

ANC details changes needed in H.R. 278

The following is the ANC position paper on H.R. 278:

H.R. 278 introduced by Congressman Young to amend ANCSA is identical to H.R. 4162 which was passed by the House but died in the Senate last year. Alaska Native leaders have carefully reviewed H.R. 278 and are unanimously agreed that, although generally positive, it must be amended if it is to achieve its stated objectives.

The expressed purposes of H.R. 278 are to insure continued Native ownership of their land and corporations and to provide a tribal option, enabling those Native corporations which desire, to get out of the corporate system and return their lands to tribal ownership.

Although H.R. 278 provides substantial protection for Native lands and corporations, its "retribalization" provisions are not workable because of the unacceptable penalties attached. Lands transferred to tribes under H.R. 278, for example, would automatically lose the protection of tribal sovereign immunity and immediately become subject to state condemnation. In addition, such lands would forever be denied the safeguards of federal trust status. Moreover, as presently worded, H.R. 278 could be construed as impliedly extinguishing the tax immunity of lands transferred to tribes under the act. Further, and even more basic, as presently worded, H.R. 278 has the potential of being construed as a

termination act.

The severity of these consequences can only be appreciated by comparing them to tribal rights and immunities under present law. Under existing law and for over 200 years, tribally owned lands have been immune from state taxation and condemnation. Further, for two centuries the federal government has protected Native lands by holding them in federal trust status. These tribal immunities and protections are either expressly or impliedly removed from lands transferred under H.R. 278. Finally, under existing law Alaska Native tribes unquestionably have some governing powers. H.R. 278 suggests that all such powers may have been extinguished.

The proposed substitute bill, (hereinafter AFN draft bill) was jointly drafted by the Alaska Federation of Natives and the Alaska Native Coalition, to cure these defects in H.R. 278. The primary thrust of the AFN draft bill is to insure that H.R. 278 remains neutral on the issue of tribal sovereignty and that the existing rights and powers of Native tribes remain unimpaired. The changes mentioned above are detailed below. In addition, the AFN draft bill includes a number of amendments to the corporate provisions of the bill which are primarily technical in nature and non-controversial.

•No taxation of tribally owned land:

Tribally owned land has always been immune

from state taxation. H.R. 278 was not intended to, nor does it, expressly extinguish this immunity with respect to lands transferred to tribes under the bill. It could, however, be construed to achieve this result by implication.

Section 13(1)(A) of H.R. 278, pp. 33-34, provides certain automatic protections against loss of undeveloped land. In addition, such land is immune from taxation and otherwise protected against loss until 1991 under the

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provisions of subsection (d) and (e) of Section 21 of ANCSA, 43 U.S.C. 1620(d). In order to eliminate any implication that by mentioning these protections and failing to mention the protections resulting from tribal land ownership (e.g., tax immunity), the Congress intended to extinguish the latter, sections 7(i)(1), p. 37, and 7(b)(f), p. 34, were added to the AFN draft bill which provide that the expressed protections "are in addition to any other protections or immunities provided by other applicable law."

•No state condemnation of tribally owned land:

States have never held the power to condemn tribally owned land. H.R. 278, sec. 13(1)(D), p. 34, gives the state of Alaska such power in the following terms: "...lands conveyed pursuant to section 7(b) (the QTE section) of this Act shall be subject to condemnation for public purposes in accordance with the provisions of applicable state law. This section is deleted in the AFN draft bill.

•Continuing Secretarial power to hold tribally owned land in trust: The Secretary of Interior currently has authority to take tribally owned land into trust. H.R. 278

was never intended to extinguish this power. As presently worded, however, it would have this result.

H.R. 278, Section 7(b)(d)(2), p. 27, prohibits a qualified transferee entity (including a Native tribe) from convey(ing) fee title to land or interests therein unless authorized or required by section 14(c) or 21(j) of this Act." Neither section 14(c) nor 21(j) authorizes transfers to the Secretary and therefore such transfers are barred. This unintended effect is corrected by Sec. 7b.(e)(3), p. 34, the AFN draft bill which expressly authorizes qualified transferee entities to reconvey land "to any government agency ...authorized by federal law to accept such conveyance."

•Neutrality on scope of self-governing powers of Native tribes: As noted above, Alaska Native tribes unquestionably hold some powers of self-government, although their precise scope is the subject of dispute. H.R. 278 was intended to remain neutral on this dispute. The disclaimer clause of H.R. 278, Sec. 8. 7c, p. 29, however, suggests that Congress has doubts as to whether Alaska tribes retain "any" such powers. It provides: "Sec. 7c. No provision of the

Alaska Native Claims Settlement Amendments of 1987 shall be construed as enlarging or diminishing or in any way affecting the scope of any existing governmental powers, if any, of an Alaska Native village entity, including entities organized under the Act of June 18, 1934 (48 Stat. 987) as amended or Traditional Councils."

The words "if any" are not necessary and in fact transform this provision from a neutral to a non-neutral position. Sec. 8. 7c of the AFN draft bill deletes them.

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and when their stock should go public. It would allow shareholders to decide whether or not to issue new stock to Native children born after 1971. It would extend protections on undeveloped Native land against bankruptcy, judgement, takeover or adverse possession.

It would also allow Native shareholders to transfer land or other assets to non-profit groups, tribal and other qualifying organizations. Its main purpose is to preserve Native control of land and other assets. Congress intended ANCSA to be a just settlement of Native land claims. It did not intend for Native people to be landowners for a brief period before its return to non-Native hands. The AFN legislation does emphasize the rights of the group

over those of the individual shareholder, consistent with our Native cultures. AFN believes that individual rights are important, but only to the extent that they do not jeopardize the continued health and survival of the group.

The past 100 years of Indian legislation has shown us that when Native lands are parcelled out to individuals who are permitted to sell it, and where it is subject to taxation, it is inexorably and quickly restored to non-Native ownership. When those lands are held in communal ownership, they tend to remain in the hands of the tribe or other group. Secretary Hodel is familiar with the sad legacy of the Dawes Act and other examples of the United States' failed Indian policy.

The 1991 amendments are entirely consistent with the original intent of ANCSA. Without them, the human cost to Alaska Natives specifically, and all Alaskans generally, would be a high one to pay.

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