind, some otherwise ambiguous terms fall into place. That is the main reason our current interpretations are different from those we had originally.

In the expression "developed or leased", the two words seem to be non-related, although in context they appear to be used almost interchangeably in several places. If you adopt the definition stated above it makes sense for Congress to have used them in that manner. The common ground shared by those terms is the generation of income through use (leasing, foresting, etc.) of the land.

The use of the term "exploration" also fits nicely into that train of thought. Clearly, exploration is necessary before productive use of the land can occur (where subsurface, non-renewable resources are concerned). ANCSA, calls for the retention of the exemption until exploration ceases; or until generation of income through use of the land begins.

The link seems legitimate and certainly provides consistency...something we have found lacking in any other interpretation.

ANCSA says the property is taxable "for so long as such portion is leased or being developed"... a very strong inference that as soon as "development" (generation of income) ceases, the property again becomes exempt for the remaining period of the moratorium. Once again, the Corporation uses the income from use of the land to pay taxes. When the income stream ceases, there is no longer any capital for payment of taxes.

Another very important consideration is that if Congress intended for developed (as in subdivision "development") land to be taxed, why didn't they say so? There is no reference to the sale of developed land, nor the thought that the land should be taxed when "developed" and made ready for sale. As a matter of fact, there is no reference whatever to the term "sale" in Sec. 21(d).

Let's consider whom we're dealing with in trying to interpret Congress' thoughts in drafting ANCSA. The typical player was probably some guy from the midwest who had never even seen Alaska, and who had a mental picture of the State which was about as far from realistic as it could possibly be.

I'm sure he was picturing Eskimos, igloos and icebergs on the one hand, and the infamous Anchorage oil and industry magnates on the other. I'm equally sure that the last thing on his mind was the subdivision, development and sale of residential property (Who the hell would want to live at that place, anyway?).

So the plain fact as we see it is that Congress did not consider the subtleties of application that we have all been discussing in our wrestling match with Sec. 21(d). They very likely only considered productive development of the earth (extraction of minerals, etc.) in drafting the language. If that thought is valid, and if their view of Alaska was likewise inaccurate, how could they possibly be thinking of subdivision development and resale when drafting the exemption?

What all this leads us to is the following extension of thought:

1. Congress did not consider subdivision resale one way or the other, and therefore Sec. 21(d) contains no reference to it.

2. If 21(d) contains no reference to it, then it is not viable to attach that definition to the word "developed".

3. ANCSA is definitely Indian Law and therefore should be interpreted in favor of the Alaska Native.

4. If it is valid to theorize that the Corporation might be forced to sell subdivided property in order to pay the taxes levied against it, it should not be taxed. Tax levies against such land would (at least in theory) be in direct opposition to the basic purpose of ANCSA.

Therefore, ANCSA land, even if subdivided and offered for sale, might not be taxable. Frankly, we believe the courts would see it that way.

I have attached an excerpt from the very recent study on supply of, vs. demand for, lands in the State. The study was done by Ken Gain, MAI, who has an excellent reputation statewide.

My thought was that with State disposals, municipal disposals and, potentially ANCSA disposals flooding the private land market, there might be virtually no demand for subdivided land, and therefore, we might be unnecesserily concerned over this problem. I still think that is probably the case, but Mr. Gain additionally points out that ANCSA land managers are seriously considering lease rather than sale of the lands.

By <u>anyone's</u> definition the leased lands will be be taxable.

I guess the bottom line here is, that from a practical point of view, I sincerely think we have made too much of this temporary, potential problem.

ASSESSMENT OF MARKET DEMAND FOR STATE LAND

for

Division of Land & Water Management
Department of Natural Resources
State of Alaska

January 11, 1982

by:

REAL ESTATE SERVICES COMPANY

Project Team:
Kenneth Jay Gain, MAI, SRS, CCIM
Project Coordinator and Principal Consultant
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Donald Graham
Associate Consultant

Native Corporation Land Offerings. Details of Native corporation land offerings are discussed in the appropriate Regional Land Market Surveys. Most Native corporations have limited plans or no plans for disposal of land to the public in the next 5 years. Some subdivisions have been developed for shareholder distribution, and some resales to nonshareholders have occurred. To cope with impending substantial real property taxation in the 1990s, a reasonable assumption is that more Native disposals will occur in the second half of the 1980s, which will satisfy some urban and remote land demands. However, little information is available presently. An issue being addressed by many Native corporation land managers is the choice of disposal by long term lease with no future purchase rights, and disposal by sale. Of those interviewed, most managers preferred land leasing. As the demand for State land includes a segment of buyers [illegible] priced out of the private land market and desiring the status of land ownership, the degree of competition which Native land leases will offer State fee interest sales is unknown.

Introduced: 2/16/82
Referred: Community & Regional
Affairs and Finance

IN THE SENATE BY FERGUSON

SENATE BILL NO. 802

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to tax exemptions; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 29.53.010(a) is amended by adding a new sub-paragraph to read:

(9) real property or interests therein which are exempt from taxation under the Alaska Native Claims Settlement Act, as amended by the Alaska National Interest Lands Conservation Act (43 USC 1620(d)(1), as more fully provided in (k) of this section.

* Sec. 2. AS 29.53.020 is amended by adding a new paragraph to read:

(k) The tax exemption required by the Alaska Native Claims Settlement Act, as amended by the Alaska National Interest Land Conservation Act (43 USC 1620(d)(1), shall be implemented according to the following conditions and interpretations:

(1) The term "developed" shall mean a purposeful modification of the property from its original state which effectuates a condition for gainful or productive present use without further substantiation modification. Developed property, in order to remove the exemption, must be developed for purposes other than exploration, and be limited to the smallest practicable tract of the property actually used in the developed state. Surveying, platting, construction of roads, providing utilities or other similar actions normally considered to be component parts of the development process [do not necessarily] create a developed state within the meaning of this sub-section. Forest lands,

as defined in AS 41.17.950(6), shall be deemed "developed" when gainful or productive present use occurs and the owner of the forest land files a notice of conversion under AS 41.17.110.

(2) The term "lease" means a grant of primary possession entered into for gainful purposes with a determinable fee remaining in the hands of the grantor. With respect to lease which conveys rights of exploration and development, this exemption shall continue with respect to that portion of the leased tract which is used solely for the purpose of exploration.

(3) If the property or interest therein reverts to an undeveloped state, or if the lease is terminated, or if property which is currently taxed should be used for purposes of exploration, the exemption shall be reinstated, subject to the provisions of this subsection.

* Sec. 3. Sections 1 and 2 of this Act are retroactive to December 31, 1980.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

CONSTRUCTION AND GENERAL LABORERS LOCAL 942, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AND TEAMSTERS LOCAL 959, STATE OF ALASKA.

Plaintiffs,

vs

CITY AND BOROUGH OF SITKA; THE ASSEMBLY OF THE CITY AND BOROUGH OF SITKA, State of Alaska; FERMIN B. GUTIERREZ, City Administrator, City and Borough of Sitka, State of Alaska; EDMUND N. ORBECK, Commissioner, DEPARTMENT OF LABOR, State of Alaska; ALASKA LUMBER AND PULP COMPANY, INC., A Corporation,

Defendants.

No. 1SI-79-145 CIV

MEMORANDUM OF DECISION

I Statement of the Case:

Before this court are reciprocal motions for summary judgment. Plaintiffs and defendant, Alaska Lumber & Pulp Co., Inc. joined by defendants, Edmund N. Orbeck and Department of Labor both contend that they are entitled to summary judgment as a matter of law pursuant to Alaska R. Civ. Pro. 56.

This case arises out of the construction of the Green Lake hydroelectric project and the contract for the sale and clearing of timber between ALP and the City and Borough of Sitka. The issue is whether wage rates under the contract for the sale of timber and reservoir clearing is governed by the provision of Alaska's Little Bacon-Davis Act, AS 36.05.010 et seq. ALP payed its employees less than the prevailing wage rates set by the Division of Wages and Hours, Department of Labor, State of Alaska.

In March 1979, the City of Sitka published its intent to receive sealed bids for the construction of various portions of the Green Lake Project including the clearing of the timber in the area. On April 19, 1979, ALP submitted an irrevocable offer to purchase the commercial timber and to accomplish the clearing in accordance with the pertinent specifications of Contract No. 3, Green Lake Project Dam and Power Plant. The City of Sitka then modified its notice to prospective bidders with respect to the Reservoir Clearing Contract as follows:

> a. The Owner will award a separate Contract for substantially all of the reservoir clearing. This reservoir clearing contract award is contingent upon the clearing contract paying the Owner a predetermined contract amount for the value of the merchantable timber.
>
> b. The Owner has obtained an offer for the purchase of the timber in the amount of Two Million Dollars ($2,000,000.00). In addition, the clearing contractor will perform the reservoir clearing pursuant to the requirements of this Contract No. 3 at no additional cost to the Owner. A copy of the referenced offer is attached hereto as Attachment I to these Special Instructions to Bidders.
>
> c. Each Bidder may, at its option, at the same time of submitting its proposal on Contract No. 3, submit a separate proposal in a separate envelope for clearing the reservoir including sale of merchantable timber, subject to the same terms and conditions as stated in Attachment I to these Special Instructions to Bidders provided that:
>
> (1) The payment to the Owner for the value of the merchantable timber shall exceed the amount stated in the referenced Attachment I.
>
> (2) Payments shall be made in the same manner and proportions as stated in the referenced Attachment I.
>
> d. Bidders shall condition their proposals for the separate reservoir clearing contract to enter into an agreement with the Owner only if ther proposal on Contract Number 3 is accepted by the Owner.

On June 13, 1979, the City of Sitka signed a separate contract with ALP for the sale of all timber within the designated site as set out in the specifications of Contract No. 3. Included in the timber sale contract was language which stated

hat Contract No. 3 was incorporated by reference. The wage ates in Contract No. 3 are specified as follows:

> a. The Contractor or its subcontractor shall pay wages which are not less than the current prevailing rate of wages as determined by the Alaska Department of Labor for labor of a similar nature in the region in which the work is done. The rate of wages shall be adjusted to the wage rate for each pay period as applicable under AS 36.05.010.

II Administrative Action:

This case was originally filed by individuals claiming ights as union members and taxpayers against the city, state nd ALP. The primary remedy sought was an injunction. When he temporary restraining order was denied the parties entered nto a stipulation that substantially changed the issues raised.

This metamorphosis is relevant to resolving the first atter in dispute: whether this court functions as a reviewing ourt under an administrative appeal or as a court exercising riginal jurisdiction. Plaintiffs claim this is an original ction seeking declaratory relief. Defendants claim that this is n administrative appeal subject to appellate review rules as o interpretation of statutes and as to exhaustion of adminis- rative remedies.

This court finds that the nature of the action is one for declaratory relief and is not an appeal. The primary reason for this conclusion is that no adjudication ever took place before the Wage and Hour Division, Department of Labor, State of Alaska Division. The authority of the Division to investigate and hold hearings is found in AS 36.05.030. This was not done. See admissions by the Division found in Exhibit C, attached to ALP's reply memorandum and Exhibit K, attached to plaintiffs' memorandum in opposition.

In April 1979, the City of Sitka received a form letter from the Wage and Hour Division, Alaska Department of Labor --

advising them that the work to be done by ALP was covered by Title 36. The City of Sitka did not agree. Subsequently, on May 15, 1979, an advisory memorandum from the attorney general's office to the Director of the Wage and Hour Division stated that the primary purpose of the clearing contract was the sale of timber rather than construction of a public work and therefore was not subject to the provisions of Title 36.

The Director of the Wage and Hour Division was thereafter asked orally by plaintiffs' counsel if a formal determination had been made by the Division as to whether the land clearing contract was covered. The oral response was that no formal or written determination had been made and none would be made. See admissions attached as Exhibit K to plaintiffs' reply memorandum. Only a "tentative conclusion" was reached by the Division. Answer to request No. 7, page 3, Exhibit C to ALP's reply.

This court concludes from the record of this matter that the Division of Wage and Hours has not made a determination on the issues raised by the parties. Not only is the Division's position uncertain but in any event no effort was expended by the Division to obtain all the facts and apply the law to those facts. See answer to request No. 8, page 4, Exhibit C to ALP's reply. Because no administrative decision was made by the Division this matter will not be treated as an administrative appeal. Therefore, the standards of review suggested by defendants will not be followed. The action, or more appropriately lack of action, by the Division has no significance in the decision to be made here. This court's decision as to statutory construction is based on the merits of the arguments put forth by the parties.

/ / /

/ / /

III Interpretation of AS 36.05:

All parties have moved for a summary judgment, however plaintiffs had, on April 18, 1980, filed a statement of genuine issues as to the activities of the Division of Labor. As reflected in the preceding comments, the court does not find a genuine issue of material fact as to what there transpired.

The court's request for briefing on remanding this case to the Division of Labor was generated by a related concern, ie that the legislative policy stated in AS 36.05.010 et seq might best be advanced by giving that agency a chance to apply its expertise. All parties opposed such a remand. The court concludes the record is adequate for a decision on the merits.

The question is whether the activities agreed to by ALP is within AS 36.05.010, ie whether work done by ALP under the contract was "work performed on public construction." AS 36.95.010 defines "public construction" to mean "the on-site field surveying, erection ... of highways or other improvements to real property ..." There is no dispute that the construction of Greenlake dam is within the definition of public construction. What is in dispute is whether the activities of ALP are also included within the definition of "public construction."

The social premise of AS 36.05.010 is that workers on government jobs should be paid a wage equal to that paid by other employers in the area. The rationale of this premise is that the government should not be a party to a contract that pays directly or indirectly a wage rate less than that prevailing in the area where the work is to be done. The legislative concern in with the wage earner.

The function of the court in to give a reasonable interpretation of AS 36.05.010 and specifically the definition

of public construction contained in AS 36.95.010. The meaning of these sections should give effect to the legislative purpose where possible. Lacking controlling Alaska authority, the decisional law of the federal act and similar state acts cited by the parties establish the guidelines for the decision of this court.

The plaintiff charactar'zes the agreement as a "land clearing contract" whereas defendants say it is a contract for sale and cutting of timber. The agreement contains aspects of both. Affidavits have been submitted and reviewed which compare the instant contract with a typical forest service timber sale contract. These affidavits seek to balance the contractural commitments toward one view or the other. From ALP's view the contract is entered into because of its need for merchantable timber. From city's point of view the reason for the contract is to cl-a: the land so that the dam could be built. The land was acquired from the state for the purpose of constructing the dam and its watershed. The city entered into the contract under its authority to build a dam.

I find that after considering all of the circumstances relevant to this agreement that the predominant charactaristic is that the work to be done is an integral part of the dam construction and is therefore "public construction". The work is an integral part of the dam because of the following factors which are not intended to be all inclusive do suggest the primary factors:

1. the clearing of the land is necessary for the dam;
2. the clearing must occur within a reasonable time of the dam construction;
3. the interrelationship of the cutting and clearing with the dam construction is strong and requires management control by the city;

4. the specifications of the contract are dictated by the needs of the dam construction, and

5. the work is being performed on the dam site.

The city and ALP, parties to the contract, now stress the separateness of the clearing from the dam itself and that the two contracts were awarded together because of the state's delay in conveying the land. The fact that the land clearing work was initially included in the bid offering and the "prevailing wage" to be paid is only one circumstance from which I infer that this is "public contruction" under AS 36.05.010 and AS 36.95.010. More important is the nature of the work to be done and how it relates to the dam.

The work being done is to clear the land. The by-product of this clearing is merchantible timber, hence the price paid by ALP. However from the government's point of view this is incidental. The focus of the rationale of AS 36.05.010 is on how the government pays public construction employees not on whether the contractor or subcontractor has separate economic aims. The intent of ALP and the city is not controlling. The savings that may result to the city if contrary to the purpose of AS 36.05.010 must be over ridden where, as here, the work involves public construction, now therefor

Plaintiffs' motion for summary judgment is granted.

ISSUED this 23 day of October, 1980.

Duane Craske
Superior Court Judge

COPIES TO:

Bruce Monroe, Esq.
James F. Clark, Esq.
Bruce M. Botelho, Esq.
Peter B. Ballgren, Esq.

CIRI COOK INLET REGION INC.

April 16, 1982

Kil

Patrick M. Anderson
Office of Legislative Affairs
Municipality of Anchorage
Pouch 6-650
Anchorage, Alaska 99502

RE: ANCSA § 21(d) and CSSB 802

Dear Mr. Anderson:

This letter is to confirm the understanding reached on April 15, 1982 between Cook Inlet Region, Inc. (CIRI) and the Municipality of Anchorage (Municipality). With respect to residential subdivisions within the Municipality, individual lots therein shall be deemed "developed" within the meaning of ANCSA § 21(d), as amended, when the particular lot has (a) all requisite utility and sewer lines in place on the lot line, (b) completed road access, and (c) met all other legal requirements for sale.

This understanding, which represents a compromise between CIRI and the Municipality regarding certain specific issues, is intended to apply solely to CIRI lands within the Municipality, and is contingent upon enactment by the Alaska Legislature of the Committee Substitute for Senate Bill 802 (C&RA).

Very truly yours,

COOK INLET REGION, INC.

Stephen C. Hillard
Vice President & General Counsel

SCH:pl

cc: Senator Arliss Sturgelewski
Senator Frank Ferguson
Senator Donald Gillman
Richard Aks

CIRI BUILDING 2525 "C" STREET P.O. DRAWER 4-N ANCHORAGE ALASKA 99509 PHONE 274-8638 TELECOPIER 907-279-8638

State of Alaska
Department of Community & Regional Affairs

Date: March 4, 1982

POSITION PAPER

Requested by: Senate Community and Regional Affairs

Subject: Senate Bill No. 802 / House Bill No. 885

Departmental Position: Support With Amendments

Remarks:

HISTORY AND RATIONALE OF SB 802 AND HB 885

History:

In December, 1971 Congress adopted the Alaska Native Claims Settlement Act (ANCSA). In December of 1980, the Alaska National Interest Lands Conservation Act (ANILCA) was passed into federal law amending certain sections of ANCSA.

Section 21(d) of the amended act provided for a property tax moratorium on ANCSA lands for a period of twenty years, subject to certain provisions within the act. That section reads as follows:

TAX MORATORIUM EXTENSION

Sec. 904. Subsection (d) of section 21 of th ska Native Claims Settlement Act, as amended (43 U.S.C 1620(d)), is amended to read:

"(d)(1) Real property interests conveyed, pursuant to this Act, to a Native individual, Native Group, Village or Regional Corporation or corporation established pursuant to section 14(h)(3) which are not developed or leased to third parties or which are used solely for the purposes of exploration shall be exempt from State and local real property taxes for a period of twenty years from the vesting of title pursuant to the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier, of those interests to such individual, group, or corporation: Provided, That municipal taxes, local real property taxes, or local assessments may be imposed upon any portion of such interest within the jurisdiction of any governmental unit under the laws of the State which is leased or developed for purposes other than exploration for so long as such portion is leased or being developed: Provided further, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interest shall be taxable to the same extent as

> such revenues or proceeds are taxable when received by a non-Native individual or corporation.
>
> "(2) Any real property interest, not developed or leased to third parties, acquired by a Native individual, Native Group, Village or Regional Corporation, or corporation established pursuant to section 14(h)(3) in exchange for real property interests which are exempt from taxation pursuant to paragraph (1) of this subsection shall be deemed to be a property interest conveyed pursuant to this Act and shall be exempt from taxation as if conveyed pursuant to this Act, when such an exchange is made with the Federal Government, the State government, a municipal government, or another Native Corporation, or, if neither party to the exchange receives a cash value greater than 25 per centum of the value of the land exchanged, a private party. In the event that a Native Corporation simultaneously exchanges two or more tracts of land having different periods of tax exemption pursuant to subsection (d), the periods of tax exemption for the exchanged lands received by such Native Corporation shall be determined (A) by calculating the percentage that the acreage of each tract given up bears to the total acreage given up, and (B) by applying such percentages and the related periods of tax exemption to the acreage received in exchange".

A conspicuous lack of definitions for key terms along with certain ambiguities in Sec. 21(d) have caused some interpretation problems for parties impacted by the legislation. ANCSA Corporations have complained of unequal treatment from one taxing jurisdiction to the next, and local assessors have voiced their frustration in attempting to interpret the language. The situation is further complicated by the fact that there is almost no legislative history available for guidance on that section.

The proposed language is intended to provide some clarification of the section and to furnish a means for the proper implementation of the moratorium. It has been drafted in an effort to more closely define those terms which have caused problems or created concerns, and in an attempt to provide some equity of application of Sec. 21 (d) statewide.

Rationale:

The logic followed in drafting the proposed language was drawn from the basic intent of Congress in their adoption of ANCSA. Generally, that intent was to allow Alaska's Native community a reasonable amount of time to develop the lands conveyed to them pursuant to the Act and the opportunity to enter the

economic mainstream of society without being forced to make premature or unwise decisions in order to pay property taxes.

The purpose of Section 21(d) was to assure that local taxes would not be levied on the lands for twenty years, or until such time as they were developed or leased. Based upon consultation with individuals familiar with the legislative history of ANCSA and ANILCA, it appears that Congress intended the taxability of ANCSA lands be linked to the generation of income, thereby providing the revenues necessary to pay property taxes without risking loss of their lands through taxation.

Brief explanation of specific terms and concerns with the bill follow:

29.53.020 (k)(1)

Page 1, line 20:

The term "developed" has been the most controversial one in the Act. The common understanding seems to be that the term means an intentional "improvement" or "physical alteration" of the property. For purposes of Sec. 21 (d) however, it appears Congress intended the word "developed" to mean an intentional improvement of the property for the purpose of producing income through use of the land. In the application of Sec. 21 (d), it is not important whether the development occurred prior to conveyance or afterward. Neither does it matter who developed the property. It is only important that as a direct result of the modification, the property was made "ripe" for the production of income.

Essentially, it appears that the taxation of the property should be triggered by its production of income. However, if it is improved to a point of readiness, but the corporation elects, for its own benefit, not to commence income producing activities, taxability is triggered as if those activities had actually begun.

Page 1, line 25:

The term "smallest practicable tract" means that portion of a tract of land which is identified with the income stream (or potential income stream as explained above). The term intends to include the fully developed portion of the land, and possibly a peripheral buffer area if it is reasonably necessary for the productive use of the site. Where municipal zoning setbacks are required, it would be logical to use that setback distance for delineation of the buffer area.

Page 1, line 26:

The portion which says "Surveying, platting, construction of roads, etc." intends to safeguard against loss of the exemption before the property is fully developed. Again, the language attempts to link the definition of "develop" to the generation of income. As a general rule, the income should be produced before the exemption is lost, thereby providing a means to pay the taxes.

Local assessors across the State have unanimously voiced strong objection to that language. They are concerned that it might be construed to say that ANCSA property could be fully developed and still be exempt from taxation. The assessors have said that at some point in the subdivision and development of ANCSA lands for resale purposes, the properties should become taxable.

Page 1, line 29 through page 2, line 3:

This language contradicts the language on Page 1, lines 21-22. In addition, the portion which references AS 41.17.110 in effect allows the property owner to determine whether his own property is exempt. According to the Department of Natural Resources, it is not required that the owner of forest lands file "...a notice of conversion...", unless:

1. The property is being converted to non-forest use, and
2. The amount of property to be converted is in excess of ten acres, and
3. The property will be converted to commercial use.

Clearly, under those conditions, the owner of the forest lands could harvest the trees from the property and construct a hotel on up to nine acres of the land without being required to file a notice or conversion with DNR. Under the current language, neither the commercially cut lands nor the hotel would be taxable. To be workable, the Department strongly suggests that the language be changed as follows:

"...as defined in AS 41.17.950(6),shall be deemed "developed" when a condition for gainful or productive present use [OCCURS] exists. [AND THE OWNER OF THE FOREST LAND FILES A NOTICE OF CONVERSION UNDER AS 41.17.110.]."

Page 2, line 10:

The word "underdeveloped" in this line is a typographical error and should have been "undeveloped". We have confirmed that fact with the drafters of the bill.

29.53.020 (k)(3)

Page 2, lines 10-14:

This paragraph is simply a rewording of certain language from ANCSA Sec. 21(d). The term on line 13, "...subject to the provisions of this subsection." was included so that no individual provision could necessarily reinstate the exemption. For example, if a lease were terminated, but the property were still to be "developed" (as described in 29.53.020 (k)(1)) the exemption would not be reinstated.

The Department feels it is necessary to define the term "exploration" within the bill and suggest the following language be added under 29.53.020 (k)(4):

For purposes of this section, the term "exploration" shall mean the examination and investigation of undeveloped land believed to contain subsurface non-renewable resources.

STATEMENT

OF

COOK INLET REGION, INC.

ON

SENATE BILL NO. 802

Community & Regional Affairs
Alaska State Senate
March 4, 1982

by: Lance W. Anderson
Vice President, Finance
Cook Inlet Region, Inc.

STATEMENT

OF

COOK INLET REGION, INC.

ON

SENATE BILL NO. 802

MARCH 4, 1982

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1620(d), as amended, provided a tax exemption for real property and interests therein conveyed to individuals and native corporations under the Settlement Act. The exemption exists for twenty years from the date of statuatory vesting of title or interim conveyance or patent, whichever is earlier, and is terminated during the period the property is "developed" or "leased to third parties" for purposes other than exploration. While the legislative history of the Settlement Act provides little guidance as to the correct definition of the term, it is clear that the federal statute must be given the broadest reasonable interpretation in favor of the tax-exempt status. Federal courts, including the United

States Supreme Court, have held that federal statutes affecting native lands are to be construed strictly in favor of the native land-holder. This policy has been followed particularly with respect to tax exemptions for native lands. In the absence of an explicit tax exemption under state law, each borough assessor would have to reach an independent determination of the meaning of the federal statute. The opportunities for inconsistency and a costly and unnecessary litigation burden on both the boroughs and the native corporations is clear. The present bill will resolve the most troublesome problem, that of the definition of the terms "developed" and "leased to third parties" by providing a uniform tax exemption which is at least as broad as that provided by the federal statute. This will insure uniformity of application among the boroughs and bring state law into line with the federal exemption.

In summary, CIRI supports passage of Sentate Bill No. 802 because:

1. It embodies and implements the most basic principle underlying interpretation of ANCSA § 21(d) -- that the tax exemption should be construed in favor of the native land-holder, and

2. By providing broad definitions of the terms "lease" and "developed", it automatically will resolve the vast majority of present tax exemption issues and will avoid inconsistency and a costly and unnecessary litigation burden on both the boroughs and the native land owners.

Draft

TESTIMONY OF SEALASKA CORPORATION
BEFORE THE
ALASKA STATE LEGISLATURE
ON
SENATE BILL NO. 802 "AN ACT RELATING TO TAX EXEMPTIONS; AND PROVIDING FOR AN EFFECTIVE DATE."

My name is Robert W. Loescher, Vice President for Resource Management, Sealaska Corporation. Thank you very much for this opportunity to present comments of Sealaska on proposed legislation Senate Bill No. 802 "An Act relating to tax exemptions; and providing for an effective date."

Sealaska Corporation supports the basic intent of the legislation which is:

- to provide for the exemption from real property taxes certain properties conveyed under the Alaska Native Claims Settlement Act

- to implement the tax exemption required by ANCSA Section 21(d) as amended by ANILCA Section 904, which read as follows:

PL 92-203 Section 21(d): "(d) Real property interests conveyed, pursuant to this Act, to a Native individual, Native group, or Village or Regional Corporation which are not developed or leased to third parties, shall be exempt from State and local real property taxes for a period of twenty years after the date of enactment of this Act: Provided, That municipal taxes, local real property taxes, or local assessments may be imposed upon leased or developed real property within the jurisdiction of any governmental unit under the laws of the State: Provided further, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation."

"SEC. 904. Subsection (d) of section 21 of the Alaska Native

Claims Settlement Act, as amended (43 U.S.C. 1601, 1620(d)), is amended to read: "(d)(1) Real property interests conveyed, pursuant to this Act, to a Native individual, Native Group, Village or Regional Corporation or corporation established pursuant to section 14(h)(3) which are not developed or leased to third parties or which are used soldely for the purposes of exploration shall be exempt from State and local real property taxes for a period of twenty years from the vesting of title pursuant to the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier, for those interests to such individual, group, or corporation: Provided, That municipal taxes, local real property taxes, or local assessments may be imposed upon any portion of such interest within the jurisdiction of any governmental unit under the laws of the State so long as such portion is leased or being developed: Provided further, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation."

- to define the term "developed" as used in ANCSA Section 21(d) inorder to establish the point in time at which exempted property becomes taxable under State and local governmental authorities.

Of particular concern to Sealaska Corporation and other timberland owners is the application of the proposed legislation to Forest land throughout Alaska. The proposed language included within AS 29.53.020 (k)(1) which reads as follows - is acceptable:

> "Forest lands, as defined in AS 41.17.950(6), shall be deemed "developed" when gainful or productive present use occurs and the owner of the forest land files a notice of conversion under AS 41.17.110."

The effect of this provision is to exempt developed or undeveloped forest land unless the landowner notices the State of Alaska pursuant to AS 41.17.110 that he intends to reclassify or convert his forest land after timber harvesting to other uses such as residential, commercial or industrial purposes. The

provision in the Forest Rsources and Practices Act reads, as follows:

> "Sec. 41.17.110. Conversion of forest land to other uses. An intention to convert forest land to other uses after timber harvesting may be stated in the notification submitted under AS 41.17.090. In that event, reforestation rquirements adopted under this chapter do not apply, except that conversion shall be completed during the time set by regulation for minimum reforestation of the land, and other requirements for revegetation may be imposed to the extent permitted by law. If the commissioner finds at any time that the responsible party has failed to conform to the intent to convert as stated in the notification, the commissioner shall revoke approval of the conversion and require full compliance with reforestation requiremens. (Sec. 1 ch 108 SLA 1978)"

Our concern is that the definition "real property" which is used in ANCSA and Title 29 not include and specifically exclude reference or application to "forest land" - where taxation is a consideration. Currently, the definition of these terms in Alaska statutes are, as follows:

> "AS 29.78.010 (13) "real property" means land and improvements and all possessory rights and privileges appurtenant to the property and includes personal property affixed to the land or improvements."

> "AS 41.17.950 (6) "forest land" means land stocked or having been stocked with forest trees of any size and not currently developed for nonforest use, regardless of whether presently available or accessible for commercial purposes, and includes any such land under state, municipal, or private ownership;"

Sealaska Corporation wants to make it perfectly clear that it is not opposing consideration of taxation of forest lands at this time or in the future, but is seriously concerned about the basis or philosophy of any tax program on forest resources considered by the legislature or advanced by timber industry. This proposed legislation "touches the edge" of that discussion in an incomplete manner. By this we mean that:

- forest lands should be treated on a resource severance tax basis rather than on real property basis as envisioned in

- o forest lands are a resource of State concern and not a resource which should be dealt with in Title 29 Municipal Governments. Oversight, regulation and any taxation of the forest resource should be administered by State government and not by local governments.

This philosophy is clearly expressed in the legislature's Declaration of Intent AS 41.17.010 of the Forest Resources and Practices Act adopted three years ago, as follows:

Sec. 41.17.010. Declaration of intent. The legislature declares that

(1) the forest resources of Alaska are among the most valuable natural resources of the state, and furnish timber and wood products, fish and wildlife, tourism, outdoor recreation, water, soil, air, minerals, and general health and welfare;
(2) economic enterprises and other activities and pursuits derived from forest resources warrant the continuing recognition and support of the state;
(3) the state has a fundamental obligation to insure that management of forest resources guarantees perpetual supplies of renewable resources, provides nonrenewable resources in a manner consistent with that obligation, and serves the needs of all Alaska for the many products, benefits, and services obtained from them;
(4) government administration of forest resources should combine professional management services, regulatory measures, and economic incentives in a complementary fashion, and should draw upon the expertise of professional foresters in conjunction with other disciplines;
(5) under the leadership of the Department of Environmental Conservation, the state should exercise its full responsibility and authority for control of nonpoint source pollution with respect to the Federal Water Pollution Control Act, as amended;
(6) subject to Sec. 307(f) of the Coastal Zone Management Act of 1972 (P.L. 92-583), the provisions of this chapter shall be the basis for forest management standards, policies, and guidelines developed under the Alaska Coastal Management Act. (Sec. 1 ch 108 SLA 1978)

- o any forest resource tax program by the State of Alaska should consider, at a minimum, equal assessment or parity between federal and state and even local forest lands in the

application of the (PILOT) payment in lieu of taxes by government timberland holders or lease holders and the level of taxes to be applied to private landowners. These resources compete in the market place. It is important not to create an artificially induced disincentive by an inequitable tax program as a part of development of timber resources in Alaska.

Additionally, it is hoped, that in the future if a tax program is designed for forest resources that such a program would recognize and provide credits for those forest land owners who make every effort and investment to meet environmental restrictions and requirements, reforestation and other similar requirements now incorporated in the public laws and are becoming a matter of business practice.

Sealaska Corporation urges your positive consideration of this bill this session. We are available to work and discuss the many aspects of forest land taxation at any time, now or in the future. Thank you.

CAPE FOX CORPORATION TESTIMONY ON SENATE BILL 802
March 9, 1982

My name is Kellus Sewell, the Governmental Affairs Representative for Cape Fox Corporation (CFC). Cape Fox Corporation, as many of you may know, is a small village corporation in Saxman, Alaska near Ketchikan.

As evidenced in the Alaska Native Claims Settlement Act (ANCSA) and as amended by the Alaska National Interest Lands Conservation Act (ANILCA), the twenty year tax moratorium was granted to free the Native community from burdens of federal taxation until a period of time elaaped that was considered necessary to allow them to "get their feet on the ground." Let me emphasize that the exemption was not for a short period of time but for "twenty years".

We hope that as you review the matter of state and local taxing of these private resources, many owned by small corporations, that you also recognize the need to support tax exemptions, credits, and incentives until a sound economic base is established.

The Cape Fox Corporation strongly feels that development of "renewable" and "nonrenewable" resources ought to be encouraged yet only if adequate time is allowed for proper planning. Consequently, we encourage the administration and the legislature t· consider the following:

(1) Exempting the Native entity from taxation until development results in the actual "generation" of income;

(2) Providing for tax incentives (i.e. similar to H.B. 866) to stimulate more diversified development;

(3) Allowing for environmental credits related to investments to guarantee sound development of our most valuable natural resources; and

(4) Establishing a tax limitation that will not erode profits or revenue from potential development but result in placing us in a "fair" competitive advantage with timber marketed from state or federal lands.

Therefore, we support Senate Bill 802 and House Bill 885 as long as the "forest" language (line 29, page 1 through line 3, page 2) exempts forest resources from taxation until the concerns mentioned above are adequately addressed.

We again emphasize that we strongly encourage the legislature to adopt a definition of "developed" property that will encourage sound development and one which does not result in taxes until the developed property actually generates income. If the state elects to allow local governments to develop their own taxing mechanisms,

we would hope that the state would see fit to establish a "taxing framework" that would promote sound development through uniform treatment of tax exemptions, credits, incentives, and limitations.

We hope that we will be included in any future deliberations on this issue and thank you for the opportunity to allow Cape Fox Corporation to present its concerns.

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CRA 3/9/82

STATEMENT

OF

COOK INLET REGION, INC.

ON

SENATE BILL NO. 802

Community & Regional Affairs
Alaska State Senate
March 4, 1982

by: Lance W. Anderson
Vice President, Finance
Cook Inlet Region, Inc.

STATEMENT

OF

COOK INLET REGION, INC.

ON

SENATE BILL NO. 802

MARCH 4, 1982

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1620(d), as amended, provided a tax exemption for real property and interests therein conveyed to individuals and native corporations under the Settlement Act. The exemption exists for twenty years from the date of statuatory vesting of title or interim conveyance or patent, whichever is earlier, and is terminated during the period the property is "developed" or "leased to third parties" for purposes other than exploration. While the legislative history of the Settlement Act provides little guidance as to the correct definition of the term, it is clear that the federal statute must be given the broadest reasonable interpretation in favor of the tax-exempt status. Federal courts, including the United

States Supreme Court, have held that federal statutes affecting native lands are to be construed strictly in favor of the native land-holder. This policy has been followed particularly with respect to tax exemptions for native lands. In the absence of an explicit tax exemption under state law, each borough assessor would have to reach an independent determination of the meaning of the federal statute. The opportunities for inconsistency and a costly and unnecessary litigation burden on both the boroughs and the native corporations is clear. The present bill will resolve the most troublesome problem, that of the definition of the terms "developed" and "leased to third parties" by providing a uniform tax exemption which is at least as broad as that provided by the federal statute. This will insure uniformity of application among the boroughs and bring state law into line with the federal exemption.

In summary, CIKI supports passage of Sentate Bill No. 802 because:

1. It embodies and implements the most basic principle underlying interpretation of ANCSA § 21(d) -- that the tax exemption should be construed in favor of the native land-holder, and

2. By providing broad definitions of the terms "lease" and "developed", it automatically will resolve the vast majority of present tax exemption issues and will avoid inconsistency and a costly and unnecessary litigation burden on both the boroughs and the native land owners.

State of Alaska
Department of Community & Regional Affairs

Date: March 3, 1982

POSITION PAPER

Requested by: Senate Community & Regional Affairs

Subject: Sponsor Substitute Senate Bill 613

Departmental Position: OPPOSED

Remarks:

The bill appears to require a property tax reduction equal to 1/2 of the difference between money received under Sec. 1 ch 60 SLA 1981 and half of the entitlement under that section.

Based on the amount received in FY 82 that would mean (535 - 500 = 35 ÷ 2 = 17.50) a tax reduction of $17.50 per capita.

The bill is unclear as to what year the tax reduction takes effect.

If it is in effect for FY 82 it would require a rebate or a tax credit in any municipality that did not reduce taxes by $17.50 per capita below the amount it would have otherwise levied. All municipalities contacted claim to have reduced taxes by at least that amount as a result of funds received as a result of Chapter 6 SLA 1981. If rebates were to actually be mandated, administration would be extremely difficult if not impossible. 1 out of 3 people move every 5 years so locating the proper people to rebate would be difficult at best.

If it is in effect for FY 83 taxes it would most severely impact those communities that have reduced taxes and would have the least effect on those that failed to reduce taxes. Some communities have already reduced taxes to a point that they are currently less than $17.50 per capita. Finally, the portion that reads "reduce the property tax it would otherwise levy" for all practicable purposes negates the required reduction. Municipalities have not yet set a tax rate. They would take the forced reduction into account before setting the rate.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SS SB 613
Title An Act Requiring Poperty Tax Relief
Requested by Senate Community & Regional Affairs Committee Date 3/1/82

II. FISCAL DETAIL
Agency Affected Department of Community and Regional Affairs
Program Category Affected Development
BRU, Program, Or Subprogram(s) Affected N/A
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES		0				
200 TRAVEL		0				
300 CONTRACTUAL		0				
400 COMMODITIES		0				
500 EQUIPMENT		0				
600 LAND & STRUCTURES		0				
700 GRANTS, CLAIMS, ETC.		0				
TOTAL		0				

FUNDING (Thousands of Dollars)

GENERAL FUND		0				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No fiscal Impact on this Agency

IV. DATE 3/1/82 PREPARED BY Terry L. Earley
AGENCY Community & Regional Affairs
PHONE 465-4730

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)