

Recently a book, "Village Journey," by Thomas Berger, has been published. Its theme is that ANCSA has failed Alaska Natives. Berger follows up this theme with a number of recommendations that, he says, will solve problems Natives face regarding self-determination and land protection. His recommendations advocate three major changes: the establishment of tribal governments, retribalization of Native land, and control over wildlife resources in the state. "Village Journey" does include accurate criticisms of ANCSA's failings. However, the book misses an important point: whenever you have exaggerated expectations about a solution, that solution is bound to fail you — be it ANCSA, IRA or any other solution. It is our exaggerated expectations for ANCSA that have resulted in much of the anger and frustration expressed by many Natives. Let us not make the same mistake again as we review Berger's recommendations. They too can be expected to achieve only limited success.

### ANCSA Criticisms

The criticisms of ANCSA were expressed by Alaska Natives long before Berger toured Alaska. For example, Larry Merculieff, former president of the St. Paul Island village corporation, summarized the economic problems of ANCSA at the village level:

*Little seed capital, lack of local business opportunities, lack of infrastructure adequate for business development in the community, lack of human resources trained and/or experienced in the business arena, the leadership spread too thin by the numerous demands placed on them from inside the village and out, political pressures to invest in something despite odds of succeeding or risk, the bias of the business community, internal and external conflicts brought about by ANCSA's ambiguities and unrealistic shareholder expectations.*

Of course, everyone's expectation was that dollars could create economic opportunity in the villages. Instead, as Merculieff points out, dollars cannot ac-

complish much without management skills, community stability, and realistic goals.

Another economic assumption was that Native corporations would provide widespread shareholder hire. This could not happen. Hiring more employees than needed makes a corporation — or any other business entity — less profitable for all shareholders. According to Berger, only 15 percent of Sealaska employees are Native, though that corporation has aggressively pursued shareholder hire. CIRI, the most profitable Native corporation, has only 55 employees, 14 of whom are Native — less than 1 percent of its shareholders.

Another false economic expectation was that ANCSA would be self-executing, and that all the settlement dollars would be available for business investments.

ANCSA's Declaration of Policy states, "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation."

Rather, implementing ANCSA became a major task: A tremendous amount of time and money was spent on fulfilling ANCSA's requirements: enrolling shareholders, fighting in court for certain Native lands, settling 7(i) differences, and processing 14(c) reconveyances.

As AFN President Janie Leask said, "What has fallen on Native people and their institutions during the past 13 years is a legal and administrative burden so overwhelming that in many ways implementing that in many ways implementing ANCSA has become an end in itself."

Yet the most important false assumption was that ANCSA would

allow Natives full control of the land without risk of loss. However, ANCSA land conveyances are not held in trust by the federal government. This means that land may be lost to the Natives through bad decisions, bankruptcy or, after 1991, corporate takeovers. Right now, no legal barrier exists against a voluntary sale of Native lands as part of real estate development or merely to raise cash.

Finally, as a price for the land settlement, aboriginal hunting and fishing rights were extinguished. However, in 1980 ANILCA established a subsistence priority on public lands. This subsistence priority benefits rural Alaskans, Native and non-Native alike. Of course, ANILCA also provided that subsistence uses must not jeopardize fish and game populations.

True, before the passage of ANCSA, Alaska Natives did claim title to all Alaska land. But we'll never know the result of that claim because the lawsuit was terminated by the passage of ANCSA. Regardless of the merits of any lawsuit, its outcome is never a sure thing.

The point is, Congress could have settled those claims with considerably less than 44 million acres and \$960 million. It is a tribute to the skill of Native leadership that so much was achieved.

### Berger's Recommendations

In summary, here is a list of Berger's recommendations, and the reasons he believed in them:

- Tribal governments should be established in all villages. The governments immediately

that jurisdiction on state and federal lands and waters.

As Berger points out administrative or legislative action at the state and/or federal level is necessary for these recommendations to take place.

Berger recommends tribal governments because he believes these governments, unlike corporations, can achieve social justice, such as caring for the young and elderly. Also, they reflect the "tribal character" of Alaska natives. And most importantly to Berger, they are the most important way to protect the land.

More specifically, Berger states that the favorable characteristics of tribal governments are as follows:

Tribal governments have sovereign immunity from lawsuits. Under the federal Indian Reorganization Act of 1934, ap-

plied to Alaska in 1936, tribal government organized under the act are also guaranteed the power to "prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe."

Like non-profit corporations, tribal governments can provide services to their members, and they can receive tax-deductible donations to finance the services that a government usually provides. They are authorized under the Tribal Governmental Tax Status Act to raise revenue to provide such services by the sale of bonds. Tribal governments can engage in profit-making activities and they can distribute any surplus to their members: as governments, they are exempt from federal income tax on their profits.

Moreover, in many cases, "consent" merely means consent by the tribal council. A tribal council is the equivalent of a corporate board of directors, which has the responsibility of making decisions for the corporation. Only if specifically stated in the tribal constitution would "consent" mean consent by the tribal members. In the same way, if a corporation's articles so state, important land decisions can be made only by a vote of the shareholders.

Provide services to members. This capability presents two problems: potential for abuse, and the need for dollars. A tribal govern-

ment can decide to provide special services to elders, youngsters or any other group. Initially, there is nothing to prevent a tribal government from providing special services to individuals simply because they belong to a particular family — or perhaps have provided favors to tribal officials. The second problem is money. Providing services requires money, which most Native corporations don't have. The capability of providing services is useless if the tribal government is as impoverished as the village corporation.

Tribal governments can receive tax-deductible donations. Operating any government requires a steady, reliable flow of money. Yet donations to the Alaskan Native Foundation have barely kept it alive. If there are no new sources of donated funds, the ability to receive them is worthless.

Sale of bonds. Bond sales must be backed by something of value. The only thing of value: most village corporations have in their land. A bond sale would put the land at risk. And it's the land we want to save.

Profit-making activities; distribution of surplus to tribal members. Right now, Native corporations are set up to engage in profit-making activities. Any earned surplus may be distributed to shareholders. There is no evidence that a tribal structure will increase profits.

Exemption from federal income tax. Right now, most Native corporations are not paying any federal income tax. It's not because they're exempt, but rather because they're not making any profits. The exemption is worthless to an entity without a profit unless such a tax benefit could be "sold" to others.

Protection against loss of Native lands through corporate bankruptcy, takeovers and taxation. Any government, like any corporation, can go broke. New York City almost did. Ruin was avoided because that municipal government tightened its belt — not because it was a government.

Tribal assets, like corporate assets, are subject to being taken if they have been used as collateral. And, as previously mentioned, tribal governments may be required to waive sovereign immunity in order to purchase goods and services. Any unpaid amounts related to those contracts put tribal assets at risk.

As for the taxation of tribal lands, ownership by an IRA does not protect that land from real property taxes. A recent Alaska Court case held that only where land is owned in trust by the federal government is it tax exempt. Alaska Native Brotherhood and Sisterhood camp No. 14 v Board of Equalization for the Borough of Ketchikan. 666 P.2d 1015 [Alaska 1983].

Other Problems Remain

Not only does retribalization not bring with it the promised guarantee of land protection, it cannot solve other existing deficiencies. As previously stated, ANCSA did not make up for too little money and too few business opportunities; it did not magically create enough leaders or make shareholders realistic; it did not provide significant shareholder hire; it imposed costly duties, such as 7 (i) reporting and monitoring and 14(c) reconveyances; it extinguished hunting and fishing rights.

Retribalization cannot make up

for these deficiencies or remove these duties. Furthermore, while being a sovereign creates new options, it does not necessarily create the dollars to exercise these options. For example, in the Lower 48, some tribes elect not to set up tribal courts because they cannot afford them.

Only where there is economic activity, such as fish processing or mineral development, is there a sufficient tax base. In those cases in which the tribal government had taken title to the land, there would be nothing to tax. Lower 48 tribes are heavily dependent on federal funding and federal decisions.

Governmental Action Required

As previously mentioned Berger agrees that it would take federal and/or state action to implement his recommendations. For example:

• The Department of Interior would have to grant IRA status. Yet Interior hasn't approved an IRA application in Alaska in more than a decade.

• Congress would have to appropriate money to pay village corporation creditors so the debts would not be transferred, with the lands, to tribal governments. Yet Alaska's Congressional delegation has agreed to 1991 amendments only if they will NOT require new federal funding.

• Congress and the Alaska legislature would have to appropriate money to finance tribal services. Yet both the BIA budget and state revenues are in serious decline.

• Both federal and state governments would have to acknowledge tribal jurisdiction over fish and wildlife. Yet the state presently will not even put in place a meaningful subsistence priority.

• Interior would have to accept ANCSA lands in trust to fully protect them from takeover and taxation. Yet Interior considers such action to be illegal.

In short, proponents of retribalization have little real chance of receiving all the required state and federal support.

Unrealistic Expectations

Once again, as recommendations are considered, we face the danger of unrealistic expectations followed by almost certain disappointment.

Realistically, tribal governments operating in the Lower 48 have failed to appreciably improve their peoples standard of living or their level of education and health care. No evidence has been presented that tribal governments will perform better in Alaska.

Realistically, there is no such thing as full control of the land by Natives without risk of loss of that same land. As the law presently stands, the greatest protection for the land is for the U.S. government to hold it in trust, but that involves some loss of Native control.

Realistically, both ANCSA and IRA are only legal structures. Ramsey Clark, keynote speaker at the October 1983 AFN convention, put it well: "No mechanism, no organizational structure, no constitution ever really preserved any important right to a people where the people themselves, by character and by spirit, were not passionately committed to its preservation."

It is our commitment which will protect the land. Nothing less and nothing more.

## Book claims to find solutions to ANCSA problems

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Despite ANCSA's problems, Berger's assertion that the settlement act was a raw deal is, simply inaccurate. Berger repeatedly claims that ANCSA, rather than securing land for Natives, put it at risk. He doesn't note that it was only through ANCSA that Native title to land was acknowledged in the first place.

should begin asserting their sovereignty.

- All corporation lands, 14(c)(3) local government lands, and 14(c)(4) airport lands should be transferred to tribal governments.

• Tribal governments should have exclusive jurisdiction over fish and wildlife on Native lands. They should be allowed to share



Village Journey: The Report of the Alaska Native Review Commission  
Thomas Berger. Hill & Wang, \$16.95