



# Land Transfers from ANCSA Village Corporations to Tribes

Lisa Jaeger  
Tribal Government Specialist  
Tanana Chiefs Conference  
June 2000

**Note:** Please note that this paper is for informational purposes only. It is basic in nature and is not intended to be relied upon for legal advice in conducting land transfers. If your corporation or tribe is considering transferring land from the corporation to the tribe, you should first consult an attorney so that you can receive legal advice specifically relevant to your tribe's/corporation's circumstance.

Many Alaska Native villages have retribalized lands by transferring land from Alaska Native Claims Settlement Act (ANCSA) village corporations to tribes. A few have transferred all or major portions of their village corporation lands to tribes, while many others have transferred smaller pieces. Generally, when land is transferred from corporations to tribes it is the land surface that is transferred because the sub-surface belongs to the regional corporation. Exceptions to this are where there were former reservations and a special settlement was made so that those village corporations received both the surface and subsurface. When land is transferred from a village corporation to a tribe, the land is owned by the tribe in fee simple title, with the tribe's name on the deed. The legal status of such land is different from reservation land, which has the United States government's name on the deed.

The reasons for transferring Native corporation land to tribes vary widely, and there are a host of political and legal complexities which corporations and tribes must confront in order to assure a sound transfer. Any consideration of transferring lands from village corporations to tribes should be preceded by a thorough examination of reasons, options, effects of such transfers, and in consultation with tribal and corporate attorneys. This paper addresses some of the reasons why villages make such land transfers, legal considerations for corporations when transferring land to tribes, and management issues for land owned by tribes once it is transferred.

## **Reasons – Land Protection from loss and Local Control**

The reasons why Native corporations and tribes consider transferring corporation land to tribes have undergone changes as the issues of tribal status and Indian country have started to become more clear in Alaska. With the formal recognition of tribal status, and with the decision in the *Venetie* tax case in which the U.S. Supreme Court decided that land that has gone through ANCSA is not Indian country, the reasons of transferring land to tribes to further arguments for tribal recognition and Indian country have dissolved.

Although there are many village-specific considerations for transferring lands, the overarching goals of why villages are now considering transferring village corporation lands revolve around **protecting developed Native lands for future generations** and **maintaining local tribal control of those lands**. Although the ANCSA Land Bank provides for free fire protection by the federal government, tax exemption, and exemptions from court judgements, ANCSA lands that are developed lose the ANCSA land protections from taxation and then can be seized if the village corporation does not pay taxes owed. The local control issue rises to the forefront especially when corporation board members and a large number of shareholders are not village residents. Additionally, it is possible that

corporations can be taken over, along with corporate assets such as land. Tribal ownership allows local control, and also allows for more tribal people to own the land such as children who do not own shares and Natives who are tribal members but do not meet ANCSA's blood quantum requirement.

### **Protection of Land From Loss:**

For the purposes of this discussion, 'land protection' means that land cannot be alienated (taken away) without consent of the Native people who own it. ANCSA establishes land protections for village corporation lands through the land bank protections. ANCSA land that is not developed has these protections. The term 'developed' is somewhat defined in ANCSA, but the application of this term to ANCSA land must be reviewed on a case by case basis. However, land protections on village corporation land are lifted when those corporation lands are developed. Once village corporation land is developed, it is subject to taxation. Failure to pay such taxes, may result in land being taken away without the consent of the owners. Land owned by an Indian tribe in the area where the tribe resides is generally not taxable, even if it is developed.

Land protection for land owned in fee simple title by federally recognized tribes is a bit more complex than the protections for ANCSA lands owned by Native corporations. In Alaska, tribes organized under the Indian Reorganization Act (IRA) have the strongest legal arguments for land protection. One of the main reasons Congress adopted the Indian Reorganization Act was to stop the erosion of tribal lands, and the Act itself says that tribal land owned by tribes organized under the IRA cannot be taken away without tribal consent.

In 1989, the Alaska Supreme Court ruled that tribally owned land could not be taken from the Nome Eskimo Community IRA for failure to pay city imposed property taxes. The Court recognized the language in the IRA statute that says land cannot be taken without tribal consent. From this case, it is clear that land

owned by an IRA tribe in Alaska is recognized by the Alaska Supreme Court to have specific statutory protection from being taken away without the tribe's consent. For this reason, it is recommended that traditional tribes that own land, consider organizing under the IRA for the land protection it provides.

A unique feature of tribes in the United States is tribal sovereign immunity. Sovereign immunity is the right not to be sued without consenting to be sued. The preamble to the list of federally recognized tribes in Alaska specifically says that tribes in Alaska have all the immunities, as do other tribes in the United States. If a tribe cannot be sued without consenting to be sued, then land cannot be taken against a tribe's wishes through a lawsuit for items such as failure to comply with paying land taxes or making loan payments. In order to do business, tribes may consent to being sued by waving their sovereign immunity, but even in those cases, tribes may protect their land by stating in the waiver of sovereign immunity that land cannot be taken. **Tribes must also be cautioned however, that state and federal courts sometimes rule against sovereign immunity defenses, and therefore sovereign immunity alone is not a defense that can be counted on, and that IRA status is a more secure defense for land protection for tribal fee land.**

While tribal sovereign immunity and IRA status may provide general protection for tribal fee land from forces outside the tribe, tribes must also impose internal restrictions through their constitutions and ordinances to provide internal protections for their lands. Tribal constitutions should state that land cannot be taken away without tribal consent. Additionally, tribes should examine how they handle sovereign immunity and tribal land management issues internally.

Tribal constitutions or ordinances can be written so that tribal councils do not have total freedom to wave sovereign immunity. Many tribes have provisions in their constitutions or ordinances that prohibit tribal councils from waiving sovereign immunity when tribal land may be put at risk, without an affirmative

vote of the tribal membership. Constitutions and ordinances may also be written so that tribal councils do not have the authority to sell tribal land without an affirmative vote of the tribal members.

### **Maintaining Local Control:**

Maintaining local control over Native lands is one of the main reasons why land transfers from village corporations to tribes is considered. Many village corporations have large numbers of shareholders who do not reside in the village. They may live in another village or city in Alaska, in the Lower 48, or in other countries. Village corporations are tied to operating under state corporate law which does not have provisions for restricting where corporation board members live, or for giving local residents preference in land use decisions.

Who should be in control over land around the villages involves a complex political decision for villages to face. Those villages that have successfully transferred over large amounts of land from village corporations to tribes have managed to navigate through those tough political issues. The internal political issues that villages face are typically far greater than the legal obstacles and mandates for transfer of land from village corporations to tribes. It is beyond the scope of this paper to advise villages on how to deal with internal tribal and village corporation politics, but it is always helpful for all involved parties to be educated on the legal parameters of corporation versus tribal ownership of land.

## **Legal Considerations for Corporations in Transferring Land from Village Corporations to Tribes**

Village corporations are unusual corporations in that they are organized under federal statute (ANCSA) and also must comply with Alaska State corporate law (Title 10 of the Alaska State Statutes). Alaska State corporate law outlines

shareholder rights when corporation assets are disposed of (i.e. transfers of land to a tribe).

Corporations that transfer land to tribes must consider the potential for shareholder derivative suits and dissenter's rights. Shareholder derivative suits are suits by shareholders against the corporation or the directors and officers of the corporation when the shareholders believe the corporation is being irresponsible in some way with corporation assets. Dissenter's rights are rights of a shareholder to have their stock bought out by the corporation if the corporation disposes of all or substantially all of its assets and the action is out of the usual course of business.

If local politics are in line and the shareholders are in agreement with a land transfer, shareholder suits and dissenter's rights generally are not an issue. In terms of local politics, it is helpful when all of the shareholders are also enrolled members of the tribe. Corporations may do a shareholder survey to assess how the shareholders feel about a transfer before doing it. Also, corporations may put the issue of a land transfer to a vote of the shareholders even in cases where it is not necessarily required by state statute. Often, the transfer is set up so that the transfer is voided if suits or dissenter's rights are filed by shareholders. The technical transfer of the land is relatively easy and is done by written agreements and resolutions.

**Title 10 of the Alaska State Statutes outlines three basic frameworks for disposing of corporate assets:**

**A. Transfers of less than all, or substantially all of a corporation's assets:**

When a transfer of less than all, or substantially all of a corporation's assets are transferred, the activity basically falls within a corporation's regular course of business and dissenter's rights do not apply. However, shareholders have the

right to file shareholder derivative suits. The transfer of a small parcel of land in the village site is an example of this type of transfer. The keys here are what is 'less than all, or substantially all' of the corporation assets, and how fiscally sound the decision to transfer is. "All or substantially all" of a corporation's assets is not defined and has no set percentage of land that a corporation owns, however, anything over 50% may likely be substantial. The value of the land must be considered, because it would be a factor in making a determination of what "all or substantially all" of a corporation's assets means.

**B. Transfers of all or substantially all of a corporation's assets in the regular course of its business:**

When a transfer of all or substantially all of a corporation's assets is in the regular course of its business, dissenter's rights do not apply. However, shareholders have the right to file shareholder derivative suits if they feel that the action is not fiscally responsible. The key here, is what is 'in the regular course of its business,' which is not defined.

**C. Transfers of all or substantially all of a corporation's assets that is not in the regular course of its business:**

When a corporation transfers all or substantially all of a corporation's assets and the transfer is not in the regular course of its business, the matter must be put to a vote of the shareholders, and shareholders may file either dissenter's rights or shareholder derivative suits. This is the only type of transfer in which dissenter's rights apply.

Shareholder derivative suits may be filed by a shareholder who believes that the transfer is a waste of corporate assets, or that the transfer puts the corporation in a bad financial position. Such suits must be filed within a certain period of time, called a statute of limitation, after the land is transferred. For this reason, it may

be advisable to wait until the statute of limitation period is over before the tribe develops or expends significant resources to manage any land transferred to it. The legal documents for land transfers are sometimes written so that if these types of suits are filed, then the land transfer deal is automatically off.

Dissenter's rights become an issue when the corporation transfers all or substantially all of the land, and it is not in the regular course of business. Dissenter's rights are rights provided by state corporate law for those who do not agree with a transfer. However, dissenter's rights are only guaranteed if dissenters follow a specific and rather difficult procedure under state law. There are specific time deadlines and complex requirements for complying. Successful dissenting shareholders can demand that the corporation buy them out, paying fair market value for their shares. If the corporation does not have the money to buy a successful dissenter out, the transfer cannot go through. As is the case for shareholder derivative suits, legal transfer documents for cases where dissenter's rights may arise, may include language that the deal is off if dissenter's rights are filed.

In order to interpret state law on when transfers may invoke shareholder derivative suits or dissenters rights, the corporation must take a look at what constitutes "regular course of business" and what constitutes "all, or substantially all" of the corporation's assets. These terms are currently not defined by statute, but become defined by courts as lawsuits occur, and court decisions are made. In other words, there are not legal standards for these terms, they become defined by factual determinations on a case by case basis.

Some corporations and tribes have worked out unique arrangements for land transfers such as transferring land to the tribe, but reserving first right of development to the corporation with the consent of the tribe. Any number of unique arrangements could be made in such land transfers. Village corporations that have merged together face slightly more complex legal problems, and



sometimes even greater political problems in doing land transfers to tribes. The shareholder base is broader, and the corresponding tribes may differ on the issue. The politics of the situation are expanded beyond just one tribe with one corresponding village corporation.

## **Management Issues for Tribes in Managing Land that has been transferred to them from corporations**

With a few unique exceptions, it is the surface estate of the land that is transferred from the corporation to the tribe. The regional corporation still holds title to the subsurface. The regional corporation then deals with the tribe rather than with the village corporation when subsurface estate issues arise. Once land is transferred from a village corporation to a tribe, it is owned by the tribe in fee simple status, with the tribe's name on the deed. The land is owned by the tribal membership, but is typically managed by the tribe's governing body, the tribal council.

Tribes often do not empower tribal councils with the authority to sell tribal land, or to put it at risk through a waiver of sovereign immunity, without an affirmative vote of the tribal members. These reservations of power by the tribal membership are usually found in tribal constitutions, but may also be in tribal ordinances. Tribes often have specific land management guidelines in the form of tribal ordinances or written land management policies.

As discussed earlier, tribes have sovereign immunity which generally, but not in every case, protects them from suits that could result in taking land away without their consent, and from suits on a range of activities that take place on their lands. Tribal lands are generally tax exempt, and tribes also generally have exemptions from federal and state income taxes from tribally owned and

operated business on tribal lands, which corporations do not. Also, there are general protections from condemnation, which is the purchase of land for a public project against the will of the owner. Arguments for protection from things such as loss of land due to failure to pay taxes and condemnation are increased with organization under the IRA.

Although tribes have a wide range of management options for tribally owned land, tribes do not have the authority to issue deeds to individuals in restricted status. If a tribe deeds land to an individual or other entity, the land is deeded in fee simple title and does not have restricted status or the protections that it has as tribally owned land. If a tribe wants to allow private residences or businesses on its land, it may use leases, permits, or land assignments that permit such activity while the title to the land remains with the tribe. This can create problems for individuals using the land to get bank loans, however, since the land cannot be used for collateral in the normal sense.

Although any land owned by a federally recognized Indian tribe has a unique status because of the special relationship of an Indian tribe to the federal government, land that has been transferred to a tribe from an ANCSA corporation has a different status than reservations in the Lower 48. Reservation land is held in trust for the tribe by the U. S. government, and the U.S. government's name is on the deed. That land is classified as Indian country which allows the tribe very broad jurisdictional authority within that area. At this time, the federal government is not taking tribal land owned in fee simple title by an Alaskan tribe into trust, which would then make the land similar to reservation land.

In 1998, the United States Supreme Court ruled in the *Venette* tax case that land which was once held by an ANCSA corporation and transferred to a tribe is not Indian country. However, even without an Indian country designation, federally recognized tribes that own land have considerable powers over it. This is due to

the unique legal nature of being an Indian tribe and also because a private land owner has considerable control over what happens on their land. Tribes can control access to their private property and do land use planning on their lands.

Conclusion:

Transferring village corporation land to tribes is an extremely complicated process involving a wide range of legal, political, and social issues. Federal, state, and tribal laws are all involved in the process. A great deal of education and political unification is required to undergo a successful transfer. However, retribalizing corporate lands has a lot of benefits in terms of local control and land protection for developed lands. The pros and cons of a land transfer should be weighed by both the tribe and the village corporation in consultation with tribal and corporate attorneys representing each party, to be certain that the land transfer is done in the best interests of the village corporation, its shareholders, the tribe, and its members.