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Gigi M. Berardi

Western Washington University, gigi.berardi@wwu.edu

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The Alaska Native Claims Settlement Act (ANCSA)— Whose Settlement Was It? An Overview of Salient Issues

Gigi Berardi*

I. INTRODUCTION

“Why do we want forty million acres of hunting rights when we’ve got the whole state?”¹ On December 18, 1971, the Alaska Native Claims Settlement Act (ANCSA),² was signed into law by Richard M. Nixon.³ ANCSA provided a federal land settlement extinguishing aboriginal claims to the state’s 375 million acres of land and territorial waters by providing Alaska Natives with forty-four million acres of land and nearly one billion dollars. One of the most significant features of the bill was the establishment of twelve regional⁴ and approximately 200 village corporations as owners of the land and recipients of the money. The consequences of this corporate structure have reverberated through Alaska Native communities and the entire Alaskan economy and society in the years since. As Steve Colt notes, “[b]y vesting the land and the money in Alaska Native business corporations and shareholders—not tribes—ANCSA deliberately repudiated previous United States Indian policy, based on reservations and federal oversight.”⁵

The regional corporations received close to half of the settlement money, sixteen million acres, and subsurface rights to village corporation land. The performance of the corporations under ANCSA was initially poor. Only the

* Gigi Berardi is a professor of environmental studies at Huxley College of the Environment. She has chaired the department since 2000. She also serves as an affiliate professor at the University of Alaska, Fairbanks and as a founding and Core Faculty member in the Tribal Environmental and Natural Resources Management Program, a cooperative program with Northwest Indian College. She holds three graduate degrees, including an M.S. and Ph.D. in Natural Resources from Cornell University, and has worked for twenty years in natural resources, rural sociology, and cultural geography. A Fulbright scholar, her edited books include *Food, Population, and Development* and she is the author of articles and books on subsistence and culture, tribal environmental issues, natural resources policy, and technology and its socio-cultural impacts. Her publications include articles in academic journals such as *BioScience*, *Biological Agriculture and Horticulture*, *Ethnohistory*, *Human Organization*, *Natural Resources Journal*, *Environmental Practice*, *Rural Sociology*, *Rural Sociologist*, *Ethics, Place, and Environment*, and the *Journal of Environmental Education*. A member of the Association of Journalists and Authors, her work also has appeared in *The Los Angeles Times* and, during the time that she lived and worked in Alaska for two years, in the *Anchorage Daily News*. She continues to work as a correspondent on Alaska for national publications.

¹ Donald Craig Mitchell, *Take My Land, Take My Life: The Story of Congress’s Historic Settlement of Alaska Native Land Claims, 1960–1971* 265 (2001) (quoting Eben Hopson, in response to the Stevens-Gravel land settlement proposal offered to the Alaska Federation of Natives Steering Committee in 1968).

² Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C.A. §§ 1601–1629a (2004)).

³ See Alaska Federation of Natives, *Alaska Settlement Act: A Scrapbook History* 61 (1991).

⁴ An authorized Thirteenth Regional Corporation, for Natives residing outside of Alaska, formed in 1976 after contested elections and lawsuits.

⁵ Steve Colt, *Alaska Natives and the “New Harpoon:” Economic Performance of the ANCSA Regional Corporations*, 25 *J. Land Resources & Envtl. L.* 155, 155 (2005).

one-time sale of old-growth timber and other natural assets and a one-time tax windfall allowed the corporations to report positive accounting income. The articles in this edition pertaining to Native American issues show that the ANCSA corporations tried many of the same strategies that have previously been proposed as answers to the problems of sustainable development in remote regions.⁶

II. ANCSA: A BRIEF HISTORY

Although Alaska Native land claims were asserted as early as 1867 when the Tlingit Indians of southeast Alaska challenged the sale of Alaska by Russia to the United States, decades passed with little attention to and no resolution of these claims.⁷ Native groups intermittently pressed the issue. In 1912, leaders of the Tanana chiefs in interior Alaska asserted Native title to traditional hunting and fishing lands that were being used by settlers. In 1935, the Tlingit, joined by the Haida, challenged the withdrawal of lands for the Tongass National Forest. It was not until 1968 that the Tlingit and Haida received a judgment in the 1935 action, a cash settlement of 7.5 million dollars in compensation, and a return of aboriginal title to about one-seventh of the federal land holdings in southeast Alaska.⁸

With statehood in 1958 and the provision that the state could select 104 million acres from the public domain, tensions mounted over the effects of these selections on traditional use by Natives and on their aboriginal land rights.⁹ By the mid-1960s, Native organizations such as the Aleut League, Arctic Slope Native Association, Chugach Natives, Cook Inlet Native Association, Fairbanks Native Association, Kodiak Native Association, Kuskokwim Valley Association, Northwest Arctic Native Association, and Tanana Chiefs Conference, had at least implicitly, included social welfare and Native political autonomy in their mandates.

The land-selection issue continued unresolved and in 1966 Interior Secretary Stewart Udall froze the conveyance of state-selected lands pending a

⁶ The problem of sustainable development in remote regions was discussed by Lee Huskey in a previous edition of this journal. See Lee Huskey, *Alaska Village Economies*, 24 J. Land Resources & Envtl. L. 435-64 (2004).

⁷ Kenneth D. Tollefson, Martin L. Abbott, and Eugene Wiggins, *Tribal Estates: A Comparative and Case Study*, 35 *Ethnology* 4, 324.

⁸ See Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 *Nat. Resources J.* 85 (1998).

⁹ See Harvey M. Jacobs & Brian H. Hirsch, *Indigenous Land Tenure and Land Use in Alaska: Community Impacts of the Alaska Native Claims Settlement Act 15-16* (1998) (noting the 104 million acre total was the largest percentage and absolute endowment ever granted to a state in the United States). See also Mary Clay Berry, *The Alaska Pipeline: The Politics of Oil and Native Land Claims 27* (1975) (using a customary formula to determine land grants to western states entering the Union, Alaska would have received about one-fifth what it actually did. Thus Alaska Natives stood to lose control over sizable holdings).

Native land claims settlement.¹⁰ In 1967, Native leaders and supporters of the newly-formed Alaska Federation of Natives (AFN) continued the push for a land settlement and the first bills were subsequently introduced in Congress.¹¹ In congressional hearings chaired by Senator Henry M. Jackson in February 1968, Willie Hensley, who was then serving as a representative in the Alaska legislature and as chair of the land claims task force appointed by the governor, provided a cogent and forceful statement on why Alaska Natives had a land claim.¹² In 1970, a land claims bill was passed by the Senate, but Alaska Natives were disappointed in its land provisions. Finally, in 1971, bills passed both houses of Congress, and a compromise version was written in conference committee that passed. The bill, known as the Alaska Native Claims Settlement Act, was signed into law on December 18, 1971.

III. INCENTIVES FOR ANCSA

The key incentive to resolve the land claims issue was the discovery of oil at Prudhoe Bay on Alaska's North Slope in 1967. All sides realized a pipeline across Alaska to get the oil to market might be delayed for years by aboriginal land claim challenges. In addition, the state urgently wanted to continue to build its own land base. There was tremendous pressure on Native groups to settle land claims, given the expected economic importance of Prudhoe Bay oil.¹³ This confluence of interests finally motivated members of Congress to write and pass a settlement bill.

Before the Prudhoe Bay oil fields were discovered, Alaska was a state of modest means. Military and other federal government spending and extractive natural resource industries (fishing, mining, logging, and some oil production in Cook Inlet) provided most of the state's income. The economic impact of the discovery of oil in Alaska was dramatically different than it might have been elsewhere; the state owned the oil field, which meant it could collect royalties as well as taxes on the large amounts of oil that could be produced.

Thus, the oil was seen as enormously important to state development and national interests, and the political will coalesced to settle Native land claims and remove that obstacle.¹⁴ ANCSA and oil development happened amid some very unforgiving physical geographies. The physical geography of much of village Alaska does not easily accommodate entrepreneurial ventures that

¹⁰ Berardi, *supra* note 8, at 90.

¹¹ *See id.*

¹² Mitchell, *supra* note 1, at 197–267.

¹³ Arctic Wildlife National Refuge, *ANWR Oil Leasing Bill Introduced in U.S. House*, available at <http://www.anwr.org/features/youngbill.htm> (last visited Feb. 4, 2005). In subsequent years, Prudhoe Bay oil would account for as much as twenty percent of U.S. oil production.

¹⁴ *See Berry, supra* note 9. *See also* Dan O'Neill, *The Firecracker Boys* (1994) (stating that soon after oil began flowing, the world price for it tripled, further amplifying its impact on the state economy).

require external markets. Villages generally lack arable land as well as the fuel and non-fuel resources needed for capital-intensive extractive industries. Local labor is unskilled; the costs of energy, transportation, and communications are high, and a harsh climate adds to the cost of service delivery and transportation. The remoteness of village sites has additionally always suggested little hope for a self-sustaining market economy. Many villages in fact represent a continued occupancy of sites formerly used for only part of the year in a mobile subsistence economy. These locations that were ideally suited for subsistence activities are ill-suited to the market economy.¹⁵ This also means that, today, little investment opportunity exists in the villages for the substantial sums of money provided by ANCSA.¹⁶ The ANCSA policy objective of economic development through corporate activity would seem to have little chance of succeeding in many villages.

IV. ANCSA AS NATURAL RESOURCES POLICY AND SOCIAL ENGINEERING

What exactly did ANCSA settle? To answer this question, it is necessary first to understand that the intent of ANCSA's architects was to both secure Native lands and provide a mechanism for social welfare, a tool of cultural preservation.¹⁷ Some drafters of the Act commented on the process, which they saw as social engineering:

[W]hile admittedly a compromise and far from perfect, [ANCSA] nevertheless marks a great moral and ethical advance over the white man's dealings with the native inhabitants of the Lower 48 . . . [T]he Act will provide an unparalleled case study on a large scale of the adaptability to a radically changed economic, social, and political environment of several markedly different ethnic groups, which have dealt effectively for centuries with a harsh physical environment and a totally different level of social and economic problems. The mechanism for the use, development, and control over the lands, resources, and money by the Native people of Alaska—only a few generations removed from aboriginal existence—is that relatively modern business creation, the corporation . . . [A]s shareholders, the Native

¹⁵ See Berry, *supra* note 9 (containing an earlier version of the same ideas expressed in this introduction).

¹⁶ See generally Colt, *supra* note 5.

¹⁷ See Mitchell, *supra* note 1 (suggesting that the framing of ANCSA was greatly influenced by a report of the Federal Field Committee for Development Planning in Alaska, which considered Alaska Natives to be part of a culture of poverty. To change the economic situation, one needed to change the culture. ANCSA does this by promoting capital expenditures. Rather than strengthen the existing subsistence economy, it encourages extraction of natural resources and anticipated that economic development would follow. However, as data now show, ANCSA disbursements have been used in some areas to bolster subsistence—through automation and other technology). See also Berardi, *supra* note 7, at 91–92; David Case and Byron Mallott *infra*.

people are entitled to a voice in management and a share in the lands, assets, and income.¹⁸

Economic benefits anticipated from ANCSA included development of natural resources, capital improvements such as housing, transportation, services, employment opportunities, and establishment of small business enterprises. Broader social benefits included improved educational levels and greater Native political influence.

The intent of the corporate structure was to assist Alaska Natives in social and economic arenas¹⁹ by giving them control (as corporate shareholders) over their land and other natural resources, while avoiding the paternalism of the reservation system in the contiguous forty-eight states.

Before 1968, there was no mention of corporations in early versions of a land settlement; the first bills introduced in 1967, “resolved claims through tribes, bands, villages, communities, associations or other identifiable groups of Eskimos, Indians, and Aleuts. . . .”²⁰ Then, in U.S. Senate Interior Committee meetings in 1968, business corporations were proposed as the means of carrying out the settlement. This proposal was motivated in large part by opposition to the power of the federal government, as exhibited by the Bureau of Indian Affairs’ bureaucratic and inept handling of its responsibilities on reservations.

The corporation model was seen by most framers of the Act, both non-Native and Native, as the key instrument to help, and perhaps induce, Native groups to make the transition to a modern economic society, more than they had in the previous 200 years. Shari Huhndorf agrees, writing:

[M]odern arctic Natives have entered the Western world in less tragic ways. If the twentieth century has been the period of high colonialism in the Arctic, it has also seen a stunning amount of resistance to these incursions and, more recently, consolidations of Native political power In 1971 Congress passed the Alaska Native Claims Settlement Act, the largest land settlement in U.S. history. Despite some major shortcomings, particularly with regard to sovereignty rights, ANCSA has enabled Alaska Natives, including Eskimos, to exert considerable power in state politics.²¹

¹⁸ Stewart French, *Alaska Native Claims Settlement Act*, Arctic Institute of North America 3,16 (1972).

¹⁹ See 43 U.S.C. § 1606(i) (2004) (clearly showing the seventy percent revenue sharing among corporations underscores the role that Congress saw for the corporations, not merely to make profits, but to provide a degree of equity among Alaska Natives).

²⁰ Robert D. Arnold, *Alaska Native Claims* 153 (1976) (internal quotation omitted).

²¹ Shari M. Huhndorf, *Going Native: Indians in the American Cultural Imagination* 126 (2001).

Native leader Byron Mallott, a former director of the Alaska Permanent Fund and CEO of Sealaska, Inc., wrote that although ANCSA was designed to rework Native political organization, traditional entities stayed intact, but now, Mallott argues, it is time to make ANCSA work by fully realizing Native visions for the future.²²

V. INTERPRETATION AND IMPLEMENTATION—SETTLING OR UNSETTLING?

In addition to resolving land and resource ownership claims, ANCSA extinguished Natives' claims to any other traditional land-related rights, including aboriginal hunting and fishing rights. This has developed into one of the most contentious and problematic provisions of the settlement. A host of related topics has come to be included under the term "subsistence." Subsistence issues are addressed by Byron Mallott in this issue.²³ Other provisions of the Act addressed different aspects of resource ownership and utilization.²⁴

In the discussions by the various authors in this issue, several themes emerge probing the goals and accomplishments of ANCSA and problems with it. The authors address the following key questions:

Did ANCSA secure Native lands? ANCSA secured title to a significant amount of the contested land,²⁵ and in this sense was considered a success.

Did ANCSA protect Native lands for purposes of subsistence? Byron Mallott argues, "no."²⁶ Continuation of the subsistence issue is, perhaps, the most unsettling part of ANCSA. Resolving subsistence rights is a key element of the agenda for the future, as discussed in this article.

Did ANCSA promote Native economic and social well-being? It appears that ANCSA has been a success in greatly expanding the economic role of Natives in the Alaskan economy, providing capital for investment by ANCSA corporations, and producing a wide range of economic and social benefits, including: employment, health care, educational opportunities, cultural programs, and more through operations of the corporations. Mallott also talks about the greater recognition that Alaska Natives now receive from the state,

²² See generally James Allaway & Byron Mallott, *ANCSA Unrealized*, 25 J. Land Resources & Envtl. L. 139 (2005).

²³ *Id.*

²⁴ See Paul Ongtooguk, *The Annotated ANCSA*, available at <http://www.alaskaool.org/projects/ancsa/annanca.htm> (last visited Feb. 4, 2005).

²⁵ Compare Jacobs & Hirsch, *supra* note 8 (arguing that historically Alaska Natives practiced, by and large, a form of collective tenure rather than embodying ideas of private or absolute ownership).

²⁶ See generally Allaway and Mallott, *supra* note 22.

and a cultural revitalization he sees on his village travels. An alternative view is also presented, similar to that expressed by Thomas R. Berger.²⁷

The question of economic and social impacts is addressed in the articles by policy economic analyst Steve Colt. Colt's article, which shows that through their first twenty years of operation (1973-1993), ANCSA regional corporations lost more than seventy-five percent of their original cash endowment, with a one-time sale of old-growth timber and other natural assets and a one-time tax windfall allowing them to report positive accounting income. Colt reports a wide variation in performance of the corporations, in an analysis that provides a quantitative basis for assessing ANCSA as natural resources policy, particularly in remote regional economies.²⁸

Did ANCSA preserve the federal trust relationship? Although in Section 2 of the Act, racially defined institutions (tribes) were not recognized, the obligations of the United States or Alaska to protect and promote the rights and welfare of Natives were. Early drafts of the Congressional bill nevertheless sought to withdraw all federally sponsored social services.²⁹

Did ANCSA protect Native governing authority? Although some argue that ANCSA was a significant step forward in terms of Native political development, primarily through increased organizational skills, it also was to some degree a step backward (Alaska Natives have historically been an important political force in Alaska) in its intent to assimilate Alaska Natives by rejecting Native or tribal government institutions as a vehicle for development. Still, Native villages have been able to assert governing authorities and powers, as discussed in the article by Native law scholar David Case.³⁰

In sum, ANCSA serves as an example of the risks in formulating natural resources policy that does not reflect the cultural values of target populations and their customary natural resource utilization strategies. The articles in this special issue look at the impacts of ANCSA and offer insights on the ever increasing dependence of Alaska's remote villages on state subsidies and the global economy.

²⁷ See Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (1985). see also Frederick Seagayuk Bigjim & James Ito-Adler, *Letters to Howard: An Interpretation of the Alaska Native Land Claims* (1974).

²⁸ See generally Colt, *supra* note 5.

²⁹ See Mitchell, *supra* note 1 (claiming early drafts included a maximum land transfer of only several million acres, a maximum of 250,000,000 dollars as a cash award, no revenue sharing with the state, and/or the elimination of all federal Indian programs).

³⁰ See generally David S. Case, *Commentary on "Sovereignty: The Other Alaska Native Claim,"* 25 *J. Land Resources & Env'tl. L.* 149 (2005).

