THE ALASKA NATIVE CLAIMS SETTLEMENT ACT: THE FIRST TWENTY YEARS

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SYNOPSIS

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> [T]he business of securing cessions of Indian titles has been, on the whole, conscientiously pursued by the Federal Government, as long as there has been a Federal Government... We are probably the one great nation in the world that has consistently sought to deal with an aboriginal population on fair and equitable terms. We have not always succeeded in this effort but our deviations have not been typical.[1]

> The Alaska Native Claims Settlement Act is monumental legislation of which all Americans, Native and non-Native, can be proud.[2]

> The promise of ANCSA has not been fulfilled. It has become, instead, a symbol of failed expectations, the focus of every discontent.[3]

> Many critical comments have been heard regarding the drafting of [ANCSA]. There are, indeed, a number of internal inconsistencies, ambiguities, and almost meaningless phrases. The writers have found, however, that the drafting of several portions of [ANCSA] which have been heavily criticized seems to be quite clear. The criticism appears to arise because the person commenting expected or hoped to find something different.[4]

01. Introduction

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* The author wishes to acknowledge his debt of gratitude to Barbara Fullmer and Joseph J. Perkins, Jr. for their assistance in locating some of the materials used in preparing this article, and to Gwen McAda and Brenda Sokolowski for their tireless efforts in typing and proofreading this manuscript.

1 Cohen, "Original Indian Title", 32 Minn. L. Rev. 28, at 34 (1947).

2 French, "Alaska Native Claims Settlement Act," The Arctic Institute of North America, August 1972, quoted in Arnold, Alaska Native Land Claims, Alaska Native Foundation, 1978, at p. 145.

3 Berger, Village Journey, Hill and Wang, 1985, at p. 27.

4 Ely, Guess & Rudd, Summary and Analysis of the Alaska Native Claims Settlement Act, prepared for the Rural Alaska Community Action Program, Inc., May 1972, at pp. i and ii.

Congress made a significant departure from established federal Indian policy in 1971 when it enacted the Alaska Native Claims Settlement Act (ANCSA)[5] in order to extinguish aboriginal title to Alaska, to compensate Alaska Natives for this interest in lands, and to provide for Natives the ownership of lands and the opportunity to earn business profits. The traditional model of federal Indian policy includes federal recognition of an Indian tribe, the reservation of lands to be held in trust for that tribe by the federal government, and the requirement that this tribe sue under the Indian Claims Commission Act[6] for compensation for the extinguishment of the tribe's aboriginal title to other lands it occupied since time immemorial.[7] In ANCSA, Congress sought to resolve claims of aboriginal title without resort to tribes, reservations and litigation over aboriginal title[8]--it created Native-owned corporations and authorized the conveyance of fee title to 40 million acres of public lands in Alaska[9] and the payment of $962.5 million to these corporations in settlement of the claims of aboriginal title to Alaska by its Natives. ANCSA represented a turn away from federal trust oversight of land and resources[10] in favor of fee ownership of Native lands and resources, and free alienability of the stock of the Native corporations, and the magnitude of the settlement was unprecedented.[11]

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5 Act of December 18, 1971, Pub.L. 92-203 (85 Stat. 689, 43 USC 1601, et seq., as amended).

6 25 USC 70 to 70v-3.

7 See, e.g., U.S. ex rel Hualapai Indians v. Santa Fe Pacific Railroad, 261 U.S. 219 (1923); Pueblo of Laguna v. United States, 17 Ind. Cl. Comm. 615, 668-70 (1967).

8 See ANCSA § 2(b), 43 U.S.C. § 1601(b): "Congress finds and declares that--(b) the settlement should be accomplished . . . without litigation, . . . [and] without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship and trusteeship. . . ." See also H. Conf. Rep. 92-746, December 13, 1971, 1971 USCC & AN 2253: ". . . the conference committee does not intend those lands granted to Natives under this Act be considered" Indian reservation lands for purposes other than those specified in this Act. The lands granted by this Act are not "in trust" and the Native villages are not Indian "reservations."

9 Approximately four million additional acres were also conveyed under ANCSA § 19, 43 U.S.C. § 1618, to former Indian reservations which chose not to accept the benefits of ANCSA.

10 See, e.g., Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stanford Law Rev. 1213 (1975). There is a well-established Federal trust relationship with Alaska Natives. See, e.g., D. Case, The Special Relationship of Alaska Natives to the Federal Government, Alaska Native Foundation 1978; D. Case, Alaska Natives and American Laws, University of Alaska Press, 1984; Adams v. Vance, 570 F.2d 950, 953 n.3 (D.C. Cir. 1978). However, this trust relationship does not create a general obligation of Federal oversight and management of ANCSA lands and resources conveyed in fee to ANCSA corporations [See, e.g. ANCSA Section 2(b), 43 U.S.C. § 1601(b)], nor, in certain circumstances, to such lands prior to their conveyance to ANCSA corporations. Cape Fox Corp. v. United States, 456 F. Supp. 784, 789 (D. Alaska 1978).

11 "In terms of the land and money settlement, the Alaska Native Claims Settlement Act was clearly an historic event. With extinguishment of their aboriginal claims, Alaska Natives were to obtain fee simple title to more land than was held in trust for all other American Indians. And compensation for lands given up was nearly four times the amount all Indian tribes had won from the Indian Claims Commission over its 25-year lifetime." Arnold, Alaska Native Land Claims, at pp. 146-147.

It is appropriate to evaluate ANCSA upon the passage of twenty years[12] because many of the provisions of ANCSA exposing lands, resources and stock to the risks of the free market contained a twenty year "grace period", and because many of these provisions, which were thought most basic to the essential policy and philosophical underpinnings of ANCSA, have been criticized[13] and, in some instances, significantly altered,[14] particularly by the 1991 Legislation.[15]

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12 The last time the Foundation visited ANCSA was in a 1978 Special Institute entitled "Alaska Mineral Development," held in Anchorage, Alaska in which several excellent papers were presented on ANCSA lands and mineral development. See paper 4, "Alaska Native Corporations and Native Lands," by John Shively; and papers 13, 14, and 15 on "Mineral Exploration Agreements on Native Lands," by, respectively, Ted P. Stockmar, Harris Saxon, and John H. Silcox. In addition, the technical and public lands aspects of ANCSA are discussed in Saxon & Perkins, Title VI, American Law of Mining (Second), ch. 70-73; see, e.g., § 72.04; and Linxwiler, Chapter 27, "Federal Oil & Gas Leasing in Alaska" in Law of Federal Oil & Gas.

Some other publications on ANCSA topics include: R. Arnold, Alaska Native Land Claims (Anchorage, The Alaska Native Foundation 1978); D. Case, The Special Relationship of Alaska Natives to the Federal Government (Anchorage, The Alaska Native Foundation 1978); Branson, "Square Pegs and Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law," 8 U.C.L.A.-Alaska L.Rev. 103 (1979); Lazarus & West, "The Alaska Native Claims Settlement Act: A Flawed Victory," 40 Law & Contemp. Prob. 132 (1976); "Comment, Charitable Donations Under the Alaska Native Claims Settlement Act," 3 U.C.L.A.-Alaska L.Rev. 148, 149-55 (1973); Price, "Region-Village Relations Under the Alaska Native Claims Settlement Act (Part I)," 5 U.C.L.A.-Alaska L.Rev. 58 (1975); Id., Part II (Part II), 5 U.C.L.A.-Alaska L.Rev. 237 (1976); Handbook of Federal Indian Law, Chapter 14(A), Michie, Bobbs-Merril (1982); Berger, Village Journey (1986); Black, Bundy, Christianson and Christianson, "When Worlds Collide: Alaska Native Corporations and the Bankruptcy Code," 6 Alaska L.Rev. 73 (1989).

13 Congress recently stated: "The Congress finds and declares that--(2) [ANCSA] enabled Natives to participate in the subsequent expansion of Alaska's economy, encouraged efforts to address serious health and welfare problems in Native villages, and sparked a resurgence of interest in the cultural heritage of the Native peoples of Alaska; (3) despite these achievements . . . the complexity of the land conveyance process and frequent and costly litigation have delayed implementation of the settlement and diminished its value; (4) Natives have differing opinions as to whether the Native Corporation as originally structured by [ANCSA], is well-adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values . . . ." Section 2 of the Alaska Native Claims Settlement Act Amendments of 1987, Act of February 3, 1988, P.L. 100-241, (101 Stat. 1788; note after 43 U.S.C. § 1601). See also Berger, Village Journey, at pp. 26-27: "Having relinquished aboriginal title to and aboriginal rights in the whole state, Alaska Natives confidently expected that their ownership of the forty-four million acres that ANCSA had conveyed to them would be secure and their way of life protected. This expectation is precisely what ANCSA has not achieved. . . . A new world beckoned, but only a relative few could enter it."

14 ANCSA has been amended by every Congress since enactment and more such amendments are pending as this is written. There are approximately 10 separate major amendments including:
(a) Alaska Native Claims Settlement Act(ANCSA), Act of December 18, 1971, PL 92-203 (85 Stat. 688 et seq., 43 U.S.C. § 1601 et seq.).
(b) Act of January 2, 1976, PL 94-204 (89 Stat. 1145) (providing for approval of Cook Inlet Land Exchange, and first technical amendments to ANCSA including interim management escrow provisions, re-opening enrollment, exemption from securities laws, merger).
(c) Act of April 21, 1976, PL 94-273 (90 Stat. 380).
(d) Act of October 4, 1976, PL 94-456 (90 Stat. 1934 et seq.) (providing for Klukwan Village lands, and further amendments to Cook Inlet Land Exchange).
(e) Act of November 15, 1977, PL 95-178 (91 Stat. 1369) (amending regional corporation land rights under ANCSA § 14(h)(8), allowing assignments of the Alaska Native Fund and further amending the Cook Inlet Land Exchange).

The result is something different than the original conception of ANCSA, something which has come to resemble, in certain limited ways, traditional federal Indian policy, at least to the extent ANCSA now seeks to preserve the ANCSA land base and corporate structure from economic forces to ensure perpetual ownership by Natives.[16] For example, undeveloped ANCSA lands now cannot be taxed, or taken in satisfaction of debts or in bankruptcy proceedings[17]; ANCSA stock which was to be freely alienable after 20 years now is not alienable unless a corporation so elects, and the one-time issuance of corporate shares can be augmented by issuance of shares to new shareholders (for instance, to those born after adoption of ANCSA)[18]; ANCSA corporate lands and resources, originally intended to be fully subject to economic forces, can be "parked" in "Settlement Trusts" exempt from creditors[19]; and notwithstanding ANCSA's effort to resolve Native claims without resort to tribal entities, such entities and their sovereign powers have spontaneously arisen as public issues[20]. ANCSA was an experiment, and it has been flexibly adapted to conform to experience. ANCSA's numerous amendments constitute a clear and accurate appraisal of the merits of the original enactment, and a response to the real needs of Alaska Natives as they have developed and come to be understood.

(f) Alaska National Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, PL 96-487, (94 Stat. 24011 et seq.) (This 180-page enactment inter alia, amended many provisions of ANCSA including the land exchange, conveyance and Native allotment provisions of ANCSA and providing many corporation-specific amendments and conveyances, all in Title XIV).

(g) Act of March 19, 1986, PL 99-258 (100 Stat. 42).

(h) Act of November 10, 1986, PL 99-644 (100 Stat. 3581).

(i) Alaska Native Claim Settlement Act Amendments of 1987, ("1991 Legislation") Act of February 3, 1988, PL 100-241 (101 Stat. 1788) created extended period of restriction on stock alienation, settlement trusts and automatic land bank.

(j) Act of August 16, 1988, PL 100-395 (102 Stat. 979).

15 The legislative history of the 1991 Legislation is fully explored in Black, et al., "When Worlds Collide", supra.

16 These changes are significant. ANCSA has been compared (perhaps somewhat extravagantly) to the changes in "Lower 48" Indian policy represented by the General Allotment Act (or Dawes Act), 25 U.S.C. § 331, et seq., and the Menominee Termination Act, formed 25 U.S.C. § 891, et seq. Berger, Village Journey, at pp. 82-87. This comparison is not accurate at more than a superficial level, because allotments and termination were attempts to end a reservation system that never widely existed in Alaska, while ANCSA was the beginning of a coherent Federal Native policy in Alaska. However, to the degree that this comparison is apt, then the changes accomplished by the 1991 Legislation might be said to have an effect similar to the Indian Reorganization Act, 25 U.S.C. § 461, et seq., in ensuring continued Native ownership of undeveloped lands, stock and assets, although without federal trusteeship.

17 Section 11 of the 1991 Legislation (101 Stat. 1806, 43 USC § 1636(d). Previously, such lands would have become subject to property taxation twenty years after conveyance. 43 U.S.C. § 2l(d).

18 Id. § 8 (101 Stat. 1797, 43 U.S.C. §§ 1606(g) and (h) and 1629(c)).

19 Id., § 10, 43 U.S.C. § 1629(e).

20 Native Village of Tyonek v. Puckett, ___ F.2d ___, No. 87-3569 (9th Cir. January 13, 1992 vacated March 16, 1992); Native Village of Venetie v. Alaska, 944 F.2d 548 (9th Cir. 1991).

An evaluation of ANCSA after twenty years must focus primarily on ANCSA lands and ANCSA business entities. ANCSA was primarily a land settlement, not social legislation[21], and not a settlement between sovereign governments. Thus its primary focus was on land-- on Native corporations obtaining unrestricted title to land, and then developing this land for economic purposes or holding it for Native uses.

After 20 years, most of ANCSA's 40 million acres of land have been conveyed and most legal uncertainties relative to these lands have been resolved. There are many successes on these lands, including the largest zinc mine in North America, significant oil and gas production, substantial ongoing mineral exploration, and major timber harvest and export operations. In an environment in which mineral developments on the public domain are subjected to ever-increasing pressures and uncertainties, and in which the extractive industry increasingly is turning to "offshore" venues for exploration and investment, ANCSA land represents one of the best remaining opportunities available in the continental United States for mineral, oil and gas, and timber development.

However, the history of ANCSA lands is not one of uniform success. The original expectation was that ANCSA would convey resource wealth to Native corporations, but this did not uniformly occur in practice. Alaska is as large as a small continent, and its lands (and resources) are not distributed equally. The land conveyance distribution scheme of ANCSA occurred in large part in specific 25 township land withdrawals surrounding those Alaskan Villages which possessed ANCSA Village Corporations. If resources were not in those withdrawals, no benefits might be obtained. As an example, the giant North Slope oil fields of Prudhoe Bay and Kuparuk lie between two ANCSA Village Corporations, outside the land withdrawals of either, and thus these oil fields were unavailable for selection by either. This experience was repeated around the state, and the original expectation of great mineral wealth being located on ANCSA lands proved, in many cases, to be unrealized. Almost all the $363 million in net resource revenues received by ANCSA corporations since 1971 came from petroleum and timber on lands not originally available through ANCSA.[22] Rights to these lands were acquired through land exchange[23] and/or amendments to ANCSA[24] and almost all (95%) of

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21 This is not to say that ANCSA has not had, or will not continue to have, significant social impact on Alaska Natives by providing Natives with proprietary interests in vast tracts of lands, and creating for-profit businesses. See, e.g., Price, "Book Review of Alaska Natives and American Laws," 2 Alaska Law Review 435 at 436 (1985). However, as social legislation, ANCSA is as important for what is not there, as for what is. The developing Native tribal, sovereignty and subsistence movement probably will be as important to the future of Alaska Natives as ANCSA's ethic of corporate capitalism. The absence from ANCSA of a clear social and cultural agenda has done much to affect the alternate directions Native cultural and political life has recently taken in relation to tribal sovereignty and to subsistence hunting and fishing rights. ANCSA's silence on social issues has, in a limited sense, encouraged and given shape to this spontaneously developing Native movement.

22 "Financial Performance of Native Regional Corporations," Alaska Review of Social and Economic Conditions, VOL. XXVIII, No. 2 at pp. 1, 3, 11; University of Alaska, Institute of Social & Economic Research.

this resource revenue was received by three Regional Corporations, Cook Inlet Region Inc. (CIRI), the Arctic Slope Regional Corporation (ASRC), and the Sealaska Corporation.[25] Other problems hindering successful resource development include the remoteness of these land holdings, and the lack of infrastructure supporting development of these lands.[26] Indeed, some of the most successful ANCSA real estate development may occur on ANCSA lands acquired by exchange which are located outside the State of Alaska.[27]

Similarly, there has been outstanding business successes among ANCSA Regional Corporations. Doyon, Ltd. (Doyon), NANA Regional Corporation (NANA), CIRI, Sealaska and ASRC all have generated significant profits, often in areas unrelated to their resource wealth. But three Regional Corporations have reorganized under Chapter 11 of the bankruptcy code[28] and one major source of income for all ANCSA corporations has been the sale of net operating losses[29] under special tax legislation.[30]

02 Aboriginal Title

A historical analysis of ANCSA should begin with aboriginal title.[31] Whatever ANCSA has come to represent, it began as a means of resolving the claims of aboriginal title to Alaska

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23 Special ANCSA land exchange authority is provided in ANCSA § 22(f), 43 U.S.C. § 1621(f); and § 1302(h) of the Alaska National Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, P.L. 96-487, 94 Stat. 2371 at 2475, 16 U.S.C. § 3192(h). See discussion, infra, at § X.04[5][d].

24 See, e.g., §§ 4 and 5 of the Act of October 4, 1976, P.L. 94-204, 90 Stat. 1935, as amended, 43 U.S.C. § 1611, note (Cook Inlet Land Exchange, granting, inter alia, oil and gas rights in the Kenai National Wildlife Refuge); ANILCA § 1418 (withdrawing Red Dog Mine Lands for ANCSA § 14(h)(8) selection by NANA); 43 U.S.C. § 1629 and 1629a (NANA land exchange granting access to Red Dog Mine); and ANILCA § 1431 (Arctic Slope Regional Corporation land exchanges, granting, inter alia, subsurface rights to the Arctic National Wildlife Refuge).

25 "Financial Performance of Native Regional Corporations," supra, at pp. 1, 3, 11.

26 For a discussion of how this impacts drafting ANCSA resource agreements, see § V, infra.

27 These lands comprise CIRI's special surplus property entitlement. See ANILCA § 1435; Sections 12(b)(5), (6), and (7) of PL 94-204, as amended, 43 U.S.C. § 1611 note.

28 For an exhaustive and scholarly treatment of the unfortunate interface between ANCSA corporations and the Federal Bankruptcy Code (along with a discussion of the impact of the 1991 Legislation on financial issues), see Black, et al., "When Worlds Collide," supra.

29 "Financial Performance of Native Regional Corporations," supra, at pp. 1, 3, and 13-14.

30 See Section 60(b)(5) of the Tax Reform Act of 1984, as amended by Section 1804(e)(4) of the Tax Reform Act of 1986, Act of October 22, 1986, PL 99-514, repealed by § 5021 of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Act of November 10, 1988. See discussion, infra, at § X.04[9].

31 This short description of the law of aboriginal title is by no means exhaustive. For a more complete discussion, see e.g., Cohen, Handbook of Federal Indian Law, Michie-Bobbs Merrill (1982), pp. 486-93, and 739-70; Cohen, "Original Indian Title," supra; for a discussion of this topic focused on Alaska, see D. Case, Alaska Native & American Laws, supra, ch. 2.

asserted by Alaska Natives. These claims were not resolved prior to the admission of the State of Alaska to the Union and the initiation of the development of Alaska's lands[32]. The continued assertions of aboriginal title disrupted many developments in Alaska that were crucial to the national interest, such as the development of the Prudhoe Bay oilfield and the construction of the Trans-Alaska Pipeline, as well as land conveyances to Alaska; thus an orderly and mutually acceptable means of extinguishing this aboriginal title, and appropriately compensating it, needed to be found.[33]

[1] Federal Common Law Doctrine of Aboriginal Title

Because ANCSA represented a response to criticism of the traditional avenues of compensation for extinguishment of aboriginal title, a brief review of the prior federal case law relative to aboriginal title is helpful to place ANCSA in context.

The American doctrine of aboriginal title is based on European international law[34] and has been judicially recognized in the United States since at least 1823.[35] Aboriginal title constitutes a possessory right not unlike a leasehold which establishes an exclusive right of occupancy enforceable against all save the United States, and which cannot be extinguished except by the express action of the federal government.[36]

[a] Creation of Aboriginal Title

Aboriginal title is created by the exclusive use and occupancy since time immemorial of lands[37] by groups[38] of aboriginal peoples and by the use of such lands in the traditional way.

[b] Extinguishment of Aboriginal Title

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32 United States v. Atlantic Richfield, 435 F.Supp. 1009 (D. Ak. 1977), 612 F.2d. 1132 (9th Cir. 1980), cert. denied, 101 S. Ct. 244 (1980); Edwardsen v. Morton, 369 F. Supp. 1359 (D. D.C. 1973).

33 Berger, Village Journey, supra, at pp. 23-24; Arnold, Alaska Native Land Claims, supra, at pp. 139-141; M. Berry, The Alaska Pipeline: The Politics of Oil & Native Land Claims (Bloomington: Indiana University Press, 1975).

34 Cohen, Handbook of Federal Indian Law, supra, pp. 50-58; Cohen, "Original Indian Title," supra at 43-45. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States," The Georgetown Law Journal, Nov., 1942, cited in Handbook of Federal Indian Law, supra; The Federal Field Committee for Development Planning in Alaska, Alaska Natives and the Land, October 1968, U.S. Government Printing Office at p. 429.

35 Johnson v. M'Intosh, 21 U.S.(8 Wheat) 543, 574 (1823).

36 See Tee Hit Ton Bank of Tlingit Indians v. United States, 348 Ul.S. 272, 2780279 (1955); United States v. Atlantic Richfield, supra.

37 Pueblo of Laguna v. United States, 17 Ind. Cl. Comm. 615, 668-70; Cohen, "Original Indian Title", supra.

38 Or by individuals, in certain cases not relevant here. Cramer v U.S., 261 U.S. 219 (1926).

Extinguishment of aboriginal title may lawfully be accomplished only by the federal government, not by states or private parties.[39] Extinguishment of aboriginal title is accomplished by express action of Congress, by congressionally authorized conquest, by congressionally authorized purchase, or by express federal actions authorized by Congress and clearly inconsistent with the continued existence of aboriginal title. A federal lease[40] or federal patent[41], or even a long-standing history of administrative actions inconsistent with the continued existence of aboriginal title[42] is not sufficient to extinguish aboriginal title. This property right is not protected by the Constitution. There is no right to compensation for taking such title[43] but the United States has consistently paid such compensation as a matter of equity.[44]

Traditionally, obtaining compensation from the United States for an extinguishment of aboriginal title was an arduous process. Until the passage in 1946 of the Indian Claims Commission Act[45], a tribe wishing to obtain compensation from the United States had to seek a special jurisdictional statute giving the Court of Claims jurisdiction over its claim.[46] Upon passage of the Indian Claims Commission Act in 1946, special legislation was no longer required, and such actions were brought before the Indian Claims Commission. Adjudication of such claims has been criticized because of the great length of time and cost that is involved, as well as the use of an adversarial process.[47]

The legislative settlement embodied in ANCSA represents the most significant Congressional response to this criticism.

[2] History of Aboriginal Title to Alaska

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39 See e.g., the Indian Non-Intercourse Act, 25 USC § 177; United States v. Atlantic Richfield, supra; Edwardsen v. Morton, supra; Tee Hit Ton, supra.

40 Jones v. Meehan, 175 U.S. 1 (1899).

41 Cramer v. United States, supra.

42 United States, ex. rel., Hualapai Indians v. Santa Fe, supra.

43 Tee Hit-Ton, supra.

44 Cohen, "Original Indian Title", supra.

45 25 U.S.C. §§ 70-70v3.

46 See, e.g., Act of June 19, 1935, 49 Stat. 388, as amended, the special statute enacted to allow the Tlingit and Haida Indians to sue the United States for loss of their aboriginal title.

47 For example, the Tlingit-Haida case took 33 years to resolve and resulted in an award of merely $7.5 million. See Arnold, Alaska Native Claims at 91-92, 97; Berger, Village Journey, supra at 23.

Although the cases have almost uniformly avoided a broad holding on this point,[48] it is clear that aboriginal title to Alaska was uniformly preserved in the original federal land statutes enacted prior to ANCSA.

[a] Treaty of Cession.

The United States purchased Alaska from Imperial Russia in 1867 pursuant to the Treaty of Cession[49] for $7,200,000. The Treaty of Cession did not contain an explicit reservation of aboriginal title. Rather, Article 3 of the Treaty, in identifying the rights of the existing inhabitants of Alaska, stated with respect to Natives that they would be subject to future U.S. statutory enactments. Article 3 states in part as follows:

> The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard aboriginal tribes of that country.[50]

This provision has been held, implicitly or directly, to have maintained the status quo as to Indian title to Alaska.[51]

However, Article VI of the Treaty of Cession also stated, in part, that the cession ". . . is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions . . . by any parties, except merely private individual property holders. . . ." This language in Article VI was incorrectly held in Miller v. United States[52] to have extinguished aboriginal title in Alaska. The Court of Claims subsequently held that Article VI did not extinguish aboriginal title to Alaska, instead holding it was narrowly directed at extinguishing the rights of the Russian-American Fur Company to lands in Alaska.[53] There had been in Alaska significant disruption of aboriginal title by private action, and these private actions had occasionally been supported by the courts.[54] The holding in Tlingit and Haida as to the

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48 See: U.S. v. Arco, supra; Tee-Hit-Ton, supra. See also ANCSA 4(b): "[a]ll aboriginal titles, if any . . ."

49 Treaty of Cession, March 30, 1867, United States-Russia, 15 Stat. 539.

50 Treaty of Cession, supra, Article III.

51 U.S. v. Arco, 435 F.Sup. 1009 (D.Ak. 1977) at 1014; U.S. v. Edwardsen, supra; Case, Alaska Natives & American Laws, supra, at p. 60.

52 Miller v. United States, 159 F.2d 997 (9th Cir. 1947).

53 Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 147 Ct. Cls. at 388-92 (1955).

54 See, e.g., Miller v. United States, 159 F.2d 997 (9th Cir. 1947) at 1002. See also Cohen, "Original Indian Title," 32 Minn. L.Rev. 28 at 46, n.38. "Efforts of the federal government to end these discriminations have met with much local hostility, as have federal efforts to protect Native land rights in Alaska where the frontier spirit still prevails." See also Arnold, Alaska Native Land Claims, supra, at 67, 72 and 77 and Case, Alaska Natives and American Laws, chapter 2.

continued existence of aboriginal title to Alaska did much to resolve this problem.[55] This holding in Tlingit and Haida was subsequently followed in Edwardsen v. United States.[56]

[b] Organic Act of 1884.

The issue of aboriginal title was much more clearly addressed in the Organic Act of 1884[57], which established the Land District of Alaska. In that statute, Congress stated as follows:

> Section 8. [Creation of Land District] That the said District of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka . . .: Provided That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

Section 8 has been cited as preserving Native aboriginal title until Congress acted to extinguish those rights.[58]

[c] Territorial Organic Act of 1912.

The Territorial Organic Act[59] extended the public land laws to Alaska. Section 3 of the Territorial Organic Act provides that ". . . the Constitution of the United States, and all the laws thereof, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.. . . "[60]

In a similar manner, Section 9 states that "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . ."[61] This provision was held by the United States Supreme Court to have

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55 Miller v. United States is but one of several Alaskan cases arising during territorial days where Natives were forced off lands by private or other non-federal actions. For an extensive discussion of these cases, see Case, Alaska Native & American Laws, ch. 2, and The Federal Field Committee, Alaska Natives and the Land at pp. 427 and ff. Surprisingly, in the same year Tlingit and Haida was decided by the Court of Claims, the United States Supreme Court refused to rule on the question of whether the Treaty of Cession extinguished aboriginal title.

56 supra, 369 F.Supp. 1359.

57 Act of May 17, 1884, ch. 53, Section 8, 23 Stat. 24-26.

58 U.S. v. Edwardsen, supra, 369 F.Supp. at 1363. Tee Hit Ton, supra,, 348 U.S. at 278; and Justice Douglas' dissent, 348 U.S. at 291-92.

59 Act of August 24, 1912, 37 Stat. 512.

60 Id. § 3.

61 Id. § 9.

specifically preserved the status quo of aboriginal title to Alaska until further congressional action.[62]

[d] Alaska Statehood Act.

The Alaska Statehood Act[63] protected the aboriginal rights of Alaska Natives in two ways. First, in section 4 of the Alaska Statehood Act, the State of Alaska and its people disclaimed any rights to the lands held by Alaska Natives under claim of aboriginal right. Section 4 provides in relevant part as follows:

> As a contract with the United States, said state and its people do agree and declare that they forever disclaim all right and title to . . . any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called "Natives"), or as held by the United States in trust for said Natives; that all such lands . . . shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .

Thus, the state disclaimed all right or title to lands ". . . title to which may be held by any" Alaska Native.[64]

Second, Section 6(b) of the Alaska Statehood Act[65] grants to the State of Alaska the right to select and receive conveyance to more than 102 million acres of lands, but such lands must be "vacant, unappropriated and unreserved" at the time of its selection by the State:

> The State of Alaska . . . is hereby granted and shall be entitled to select, . . . not to exceed 102,550,000 acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection. . . . (emphasis added)[66]

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62 Tee-Hit-Ton Indians v. United States, supra, 348 U.S. at 272.

63 Act of July 7, 1958, Public Law No. 85-508; 48 U.S.C. Note prec. § 21.

64 This disclaimer was crucial in giving Congress the flexibility it required in the enactment of ANCSA to take back from Alaska lands and royalty income which the State previously received rights to under the Statehood Act. See discussion infra at §§ III[1], and IV[4][a] and [5][a].

65 Id., Section 6(b).

66 In addition, Section 6(a) granted the State the right to select and receive conveyance to an additional 800,000 acres of lands in Alaska which must also be "vacant, unappropriated and unreserved at the time of their selection."

[1] Events preceding ANCSA

Because aboriginal title to Alaska had been preserved in all major relevant federal enactments relating to Alaska lands, and because Alaska was admitted to the Union for 12 years before Congress comprehensively dealt with the issue of aboriginal title,[67] a significant amount of settlement had occurred, and many third party interests in land had been created. The conflicts created by State land selections resulted in the assertion of Native claims and the Land Freeze, which led directly to the passage of ANCSA.

[a] Statehood Act Selections and Conveyances.

The full import of Statehood Act Sections 4 and 6(b) was not appreciated at the time the State began its land selection program in about 1961, when the State began to select lands around the settled areas and cities. Beginning in about 1962, the state began to select lands on the Central Arctic Coastal Plain lying between the Arctic National Wildlife Refuge to the east and the Naval Petroleum Reserve - 4 to the west. Thereafter, in about 1963 the State began to receive "tentative approvals" (TA) to these lands; by 1965, it had received title to 1,650,000 acres of such lands.

The TA procedures were established by Section 6(g) of the Statehood Act which provided in part as follows:

> Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior . . . but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. (emphasis added)[68]

The legal significance of a TA was, at the outset, unclear[69], particularly in light of the unresolved status of aboriginal title and the disclaimer in Section 4 of the Statehood Act. However, almost immediately upon receipt of TAs, the state held competitive sales and sold "conditional" oil and gas leases of lands on the Central Arctic Coastal Plain, as apparently authorized by Section 6(g) of the Statehood Act. In 1967, the Prudhoe Bay Oil Field was discovered on TA'd lands lying between the Colville and Canning Rivers. In 1969, in the same area, the Kuparuk River Oil Field was discovered, and in October of 1969, the fledgling State government held another competitive oil and gas lease sale of adjoining TA'd acreage and received successful bids of nearly $1 billion. All of the State selections and TA's statewide had

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67 The only other state in which this appears to have been uniformly true was Hawaii. See Cohen, "Original Indian Title," supra, at 34, 36 n.19.

68 Alaska Statehood Act, Section 6(g).

69 Since then, a TA has come to be statutorily recognized as the functional equivalent of a patent without survey, conveying all federal rights and title to such lands, in Section 906(c) of the Alaska Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, 94 Stat. 2430, 43 U.S.C. § 1635(c).

created significant friction with the Native community, but the 1969 North Slope oil sale finally brought to a climax a dispute between the State of Alaska and the Native community concerning the extent of unextinguished aboriginal title to all of the State of Alaska.[70]

[b] Native Claims.

The State's ongoing selections and lease sales of the same lands under the Statehood Act resulted in a widespread wakening of Natives to the political process. In 1963 the Native community began in a somewhat disorganized fashion to file claims with the Bureau of Indian Affairs (BIA), asserting title to various regions of Alaska. By 1968, 40 claims had been asserted to 80% of Alaska by various Regional Native groups.[71]

[c] The Freeze and the Super Freeze.

In response to the Native claims and protests filed by Native groups alleging title to all of Alaska, in 1966 the Secretary of the Interior informally suspended all actions which would result in the conveyance of title to federal lands in Alaska (the "Freeze"). The Freeze slowed the pace of land development in Alaska to a standstill except for those portions of state lands which had been already conveyed.

The Freeze had the effect of stopping conveyances to the State under the Statehood Act. The state unsuccessfully challenged the Freeze in Alaska v. Udall,[72] which reversed an appeal of summary judgment because aboriginal rights and Native use might, as a factual matter, render lands not "vacant, unappropriated, and undeserved "and thus unavailable under the Statehood Act. The case was remanded and held in abeyance pending passage of ANCSA.

In 1968 the BIA filed an application under the Pickett Act[73] for withdrawal of all claims not otherwise withdrawn in Alaska.[74] On January 17, 1969, Secretary Udall responded to the BIA application by promulgating PLO 4582.[75] PLO 4582 has been referred to as "the Super Freeze."[76] The Super Freeze withdrew all unreserved public lands in Alaska from all forms of

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70 Arnold, Alaska Native Land Claims, supra, at p. 131.

71 Id. at pp. 102-03, 119; Federal Field Committee for Development Planning in Alaska,Alaska Natives and the Land, Anchorage, Alaska, October 1968, U.S. Government Printing Office, Washington, D.C. (556 pages).

72 420 F.2d 938 (9th Cir., 1969), cert. den. 397 U.S. 1076 (1970).

73 Act of June 25, 1910, Ch. 421, 36 Stat. 847 (codified as amended at 43 U.S.C. § 141-43, repealed in part 1960 and 1976).

74 33 Fed. Reg. 18591 (December 14, 1968).

75 PLO 4582, (34 Fed. Reg. 1025, as amended) January 17, 1969. PLO 4582 was revoked by ANCSA § 17(d)(1), 43 U.S.C. § 1618(d)(1).

76 J. Rudd, "Who Owns Alaska,": "Mineral Rights Acquisition Amid Rapidly Changing Land Ownership", 20 Rocky Mt. Min. L.Inst 109 (1974).

appropriation and disposition under the Public Land Laws (except location for metalliferous minerals) and reserved those lands for the determination and protection of the rights of Alaska Natives.

Another Department of the Interior response to the assertion of Native claims to Alaska was to direct the Federal Field Committee for Development Planning in Alaska to investigate the issue of Native land claims and to report to Congress. The report was issued October 1, 1968.[77] This report analyzed the assertion of Native claims to Alaska and made a remarkably accurate forecast of the form of their resolution.

Alaska Natives and the Land helped to resolve Native claims by officially recognizing the claims, identifying the issues, and by formally proposing a form for their resolution. In doing so, it became an important influence on ANCSA.

[2] Enactment of ANCSA.

[a] Process of Enactment.

The Native community, the oil industry, the State of Alaska, and others heavily lobbied for ANCSA for three years.[78] There was not, however, a unity of vision about the terms of the proposed settlement and, thus, Congress could not settle upon a single legislative vehicle for ANCSA. The House alone considered six different bills in 1971.[79] As 1971 drew to a close, there were major discrepancies between the bills passed by the House of Representatives[80] and the Senate[81]. A Conference Committee was appointed to resolve the differences between the bills and ANCSA was the result.[82]

There was no question that the opportunity should have been taken, and that ANCSA should have been enacted in the form it was. Because of speed with which the Conference Report was issued, some parts of ANCSA are clearly drafted; other parts are ambiguous or do not merge well with other provisions of ANCSA. Unfortunately, most of ANCSA's ambiguity and lack of clarity related to basic issues that most heavily impacted Native corporation rights in lands and money.

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77 Alaska Natives and the Land, supra.

78 See note 16, supra.

79 H.R. 10367, H.R. 3100, H.R. 7039, H.R. 7729, and H.R. 8725, 92nd Cong. 1st Sess. See: H. Rep. No. 92-523, 1971 USCC & AN 2192, at 2192-93.

80 H.R. 10367, 92d Congress, 1st Sess. (1971).

81 S. 35 , 92d Congress, 1st Sess. (1971).

82 For a complete history of the enactment of ANCSA, see Arnold, Alaska Native Claims, supra, at Chapter Four.

Even after twenty years, the effects of a rushed enactment of a Conference Committee compromise bill is inescapable: the flaws in this process have resulted in many significant delays and costs for Native corporations in implementing ANCSA. These delays and costs have, in effect, denied much of the benefit of ANCSA to Natives.[83]

[b] The Policy of ANCSA.

The basic policy of ANCSA is stated in Section 2 (b) and (c)[84] to be to extinguish aboriginal title and to create a new mechanism for managing federal policy for Alaska Natives, without creating tribes or a trust relationship that did not already exist, and without creating or diminishing any right that Natives may have previously held. Section 2(b)[85] states the purpose for the settlement embodied in ANCSA as follows:

> (b) The settlement shall be accomplished rapidly, with certainty, and in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property in institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States government and the State of Alaska.

Section 2(c)[86] is a savings clause providing that ANCSA did not affect any existing rights of Alaska Natives. It states in part as follows:

> (c) No provision of this chapter shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska or relieve, replace, or diminish any obligation of the United States or of the state or (sic) Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska . . .

04 Section by Section Historic Analysis of ANCSA -- 20 Years of Litigation and Amendments.

[1] Summary of Provisions.

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83 See note 13, supra; Berger, Village Journey, supra, at 30.

84 43 U.S.C.§ 1601 (b) and (c).

85 43 U.S.C. § 1601(b)

86 43 U.S.C. § 1601(c).

ANCSA fundamentally provides as follows: Section 2[87] establishes overall policies for ANCSA; Section 4[88] extinguishes aboriginal title; Section 5[89] provides for the enrollment of Alaska Natives by the Secretary of the Interior; Section 7[90] provides for the incorporation of 12 land-owning and "for profit" Regional Corporations one non-land-owning Regional Corporations for non-residents, and the issuance of stock in these corporations to Natives on the rolls; Section 8[91] similarly provides for the incorporation of about 225 Village Corporations within the Regional Corporation geographic areas, either as "for profit" or non-profit corporations[92] and the issuance of separate stock to those Natives enrolled to a Village; Section 6[93] provides for the establishment of the Alaska Native Fund and the payment to the Regional Corporation over the following ten years of $962.5 million to the Native corporations. Of this sum, $462.5 million came from the Federal Treasury, and, pursuant to Section 9[94], $500 million came from 2% of the royalties and bonuses received by the state from conditional leases of its TA'd lands and from federal leases it received at statehood, and from 2% of royalties and bonuses received by the federal government from Federal leases in Alaska remaining in federal ownership; Section ll[95] provides for the withdrawal of 25 townships of lands surrounding each of about 225 Villages, including lands TA'd to the state, and for "deficiency" withdrawals; Section 12[96] provides for selection of such lands by the Village and Regional Corporations; Section 14[97] provides for the conveyance of such lands to the Regional and Village Corporations "immediately after selection." Additional provisions of ANCSA include Section 7(i)[98], which provide for the payment by the Regional Corporation of 70% of its mineral revenue to the other Regions; Section 16[99], which establish land withdrawals for nine southeastern Alaska Villages; and Section 21[100], which originally provided for tax exemptions until 1991. Third-party rights are

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87 43 U.S.C. § 1601

88 43 U.S.C. § 1603

89 43 U.S.C. § 1604

90 43 U.S. C. § 1606.

91 43 U.S.C. § 1607.

92 To the author's knowledge, no village corporation incorporated on a non-profit basis.

93 43 U.S.C. § 1605.

94 43 U.S.C. § 1608.

95 43 U.S.C. § 1610.

96 43 U.S.C. § 1611.

97 43 U.S.C. § 1613.

98 43 U.S.C. § 1606(i).

99 43 U.S.C. § 1615.

100 43 U.S.C. § 1620.

protected in Sections 11[101], 14(c) and (g)[102], 16[103], and 22(b) and (c)[104]. Under Section 19[105], existing Indian reservations could elect to receive the surface and subsurface of their reservation lands in fee and receive nothing further under ANCSA, or elect to become a Village Corporation and receive only the surface lands, and money, provided it by ANCSA.

[2] Section 4--Extinguishment of Aboriginal Title

Section 4[106] is broadly drafted to extinguish all aboriginal title and claims based on aboriginal title, and to establish that all prior federal conveyances constituted extinguishment of aboriginal title. Section 4(a) provides as follows:

> (a) All prior conveyances of public land and water areas in Alaska . . . and all tentative approvals pursuant to Section 6 of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.[107]

Section 4(a) thus retroactively validates federal conveyances and makes them effective as extinguishments of aboriginal title when made. Section 4(a) thus overcomes arguments based on the disclaimer in Section 4 of the Alaska Statehood Act, and on the "vacant, unappropriated and unreserved" language of § 6(b) that such conveyances were invalid ab initio.

Next, Section 4(b) states in part as follows:

> (b) All aboriginal titles, if any, . . . in Alaska . . . are hereby extinguished.

This extinguishes any remaining aboriginal title "in Alaska." Finally, Section 4(c) extinguishes causes of action based on aboriginal title:

> (c) All claims against the United States, the state, and all other persons that are based on claims of aboriginal right, title, use, or occupancy . . . are hereby extinguished.

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101 43 U.S.C. § 1612.

102 43 U.S.C. § 1613(c) and (g).

103 43 U.S.C. § 1615.

104 43 U.S.C. § 1621(b) and (c).

105 43 U.S.C. § 1618.

106 43 U.S.C. § 1603.

107 The "if any" language in Section 4 is responsive to the uncertainty concerning the existence of aboriginal title in Alaska. See X.02[2], supra. It is difficult to believe Congress would pay $962.5 million and convey 40 million acres of land if it seriously doubted the existence of title.