

# Chapter 12

## THE ALASKA NATIVE CLAIMS SETTLEMENT ACT AT 35:

### DELIVERING ON THE PROMISE

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### **§ 12.01 Introduction**

The Alaska Native Claims Settlement Act (ANCSA),<sup>1</sup> enacted in 1971, was an experiment in resolving aboriginal title in Alaska. In ANCSA, Congress sought to resolve claims of aboriginal title without resort to tribes, reservations, and litigation.<sup>2</sup> Instead, Congress created 13 for-profit regional corporations and 225 for-

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<sup>1</sup>Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, as amended, 43 U.S.C.

§§ 1601-1629h (elec. 2007).

<sup>2</sup>See ANCSA § 2(b), 43 U.S.C. § 1601(b) (elec. 2007): “Congress finds and

profit village corporations, and conveyed to them some 40 million acres of land,<sup>2.1</sup> and \$962.5 million.<sup>3</sup>

ANCSA embodied a totally new approach to resolving aboriginal title claims, unlike any used anywhere before or since. ANCSA was driven in large part by the

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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, Dec. 13, 1971, 1971 U.S.C.C.A.N. 2247, 2253: “[T]he conference committee does not intend that 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.’”

<sup>2.1</sup>Approximately four million additional acres were also conveyed under ANCSA § 19, 43 U.S.C. § 1618 (elec. 2007), to former Indian reservations that chose not to accept the benefits of ANCSA.

<sup>3</sup>The large initial numbers of village corporations have decreased somewhat due to mergers and dissolution. “As of December 2005, there were 13 regional corporations and 182 village, urban, and group corporations.” U.S. Gov’t Accountability Off., Contract Management: Increased Use of Alaska Native Corporations’ Special 8(a) Provisions Calls for Tailored Oversight 1 (GAO 06-399, Apr. 2006), *available at* <http://www.gao.gov/new.items/d06399.pdf> [hereinafter GAO Report].

need to resolve aboriginal title claims that prevented the development of the North Slope oilfields and the Trans-Alaska Pipeline, and it was drafted from the beginning with profitable business activities and resource developments in mind, so it can be viewed as a unique response to the interaction of native peoples and mineral development.

ANCSA posed a compelling mix of statutory complexity, national policies, and the interests of Alaska Natives. While the initial approach embodied a considerable amount of idealism concerning the transformational power of capitalism, ANCSA almost immediately embarked upon a course of extensive litigation and statutory amendments—midcourse corrections required to adjust ANCSA to the real world. The result is a smoothly functioning statutory system of corporations administering assets for the Alaska Native community. However, the result also deviates somewhat from the original conception of ANCSA, and in certain ways more resembles traditional Indian policy, at least to the extent that ANCSA now seeks to preserve the ANCSA land base and corporate structure from economic forces to ensure perpetual ownership by Natives.<sup>4</sup> For example, undeveloped ANCSA lands

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<sup>4</sup>These changes are significant. ANCSA has been compared (perhaps somewhat extravagantly) to the changes in “Lower 48” Indian policy represented by the Indian General Allotment Act (or Dawes Act), 25 U.S.C. §§ 334-381 (elec. 2007), and the Menominee Termination Act, 25 U.S.C. §§ 891-902 (repealed). Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* 82-87 (Hill & Wang 1985). This comparison is not accurate at more than a superficial level,

now cannot be taxed or taken in satisfaction of debts or in bankruptcy proceedings;<sup>5</sup> 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);<sup>6</sup> ANCSA corporate lands and resources, originally intended to be fully subject to economic forces, are subject to protections that make them exempt from creditors under the Automatic Land Bank<sup>7</sup> until such lands are “developed or leased or sold”; and notwithstanding ANCSA’s effort to resolve Native

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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 ANCSA Amendments Act of 1987, Pub. L. No. 100-241, 101 Stat. 1788 (1988), commonly referred to as the 1991 Legislation, might be said to have an effect similar to the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (elec. 2007) in ensuring continued Native ownership of undeveloped lands, stock, and assets, although without federal trusteeship. The 1991 Legislation, among other things, created an extended period of restriction on stock alienation to preserve Native ownership of ANCSA corporations, and authorized settlement trusts and the automatic land bank to protect ANCSA land title from creditors and taxation.

<sup>5</sup>43 U.S.C. § 1636(d) (elec. 2007).

<sup>6</sup>43 U.S.C. § 1606(g) - (h) (elec. 2007).

<sup>7</sup>43 U.S.C. § 1636 (elec. 2007).

claims without resort to tribal entities, such entities and their sovereign powers have spontaneously arisen as public issues.<sup>8</sup> ANCSA was an experiment, and it has been flexibly adapted to conform to experience.

ANCSA—as it was, and as it has become—is noteworthy as various alternative forms for resolving native and aboriginal claims are explored worldwide.

In 1992, this author presented a paper at the 38th Annual Rocky Mountain Mineral Law Institute in Vancouver detailing ANCSA’s development since its enactment.<sup>9</sup> The 1992 paper described in detail the circumstances surrounding the enactment of ANCSA, its terms, and the significant amount of litigation that was pursued by ANCSA corporations to establish the precise meaning of ANCSA. The 1992 paper came at the end of this period of heavy litigation about the terms and application of ANCSA and nearly continuous amendments to ANCSA. At that time, the overall impact of ANCSA corporations on the Alaska Native community, and on the Alaskan economy, was not clearly defined.

Since then, ANCSA has matured. This chapter updates the 1992 paper and describes a different ANCSA, one more complete and successful at achieving its initial economic goals.<sup>10</sup>

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<sup>8</sup>Native Village of Tyonek v. Puckett, 957 F.2d 631, 633 (9th Cir. 1992); Native Village of Venetie v. Alaska, 944 F.2d 548 (9th Cir. 1991).

<sup>9</sup>James D. Linxwiler, “The Alaska Native Claims Settlement Act: The First 20 Years,” 38 *Rocky Mt. Min. L. Inst.* 2-1 (1992).

<sup>10</sup>The reader seeking a detailed understanding of the origins and provisions

There have been two major events since 1992 that have contributed to this success: First, the cycle of litigation and statutory amendments concerning the original terms of ANCSA has largely ended as the structure and function of ANCSA have been optimized. Second, since 1992, ANCSA corporations have become the sophisticated business powerhouses of the Alaskan business world. Significant new business successes have occurred, which have delivered on the promise of the original vision for ANCSA of business profits for the benefit of Alaska Natives. Many regional corporations and large village corporations have engaged in new businesses, very often with extremely successful outcomes. These economic activities primarily occur in two areas: In section 8(a) government contracting and in the oilfield service industry.

The results are impressive: In 2004, the most recent year for which there are figures, the major ANCSA corporations had total combined revenues of \$4.47 billion; and seven of the top ten Alaska-owned businesses were Native corporations, which distributed \$117.5 million in shareholder dividends, employed 3,116 Native shareholders and 12,536 people overall in the State of Alaska, and donated \$5.4 million in scholarships for 3,040 Alaska Native students.<sup>11</sup>

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of ANCSA should first read the 1992 paper, which contains a far more detailed discussion of the origin and features of ANCSA. See Linxwiler, *supra* note 9.

<sup>11</sup> Ass'n of ANCSA Regional Corp. Presidents/CEOs, Inc., *Ch'elbuja—We Share It: A Look at 13 Native Regional Corporations and 29 Native Village Corporations* (Anchorage, Alaska 2006) [hereinafter 2006 ANCSA CEO Report]. As

This business success also signals a success, somewhat late in coming, for the original vision for ANCSA, which was to create profit-making corporations, instead of tribal governments, as the focal point of the resolution of aboriginal claims in Alaska, in the hopes that this would lead to the maximum benefit for the Alaska Native community. While there are persistent social problems in the Alaska Native community that are not directly addressed by ANCSA,<sup>12</sup> its record of achievement is

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this chapter was going to press, a new report covering 2005 economic data, and reflecting even larger numbers, was issued. Ass'n of ANCSA Regional Corp. Presidents/CEOs, Inc., *Wooch Yaayi: Woven Together, Alaska Native Corporations 2005 Economic Data* (Anchorage, Alaska 2007).

<sup>12</sup>For a careful and systematic evaluation of the status of Alaska Natives in the fields of education, health, poverty, jobs, and other areas, see Alaska Native Policy Center, Our Choices, Our Future: The Status of Alaska Natives 2004, available at [http://www.firstalaskans.org/documents\\_fai/ANPCa.pdf](http://www.firstalaskans.org/documents_fai/ANPCa.pdf).

This analysis digests the 1,050-page report, Scott Goldsmith *et al.*, *Status of Alaska Natives 2004* (Univ. of Alaska Inst. of Social & Economic Research, Anchorage, Alaska 2004), available at <http://www.iser.uaa.alaska.edu/Home/ResearchAreas/statusaknatives.htm>. No careful, honest, and nuanced analysis of ANCSA and the lot of Alaska Natives can ignore the continuing issues relating to the health, employment, education, and economic status of Alaska Natives, many of which derive from the extreme remoteness of many Native villages. Nor can any such analysis of ANCSA and the

noteworthy.<sup>13</sup>

## § 12.02 Summary of ANCSA

ANCSA fundamentally provides as follows: section 2<sup>14</sup> establishes overall policies; section 4<sup>15</sup> extinguishes aboriginal title; section 5<sup>16</sup> provides for the enrollment of Alaska Natives by the Secretary of the Interior; section 7<sup>17</sup> provides for the incorporation of 12 land-owning and “for profit” regional corporations, one non-land-owning regional corporation for non-residents, and the issuance of stock in

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lot of Alaska Natives ignore that while the larger ANCSA corporations profit, the smaller ANCSA corporations function in a much more problematic context of remoteness, small size, and limited business opportunity.

<sup>13</sup>One description of the benefits ANCSA corporations currently give to their shareholders in the fields of social and personal growth of Native peoples is found in the GAO Report, *supra* note 3, Appendix X: Benefits That Alaska Native Corporations Provide to Their Shareholders. These benefits include direct benefits such as dividends, jobs, job training, and scholarships, and indirect benefits such as cultural preservation, support for subsistence lifestyles, and creation of foundations and nonprofit organizations.

<sup>14</sup> 43 U.S.C. § 1601 (elec. 2007).

<sup>15</sup> 43 U.S.C. § 1603 (elec. 2007).

<sup>16</sup> 43 U.S.C. § 1604 (elec. 2007).

<sup>17</sup> 43 U.S.C. § 1606 (elec. 2007).

these corporations to Natives on the rolls. Section 8<sup>18</sup> similarly provides for the incorporation of about 225 village corporations within the regional corporation geographic areas, either as “for profit” or non-profit corporations<sup>19</sup> and the issuance of separate stock to those Natives enrolled in a village corporation. Section 6<sup>20</sup> provides for the establishment of the Alaska Native Fund and the payment to the regional corporations over the following ten years of \$962.5 million;<sup>21</sup> Section 11<sup>22</sup> provides for the withdrawal of 25 townships of lands surrounding each of about 225 villages, including lands TA’d to the State of Alaska for conveyance pursuant to section 6(g) of the Alaska Statehood Act,<sup>23</sup> and for “deficiency” withdrawals; section

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<sup>18</sup> 43 U.S.C. § 1607 (elec. 2007).

<sup>19</sup>The author is unaware of any village corporation that incorporated on a non-profit basis.

<sup>20</sup> 43 U.S.C. § 1605 (elec. 2007).

<sup>21</sup>Of this sum, \$462.5 million came from the federal treasury. Pursuant to section 9, 43 U.S.C. § 1608 (elec. 2007), \$500 million came from 2% of the royalties and bonuses received by the state from conditional leases of its tentatively approved (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. *See infra* § 12.03[2][e].

<sup>22</sup> 43 U.S.C. § 1610 (elec. 2007).

<sup>23</sup>Pub. L. No. 85-508, 72 Stat. 339 (1958), 48 U.S.C. note preceding § 21.

12<sup>24</sup> provides for selection of such lands by the village and regional corporations; and section 14<sup>25</sup> provides for the conveyance of such lands to the regional and village corporations “immediately after selection.” Additional provisions of ANCSA include section 7(i),<sup>26</sup> which provides for the distribution by the regional corporations of 70% of their mineral revenues among all 12 land-owning regional corporations; section 16,<sup>27</sup> which establishes land withdrawals for nine southeastern Alaska villages; and section 21,<sup>28</sup> which originally provided for tax exemptions through 1991. Third-party rights are protected in sections 11,<sup>29</sup> 14(c) and (g),<sup>30</sup> 16,<sup>31</sup> and 22(b) and (c).<sup>32</sup> Under section 19,<sup>33</sup> village corporations on existing Indian reservations could elect to receive the surface and subsurface of their reservation lands in fee and receive nothing further under ANCSA.

After the enactment of ANCSA, significant supplemental legislation was

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<sup>24</sup> 43 U.S.C. § 1611 (elec. 2007).

<sup>25</sup> 43 U.S.C. § 1613 (elec. 2007).

<sup>26</sup> 43 U.S.C. § 1606(i) (elec. 2007).

<sup>27</sup> 43 U.S.C. § 1615 (elec. 2007).

<sup>28</sup> 43 U.S.C. § 1620 (elec. 2007).

<sup>29</sup> 43 U.S.C. § 1610 (elec. 2007).

<sup>30</sup> 43 U.S.C. § 1613(c) & (g) (elec. 2007).

<sup>31</sup> 43 U.S.C. § 1615 (elec. 2007).

<sup>32</sup> 43 U.S.C. § 1621(b) & (c) (elec. 2007).

<sup>33</sup> 43 U.S.C. § 1618 (elec. 2007).

enacted to aid in the orderly adaptation of ANCSA to the needs of the Native community, including provisions to clarify the ownership and charge to the acreage entitlement of ANCSA corporations due to water bodies<sup>34</sup> and the related statute of limitations on determinations of navigability;<sup>35</sup> a provision<sup>36</sup> ratifying Native allotment applications under the Alaska Native Allotment Act<sup>37</sup> pending at the time of enactment of ANCSA; establishment of the Alaska Land Bank including the Automatic Land Bank protections for ANCSA land from creditors until it is developed, leased, or sold;<sup>38</sup> and a provision exempting the ANCSA land conveyancing program from National Environmental Policy Act (NEPA) requirements.<sup>39</sup>

### **§ 12.03 Developments in ANCSA**

#### **[1] Alaska Native Claims of Aboriginal Title**

Whatever ANCSA has come to represent, it began as a means of resolving the claims of aboriginal title to Alaska asserted by Alaska Natives. Thus, any systematic analysis of ANCSA must review in at least some detail the legal foundation of that statute.

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<sup>34</sup> 43 U.S.C. § 1631 (elec. 2007).

<sup>35</sup> 43 U.S.C. § 1632 (elec. 2007).

<sup>36</sup> 43 U.S.C. § 1634 (elec. 2007).

<sup>37</sup> Act of May 17, 1906, 34 Stat. 197 (repealed in 1971).

<sup>38</sup> 43 U.S.C. § 1636 (elec. 2007).

<sup>39</sup> 43 U.S.C. § 1638 (elec. 2007).

The American doctrine of aboriginal title is based on European international law<sup>40</sup> and has been judicially recognized in the United States since at least 1823.<sup>41</sup> 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.<sup>42</sup> Aboriginal title is created by the exclusive use and occupancy since time immemorial of lands<sup>43</sup> by groups<sup>44</sup> of aboriginal peoples and by the use of such lands in the traditional way.

The claims of Alaska Natives concerning their aboriginal title were not resolved prior to the admission of the State of Alaska to the Union and the initiation

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<sup>40</sup>See Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* (LexisNexis 2005); Felix S. Cohen, "Original Indian Title," 32 *Minn. L. Rev.* 28, 43-45 (1947); Fed. Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* 429 (U.S. GPO Oct. 1968) [hereinafter Fed. Field Committee].

<sup>41</sup>Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 574 (1823).

<sup>42</sup>See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-79 (1955); United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d. 1132 (9th Cir. 1980).

<sup>43</sup>Pueblo of Laguna v. United States, 17 Ind. Cl. Comm. 615, 668-70 (1967); Cohen, "Original Indian Title," *supra* note 40.

<sup>44</sup>Or by individuals, in certain cases not relevant here. Cramer v. United States, 261 U.S. 219 (1923).

of the development of Alaska's lands.<sup>45</sup> 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.<sup>46</sup>

The traditional model of federal Indian policy historically included 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 the tribe sue under the Indian Claims Commission Act<sup>47</sup> for compensation for the extinguishment of the tribe's aboriginal title to other lands it occupied since time immemorial.<sup>48</sup>

In ANCSA, as noted in § 12.01,<sup>49</sup> Congress sought to resolve claims of

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<sup>45</sup> *Atlantic Richfield Co.*, 435 F. Supp. 1009; *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973).

<sup>46</sup> Berger, *supra* note 4, at 23-24; Robert D. Arnold, *Alaska Native Land Claims* 139-41 (Alaska Native Fdn. 1976); Mary Clay Berry, *The Alaska Pipeline: The Politics of Oil & Native Land Claims* (Ind. Univ. Press 1975).

<sup>47</sup> Ch. 959, 60 Stat. 1049 (1946).

<sup>48</sup> See, e.g., *Pueblo of Laguna v. United States*, 17 Ind. Cl. Comm. 615, 668-70 (1967).

<sup>49</sup> See *supra* note 2 and accompanying text.

aboriginal title without resort to tribes, reservations, and litigation. ANCSA represented a turning away from federal trust oversight of land and resources<sup>51</sup> in favor of fee ownership of Native lands and resources, and free alienability of the stock of the Native corporations. The magnitude of the settlement was unprecedented.<sup>52</sup>

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<sup>50</sup>Reserved.

<sup>51</sup>See, e.g., Reid Peyton Chambers, “Judicial Enforcement of the Federal Trust Responsibility to Indians,” 27 *Stanford L. Rev.* 1213 (1975). There is a well-established federal trust relationship with Alaska Natives. See, e.g., David S. Case, *The Special Relationship of Alaska Natives to the Federal Government* (Alaska Native Fdn. 1978); David S. Case, *Alaska Natives and American Laws* (Univ. 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 § 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).

<sup>52</sup>Arnold, *supra* note 46, at 146-47 states:

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.

**[a] History of Aboriginal Title to Alaska—The Origin and Need for ANCSA**

Although the cases have almost uniformly avoided a broad holding on this point,<sup>53</sup> it is clear that aboriginal title to Alaska was uniformly preserved in the original federal land statutes enacted prior to ANCSA.

**[i] Treaty of Cession**

The United States purchased Alaska from Imperial Russia in 1867 pursuant to the Treaty of Cession<sup>54</sup> for \$7.2 million. The Treaty of Cession did not contain an explicit reservation of aboriginal title. Rather, Article III 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 III 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 to aboriginal tribes of that

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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.

<sup>53</sup>See *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). Even ANCSA § 4(b), 43 U.S.C. § 1603(b) (elec. 2007), assiduously avoids a statement unqualifiedly acknowledging the existence of aboriginal title in Alaska: “[a]ll aboriginal titles, if any. . . .”

<sup>54</sup>Treaty of Cession, Mar. 30, 1867, United States-Russia, 15 Stat. 539.

country.”<sup>55</sup> This provision has been held, implicitly or directly, to have maintained the status quo as to aboriginal title to Alaska.<sup>56</sup>

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. . . .”<sup>56.1</sup> This language in Article VI was incorrectly held in *Miller v. United States*<sup>57</sup> to have extinguished aboriginal title in Alaska. The court of claims subsequently held, in *Tlingit and Haida Indians v. United States*,<sup>58</sup> that Article VI did not extinguish aboriginal title to Alaska, instead holding that it was narrowly directed at extinguishing the rights of the Russian-American Fur Company to lands in Alaska. There had been in Alaska significant disruption of aboriginal title by private actions, and these private actions had occasionally been supported by the courts.<sup>59</sup> The holding in *Tlingit and Haida* as to

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<sup>55</sup> *Id.* art. III.

<sup>56</sup> *Atlantic Richfield Co.*, 435 F. Supp. at 1014; *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973); Case, *Alaska Natives*, *supra* note 51, at 60.

<sup>56.1</sup> Treaty of Cession, art. VI.

<sup>57</sup> 159 F.2d 997 (9th Cir. 1947).

<sup>58</sup> 177 F. Supp. 452 (Ct. Cl. 1959).

<sup>59</sup> See, e.g., *Miller*, 159 F.2d at 1002. See also Cohen, “Original Indian Title,” *supra* note 40, 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

the continued existence of aboriginal title to Alaska did much to resolve this problem.<sup>60</sup> This holding was subsequently followed in *Edwardsen v. Morton*.<sup>61</sup>

### [ii] Organic Act of 1884

The issue of aboriginal title was much more clearly addressed in the Organic Act of 1884,<sup>62</sup> 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

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Native land rights in Alaska where the frontier spirit still prevails.” *See also* Arnold, *supra* note 46, at 67, 72 & 77; Case, *Alaska Natives*, *supra* note 51, at ch. 2.

<sup>60</sup> *Miller*, 159 F.2d 997, 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 Natives*, *supra* note 51, ch. 2, and Fed. Field Committee, *supra* note 40, at 427 & ff. Surprisingly, in the same year *Tlingit and Haida* was decided by the U.S. Court of Claims, the U.S. Supreme Court refused to rule on the question of whether the Treaty of Cession extinguished aboriginal title.

<sup>61</sup> 369 F. Supp. 1359 (D.D.C. 1973).

<sup>62</sup> Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26.

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.<sup>63</sup>

### **[iii] Territorial Organic Act of 1912**

The Territorial Organic Act<sup>64</sup> 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. . . .”<sup>65</sup>

In a similar manner, section 9 states that “[t]he legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . .”<sup>66</sup> This provision was held by the U.S. Supreme Court to have specifically preserved the status quo of aboriginal title to Alaska until further congressional action.<sup>67</sup>

### **[iv] Alaska Statehood Act**

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<sup>63</sup> *Edwardsen*, 369 F. Supp. at 1363; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955); and 348 U.S. at 291-92 (Douglas J., dissenting).

<sup>64</sup> Act of Aug. 24, 1912, ch. 387, 37 Stat. 512.

<sup>65</sup> *Id.* § 3, 37 Stat. at 512.

<sup>66</sup> *Id.* § 9, 37 Stat. at 514.

<sup>67</sup> *Tee-Hit-Ton Indians*, 348 U.S. at 272.

The Alaska Statehood Act<sup>68</sup> 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 compact 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 is 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. . . .<sup>68.1</sup>

Thus, the state disclaimed all right or title to lands “title to which may be held by any” Alaska Native.<sup>69</sup>

Second, section 6(b) of the Alaska Statehood Act<sup>70</sup> grants to the State of

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<sup>68</sup>Pub. L. No. 85-508, 72 Stat. 339 (1958), 48 U.S.C. note preceding § 21.

<sup>68.1</sup>*Id.* § 4, 72 Stat. at 339.

<sup>69</sup>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 that the State previously received rights to under the Alaska Statehood Act.

<sup>70</sup>§ 6(b), 72 Stat. at 340.

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.<sup>71</sup>

#### **[v] Statehood Act Selections and Conveyances**

The full import of the Alaska Statehood Act §§ 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” (TAs) 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.”<sup>72</sup> The legal significance of a TA was unclear at the outset,<sup>73</sup> particularly in light of the unresolved status of

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<sup>71</sup>Id. 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.”

<sup>72</sup>§ 6(g), 72 Stat. at 341-42 (emphasis added).

<sup>73</sup>Since then, a TA has come to be statutorily recognized as the functional

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 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.<sup>74</sup>

#### **[vi] 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

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equivalent of a patent without survey, conveying all federal rights and title to such lands. Alaska National Interest Lands Conservation Act (ANILCA), § 906(c), 94 Stat. 2430, codified at 43 U.S.C. § 1635(c) (elec. 2007).

<sup>74</sup>Arnold, *supra* note 46, at 131.

Native groups.<sup>75</sup>

### [vii] 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 that 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 that 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*,<sup>76</sup> which reversed an appeal of summary judgment because aboriginal rights and Native use might, as a factual matter, render lands *not* “vacant, unappropriated, and unreserved” 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<sup>77</sup> for withdrawal of all claims not otherwise withdrawn in Alaska.<sup>78</sup> On January 17, 1969, Secretary Stewart Udall responded to the BIA application by promulgating Public Land Order

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<sup>75</sup> *Id.* at 102-03, 119; Fed. Field Committee, *supra* note 40.

<sup>76</sup> 420 F.2d 938 (9th Cir. 1969).

<sup>77</sup> Act of June 25, 1910, ch. 421, 36 Stat. 847 (codified as amended at 43 U.S.C. §§ 141-143, repealed in part 1960 and 1976).

<sup>78</sup> 33 Fed. Reg. 18,591 (Dec. 14, 1968).

(PLO) 4582.<sup>79</sup> PLO 4582 has been referred to as “the Super Freeze.”<sup>80</sup> The Super Freeze withdrew all unreserved public lands in Alaska from all forms of 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.<sup>81</sup> This report analyzed the assertion of Native claims to Alaska and made a remarkably accurate forecast of the form of their resolution. It helped to resolve Native claims by officially recognizing the claims, identifying the issues, and formally proposing a form for their resolution. In doing so, it became an important influence on ANCSA.

#### **[b] ANCSA § 4—Extinguishment of Aboriginal Title**

ANCSA § 4<sup>82</sup> is broadly drafted to extinguish all aboriginal title and claims based on aboriginal title, and to establish that all prior federal conveyances

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<sup>79</sup>34 Fed. Reg. 1025 (Jan. 23, 1969). PLO 4582 was revoked by ANCSA § 17(d)(1), 43 U.S.C. § 1616(d)(1) (elec. 2007).

<sup>80</sup>Joseph Rudd, “Who Owns Alaska? Mineral Rights Acquisition Amid Rapidly Changing Land Ownership,” 20 *Rocky Mt. Min. L. Inst.* 109, 116 (1974).

<sup>81</sup>*Alaska Natives and the Land* (U.S. GPO Oct. 1968).

<sup>82</sup>43 U.S.C. § 1603 (elec. 2007).

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(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.”<sup>83</sup> Section 4(a) thus retroactively validates federal conveyances and makes them effective as extinguishments of aboriginal title when made. Section 4(a) also overcomes arguments based on the disclaimer in section 4 of the Alaska Statehood Act, and on the “vacant, unappropriated, and unreserved” language of section 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.”<sup>83.1</sup> 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.”<sup>83.2</sup>

There are four major cases interpreting ANCSA § 4. First, *Edwardsen v.*

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<sup>83</sup>The “if any” language in section 4 is responsive to the uncertainty concerning the existence of aboriginal title in Alaska. It is difficult to believe that Congress would pay \$962.5 million and convey 40 million acres of land to Native corporations if it seriously doubted the existence of aboriginal title.

<sup>83.1</sup>43 U.S.C. § 1603(b) (elec. 2007).

<sup>83.2</sup>43 U.S.C. § 1603(c) (elec. 2007).

*Morton*<sup>84</sup> constituted a mandamus action against the Secretary of the Interior to force him to bring an action against third parties who, it was asserted, trespassed against aboriginal title on the North Slope during the conduct of exploration for oil and gas resources. *Edwardsen* was originally filed in 1969 and was delayed pending the passage of ANCSA; in his decision, issued in 1973, Judge Oliver Gasch determined that while aboriginal rights were extinguished by section 4, claims for past trespasses survived ANCSA § 4(c) and that the United States had a legal obligation to pursue these claims on behalf of Natives.

The *Edwardsen* decision led to the filing of *United States v. Atlantic Richfield Co.*<sup>85</sup> This lawsuit was filed by the United States on behalf of the Inupiat Eskimos of the Arctic Slope of Alaska against the various oil companies and oilfield service companies that conducted oil exploration and development activities on the Slope prior to the passage of ANCSA. The lawsuit sought recovery of trespass damages on a wide range of theories. This suit resulted in a broadly applicable decision that rejected the holding of *Edwardsen* and held that the purpose of section 4 was to extinguish all title or claims based on aboriginal title, and thereby avoid litigation and end the divisiveness that had come to exist between Natives and non-Natives in Alaska.<sup>86</sup>

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<sup>84</sup> 369 F. Supp. 1359 (D.D.C. 1973).

<sup>85</sup> 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).

<sup>86</sup> The suggestion in *Atlantic Richfield* that the United States might itself be liable for damages for the extinguishment of the aboriginal title of third parties led

Thereafter, two other suits were brought to extend the theory of aboriginal claims in a manner to avoid this broad interpretation of section 4. *Village of Gambell v. Clark*<sup>87</sup> asserted aboriginal rights to hunt and fish on the Outer Continental Shelf (OCS) adjacent to Alaska. The claim of the plaintiffs in that case was that the extinguishment of aboriginal title contained in section 4(b) of ANCSA extended only to the state boundaries of the State of Alaska and not to the OCS. The claim was initially unsuccessful: the court concluded that if in fact such rights existed, they were extinguished by section 4(b). This holding was eventually vacated by the U.S. Supreme Court.<sup>88</sup> On remand, the Ninth Circuit held<sup>89</sup> that aboriginal rights to the OCS were not extinguished by section 4(b) and remanded the case to the district court to determine: (1) if such rights actually existed; and (2) if so, whether such rights were extinguished by the Outer Continental Shelf Lands Act.<sup>90</sup>

Finally, in *Inupiat Community v. United States*,<sup>91</sup> it was asserted that the Inupiat Community established aboriginal rights to sea ice based on subsistence

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to an unsuccessful claim for such damages in *Inupiat Community v. United States*, 680 F.2d 122 (Ct. Cl. 1982).

<sup>87</sup>746 F.2d 572 (9th Cir. 1984).

<sup>88</sup>This part of the case was vacated on appeal and remanded. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

<sup>89</sup>*Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989).

<sup>90</sup>43 U.S.C. §§ 1331-1356a (elec. 2007).

<sup>91</sup>746 F.2d 570 (9th Cir. 1984).

hunting and fishing in a manner to escape the terms of section 4(b). The court concluded that if such rights existed, they were extinguished by section 4.

The efforts of Alaska Natives to assert theories that aboriginal rights have survived ANCSA have continued. While the holding is not based on ANCSA § 4, *Native Village of Eyak v. Trawler Diane Marie, Inc.*,<sup>91.1</sup> decides very similar issues, and is consistent with the line of cases outlined above. In this case, Native villages asserted that they held aboriginal title and exclusive aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters, and to the mineral resources within their traditional use area of the OCS of the United States. The Ninth Circuit rejected these claims, and held that the federal paramountcy doctrine<sup>92</sup> establishing exclusive federal control over the OCS precluded aboriginal title to the OCS and that there was no exclusive aboriginal right to fish in navigable waters based on aboriginal title.

## **[2] Provisions Relating to Native Corporation Structure**

The provisions of ANCSA that establish Native corporations consist of section 7, primarily pertaining to regional corporations; section 8, primarily pertaining to village corporations; sections 6 and 9, dealing with the Alaska Native Fund (\$962.5 million); and sections 5 and 7(g), relating to the enrollment of Alaska Natives. Since 1992, there has not been substantial change to these provisions, and this section is therefore brief. Readers interested in these provisions should consult

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<sup>91.1</sup> 154 F.3d 1090 (9th Cir. 1998).

<sup>92</sup> See, e.g., *United States v. California*, 332 U.S. 19 (1947).

this author's 1992 article.<sup>92.1</sup> Here, we primarily focus on a brief description of these provisions and enumerate a few recent legislative changes.

### **[a] Section 7—Regional Corporations**

Section 7(a) and (b)<sup>93</sup> created 12 land-holding regional corporations covering all of Alaska, and section 7(c)<sup>94</sup> created a thirteenth region for non-resident Natives which was conveyed no land by the United States. Because the 12 land-owning regional corporations hold title to subsurface natural resources, and have a broad population base, they play a critical role in the ANCSA settlement.<sup>95</sup>

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<sup>92.1</sup> Linxwiler, *supra* note 9.

<sup>93</sup> 43 U.S.C. § 1606(a) & (b) (elec. 2007).

<sup>94</sup> 43 U.S.C. § 1606(c) (elec. 2007).

<sup>95</sup> Congress intended that the regional corporations have no federal supervision. The ANCSA legislative history contains a statement of faith and hope in the future good business judgment of the regional corporations:

In §§ 7 and 8 of the conference report authorizing the creation of Regional and Village Corporations, the conference committee has adopted a policy of self determination on the part of the Alaska native people. The conference committee anticipates that there will be responsible action by the board members and officers of the corporations and that there will not be any abuses of the intent of this Act. The conference committee does not contemplate that the Regional and Village Corporations will allow unreasonable staff, officer, board

Under ANCSA § 7(d)<sup>96</sup> the 12 regional corporations are organized under existing Alaska corporate law, which contains a number of special provisions for ANCSA corporations.<sup>97</sup> Originally, under ANCSA § 7(g),<sup>98</sup> stock was issued only to Natives of quarter blood quantum or more<sup>99</sup> who were alive on December 18, 1971.<sup>100</sup> This had the effect of disenfranchising “after borns,” natives born after December 18, 1971, and thus gave a “one time” character to the settlement. The 1991 Legislation amended these provisions to allow issuance of stock to Natives or descendants of Natives who were born after 1971, who were not initially enrolled, or who were more than 65 years of age.<sup>101</sup> These changes resolved criticism of the “one

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member, consultant, attorney or other salaries, expenses and fees. The conference committee also contemplates that the Regional and Village Corporations will not expend funds for purposes other than those reasonably necessary in the course of ordinary business operations.

H. Conf. Rep. 92-746, 1971 U.S.C.C.A.N. 2247, 2250. In large part, the confidence of Congress has proven to be well placed.

<sup>96</sup> 43 U.S.C. § 1606(d) (elec. 2007).

<sup>97</sup> See, e.g., Alaska Stat. §§ 10.06.960, 45.55.138, .139 & .160 (elec. 2007); Alaska Admin. Code tit. 3, §§ 08.305 to .365 (elec. 2007).

<sup>98</sup> Formerly codified at 43 U.S.C. § 1606.

<sup>99</sup> 43 U.S.C. § 1602(b) (elec. 2007).

<sup>100</sup> 43 U.S.C. § 1604(a) (elec. 2007).

<sup>101</sup> 43 U.S.C. § 1606(g) & (h) (elec. 2007). See, e.g., 43 U.S.C.

time” nature of the original enactment, and have given needed flexibility for stock issuance.

### **[b] Section 8—Village Corporations**

ANCSA § 8(a)<sup>102</sup> requires the organization of village corporations under Alaska corporate law as part of the receipt of lands or any benefits under ANCSA. Section 11(b)<sup>103</sup> lists about 225 historic villages in Alaska in which village corporations might be organized. However, unlike the specific mandatory provisions relative to creating regional corporations, the eligibility of a village (whether named in ANCSA § 11(b) or not) was uncertain until the Secretary granted it village status. ANCSA § 3(c)<sup>104</sup> requires that village corporations possess at least 25 shareholders. In addition, ANCSA § 10(b) and the regulations also require the village to have “on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives’ own cultural patterns and life style . . .; [t]he Village must not be modern and urban in character; and . . . [i]n the case of unlisted Villages, a majority of the residents must be Native. . . .”<sup>105</sup> Like many of the other complex and uncontested provisions of ANCSA, these regulatory requirements for village eligibility

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§ 1606(g)(1)(B)(i)(I)-(III) and (h)(1)(C)(iii) & (4) (elec. 2007).

<sup>102</sup> 43 U.S.C. § 1607(a) (elec. 2007).

<sup>103</sup> 43 U.S.C. § 1610(b) (elec. 2007).

<sup>104</sup> 43 U.S.C. § 1602(c) (elec. 2007).

<sup>105</sup> 43 C.F.R. § 2651.2(b)(2), (3) & (4) (elec. 2007).

led to litigation,<sup>106</sup> which was resolved by settlement only after many years of protracted negotiation. Similar litigation relating to the recognition of a Native group (a Native organization with less than 25 members), which would entitle the group to receive fee title to certain land under ANCSA, continued for several years and was only recently resolved.<sup>107</sup>

#### **[c] Section 7(h)—Restrictions on Alienation**

Originally, ANCSA imposed a period of restriction on the alienation of stock in regional and village corporations until December 18, 1991.<sup>108</sup> One of the most significant amendments to ANCSA, in the 1991 Legislation, is to allow the continuation of this restriction after 1991, unless a corporation opts to allow stock sale.<sup>109</sup>

#### **[d] Sections 5 and 7(g)—Native Roll and Shareholders**

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<sup>106</sup>Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978).

<sup>107</sup>Minchumina Natives, Inc. v U.S. Dep’t of the Interior, 60 F.3d 1363 (9th Cir. 1995); Minchumina Natives, Inc. (On Judicial Remand), 153 IBLA 225, GFS(MISC) 36(2000).

<sup>108</sup>Pub. L. No. 92-203, § 7(h)(1), 85 Stat. 688, 692 (1971).

<sup>109</sup>43 U.S.C. §§ 1629b-1629d (elec. 2007). The original stock restrictions applicable to ANCSA regional corporation stock, and the more recent provisions of the 1991 Legislation, apply to village stock in the same manner as to regional corporation stock. 43 U.S.C. § 1607(c) (elec. 2007).

<sup>110</sup>Reserved.

In a manner similar to the issue of eligibility of village corporations, there was a significant amount of administrative litigation concerning the enrollment of individuals as Natives eligible for the benefits of ANCSA. ANCSA's requirement for the enrollment of Natives is minimal. A "Native" is defined in section 3(b) as an Alaska native of one-quarter or greater blood quantum, or, "in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member. . . ." <sup>111</sup> ANCSA § 5(a) <sup>112</sup> required the Secretary of the Interior to prepare a roll of all Natives. Periodically, the Secretary of the Interior attempted to purge the rolls of ineligible enrollees and significant amounts of administrative litigation resulted, until clarified policies were adopted concerning enrollment. Subsequent enactments authorized late enrollment of otherwise qualified Natives. <sup>113</sup> In addition, as discussed above, the 1991 Legislation authorized the issuance of stock to Natives born after December 18, 1971, and Natives who were eligible for enrollment but were not so enrolled. <sup>114</sup>

#### **[e] Sections 6 and 9—The Alaska Native Fund**

In substance, ANCSA extinguished aboriginal title in return for the payment

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<sup>111</sup> 43 U.S.C. § 1602(b) (elec. 2007).

<sup>112</sup> 43 U.S.C. § 1604(a) (elec. 2007).

<sup>113</sup> Pub. L. No. 94-204, § 1, 89 Stat. 1145 (1976).

<sup>114</sup> See 43 U.S.C. § 1606(g)(1)(B)(i)(I) & (II) (elec. 2007); *supra* § 12.03[2][a].

of money and the grant of title to lands to Native corporations. ANCSA § 6(a)<sup>115</sup> provided that \$962.5 million would be deposited into the Alaska Native Fund established in the U.S. Treasury; \$462.5 million<sup>116</sup> of this sum was authorized to be appropriated from federal funds;<sup>117</sup> an additional \$500 million was to come from the State of Alaska and from federal oil and gas leases pursuant to the revenue sharing provisions of ANCSA.<sup>118</sup>

ANCSA § 9 created two types of royalty interests to be paid until the \$500 million figure was reached: (1) Under section 9(b) and (c), one such royalty was to be paid by the State of Alaska to the United States and consisted of (i) 2% of the gross value of minerals produced or removed from lands previously or subsequently TA'd to the state, which funds were received by the state after passage of ANCSA, or from lands subsequently patented to the state; (ii) 2% of all rentals and bonuses received by the state after passage of ANCSA from leases or sales of such lands; and (iii) 2% of funds received by the state from former federal leases to which the state acquired title under section 6(h) of the Alaska Statehood Act. (2) The second such royalty was

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<sup>115</sup> 43 U.S.C. § 1605(a) (elec. 2007).

<sup>116</sup>This sum represents a compromise between the House figure of \$425 million and the Senate figure of \$500 million. H. Conf. Rep. 92-746, Dec. 13, 1971, 1971 U.S.C.C.A.N. 2247, 2252.

<sup>117</sup> 43 U.S.C. § 1605(a)(1) (elec. 2007).

<sup>118</sup> 43 U.S.C. § 1605(a)(3) (elec. 2007).

<sup>119</sup>Reserved.

2% of the funds received by the United States under the Mineral Leasing Act<sup>120</sup> after the passage of ANCSA from federal leases in Alaska remaining in federal ownership. Except for this provision, 90% of all such royalties, rentals, and bonuses received by the United States under the Mineral Leasing Act would have been paid to the state pursuant to the terms of the Mineral Leasing Act.<sup>121</sup>

The effect of ANCSA §§ 6(a)(3)<sup>122</sup> and 9<sup>123</sup> therefore was that the state paid the lion's share of the \$500 million portion of the ANCSA settlement. The legislative history of ANCSA suggests that the state agreed with this result:

The natives will be paid . . . \$500 million from mineral revenues received from lands in Alaska hereafter conveyed<sup>124</sup> to the State under the Statehood Act, and from the remaining federal lands, other than the Naval Petroleum Reserve Numbered Four, in Alaska. Most of

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<sup>120</sup> 30 U.S.C. §§ 181-263 (elec. 2007).

<sup>121</sup> 30 U.S.C. § 191 (elec. 2007).

<sup>122</sup> 43 U.S.C. § 1605(a)(3) (elec. 2007).

<sup>123</sup> 43 U.S.C. § 1608 (elec. 2007).

<sup>124</sup> The legislative history is incorrect in its statement that these funds are to come only from lands that are "hereafter conveyed." Section 9(b), the relevant provision of ANCSA, states: "[w]ith respect to conditional leases and sales of minerals *heretofore or hereafter made* pursuant to § 6(g) of the Alaska Statehood Act. . ." (emphasis added). In fact, the relevant question is whether or not the funds were received after the passage of ANCSA.

the \$500,000,000 paid to the natives would otherwise be paid to the State under existing law, and the State has agreed to share in the settlement of native claims in this manner.<sup>125</sup>

The legislative history may overstate the level of agreement of the state with these provisions. There was apparently some significant doubt in Congress as to whether the State of Alaska would sue the United States concerning the lawfulness of these provisions.<sup>126</sup> Consequently, ANCSA contained two extraordinary provisions: First, section 10(a) provided a one-year statute of limitations for “any civil action to contest the authority of the United States to legislate on the subject matter or the legality of this chapter. . . .”<sup>127</sup> Second, ANCSA § 10(b) provided that the state’s land selection and conveyance rights would be suspended if it challenged the lawfulness of ANCSA.<sup>128</sup> The one-year statute of limitations on challenges to the

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<sup>125</sup>H. Conf. Rep. 92-746, 1971 U.S.C.C.A.N. 2247, 2248.

<sup>126</sup>The state Attorney General had previously issued a contrary opinion. 1969 Op. Att'y Gen, No. 6, Supp.

<sup>127</sup>43 U.S.C. § 1609(a) (elec. 2007). The constitutionality of this statute of limitations was upheld in *Paul v. Andrus*, 639 F.2d 507 (9th Cir. 1980).

<sup>128</sup>Section 10(b) of ANCSA provides in relevant part as follows:

In the event that the State initiates litigation . . . to contest the authority of the United States to legislate on the subject matter or the legality of this Act, all rights of land selection granted to the State by the Alaska Statehood Act shall be suspended . . . and no selections

lawfulness of ANCSA passed without litigation being filed.

ANCSA § 6(a)<sup>129</sup> set forth a schedule for payments from the Alaska Native Fund. The \$462.5 million in federal funds was to be appropriated to the Alaska Native Fund according to the following schedule: \$12.5 million in the fiscal year in which ANCSA became effective; \$50 million in the second fiscal year; \$70 million in each of the third, fourth, and fifth fiscal years; \$40 million for the transition quarter in 1976 when the United States changed fiscal years; and \$30 million in each of the remaining five fiscal years.<sup>130</sup>

The section 6(a) payment schedule, while appearing innocent enough, was probably responsible for some significant early financial errors committed by some ANCSA corporations. These corporations generally were not organized and functioning until 1973 and the first distributions were aggregated and released in two parts in 1973. This meant that, instead of \$12.5 million initially being distributed to these regional corporations, \$132.5 million was distributed soon after they began functioning. These were startup corporations with little business experience, and many significant business problems arose as such significant

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shall be made, no tentative approval shall be granted, and no patents shall be issued for such lands during the pendency of such litigation.

<sup>129</sup> 43 U.S.C. § 1605(a) (elec. 2007).

<sup>130</sup> Section 6(c) also states in relevant part as follows: “After completion of the roll . . . *all money in the Fund . . .* shall be distributed at the end of each three months of the fiscal year among the Regional Corporations.” (emphasis added).

amounts of money were sought to be invested in the rural Alaskan economy. The consequences of financial decisions, business fraud, and bad investments occurring during this very early period persisted for many years.

The size of the Alaska Native Fund contributed significantly to the success of ANCSA; a lesser monetary settlement would not have rendered the statute the success it has turned out to be. However, the unrestricted non-trust nature of the relationship between the federal government and ANCSA corporations could have been satisfied, while business goals were enhanced, by a more gradual initial distribution of funds.

### **[3]     Section 7(i) and (j)—Sharing Mineral Wealth Among Regional Corporations**

A significant part of the political compromise in the Alaska Native community relating to ANCSA occurred with respect to sharing the revenues of mineral development with Natives statewide, whereby the “have not” regional corporations share in the mineral wealth of the “haves.” ANCSA § 7 contains two provisions pertaining to the payment of money by Native corporations to other Native corporations: (1) the sharing of resource revenue among regions under section 7(i); and (2) the payment of a portion of section 7(i) funds to village corporations and individual shareholders not enrolled in villages under section 7(j).

#### **[a] ANCSA § 7(i)**

ANCSA § 7(i)<sup>131</sup> is a key part of the settlement of the claims of Alaska

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<sup>131</sup>43 U.S.C. § 1606(i) (elec. 2007).

Natives represented by ANCSA. This section requires each regional corporation to share with all 12 land-owning regional corporations in Alaska 70% of all revenues derived from the timber resources and subsurface estate conveyed to it pursuant to ANCSA.<sup>132</sup> The intent of this provision has been stated by one court as follows: “Section 1606(i) thereby achieves a rough equality by allowing for the fact that some regions are resource-poor, while others possess a wealth of natural resources.”<sup>132.1</sup>

The revenue sharing requirements of section 7(i) have been broadly construed by the courts as intending “to achieve a rough equality of assets among all the Natives.”<sup>133</sup> The subject of revenue sharing among ANCSA regional corporations under ANCSA § 7(i) is enormously complicated and resulted in seven years of litigation and the many reported decisions cited below. Section 7(i) states as follows:

Seventy percentum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporations among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each Region pursuant to section 5. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized

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<sup>132</sup>Pub. L. No. 92-203, 85 Stat. 688, 693 (1971).

<sup>132.1</sup>*See* Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp., 517 F. Supp. 1255, 1257 (D. Alaska 1981).

<sup>133</sup>Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 732 (9th Cir. 1978).

pursuant to subsection (c) hereof.

Section 7(i) thus accomplishes two things: (1) it provides to each regional corporation a financial share of the section 7(i) revenues being derived by the other regional corporations from the subsurface or timber interests in lands received pursuant to ANCSA; and (2) it limits the share of revenues a regional corporation may retain that is derived from its own ANCSA subsurface.

A regional corporation's share of section 7(i) revenues is calculated as follows:

(1) Its share of the section 7(i) revenues derived from the other regional corporations is based upon its relative percentage of the Native population of all regional corporations. This percentage is applied to the revenues of all other regional corporations that are subject to sharing to determine the share that regional corporation receives of the revenues generated by other regional corporations.

(2) With respect to revenues a regional corporation derives from its own ANCSA subsurface, 30% is initially retained by that corporation, and 70% is distributed. Because the 70% is distributed to all 12 regional corporations, in effect some of the 70% of the revenue is also distributed by the regional corporation to itself according to its percentage share of section 7(i) distributions.

The amounts actually retained by a regional corporation under section 7(i) are further limited, however, by section 7(j) of ANCSA<sup>134</sup> which provides that 50% of funds received by a regional corporation under section 7(i) are to be distributed to

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<sup>134</sup> 43 U.S.C. § 1606(j) (elec. 2007).

the at-large shareholders and the village corporations of that region.<sup>135</sup> Section 7(j) has been held to require distribution not only of 50% of the revenue stream coming from other regional corporations, but also that portion of the 70% the regional corporation distributes to itself, which is generated from its own exploitation of its own section 7(i) resources.<sup>136</sup>

Like much of the rest of ANCSA, section 7(i) did not contain an adequate legislative definition of its basic terms. For instance, it was unclear whether the section 7(i) sharing requirement applied to net or gross proceeds, what accounting methodology must be utilized, whether it applied to sand and gravel, and whether direct or indirect and cash or non-cash income were affected. Moreover, section 7(i) requires the sharing of resource revenues in a manner that regional corporations might wish to avoid. The result was seemingly endless<sup>137</sup> and extremely costly<sup>138</sup>

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<sup>135</sup> See § 12.03[3][b], *infra*.

<sup>136</sup> *Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F. Supp. 1255 (D. Alaska 1981); *see also Chugach Natives, Inc. v. Doyon Ltd.*, 588 F.2d 723, 732 (9th Cir. 1978). *Accord Aleut Corp. v. Tyonek Native Corp.*, 725 F.2d 527, 529 (9th Cir. 1984) (“As noted above, § 7(i) of ANCSA requires each region to give 50% of the revenue *derived from other regions* to the villages within its boundaries” (emphasis added)).

<sup>137</sup> See, e.g., *Aleut Corp. v. Arctic Slope Regional Corp.*, 410 F. Supp. 1196 (D. Alaska 1976); *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F. Supp. 900 (D. Alaska 1976), *rev’d in part sub nom. Doyon Ltd. v. Bristol Bay Native Corp.*, 569

litigation respecting the payment of funds pursuant to section 7(i). The litigation attacking the obligations and ambiguities of section 7(i) proceeded for seven years.

This litigation culminated in a 121-page Section 7(i) Settlement Agreement entered into on June 29, 1982, among all 12 resource-holding ANCSA regional corporations.<sup>139</sup> The Section 7(i) Settlement Agreement was accompanied by a 37-page master's report; these documents were approved by the court and formed the basis for dismissal in 1983 of *Aleut Corp. v. Arctic Slope Regional Corp.*<sup>140</sup> ANCSA village corporations unsuccessfully sought to intervene as a matter of right in order

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F.2d 491 (9th Cir. 1978); *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862 (D. Alaska 1976), *aff'd in part, rev'd in part sub nom. Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (9th Cir. 1978); *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F. Supp. 482 (D. Alaska 1980).

<sup>138</sup>The amount and cost of litigation arising out of section 7(i) was criticized in *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F. Supp. 482, 485, n.5 (D. Alaska 1980), and in Douglas M. Branson, "Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations under Corporate Law," 8 *UCLA-Alaska L. Rev.* 103, 137 (1979).

<sup>139</sup>A non-legal narrative of the process leading to the adoption of the section 7(i) Settlement Agreement is found in 2006 ANCSA CEO Report, *supra* note 11.

<sup>140</sup>Judgment of dismissal was entered June 3, 1983. No. A75-53, D. Alaska.

to prevent the approval of the Settlement Agreement.<sup>141</sup>

The Section 7(i) Settlement Agreement represented an effort by the 12 regional corporations to resolve the cycle of litigation and to bring certainty to the application of section 7(i). In essence, the Settlement Agreement was an effort by the regional corporations to correct the deficiencies of ANCSA by a detailed agreement in order to facilitate commercially viable resource development without litigation; it exhaustively defined terms and concepts, established detailed accounting procedures, and established a consensus among the regions on policies for development of resources.

This is not to say that all section 7(i) litigation ended with the Section 7(i) Settlement Agreement. The Settlement Agreement, however, has transformed the litigation among the regional corporations into binding arbitration, and has also narrowed the scope of such arbitration to the application of its extensive and rigid accounting terms. It also took steps to control litigation: it provided that the prevailing party in such an arbitration would receive its costs and attorneys' fees pursuant to Rule 82 of the Alaska Rules of Civil Procedure.<sup>142</sup> In the few arbitrations that have occurred, the attorneys' fees awards have been large. This has proven to be an effective *in terrorem* financial deterrent to frivolous arbitrations.

The Section 7(i) Settlement Agreement was agreed to by all the regional

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<sup>141</sup>Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527 (9th Cir. 1984).

<sup>142</sup>Alaska has adopted a “loser pays” rule relative to attorney’s fees. See Alaska R. Civ. P. 82.

corporations, “haves” and “have nots” alike. The consensus position it represents discourages the “active” development of resources by regional corporations in favor of “passive” developments conducted by presumably more experienced mining and oil and gas companies, with the regional corporation primarily collecting royalty payments. This feature has been the subject of criticism as the sophistication of regional corporations in resource development has increased. However, no amendment of this aspect of the Section 7(i) Settlement Agreement has yet occurred.

**[b] ANCSA § 7(j)—Mandatory Payments by Regional Corporations to Village Corporations and At-Large Shareholders**

Another essential element of the political settlement among Natives affected by ANCSA is section 7(j).<sup>143</sup> This section ensured that at least some of the Alaska Native Fund moneys were received by all corporate stockholders, and now that this Fund is depleted, it ensures that moneys paid pursuant to section 7(i) continue to be received by the village corporations and by the class of stockholders not enrolled in village corporations (at-large shareholders). Section 7(j) provides as follows:

During the five years following [December 18, 1971], not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 6 (Alaska Native Fund), and under subsection (i) . . . and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less

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<sup>143</sup> 43 U.S.C. § 1606(j) (elec. 2007).

than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those Villages, as provided in subsection to it [sic].<sup>144</sup> Section 7(j) has proven to be critical in ensuring the continued viability of many village corporations as functioning economic entities because in many areas of Alaska, village corporations are heavily dependent upon section 7(j) income.

The first sentence of section 7(j) is absolutely clear: during the first five years, Alaska Native Fund moneys, section 7(i) moneys, and “all other net income” were mandated to be distributed to all shareholders and to villages.

A question arose, however, as to whether the phrase “[n]ot less than 45% of funds *from such sources* during the first five year period, and 50% thereafter” (emphasis added) included “all other net income” received by regional corporations, and thus was to be distributed to village corporations. This led to litigation<sup>145</sup> seeking to clarify the ambiguity.<sup>146</sup>

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<sup>144</sup>Pub. L. No. 92-203, § 7(j), 85 Stat. 688, 693 (1971). The phrase “subsection to it” probably was intended to read “subsection (m).” ANCSA § 7(m) relates to the distribution and allocation of funds to at-large and village shareholders.

<sup>145</sup>Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp., 517 F. Supp. 1255 (D. Alaska 1981).

<sup>146</sup>In this case, the court recognized a significant ambiguity in § 7(i) as follows:

The court concluded that “‘all other net income,’ as used in the first sentence, is not a ‘source’ which must be distributed under the second sentence. Accordingly, the second sentence of subsection (j) does not require Regional Corporations to distribute any net income to Village Corporations and at-large shareholders.”<sup>146.1</sup> In addition, the court concluded that section 7(j) “requires a Regional Corporation to distribute to Village Corporations and at-large stockholders its received seventy percent share of [section 7(i)] resources, but not, in the case of a resource-holding

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Here, the second sentence of subsection (j) is unclear regarding whether the words “from such sources” also refer to a regional corporation’s “net income”. Ambiguity is evident from the fact that commentators who have addressed the second sentence of subsection (j) have disagreed on whether net income must be distributed. Lazarus and West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 L & Contemp. Prob. 132, 162-64 (1976) (phrase “from such sources” not intended to encompass regional corporation net earnings); Price, *Region-Village Relations under ANCSA*, 5 UCLA-Alaska L.Rev. 58, 62 n. 20 (1975) (resolve ambiguity regarding “all other net income” by requiring “net income” to be distributed under the second sentence).

517 F. Supp. at 1258-59.

<sup>146.1</sup> *Id.* at 1261.

Regional Corporation, its thirty percent retained share.”<sup>147</sup>

This decision had considerable impact upon the role of Regional Corporations, enhancing their “for profit” function as opposed to their social welfare function. If the court had held to the contrary, then regional corporations would distribute one-half of their profits to village corporations and individuals, and would be less profit-oriented and more politically aligned with villages than is now the case. The court understood this implication and stated in its concluding paragraph that “[s]uch a requirement would erode the economic strength of the Regional Corporations, and thereby weaken the foundation for the settlement, the Regional Corporations.”<sup>148</sup>

Section 7(j) was litigated more recently in relation to whether the proceeds of net operating loss (NOL) transactions were subject to sharing under section 7(i), and thus subject to distribution to village corporations and at-large shareholders under section 7(j). During the late 1970s and early 1980s, many Native corporations suffered financial reverses. Eventually, while it was seeking reorganization pursuant to the bankruptcy laws, Bering Straits Native Corporation (BSNC), along with its advisors, initiated an effort to engage in the sharing of the tax benefits of its NOLs through transactions with profitable companies with large tax liabilities—in essence, the ANCSA corporation “sold” its losses to the profitable company, which used them as deductions to decrease its tax liability. Senator Ted Stevens (R-AK)

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<sup>147</sup>517 F. Supp. at 1261-62.

<sup>148</sup>*Id.* at 1262. Other commentators have questioned whether regional corporations are the “foundation for the settlement.” See Berger, *supra* note 4.

was instrumental in obtaining the enactment of a series of statutes that clarified the authority of all Native corporations to enter into such transactions and they eventually became widespread among ANCSA corporations until the authority for them was repealed in 1988.<sup>149</sup>

These NOL transactions were instrumental in recapitalizing many Native corporations. It was estimated that NOL transactions were responsible for payments to regional corporations alone of \$445 million,<sup>150</sup> and many additional large transactions were entered into by various ANCSA village corporations. Thus, village corporations and at-large shareholders of regional corporations had a major interest in establishing that these funds were subject to sharing under section 7(i), and thus subject to distribution to them under section 7(j).<sup>151</sup> Congress eventually enacted an amendment to section 7(i)<sup>152</sup> clarifying that benefits received as a result of losses or credits are not subject to sharing under section 7(i) (and thus are not subject to

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<sup>149</sup>See § 60(b)(5) of the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 793, as amended by § 1804(e)(4) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (repealed by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), § 5021, Pub. L. No. 100-647, 102 Stat. 3342).

<sup>150</sup>Steve Colt, “Financial Performance of Native Regional Corporations,” *Alaska Review of Social and Economic Conditions* (Dec. 1991).

<sup>151</sup>A federal lawsuit seeking this outcome was unsuccessful. See *Bay View, Inc. ex rel. AK Native Village Corps. v. Ahtna, Inc.*, 105 F.3d 1281 (9th Cir. 1997).

<sup>152</sup>43 U.S.C. § 1606(i)(2) (elec. 2007).

distribution under section 7(j)).

#### **[4] Provisions Relating to Native Lands**

In addition to the payment of money, the other element of compensation provided by ANCSA was land: ANCSA provides for the conveyance of fee title to 40 million acres of lands to Native corporations. There was no simple grant of contiguous lands, however: Under ANCSA, lands are withdrawn for selection under section 11, selected under section 12, and conveyed under section 14 to Native village corporations and Native regional corporations (and reconveyed to third parties). The conveyances encompass various estates in land, in varying amounts, and for various purposes all over the state. Fundamentally, 25 townships of lands surrounding villages were withdrawn for selection, and three to seven townships of surface interests in lands around village corporations were eventually granted in fee to those corporations, while the subsurface (mineral) interests in these lands and fee title to the entire estate in other lands, were granted to the 12 Alaska regional corporations, with protection for residents and entrymen on such lands.

##### **[a] Sections 11(a)(1) and 12(a)—Village Withdrawals and Selections**

The 25 townships of lands surrounding villages (except lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4) were withdrawn for village selection in

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<sup>153</sup>Reserved.

<sup>154</sup>Reserved.

ANCSA § 11.<sup>155</sup> The section 11(a)(1) withdrawals included, under section 11(a)(2),<sup>156</sup> lands that were tentatively approved to the State of Alaska for conveyance pursuant to section 6(g) of the Alaska Statehood Act.<sup>157</sup> If there were insufficient lands to allow a village corporation to select its entire entitlement in the section 11(a)(1) withdrawal, then ANCSA § 11(a)(3)<sup>158</sup> authorized the Secretary to make “deficiency” withdrawals in other lands.

Section 12(a) of ANCSA<sup>159</sup> authorized the village corporations to select lands within their withdrawals until December 18, 1974. Under section 12(a), no more than three townships could be selected from lands TA’d to the state and withdrawn under section 11(a)(2) and no more than three townships could be selected from the National Wildlife Refuge System or within a National Forest.

Section 12(b) of ANCSA<sup>160</sup> provided that additional surface acreage (totaling 22 million acres in the aggregate with section 12(a) lands) would be allocated to regions for reallocation to their village corporations. In large part, this section 12(b) allocation has not yet occurred because village over-selections remain unresolved.

Like so many other provisions of ANCSA, the land withdrawal, selection, and

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<sup>155</sup> 43 U.S.C. § 1610 (elec. 2007).

<sup>156</sup> 43 U.S.C. § 1610(a)(2) (elec. 2007).

<sup>157</sup> Pub. L. No. 85-508, 72 Stat. 339 (1958); 48 U.S.C. note preceding § 21.

<sup>158</sup> 43 U.S.C. § 1610(a)(3) (elec. 2007).

<sup>159</sup> 43 U.S.C. § 1611(a) (elec. 2007).

<sup>160</sup> 43 U.S.C. § 1611(b) (elec. 2007).

conveyance provisions were complex, ambiguous, and heavily litigated. Much of this litigation was brought by the State of Alaska<sup>161</sup> or other holders of third party rights aggrieved by Bureau of Land Management (BLM) decisions. So many administrative appeals were filed that the Department of the Interior created the Alaska Native Claims Appeals Board (ANCAB) from 1976 to 1982 to hear them all.<sup>162</sup> A Native

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<sup>161</sup>There was a widespread perception in the Native community until at least the early 1980s that the state was an aggressive, litigious opponent of Native land conveyances in seeking to protect its own land interests.

<sup>162</sup>The number of reported decisions (especially in administrative appeals) is simply staggering. A 1986 publication, Div. of Info. & Library Services, U.S. Dep’t of the Interior, *Information Interior: Alaska Native Claims Settlement Act, as Amended* (July 1986), lists judicial and administrative decisions citing provisions of ANCSA. Organized by section, and ignoring judicial decisions, this publication lists the following numbers of decisions in administrative appeals citing sections 11, 12, and 14: Citing § 11 (withdrawals) (without subsection reference): 14 ANCAB decisions, 9 IBLA decisions, and 6 I.D. decisions; citing § 11(a)(1) (25 townships withdrawal): 7 ANCAB, 14 IBLA, and 22 I.D. decisions; citing § 11(a)(1)(A) (core township withdrawals): 4 I.D. decisions; citing § 11(a)(2) (withdrawal of state TA’d lands): 11 ANCAB, 14 I.D. decisions; citing § 11(a)(3) (deficiency withdrawals): 7 ANCAB, 6 IBLA, and 2 I.D. decisions; citing § 12 (conveyances) (without subsection reference): 11 ANCAB, 14 IBLA, and 7 I.D. decisions; citing § 12(a)(1) (village selections): 4 ANCAB, 10 IBLA, and 21 I.D. decisions; citing § 12(b) (village land reallocation): 1

corporation's most important employees in the early stages were often its land and legal personnel. It was difficult to focus on business issues as long as this remained the case.

Most of these village lands disputes were resolved by the 1980s, but one major dispute arising under a complex and unique set of facts and agreements survived and has been resolved only recently. This litigation involved the claims of village corporations in the Cook Inlet Region that they were entitled to lands initially withdrawn for them on the west side of Cook Inlet, in or near what is now

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ANCAB, 1 IBLA, and 4 I.D. decisions; citing § 12(c) (regional "land loss formula"): 6 ANCAB, 3 IBLA, and 6 I.D. decisions; citing § 14 (conveyances) (without subsection reference): 8 IBLA decisions; citing § 14(a) (village conveyances): 37 ANCAB, 8 IBLA, and 7 I.D. decisions; citing § 14(c) (village corporation reconveyances to third parties) (all subsections together): 6 ANCAB, 10 IBLA, and 7 I.D. decisions; citing § 14(f) (regional subsurface conveyance and village consent right): 2 ANCAB and 3 I.D. decisions; citing § 14(g) (valid existing rights): 16 ANCAB, 17 IBLA, and 33 I.D. decisions; citing § 14(h) (2 million acre regional conveyance) (without subsection reference): 1 ANCAB and 3 I.D. decisions; citing § 14(h)(1) (cemetery sites): 1 ANCAB and 3 I.D. decisions; citing § 14(h)(2) (Native group conveyances): 5 IBLA decisions; citing § 14(h)(5) (primary place of residence): 3 ANCAB, 4 IBLA, and 3 I.D. decisions.

The total is 367 Department of the Interior administrative decisions citing ANCSA provisions through 1986. Even allowing for some duplication, this was a huge amount of litigation over a benefit granted by statute.

Lake Clark National Park. This dispute was adjudicated in two separate lawsuits, *Seldovia Native Ass'n, Inc. v. United States*<sup>163</sup> and *Chickaloon-Moose Creek Native Ass'n, Inc. v. Norton*.<sup>164</sup>

Both decisions involve the same dispute, one brought by Seldovia Native Association, and one by other villages. The facts are identical in each case: Cook Inlet villages lay along the coast of the Kenai Peninsula and thus half of their land withdrawals were underwater, significantly diminishing the lands from which they could select their entitlements; these villages were close to each other and thus their withdrawal areas overlapped, diminishing even further the lands available to each. The Secretary withdrew “deficiency lands” under ANCSA § 11(a)(3)<sup>165</sup> for the villages on the remote west side of the Cook Inlet. The Secretary set aside deficiency lands for the villages in common pursuant to a Deficiency Agreement between the Department of the Interior and Cook Inlet Region which outlined, in Appendices to the Deficiency Agreement, a complex set of limitations on the selection of lands; the Villages selected lands in a round-robin process, and some of these selections were rejected. Cook Inlet Region, the Department of the Interior, and the villages entered into a complex series of agreements to resolve this and other land issues for and with the villages. The Department of the Interior asserted that the rights of the villages to select certain lands on the west side were thereby lost (the lands would

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<sup>163</sup>35 Fed. Cl. 761 (1996).

<sup>164</sup>360 F.3d 972 (9th Cir. 2004).

<sup>165</sup>43 U.S.C. § 1610(a)(3) (elec. 2007).

instead be taken elsewhere).

In *Seldovia Native Ass'n*, Seldovia asserted takings and breach of fiduciary duty claims as a result of the loss of these selections. The court held that the Native village's takings claim was barred by the statute of limitations because the complaint was not filed within six years of the accrual of the action pursuant to 28 U.S.C. § 2501. The court dismissed the fiduciary duty claim because ANCSA did not create any federal fiduciary duties. In *Chickaloon-Moose Creek*, the court again upheld the construction of the Deficiency Agreement urged by the Department of the Interior.

### **[b] Regional Corporation Withdrawals and Selections**

The subsurface of lands was withdrawn for regional corporations by section 11(a). The regional selection obligation is not clear in section 12; some of section 12 actually addresses conveyance rights of regional corporations more properly included in section 14. The Department of the Interior regulations governing regional corporation selections<sup>166</sup> most clearly establish the various regional corporation selection obligations. For example, as to section 14(f) subsurface lands, even though the statute was silent, the regulations required the region to file a subsurface selection when the villages selected the surface.

The regional corporations were to select and receive conveyance of two basic types of interests in lands: the subsurface of village lands under ANCSA § 14(f) and

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<sup>166</sup> See 43 C.F.R. § 2652 (elec. 2007).

<sup>167</sup> Reserved.

surface and subsurface interests in other lands pursuant to sections 12(c) and 14(h)(1) and (8).

Pursuant to ANCSA § 14(f),<sup>168</sup> when the surface estate is conveyed to a village corporation, the regional corporation for the region in which the lands are located receives title to the subsurface estate. A question inevitably arises about the precise meaning of “subsurface.” This is one of the most basic ambiguities in ANCSA. Initial drafts of ANCSA did not contain the term “subsurface estate,” but instead stated that regional corporations should receive patents to “all minerals covered by the mining and mineral leasing laws.”<sup>169</sup> Later versions of the bills included the phrase “subsurface” to denominate the interests conveyed to the regional corporations. A Ninth Circuit decision held, in deciding the ownership of sand and gravel, that “subsurface” means mineral estate.<sup>170</sup> One of the more energetically pursued ambiguities in ANCSA is whether sand and gravel are part of the “surface” or “subsurface” estate, and thus owned by the region or the village. This is of significance in Alaska due to the need for gravel to fill marshy lands. This dispute was eventually and finally resolved by *Koniag, Inc. v. Koncor Forest*

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<sup>168</sup> 43 U.S.C. § 1613(f) (elec. 2007).

<sup>169</sup> See *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 726 (9th Cir. 1978) (quoting H. Rep. 7039 before Subcomm. on Indian Affairs, 92d Cong., 1st Sess. 36 (1971)).

<sup>170</sup> *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727, 730 (9th Cir. 1988).

*Resource*,<sup>171</sup> in which it was held that, while the regions owned the gravel, they could not prevent village corporations from using the gravel. When there was no other practical source for the materials, the subsurface owner could not unreasonably deny the surface owner access to materials necessary for surface development. The court ruled, however, that the village had to compensate the region for the materials it used.

These “split estate” lands are also subject to the further rights of the village corporations established in ANCSA § 14(f) to consent to the exploration, development, or removal of minerals from these lands within the Native village boundaries.<sup>172</sup>

ANCSA § 12(c)<sup>173</sup> creates an additional entitlement for regions. Under section 12(c), the surface and subsurface interest in an additional 16 million acres of lands are allocated directly to the 11 land-owning regional corporations.<sup>174</sup> This is the regional “land loss” formula, which relates to the relative amount of lands in each region in which aboriginal rights were extinguished. This percentage allocation of lands is different from the rest of ANCSA, which basically allocates all other Native corporation lands on the basis of population. The “acreage vs. population”

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<sup>171</sup> 39 F.3d 991 (9th Cir. 1994).

<sup>172</sup> § 12.03[4][g][vi] *infra*.

<sup>173</sup> 43 U.S.C. § 1611(c) (elec. 2007).

<sup>174</sup> Excluding Sealaska Corporation, the regional corporation for southeastern Alaska, because of the *Tlingit-Haida* settlement discussed *infra* in § 12.03[4][e].

dispute was longstanding in the Native community as it sought passage of ANCSA, and section 12(c) represents a compromise on the issue.<sup>175</sup>

### **[c] Section 14—Village and Regional Conveyances**

Section 14(a) of ANCSA<sup>176</sup> authorized the conveyance of between three and seven townships of land to each village corporation, depending upon its population. These conveyances were to occur “[i]mmediately after selection.”<sup>177</sup> In fact, almost no conveyances occurred until the closing days of the Ford Administration in early 1977, and then again in 1978, 1979, and 1980 towards the close of the Carter Administration, when the ANCSA land conveyancing program finally began to become effective.<sup>178</sup> Land conveyancing under ANCSA has been slow and complex, although it is a task nearing completion today. Many harms resulted from the great delay in land conveyancing. Section 1415 of the Alaska National Interest Lands Conservation Act (ANILCA)<sup>179</sup> created an “automatic conveyance” procedure to break the logjam on conveyances with respect to certain “core township” village lands.

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<sup>175</sup> See Arnold, *supra* note 46, at 136-37, 150-51 & 257-58.

<sup>176</sup> 43 U.S.C. § 1613(a) (elec. 2007).

<sup>177</sup> *Id.*

<sup>178</sup> There was a widespread perception in the Native community through at least the early-1980s that this delay resulted in part from a strong institutional resistance to conveyancing on the part of the Bureau of Land Management.

<sup>179</sup> 43 U.S.C. § 1641 (elec. 2007).

The regional corporations were also conveyed surface and subsurface title in up to two million acres of additional lands pursuant to ANCSA § 14(h)(1) and (8).<sup>180</sup> Section 14(h)(1) conveyances are for preserving existing cemetery and historical sites and these lands may not be utilized for mineral development purposes,<sup>181</sup> while section 14(h)(8) lands are freely conveyed to regional corporations for any use whatsoever. Section 14(h) provides that the two million acres to be conveyed pursuant to that subsection be “located *outside* the areas withdrawn by [ANCSA] section 11.”<sup>181.1</sup> The regulations provide the reverse.<sup>182</sup> This obvious divergence between the statute and the regulations has not been litigated, but it has been responsible for at least one regional corporation being significantly underselected on its 14(h)(8) acreage allocation. Either litigation or, preferably, legislation or suspension of the regulations will presumably occur in the future to resolve this problem. There are significant mineral successes on statutorily approved 14(h)(8) regional selections.<sup>183</sup>

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<sup>180</sup> 43 U.S.C. § 1613(h)(1) & (8) (elec. 2007).

<sup>181</sup> See second proviso in 43 C.F.R. § 2653.5(a) (elec. 2007).

<sup>181.1</sup> 43 U.S.C. § 1613(h) (elec. 2007).

<sup>182</sup> 43 C.F.R. §§ 2653.3(b) & 2653.1(b) (elec. 2007) together provide that § 14(h)(8) allocations will be made from lands “previously withdrawn under § 11 . . . of the Act which are not otherwise appropriated.”

<sup>183</sup> See ANILCA § 1418. The Red Dog Mine is located on such a selection made by NANA Regional Corp., Inc.

ANCSA contemplated land conveyances only by patent. However, patents require surveys under ANCSA § 13,<sup>184</sup> which are rare in remote areas of Alaska. Instead, BLM issued regulations providing for interim conveyances (ICs<sup>185</sup>) on the basis of protraction diagrams and this option is now acknowledged by statute: ANCSA § 22(j)(1)<sup>186</sup> now accords ICs the finality and status of patents and further provides that the boundaries of the lands so ICd will not change upon survey. The requirement of survey for patent was amended to allow patents to be issued on the basis of a protraction diagram.<sup>187</sup> In addition, there is a two-year statute of limitations on secretarial decisions made in relation to ANCSA<sup>188</sup> which buttresses the finality of ICs.

The ownership of submerged lands underlying navigable and non-navigable waters is the subject of a number of pieces of legislation. The Secretary of the Interior is obligated to grant title to lands underlying non-navigable lakes of less than 50 acres in size or streams less than three chains in width, and to “meander” these waters in surveys.<sup>189</sup> Basically, the State of Alaska owns lands under

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<sup>184</sup> 43 U.S.C. § 1612 (elec. 2007).

<sup>185</sup> 43 C.F.R. § 2650.0-5(h) (elec. 2007).

<sup>186</sup> See 43 U.S.C. § 1621(j)(1) (elec. 2007) (an amendment to ANCSA created by ANILCA).

<sup>187</sup> 43 U.S.C. § 1637 (elec. 2007).

<sup>188</sup> 43 U.S.C. § 1632(a) (elec. 2007).

<sup>189</sup> See 43 U.S.C. § 1631 (elec. 2007).

navigable waters (except where withdrawn at statehood<sup>190</sup>), and the Native corporations own the beds of the above-referenced non-navigable waters within its selections, although the state and the Native corporations can agree to the contrary.

The Secretary of the Interior manages lands prior to conveyance and there is no right in land granted by a Native selection prior to conveyance.<sup>192</sup> The Secretary is obligated to consult with Native corporations prior to making any agreement with respect to selected lands,<sup>193</sup> and is obligated to escrow any moneys received from such lands.<sup>194</sup> Interim management of ANCSA selected lands by the Secretary creates some difficulty. Basically, on a case-by-case basis, the BLM has been cooperative in facilitating exploration activities on such lands, and accords substantial deference to the wishes of the Native corporations. A Native corporation possesses no right to authorize the severance of minerals from lands prior to the time it obtains title.

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<sup>190</sup> See Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); 43 U.S.C. § 1311 (elec. 2007).

<sup>191</sup> Reserved.

<sup>192</sup> ANCSA § 22(i), 43 U.S.C. § 1621(i) (elec. 2007). See Cape Fox Corp. v. United States, 646 F.2d 399 (9th Cir. 1981); Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983).

<sup>193</sup> 43 C.F.R. § 2650.1(a)(2) (elec. 2007).

<sup>194</sup> Pub. L. No. 94-204, § 2, 89 Stat. 1145 (1976), note following 43 U.S.C. § 1613 (elec. 2007).

## [d] Land Exchanges

Section 22(f) of ANCSA<sup>195</sup> and section 1302(h) of ANILCA<sup>196</sup> provide special authority for the exchange of lands by Native corporations, the Secretary of the Interior, and the State of Alaska.<sup>197</sup> Both statutes allow the Secretary of the Interior to exchange lands on other than an equal value basis, when the Secretary determines it to be in the public interest.<sup>198</sup>

The primary difference between ANCSA § 22(f) and ANILCA § 1302(h) is that the latter statute begins with the words “notwithstanding any other provisions of law.” This language avoids the requirement of section 204(j) of FLPMA<sup>199</sup> that the Secretary may not modify or revoke congressional withdrawals of lands. Section 1302(h) thus authorizes exchanges in congressional withdrawals, such as the game refuges, parks, and monuments created by ANILCA. It once appeared that land exchanges were a way of achieving the desirable end of consolidating Native land

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<sup>195</sup> 43 U.S.C. § 1621(f) (elec. 2007).

<sup>196</sup> 16 U.S.C. § 3192 (elec. 2007).

<sup>197</sup> For additional Alaska authority, see Alaska Stat. §§ 38.50.010 - .170 (elec. 2007).

<sup>198</sup> Note that the Alaska statutes do not contain such a proviso. Alaska Stat. § 38.50.020(a) (elec. 2007), requires that “[t]he land . . . which the state receives in an exchange made under this chapter shall be equal to or exceed the appraised fair market value of the land . . . exchanged by the state.”

<sup>199</sup> 43 U.S.C. § 1714(j) (elec. 2007).

holding patterns in the state, and there were several outstanding successes.<sup>200</sup> However, substantial political controversy arose from a land exchange proposed at St. Matthews Island in the Bering Sea which was intended to provide lands to Native corporations to be leased to oil companies to support OCS development in nearby offshore areas. Litigation successfully challenged this proposal.<sup>201</sup>

Thereafter, another significant political controversy arose in Congress concerning a proposal to grant oil and gas rights to Native corporations in the ANWR in exchange for Native land holdings in other refuges.<sup>202</sup> Legislation was introduced to block these exchanges without congressional approval,<sup>203</sup> litigation was filed,<sup>204</sup> and the proposal was indefinitely delayed.

Although land exchange proposals can be controversial, a number of land exchanges have been completed successfully. For approval of such exchanges to be

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<sup>200</sup>The Cook Inlet Land Exchange (see *State v. Lewis*, 559 P.2d 630 (Alaska 1977)), the NANA Red Dog exchanges, the ASRC exchanges into the Arctic National Wildlife Refuge (ANWR), and Cape Halkett in the Naval Petroleum Reserve are successful examples of such land exchanges, although each such exchange required special legislation. See Linxwiler, *supra* note 9, at 2-9, nn.23 & 24.

<sup>201</sup>See Nat'l Audobon Soc'y v. Hodel, 606 F. Supp. 825 (D. Alaska 1984).

<sup>202</sup>See U.S. Dep't of the Interior, "Acquisition of Selected Inholdings in Alaska National Wildlife Refuges," Final Environmental Impact Statement (Dec. 1988).

<sup>203</sup>H.R. 3601, S. 2214, 100th Cong., 1st Sess.

<sup>204</sup>Trustees for Alaska v. Horn, Civ. No. A87-118 (D. Alaska 1987).

effectuated promptly, it is important that the values of the respective lands be appropriately appraised and that the exchange be otherwise non-controversial.

### **[e] Section 16—Southeastern Alaska Native Corporations**

As discussed in § 12.03[1][b] and [2] above, ANCSA was a legislative alternative to proceedings before the Court of Claims, and later the Indian Claims Commission, to obtain compensation for the extinguishment of aboriginal title. At the time of the passage of ANCSA, Southeastern Alaska Natives had already obtained a monetary award from the Court of Claims for the extinguishment of their aboriginal title.<sup>205</sup> Moreover, many of the traditional Indian villages in Southeastern Alaska had become of a modern and urban character, and the majority of the residents were non-Native.<sup>206</sup> Congress instead provided in ANCSA § 16<sup>207</sup> for the withdrawal of nine townships adjacent to each of nine named Southeast Alaska Native villages, from which each of those villages could select one township of land; pursuant to ANCSA § 14(h)(3),<sup>208</sup> the Natives in the cities of Sitka and Juneau were granted a township “in reasonable proximity to the municipalities;” the Village of

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<sup>205</sup>Tlingit & Haida Indians v. United States, 177 F. Supp. 452 (Ct. Cl. 1959).

<sup>206</sup>In other areas of the state, such a village became ineligible to be considered as a village corporation, pursuant to ANCSA § 11(b)(2)(B), receiving instead 23,040 acres pursuant to ANCSA § 14(h)(2).

<sup>207</sup>43 U.S.C. § 1615 (elec. 2007).

<sup>208</sup>43 U.S.C. § 1613(h)(3) (elec. 2007).

Klukwan was granted, in ANCSA § 16(d),<sup>209</sup> a selection right to a township of land when it decided to become a village corporation under ANCSA after first deciding to accept surface and subsurface rights to its former reservation under section 19.<sup>210</sup> In addition, Congress provided that the section 12(c) “land loss” formula<sup>211</sup> was to exclude Sealaska, the regional corporation for Southeastern Alaska. ANCSA § 16(c)<sup>212</sup> states that the funds appropriated in the *Tlingit and Haida* case “are in lieu of the additional acreage to be conveyed to qualified villages” otherwise provided in ANCSA.

#### **[f] Indian Reservations**

Although ANCSA sought to resolve Alaska Native claims without resort to the reservation system, Indian reservations had come to exist on a limited basis in Alaska.<sup>213</sup> ANCSA § 19<sup>214</sup> provided for the revocation of existing Indian reservations in Alaska and for the election of the village corporation that was organized on each such reservation within two years of the passage of ANCSA either “to acquire title to the surface and subsurface estates in any reserve” and not receive any other benefit under ANCSA, or to continue as a village corporation pursuant to the other

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<sup>209</sup> 43 U.S.C. § 1615(d) (elec. 2007).

<sup>210</sup> 43 U.S.C. § 1618(b) (elec. 2007).

<sup>211</sup> 43 U.S.C. § 1611(c) (elec. 2007).

<sup>212</sup> 43 U.S.C. § 1615(c) (elec. 2007).

<sup>213</sup> See Case, *Alaska Natives*, *supra* note 51, at ch. 3.

<sup>214</sup> 43 U.S.C. § 1618 (elec. 2007). See also 43 C.F.R. § 2654 (elec. 2007).

provisions of ANCSA. Natives of a number of Alaskan Indian reservations, including Arctic Village, Elim, Gambell, Savoonga, Tetlin, and Venetie, opted to obtain surface and subsurface title to their former reserves. Klukwan initially opted to receive such title and later decided to participate as a Southeast Alaskan village corporation under ANCSA.<sup>215</sup>

Natives in former reserves electing to acquire title to their lands are not counted for the various population allocations of land and moneys made pursuant to ANCSA.<sup>216</sup>

### **[g] Provisions Relating to Third Party Rights**

#### **[i] Valid Existing Rights**

All ANCSA withdrawals and conveyances are made subject to valid existing rights under ANCSA §§ 11(a)(1)<sup>217</sup> and 14(g).<sup>218</sup> Section 14(g) was one of the critical provisions of ANCSA during the drafting phase, and was drafted broadly to protect North Slope oil and gas leases and the Trans-Alaska Pipeline right-of-way. Section 14(g) thus expressly protects, *inter alia*, previously issued leases, permits, and rights-of-way. ANCSA's protection of third-party rights has been held broadly to protect open-to-entry option rights granted to third parties by the State of Alaska in state TA'd lands which were otherwise available for selection by a Native

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<sup>215</sup>See *supra* notes 209 & 210.

<sup>216</sup>Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978).

<sup>217</sup>43 U.S.C. § 1610(a)(1) (elec. 2007).

<sup>218</sup>43 U.S.C. § 1613(g) (elec. 2007).

corporation pursuant to ANCSA § 11(a)(2).<sup>219</sup>

**[ii] Section 14(c)—Reconveyances by Village Corporations**

As complex as the land conveyancing process is under ANCSA, the statute recognized that not every form of present or future third-party interest could be provided for. Section 14(c)(1)-(4)<sup>220</sup> therefore provides for reconveyance by village corporations of four types of land: (1) primary places of residence or business, subsistence campsites, or headquarters for reindeer husbandry occupied as of December 18, 1971; (2) any tract occupied by a non-profit organization as of December 18, 1971; (3) lands to be conveyed to a municipal corporation in a village corporation for community expansion, rights-of-way, and other foreseeable community needs; and (4) airport sites and beacons and navigation aids existing on December 18, 1971. The section 14(c) program has been difficult for a number of reasons: no funding was provided to complete it; it requires Native corporations to take land from themselves and give it to non-Natives; and section 14(c)(3) involves grants of land to village governments which are arguably the most valuable lands in the village, and are probably vastly in excess of any foreseeable local needs.

Predictably, litigation has resulted. In *Donnelly v. United States*,<sup>221</sup> the court

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<sup>219</sup>Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335 (9th Cir. 1990).

<sup>220</sup>43 U.S.C. § 1613(c)(1)-(4) (elec. 2007).

<sup>221</sup>850 F.2d 1313 (9th Cir. 1988).

held that trespass is not protected by section 14(c). In *Buettner v. Kavilco, Inc.*,<sup>222</sup> the court held that occupancy under a Forest Service special use permit was sufficient to create an entitlement to conveyance of lands under section 14(c)(1). In *Hakala v. Atxam Corp.*,<sup>223</sup> the court held that a guide's cabin site was sufficient to establish primary place of business under section 14(c)(1). In *City of Ketchikan v. Cape Fox Corp.*,<sup>224</sup> the court held that the City of Ketchikan's powerhouse does not satisfy the requirements for a primary place of business under section 14(c)(1). In *Ogle v. Salamatof Native Ass'n*,<sup>225</sup> the court addressed the provisions of section 14(c)(1) and the implementing regulations at 43 C.F.R. § 2650.5-4 which require a publication by the village corporation of its intended § 14(c) reconveyances. Once published, ANCSA imposes a one-year statute of limitations under 43 U.S.C. § 1632(b). Ogle claimed his due process rights were not satisfied by the process of publication and notice. The court remanded to determine the nature and timing of the notice he received.

### **[iii] Native Allotments**

The Alaska Native Allotment Act, as amended, former 43 U.S.C. §§ 270-1 to 270-3, provided a right to Alaska Native applicants to receive an allotment after "substantially continuous use and occupancy of the land for a period of five years."

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<sup>222</sup> 860 F.2d 341 (9th Cir. 1988).

<sup>223</sup> 753 P.2d 1144 (Alaska 1988).

<sup>224</sup> 85 F.3d 1381 (9th Cir. 1996).

<sup>225</sup> 906 F. Supp. 1321 (D. Alaska 1995).

Subject to exceptions recognized in the statute and the case law, the five years of occupation vested in the occupant an inchoate right to receive the allotment, whether or not the Native had first filed an application for a Native allotment. This inchoate right was first recognized in *Aguilar v. United States*,<sup>226</sup> in reference to conveyances by the United States to the State of Alaska of lands subject to five such years of Native occupation, and was subsequently applied in a case related to the Trans-Alaska Pipeline right-of-way, *Alaska v. 13.90 Acres of Land*,<sup>227</sup> in which the federal district court stated: “Once vested, the [native allotment] preference [right] relates back to the initiation of occupancy and takes preference over competing applications filed prior to the native allotment application.”<sup>227.1</sup>

ANCSA § 18<sup>228</sup> repealed the Alaska Native Allotment Act. Section 18(a) provided that the approximately 7,000 allotment applications pending on December 18, 1971,<sup>229</sup> remained subject to the process of approval under the Allotment Act. If approval occurred, then the Native was not eligible for a patent of a primary place of residence pursuant to ANCSA § 14(h)(5).<sup>230</sup> Lands in allotments

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<sup>226</sup> 474 F. Supp. 840 (D. Alaska 1979).

<sup>227</sup> 625 F. Supp. 1315 (D. Alaska 1985), *aff’d sub nom.* *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987).

<sup>227.1</sup> 625 F. Supp. at 1319.

<sup>228</sup> 43 U.S.C. § 1617 (elec. 2007).

<sup>229</sup> Case, *Alaska Natives, supra* note 51, at 138.

<sup>230</sup> 43 U.S.C. § 1613(h)(5) (elec. 2007).

are charged against the two million acres made available to regional corporations under ANCSA § 14(h) pursuant to the terms of ANCSA § 14(h)(6).<sup>231</sup> This attempted legislative resolution of the backlog of pending Native allotments was not successful, however, because it became bogged down in litigation and the burdensome process applicable to each application.

The subject was revisited in 1980, in ANILCA § 905, 43 U.S.C. § 1634, which statutorily approved the thousands of still-pending applications, subject to valid existing rights.<sup>233</sup> Section 905 states in part as follows:

(a)(1)(A) *Subject to valid existing rights*, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) *which were pending before the Department of the Interior on or before December 18, 1971* and which describe . . . land that was unreserved on December 13, 1968, . . . are hereby approved on the one hundred and eightieth day following December 2, 1980. . . .<sup>233.1</sup>

43 U.S.C. § 1634(a)(5) states:

Paragraph (1) of this subsection and subsection (d) shall not apply and the Native allotment application shall be adjudicated

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<sup>231</sup> 43 U.S.C. § 1613(h)(6) (elec. 2007).

<sup>232</sup> Reserved.

<sup>233</sup> 43 U.S.C. § 1634 (elec. 2007).

<sup>233.1</sup> 43 U.S.C. § 1634(a)(1)(A) (elec. 2007) (emphasis added).

pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following December 2, 1980—

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(C) a person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.<sup>233.2</sup>

In 1987, in *Golden Valley Electric Ass'n (On Reconsideration)*,<sup>234</sup> the Interior Board of Land Appeals (IBLA) for the first time applied the inchoate rights recognized in *Aguilar v. United States*<sup>234.1</sup> (the relation back doctrine) to Native allotments that had been legislatively approved under ANILCA § 905. In turn, this automatic statutory approval (subject to valid existing rights) has led to difficulties in application and enforcement.

Native allotments located in the bush in undeveloped areas pose little difficulty because they generally pose no conflicts with other land uses or claims to rights in public lands. However, Native allotments located on the road system in Alaska, or in areas of development off the road system, have proven to pose troublesome issues, because in such areas conflicts with other claimants of interests

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<sup>233.2</sup> *Id.* § 1634(a)(1)(C) (elec. 2007).

<sup>234</sup> 98 IBLA 203, GFS(MISC) 60(1987).

<sup>234.1</sup> 474 F. Supp. 840 (D. Alaska 1979).

in the public lands are more likely. The doctrine of relation back provides that, although five years of use and occupancy are needed to entitle an applicant to an allotment, the application relates back to the commencement of use and occupancy by the Native applicant and takes precedence over other claims to these public lands initiated after that time.<sup>235</sup>

While this doctrine appears on its face to lead to a clear result, there have proven to be problems for parties that claim “valid existing rights” that may conflict with a Native allotment application. One problem is that often there are few visible signs of use by the allotment applicant (such as permanent improvements) during the period of relation back that would put another entryman on notice of the prior use. Another is that there are often few or no specific indicators of the time when such use was initiated, and the statutory approval in ANILCA § 905 of Native allotment applications means that there is no present way of contesting the assertion of the date of initiation of Native use claimed in the allotment application. A third problem is that the process of obtaining a right-of-way, or determining trespass damages, is subject to a slow and complex process.

Thus, a series of difficult conflicts have ripened into litigation between applicants for or holders of Native allotments and claimants asserting “valid existing rights” to allotment lands. These contests have arisen with respect to the Trans-Alaska Pipeline System,<sup>235.1</sup> owners of North Slope oil and gas leases, holders of

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<sup>235</sup> Alaska v. Babbitt, 182 F.3d 672, 674 (9th Cir. 1999).

<sup>235.1</sup> Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985).

state or federally derived utility rights-of-way, and State of Alaska highway rights-of-way.

No simple way exists to resolve these claims before IBLA and the courts, however, under existing available judicial and administrative remedies.<sup>236</sup> In fact, in

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<sup>236</sup>See Gov't Accountability Off., Alaska Native Allotments: Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies (GAO Report GAO-04-923, Oct. 7, 2004), *available at* <http://www.gao.gov/htext/d04923.html>, and Alaska Native Allotments: Alternatives to Address Conflicts with Utility Rights-of-way (GAO Report GAO-06-1107T, Sept. 13, 2006), presented as testimony before the Committee on Resources, House of Representatives, *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-06-1107T>. Highlights of the latter report are *available at* <http://www.gao.gov/highlights/d061107thigh.pdf>. [hereinafter GAO-06-1107T Highlights].

Copper Valley representatives, Alaska Native advocates, and GAO identified four legislative alternatives that could be considered to resolve conflicts over the validity of Copper Valley rights-of-way within Alaska Native allotments:

- Change Interior's application of the relation back doctrine to Alaska Native allotments so that the date an allotment was filed, rather than the date an allottee claimed initial use and occupancy of the land, is used to determine the rights of allottees and holders of rights-of-way.

one such particularly difficult dispute between an applicant for a Native allotment and the State of Alaska involving both federal and state court litigation, the Ninth Circuit held, in *Alaska v. Babbitt*<sup>237</sup> (Foster Allotment), that the Quiet Title Act<sup>238</sup> did not waive sovereign immunity to adjudicate the matter in federal court because the action involved trust and restricted Indian lands; and the Alaska Supreme Court, in *Foster v. State*,<sup>239</sup> affirmed dismissal of a state court proceeding because it lacked jurisdiction to adjudicate rights to the Native allotment, and so the matter was not resolved by the courts.<sup>240</sup> There is also no current initiative to enact

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- Allow the U.S. government to be sued with regard to Alaska Native allotments so that legal challenges to the relation back doctrine and other legal issues can be heard in federal court.
  - Ratify the rights-of-way granted by the State of Alaska within federally granted highway easements, to provide for a valid right-of-way dating back to the time the state right-of-way was granted.
  - Establish a federal fund to pay for rights-of-way across Alaska Native allotments.

GAO-06-1107T Highlights, at 1.

<sup>237</sup>75 F.3d 449 (9th Cir. 1995).

<sup>238</sup>28 U.S.C. § 2409a (elec. 2007).

<sup>239</sup>34 P.3d 1288 (Alaska 2001).

<sup>240</sup>This dispute involved complex facts and law. The State of Alaska received a material site right-of-way in 1961 and a right-of-way from the BLM in 1962

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pursuant to 23 U.S.C. § 317 for the construction of the George Parks Highway. The state's right-of-way was amended in 1969. The allotment application of an Alaska Native (Evelyn Foster) to lands subject to the state's rights-of-way under the Allotment Act was approved in 1979 by the BLM. Foster asserted that her occupancy of the lands was initiated in 1964. Foster's allotment application was thus approved subject to the State of Alaska's original 1961 and 1962 rights-of-way, but not to its 1969 amended right-of-way. The state challenged the failure to approve its 1969 amended right-of-way first before the IBLA, then in federal district court, and eventually in the Ninth Circuit. Relying primarily on the authority of *Alaska v. Babbitt* (Albert Allotment), 38 F.3d 1068, 1072 (9th Cir. 1994), the Ninth Circuit held, as noted above, in *Alaska v. Babbitt* (Foster Allotment), 75 F.3d 449 (9th Cir. 1995), that the waiver of sovereign immunity contained in the Quiet Title Act, 28 U.S.C. § 2409a, did not apply because the action involved trust and restricted Indian lands. Foster then brought a state court action which ended with the decision of the Alaska Supreme Court in *Foster v. State*, 34 P.3d 1288 (Alaska 2001). These circumstances in general, and the Ninth Circuit's decision in *Alaska v. Babbitt* in particular, were heavily criticized by the then Assistant Alaska Attorney General representing the state in highway right-of-way matters in relation to Native allotments. John Athens, Jr., "The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review," 19 *Alaska L. Rev.* 433 (2002). Concerning the decisions in *Alaska v. Babbitt* and *Foster v. State*, this article states: "The result of these decisions is that no federal or state judicial forum exists to resolve the contested

legislation providing a broadly applicable, simple, and clear remedy.

In a few of its numerous holdings on this issue, IBLA has recognized prior entries under the public land laws or under the Alaska Statehood Act as “valid existing rights.” IBLA has held that a material site right-of-way is a “valid existing right” with regard to Native allotments, when the right-of-way was granted prior to the initiation of Native use and occupancy.<sup>241</sup> IBLA has also held that a “previously granted right-of-way which was valid when it was issued could not be retroactively invalidated.”<sup>242</sup> More commonly, however, the IBLA has held that Native occupancy prevents the acquisition of any conflicting rights in the land.

Until a comprehensive legislative solution is enacted, Native allotments promise to be controversial and troublesome, particularly as they relate to conflicts with third parties, and particularly private third parties asserting rights to rights-of-way, easements, or other land rights not originating with ANCSA or the Statehood Act. These conflicts can be expected to increase in the future, as Alaska sees more private development of its lands.

An attempt to ease some of the difficulties surrounding Alaska Native allotments, at least those arising with respect to the state and Native corporation land selections and conveyances, is found in Title III of the Alaska Land Transfer

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ownership of an important parcel of land.” *Id.* at 434.

<sup>241</sup>State of Alaska, 133 IBLA 281, GFS(MIN) 45(1995) (Irene Johnson & Jack Craig).

<sup>242</sup>State of Alaska, 140 IBLA 205, 215, GFS(MISC) 59(1997) (Goodlataw).

Acceleration Act.<sup>243</sup> This statute amended ANCSA § 18<sup>244</sup> to allow allotment applicants, the State of Alaska, and Native corporations to more readily accommodate the grant and approval of Native allotment applications when there are conflicts with state or ANCSA selections, or when the United States is trying to recover title to lands covered by Native allotment applications pursuant to *Aguilar v. United States*.<sup>245</sup>

Section 301 of the Alaska Land Transfer Acceleration Act<sup>246</sup> provides a process to allow Native allotment applications that would have been approved by ANILCA § 905,<sup>247</sup> had the lands been in federal ownership at that time. Section 301 authorizes the Secretary to “correct a conveyance” to a Native corporation or the state to exclude the allotment application, with the written concurrence of the state or Native corporation.

Section 302 of the Act provides for voluntary reconveyance to the Secretary of title to lands previously conveyed to Native corporations to facilitate recovery of title, so that the Native allotment application might be granted.

Section 303 of the Act provides that if a Native allotment application was

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<sup>243</sup>Pub. L. No. 108-452, 118 Stat. 3575 (2004).

<sup>244</sup>43 U.S.C. § 1617 (elec. 2007).

<sup>245</sup>474 F. Supp. 840 (D. Alaska 1979).

<sup>246</sup>All of Title III of the Alaska Land Transfer Acceleration Act except section 306 is codified at 43 U.S.C. § 1617 note (elec. 2007).

<sup>247</sup>43 U.S.C. § 1634 (elec. 2007).

pending upon the enactment of ANCSA and is still open and would have been approved by ANILCA § 905,<sup>248</sup> the applicant may revise his or her application if the lands subject to the application were previously conveyed to a Native corporation.

Section 304 of the Act authorizes the Secretary to convey to the state or the affected Native corporation compensatory acreage for lands they may have reconveyed, or concurred in the correction of conveyances, pursuant to the foregoing provisions of that Act.

Section 305 of the Act authorizes the Secretary to accept voluntary reconveyance from a current landowner when the applicant has petitioned the Secretary to reinstate his or her application or “to accept a reconstructed copy of an application claimed to have been timely filed with an agency of the Department of the Interior. . . .”<sup>248.1</sup>

Section 306 of the Act amends section 41(b) of ANCSA<sup>249</sup> relating to allotment applications of veterans.

#### **[iv] Section 17(b)—Easements**

Another in the myriad difficulties arising between existing land uses and ANCSA land grants occurred with reference to public rights-of-way and easements across ANCSA lands. ANCSA § 17(b)<sup>250</sup> provided for the reservation of public

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<sup>248</sup> 43 U.S.C. § 1634 (elec. 2007).

<sup>248.1</sup> 43 U.S.C. § 1617(f)(1) (elec. 2007).

<sup>249</sup> 43 U.S.C. § 1629g(b) (elec. 2007).

<sup>250</sup> 43 U.S.C. § 1616(b) (repealed).

easements across ANCSA lands “and at periodic points along the courses of major waterways which are reasonably necessary to guarantee . . . a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses. . . .” A variety of public user groups were concerned with public access onto and across Native lands. Their cause was taken up by the Federal and State Land Use Planning Commission (FSLUPC) created pursuant to ANCSA § 17, which recommended that all ANCSA conveyances contain a very broad scope of easements, including strip easements along all streams, floating easements for the purpose of transportation of natural resources, and floating rights-of-way for “ditches and canals” pursuant to 43 U.S.C. § 945 and for railroads and telegraph and telephone lines pursuant to 43 U.S.C. § 975d.<sup>251</sup> The broad attempts of the public user groups and the FSLUPC to subjugate Native lands to such public uses were unsuccessful.<sup>251.1</sup>

#### [v] Section 21(j)—Shareholder Homesites

ANCSA provided a variety of ways for Native individuals to obtain title to lands.<sup>252</sup> ANCSA provided, in section 21(j) for the exemption from the income tax

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<sup>251</sup> Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977).

<sup>251.1</sup> See *id.*

<sup>252</sup> As discussed above, ANCSA § 18 provided for the approval of allotments, § 14(h)(5) provided for the approval of a primary place of residence, § 14(c)(1) provided for the grant of title to a primary place of residence in a village, and § 22(b)

statutes of a real property interest in lands granted before December 18, 1991, to shareholders by a village corporation “pursuant to a program to provide homesites to its shareholders.”<sup>253</sup> This tax exemption is subject to the proviso that the land must be restricted “by covenant for a period of not less than ten years to single-family . . . residential occupancy . . . [and] [t]hat the land conveyed does not exceed one and a half acres. . . .”<sup>253.1</sup>

**[vi]    Section 14(f)—Village Consent to Exploration and Development of Regional Subsurface**

As discussed above, about two-thirds of the lands conveyed pursuant to ANCSA are “split estate lands,” where the surface is owned by a village corporation and the subsurface is owned by a regional corporation. Congress provided in ANCSA § 14(f) some ill-defined protection for village corporations when regions wish to develop such lands. Section 14(f) of ANCSA provides that when the conveyance is issued, “the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native Village shall be subject to the consent of the Village Corporation.”<sup>254</sup> The extent of village corporation consent required pursuant to section 14(f) was a topic of lively and unresolved disagreement

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provided for various public land entrymen.

<sup>253</sup> 43 U.S.C. § 1620(j) (elec. 2007).

<sup>253.1</sup> *Id.*

<sup>254</sup> 43 U.S.C. § 1613(f) (elec. 2007).

between village and regional corporations.<sup>255</sup> This dispute was finally resolved in *Leisnoi, Inc. v. Stratman*<sup>256</sup> in which the court held that section 14(f)'s limit on the exercise of the village consent to "lands within the boundaries of any Native Village" granted a village a right of consent only to the boundaries of the village as demonstrated by structures. The court borrowed the language of 43 C.F.R. § 2651.2(b)(2) to determine that section 14(f) gave a village consent rights only in "an identifiable physical location *evidenced by occupancy* consistent with the Natives' own cultural patterns and life style."<sup>256.1</sup>

It is noteworthy that provisions relative to mergers between village corporations or between a village corporation and a regional corporation contained in section 30 of ANCSA<sup>257</sup> require that the plan of merger or consolidation provide that the section 14(f) consent rights of any affected village corporation shall be conveyed "as part of the merger or consolidation, to a separate entity composed of the Native

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<sup>255</sup> At least one court sought to resolve this issue in dicta. *See Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862, 866 n.4 (D. Alaska 1976). A somewhat more judicially restrained footnote on the subject is found in the appeal of that decision, *Chugach Natives, Inc. v. Doyon Ltd.*, 588 F.2d 723, 732 n.19 (9th Cir. 1978), but the issue still was not resolved, and the issue was not further refined by the Section 7(i) Settlement Agreement. *See* § 12.03[3][a], *supra*.

<sup>256</sup> 154 F.3d 1062 (9th Cir. 1998).

<sup>256.1</sup> *Id.* at 1068.

<sup>257</sup> 43 U.S.C. § 1627(e) (elec. 2007).

residents of such Native Village.”<sup>258</sup> The purpose of this provision apparently was to ensure that the section 14(f) consent rights (which presumably are intended to affect local concerns) are not trod upon when a village corporation merges with a regional corporation. This provision can create difficulty (simply by being forgotten) when village corporations merge not with regional corporations, but with other village corporations.

#### **[h] Alaska Land Transfer Acceleration Act**

The Alaska Land Transfer Acceleration Act<sup>259</sup> is intended to end the ANCSA land selection process by 2009. For this reason, the enactment is sometimes referred to as the 2009 Legislation.

ANCSA, the Alaska Statehood Act,<sup>260</sup> and the Native Allotment Act<sup>261</sup> (as modified by ANILCA<sup>262</sup>) have in many instances held land status in Alaska in suspension as the various land withdrawals, selections, and conveyances under those statutes have progressed through the statutory processes. “Progressed” sometimes is a relative term, and the progress under these statutes has occasionally been glacially slow. ANCSA and Statehood Act selections have segregative effect, and ANCSA selections continue the land withdrawals in that Act made to facilitate

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<sup>258</sup>This entity is usually a tribal council for the village.

<sup>259</sup>Pub. L. No. 108-452, 118 Stat. 3575 (2004).

<sup>260</sup>Pub. L. No. 85-508, 72 Stat. 339 (1958); 48 U.S.C. note preceding § 21.

<sup>261</sup>Former 43 U.S.C. §§ 270-1 to 270-3 (repealed by ANCSA § 18).

<sup>262</sup>Pub. L. No. 96-487, 94 Stat. 2371, 2430 (1980).

such selections. This has resulted in the perpetuation of land withdrawals for 35 or more years that were intended to be temporary, and has disrupted land status and interfered with the orderly development of the public lands in Alaska, and created persistent uncertainty and confusion about lands and land availability for various purposes.

For instance, section 14<sup>263</sup> provides for the conveyance of ANCSA lands to the regional and village corporations “immediately after selection,” but that has still not occurred, more than 35 years later. In addition, Native corporations have long maintained large overselections of their unconveyed entitlements under ANCSA, which has further disrupted land status.

The Alaska Land Transfer Acceleration Act represents Congress’ effort to finalize and resolve no later than 2009 all pending Alaska land status issues under ANCSA, the Alaska Statehood Act, and the Native Allotment Act. The focus here is only on Titles II and IV of the Alaska Land Transfer Acceleration Act, the provisions that apply to ANCSA lands and land conveyances, although the Act also amends many provisions of ANCSA discussed elsewhere in this chapter.<sup>264</sup>

### **[i] Title II**

Title II of the Act contains technical amendments to the land selection and conveyance provisions of ANCSA that will enable the process to draw to a close.

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<sup>263</sup> 43 U.S.C. § 1613(a) (elec. 2007).

<sup>264</sup> The provisions of the Alaska Land Transfer Acceleration Act relating to Native allotments are discussed in § 12.03[4][g][iii], *supra*.

Section 201 of the Act<sup>265</sup> allows the Secretary to waive the filing deadlines for ANCSA selections if there are lands available in a village's core township or it is surrounded by lands selected by an ANCSA corporation, and the lands became available after the end of the original selection period. This provision appears to be intended to fill in voids in selected and conveyed lands.

Section 202 of the Act amends ANCSA § 12(b)<sup>266</sup> to allow village corporations to combine their section 12(a) and (b) selection entitlements and fulfill either entitlement under selections originally made under either authority.

Section 203 of the Act amends ANCSA § 14(d)<sup>267</sup> (which previously provided for use of the rule of approximation in ANCSA conveyances) to limit the acreage of conveyances in excess of the entitlement of an ANCSA corporation that thereby result—640 acres if the lands are administered by the Bureau of Land Management, 160 acres if the lands are administered by any other federal agency, and 40 acres if the lands are located in any conservation system unit (CSU) created under ANILCA—and further allows agreements providing that the land entitlement of a corporation is thereby deemed satisfied.

Section 204 of the Act amends ANCSA § 14(h)(1)<sup>268</sup> to allow the conveyance of certain cemeteries and historical sites for which an application is on file and that

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<sup>265</sup> 43 U.S.C. § 1611 note (elec. 2007).

<sup>266</sup> 43 U.S.C. § 1611(f) (elec. 2007).

<sup>267</sup> 43 U.S.C. § 1613(d) (elec. 2007).

<sup>268</sup> 43 U.S.C. § 1613(h)(1) (elec. 2007).

are eligible for conveyance, and 188 additional such sites that were previously closed; prohibits further changes to such applications after the date of enactment of the Alaska Land Transfer Acceleration Act; and requires the filing within one year of a statement why the site is important.

Section 205 of the Act amends ANCSA § 14(h)(8)<sup>269</sup> to require the Secretary to make a prompt allocation of each region's share of the section 14(h)(8) entitlement.

Section 206 of the Act amends ANCSA § 14(h)(10)<sup>270</sup> to allow the Secretary to withdraw for selection sufficient lands necessary to complete a regional corporation's section 14(h)(8) entitlement, if there are not sufficient existing selections to do so. This provision resolves the issue of underselections of section 14(h)(8) entitlements.

Section 207 of the Act<sup>270.1</sup> requires the Secretary to report to Congress within 18 months of the date of enactment of the Act concerning whether the withdrawals made pursuant to ANCSA remain necessary to allow conveyances or can be opened to appropriation under the public land laws. (Presumably, if the lands are not further required for ANCSA, Congress would act to release the lands.)

Section 208 of the Act amends ANCSA § 22(j)<sup>271</sup> to allow the withdrawal of lands by agreement if necessary to resolve underselections.

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<sup>269</sup> 43 U.S.C. § 1613(h)(8) (elec. 2007).

<sup>270</sup> 43 U.S.C. § 1613(h)(10) (elec. 2007).

<sup>270.1</sup> Pub. L. No. 108-452, 118 Stat. 3575, 3585-86 (2004).

<sup>271</sup> 43 U.S.C. § 1621(j) (elec. 2007).

Section 209 of the Act,<sup>271.1</sup> which contains authority for the Secretary to enter into agreements with Native corporations relating to lands to be conveyed, the priority of the conveyances, the relinquishment of selections, the survey of lands, and the resolution of conflicts with Native allotment applications. These agreements, when entered into by village corporations, are binding on the pertinent regional corporation with respect to the location and quantity of its subsurface estate. Section 209 also authorizes the Secretary to make technical corrections to conveyance documents.

### **[iii] Title IV**

In a sense, all of the preceding is prelude to Title IV of the Alaska Land Transfer Acceleration Act, which contains a series of requirements intended to end, no later than 2009, the prolonged period in which ANCSA lands were not conveyed and remained withdrawn from appropriation under the public land laws.

Section 401 of the Alaska Land Transfer Acceleration Act<sup>272</sup> requires the Secretary to update regional corporation conveyance and survey plans within 18 months of the date of enactment of the Act and contains a means of resolving any conflicts “to facilitate the finalization of land conveyances in a region by 2009.”

Section 402 of the Act requires the Secretary to update village conveyance and survey plans within 30 months after the date of enactment of the Act.

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<sup>271.1</sup> 43 U.S.C. § 1611 note (elec. 2007).

<sup>272</sup> Sections 401, 402, and 403 are all codified at 43 U.S.C. § 1611 note (elec. 2007).

Section 403 of the Act requires the filing of a final prioritization of ANCSA selections, in the case of village corporations within 36 months of the date of enactment of the Act, and in the case of regional corporations within 42 months. No more than the greater of 125% of the remaining entitlement, or 640 acres, of the corporation's selections may be so prioritized. As of the date of submission of the final priorities, that corporation's remaining unprioritized selections are relinquished, have no further segregative effect, and all withdrawals of lands under the relinquished selections are terminated. If a corporation does not submit priorities, then the Secretary is directed to convey its lands based on its most recently filed priorities, and may reject any selections not required to complete its entitlement. If there were no priorities on file, then the Secretary shall create such priorities in consultation with the ANCSA corporation(s), other federal agencies, and the state and develop a plan of conveyance.

## **[5] Securities Laws and Proxy Solicitations**

ANCSA corporation shareholder elections are corporate elections conducted largely through proxy solicitations, subject (like all corporate shareholder elections involving proxies) to securities law concepts, including prohibitions on material misrepresentations and omissions of material facts necessary to make a statement not misleading. ANCSA corporation shareholder elections are not political contests subject to concepts of broadly tolerant political speech.

Elections of the board of directors by shareholders of ANCSA corporations are

exempted from the federal securities laws in ANCSA § 26,<sup>273</sup> which states in relevant part as follows: “A Native Corporation shall be exempt from the provisions, as amended, of the Investment Company Act of 1940 (54 Stat. 789), the Securities Act of 1933 (48 Stat. 74) and the Securities Exchange Act of 1934 (48 Stat. 881).” In enacting this exemption, however, Congress did not intend to remove from Alaska Natives protection from material misstatements in proxy solicitations. Instead, Congress intended only to remove from ANCSA corporations the burdensome corporate filing requirements—Congress did not intend to remove from ANCSA Native shareholders the strict and careful protection from misrepresentations in proxy solicitations available to non-ANCSA shareholders. In the committee report accompanying the enactment of this provision of ANCSA,<sup>274</sup> Congress foresaw that the interests of Alaska Native shareholders (including ensuring the truthfulness of proxy solicitations) would be protected under Alaska state law:

[T]he Committee understands that the general provisions of Alaska law provide protection for Native stockholders from any corporate mismanagement and misrepresentations or omissions to represent in connection with sales of securities, and that Alaska courts would look to precedents under federal securities laws for appropriate standards of conduct by management and other persons connected with securities transactions. . . .

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<sup>273</sup> 43 U.S.C. § 1625(a) (elec. 2007).

<sup>274</sup> H. Rep. 94-729, Dec. 15, 1975, 1975 U.S.C.C.A.N. 2376.

It should be noted that these corporations are being exempted from the federal securities laws on the understanding that federal regulation of Settlement Act corporations is not necessary to protect Native stockholders or the public. . . . However, if this assumption proves invalid in light of experience, the Committee is prepared to reimpose such provisions of the federal laws [as] may be necessary. In short, the . . . exemption should be viewed by the Natives as an experiment which will be stopped if it is abused.<sup>274.1</sup>

In other words, state securities law would replace federal securities law and protect Native shareholders from misrepresentations in the same manner that federal law does for stockholders of other corporations. If state securities laws are not administered in the same strict manner as federal securities laws and Native shareholders are not subject to the same protections, then the exemption will be ended.

Alaska's protection of Alaska Native shareholders from misrepresentations in proxy solicitations began with the Alaska courts, which have been punctilious in protecting Alaska Native shareholders from materially false and misleading statements in ANCSA corporate proxy solicitations. This issue was first addressed by Alaska courts in *Brown v. Ward*,<sup>275</sup> in which the Alaska Supreme Court found that certain statements by Jerry Ward, a shareholder soliciting proxies from other

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<sup>274.1</sup> *Id.* at 2386-87.

<sup>275</sup> 593 P.2d 247 (Alaska 1979).

shareholders in the 1977 Cook Inlet Region, Inc. (CIRI) election “misrepresented [the] ability of Cook Inlet to distribute money or land to shareholders on the scale expressed in the solicitation....”<sup>275.1</sup> The court held: “a misleading or false statement ‘is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.’”<sup>276</sup> The court further stated that Ward’s misrepresentations were “likely to influence shareholders to grant proxies to Ward.”<sup>276.1</sup> In substance, in *Brown v. Ward*, the Alaska Supreme Court defined “material” as something “a reasonable shareholder would consider important in deciding how to vote.”

In 1978, a group associated with Ward (Slate) solicited proxies, but failed to disclose that it was financially supported by Bruce Kendall, a prominent local businessman and former Speaker of the Alaska State House, and significantly, a person whom CIRI was suing for more than \$1 million; Slate purchased ads which it claimed were paid for by the Slate candidates, but which were actually paid for by Bruce Kendall. Slate sought special shareholders meetings and took other actions without disclosing the true source of its financing. The Slate group filed litigation unsuccessfully challenging the 1978 and 1979 elections in *Bahr v. Huhndorf*.<sup>277</sup>

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<sup>275.1</sup> *Id.* at 251.

<sup>276</sup> *Id.* (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

<sup>276.1</sup> *Id.*

<sup>277</sup> No. 3AN-78-3037, Order dated Apr. 24, 1979. This superior court decision

In *Meidinger v. Koniag, Inc.*,<sup>278</sup> the Alaska Supreme Court again addressed the question of the materiality of misrepresentations and determined certain proxy solicitation statements by shareholders to be materially false as a matter of law:

The Meidinger slate's misrepresentations pertained to the merits of the only proposition scheduled to be considered at Koniag's 1997 annual meeting. Indeed, Meidinger's appellate brief describes the trust proposal as "important." We conclude that the misrepresentations were so obviously important to an investor, that reasonable minds cannot differ on the question of materiality.<sup>278.1</sup>

Subsequent to the Jerry Ward cases, the Alaska legislature adopted statutes directly protecting Alaska Native shareholders. Any person soliciting proxies from the shareholders of an ANCSA corporation is now subject to the proxy provisions of the Alaska Securities Act.<sup>279</sup> This act requires filing regional corporation proxy solicitations with the Division of Securities (Division),<sup>280</sup> and also requires that all

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is attachment 4 to the Division's Order in *In re Jerry Ward*, Order No. 85-15, Div. of Banking, Securities & Corps., Alaska Dep't of Commerce & Economic Dev. (May 9, 1985). ALAS.SEC.Lexis 23. The Division ordered a remedy of full disclosure against Ward as a precondition to his soliciting any future proxies.

<sup>278</sup> 31 P.3d 77 (Alaska 2001).

<sup>278.1</sup> *Id.* at 84.

<sup>279</sup> Alaska Stat. §§ 45.55.010 - .995 (elec. 2007).

<sup>280</sup> *Id.* § 45.55.139.

statements made in such proxy solicitations be true and not omit to state a material fact. Alaska Stat. § 45.55.160 states as follows:

A person may not, in a document filed with the administrator or in a proceeding under this chapter, *make or cause to be made an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.*<sup>281</sup>

The Division's regulations, promulgated under the Alaska Securities Act, also prohibit the publication of materially false or misleading proxy statements as follows:

(a) A solicitation may not be made by means of a proxy statement, proxy, notice of meeting, or other communication that contains a material misrepresentation. A misrepresentation is a statement that, at the time and under the circumstances in which it is made (1) *is false or misleading with respect to a material fact; (2) omits a material fact necessary in order to make a statement made in the solicitation not false or misleading;* or (3) omits a material fact necessary to correct a statement, in an earlier communication regarding the solicitation of a proxy for the same meeting or subject matter, which has become false or misleading. *A misrepresentation is material if there is substantial*

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<sup>281</sup> *Id.* § 45.55.160 (emphasis added).

*likelihood that a reasonable shareholder would consider it important in deciding how to vote. A series of statements or omissions that are objectively false or misleading, but which might not be material misrepresentations if considered separately, might be material misrepresentations if there is a substantial likelihood that a reasonable shareholder would consider the series important in deciding how to vote.*<sup>282</sup>

These regulations apply to administrative proceedings before the Division. Alaska Natives seeking to remedy proxy misrepresentations may elect to proceed in Alaska Superior Court to enforce the common law of Alaska enunciated in *Brown v. Ward* and *Meidinger v. Koniag*, or may file a proxy complaint before the Division.

#### **§ 12.04 Achieving an Astonishing Economic Success—Delivering on ANCSA’s Promise**

If ANCSA was an expression of America’s idealistic belief in the transformational power of capitalism applied to Alaska Natives, then for a large part of the first 25 years of ANCSA the reality largely deviated from the hope, because ANCSA’s promise of significant and widespread economic achievement largely went unrealized. Assuredly there were corporations with noteworthy business success, but that success did not reflect a widespread pattern throughout ANCSA corporations.

In recent years, however, the economic promise of ANCSA, the promise of

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<sup>282</sup>Alaska Admin. Code tit. 3, § 08.315(a) (elec. 2007) (emphasis added).

corporate economic success benefiting Alaska Natives, has been achieved by many corporations. Certainly this success is not uniform, and thus the benefit to individual Natives has been uneven, but the evidence of success is inescapable, and its magnitude is astonishing.

Since 1992, ANCSA corporations have become dominant members of the Alaskan business community, second only to the oil industry in total economic impacts. Many regional corporations and large village corporations have engaged in new businesses, very often with extremely successful outcomes. The results are impressive.

This business success also signals a success, somewhat late in coming, for the original vision for ANCSA—which was to create profit-making corporations, instead of tribal governments, as the focal point of the resolution of aboriginal claims in Alaska, in hopes that this would lead to the maximum benefit for the Alaska Native community.

According to three recent publications,<sup>283</sup> these influences on Alaskan economic life are profound. As noted in the 2006 ANCSA CEO Report:

This report is a summary of Alaska Native Corporations' progress and their contribution to the state, covering economic growth, employment, and philanthropy. Highlights of the 2004 combined findings for the 13 regional corporations and 29 village corporations

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<sup>283</sup>2006 ANCSA CEO Report, *supra* note 11; Alaska Native Policy Center, *supra* note 12; GAO Report, *supra* note 3.

surveyed include:

- Revenue of \$4.47 billion and assets of \$3.57 billion
- \$117.5 million in dividends
- Statewide employment of 12,536
- Alaska Native employment of 3,116
- \$8.5 million in charitable donations
- \$5.4 million in scholarships distributed.<sup>284</sup>

In addition, as of 2002, according to *Our Choices, Our Future*:

Business data indicate that *Native firms* are making strides:

- Alaska Natives own 11% of all business firms in Alaska, a higher percentage than for Native Americans in any other state. These firms, many of which are very small operations, generate about 5% of Alaska's total business revenues.
- ANCSA regional and village corporations also have a large role in Alaska's economy, generating almost \$3 billion in annual revenues and employing 13,000 people.
- Native profit and non-profit corporations are among Alaska's largest employers and landholders, ten of them being among the 100 largest private firms in the state.<sup>285</sup>

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<sup>284</sup> 2006 ANCSA CEO Report, *supra* note 11, at 3.

<sup>285</sup> Alaska Native Policy Center, *supra* note 12, at 9 (emphasis added).

Finally, the GAO Report states:

- The 30 ANCs included in our review reported providing three categories of benefits
  - dividends,
  - other direct benefits, and
  - indirect benefits

Dividends: In 2004, the 30 corporations paid a total of \$121.6 million in dividends.

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**Other Direct Benefits:**

- *Shareholder hiring preference and job opportunities.* All of the corporations we interviewed reported a hiring preference for shareholders. Some corporations extended this preference to shareholders' families, other Alaska Natives, and/or other Native Americans.
  - *Other employment assistance programs.* In addition to offering a shareholder hire preference, corporations made efforts to encourage other shareholder employment.
- ....
- *Benefits for elder shareholders. . . .*
  - *Scholarships.* Almost all corporations offered scholarships for shareholders.

- *Internships and other youth programs. . .*<sup>286</sup>

In recent years, many ANCSA regional and village corporations have announced record profits in impressive amounts. These corporations are among the most successful of all Alaska corporations. As stated in the 2006 ANCSA CEO Report:

Alaska Native Corporations lead the list of Alaska-owned businesses recognized by *Alaska Business Monthly* (October 2005) and are among the state's top 49 most successful Alaska businesses. The list was led by Arctic Slope Regional Corporation. Seven ANCs were in the top 10, and a total of 15 made the overall list. . . Vern McCorkle, *Alaska Business Monthly* publisher, said the importance of Alaska Native Corporations continues to grow in the Alaska economy. "These companies have built up Alaska in so many ways. They produce products and services we need. They are the backbone of the communities they operate in, and some even have a national or an international reach."

Just recently one native regional corporation, Arctic Slope Regional Corporation, announced revenues in excess of \$1 billion for the second straight year.<sup>287</sup>

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<sup>286</sup>GAO Report, *supra* note 3, at 81-82.

<sup>287</sup>"For the second year in a row, the Arctic Slope Regional Corp. brought in more than \$1 billion in revenues, thanks in part to the Alpine oil field and high oil prices." "Native Corporation Shows Record Profits Last Year," *Anchorage Daily*

While in part the result of diversified economic activities, these economic successes for ANCSA corporations often (but not exclusively) occur in two areas: In section 8(a) government contracting, and in the oilfield service industry.

The successes of ANCSA corporations in the oilfield service industry is a story of alliances, a recognition of the importance of the Native community to the oil industry, a recognition of the Native community in Alaska, and a recognition by the oil industry of its social responsibility to the Native community. This success began slowly, with a few contractors, and increased to the point where many of the major oilfield service companies (drilling companies, security companies, camp services, engineering companies) are Native owned.

There are many examples of Native corporations success in this field, and some examples follow. NANA Regional Corporation's history is typical. NANA states as follows:

As Alaska's North Slope oil fields were developed and the trans-Alaska oil pipeline constructed in the 1970s, NANA was instrumental in developing early contracting relationships between Alaska Native corporations and the petroleum industry. These relationships began in the 1970s, in ventures like catering, camp services and security services. They were broadened in the 1980s to include fuel and utility services, interests in oil and gas drilling rigs, and ultimately a working interest in a producing oil field, the Endicott

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*News, May 17, 2007.*

field.<sup>288</sup>

Other regional corporations in the oilfield services industry include Ahtna, Inc.; Arctic Slope Regional Corp.; Bristol Bay Native Corp.; Calista Corp.; Chugach Alaska Corp.; Cook Inlet Region, Inc.; and Doyon, Ltd.

Large village corporations also are active in this sector, including, for example, the village corporation for Barrow:

One of Alaska's newest oil field contractors—UIC Oilfield Services—is carving out a niche in the industry in its first year.

And the firm working right in its own backyard—if you can call a 23 million-acre expanse as big as Indiana a backyard.

Ukpeagvik Inupiat Corp., or UIC, is the village-owned Alaska Native corporation for Barrow, formed under the Alaska Native Claims Settlement Act of 1971.

UIC is now Alaska's ninth-largest Alaskan-owned business, and its shareholders reside in the largest community of the North Slope.<sup>289</sup>

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<sup>288</sup>NANA Regional Corp., NANA Took Lead Role in Development of Alaska's Oil and Gas Industry 1, at <http://www.nana.com/pdfs/FINALOil&GAS.pdf> (visited June 22, 2007).

<sup>289</sup>Tim Bradner, "UIC Oilfield Services jumps into industry on its home turf," *Alaska J. of Commerce*, Apr. 29, 2007, at [http://www.alaskajournal.com/stories/042907/oil\\_20070429009.shtml](http://www.alaskajournal.com/stories/042907/oil_20070429009.shtml).

The section 8(a) government contracting sector has had a profound effect on ANCSA corporations. These benefits began in 1986 when ANCSA corporations were first authorized to participate in the Small Business Administration's (SBA) section 8(a) minority contracting program and have accelerated over the years:

In 1986, legislation passed that allowed ANC-owned businesses to participate in the Small Business Administration's (SBA) 8(a) program—one of the federal government's primary means for developing small businesses owned by socially and economically disadvantaged individuals. This program allows the government to award contracts to participating small businesses without competition below certain dollar thresholds.<sup>290</sup>

The section 8(a) program allows ANCSA corporations to obtain federal contracts on a sole source basis.<sup>291</sup> The economic benefits to ANCSA corporations from the section 8(a) program are significant:

While representing a small amount of total federal procurement spending, 8(a) obligations to firms owned by ANCs increased from \$265 million in fiscal year 2000 to \$1.1 billion in 2004. In fiscal year 2004, obligations to ANC firms represented 13 percent of total 8(a) dollars. Sole-source awards represented about 77 percent of 8(a) ANC

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<sup>290</sup>GAO Report, *supra* note 3, at 1 (ANCSA corporations are referred to as ANCs in the GAO Report.).

<sup>291</sup>*Id.* at 2.

obligations for the six procuring agencies that accounted for the vast majority of total ANC obligations over the 5-year period. These sole-source contracts can represent a broad range of services, as illustrated in GAO's contract file sample, which included contracts for construction in Brazil, training of security guards in Iraq, and information technology services in Washington, D.C.<sup>292</sup>

#### **§ 12.05 Conclusions**

ANCSA has become a mature statute, and the pace of development and change in the statutory structure of ANCSA has slowed as ANCSA has become optimized. In the beginning, ANCSA was an experiment representing a radical change from traditional means of providing for the extinguishment of aboriginal title. The noteworthy feature of ANCSA after 35 years is not that changes have occurred, but that the changes, in the overall perspective of the radical departure ANCSA represented, were relatively minor. It can be accurately stated that notwithstanding the volume of litigation and amendments, these changes are more in the nature of adjustments than significant corrections. ANCSA has been adjusted from its original form in certain ways, but the fundamental structure, the fundamental vision embodied in ANCSA has endured. By any measure, this structure and vision have succeeded.

When the status of ANCSA is reviewed after 35 years, the single most significant development is the economic success of ANCSA corporations, both

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<sup>292</sup>*Id.* at 6.

regional corporations and village corporations. By any measure, ANCSA's business success is overwhelming. It cannot seriously be contested that ANCSA has succeeded when viewed in light of the following: revenues of nearly \$5 billion, employment of 12,000 persons statewide and 3,000 Natives, distributing dividends of nearly \$120 million, and constituting seven of the top 10 Alaska-owned corporations. A key measure in the future of the success of ANCSA is whether the ANCSA corporations will be able to sustain this success as they grow and diversify.