

THE ALASKA NATIVE CLAIMS SETTLEMENT ACT: THE FIRST TWENTY YEARS

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

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

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

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

01. Introduction

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

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

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

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

Congress made a significant departure from established federal Indian policy in 1971 when it enacted the Alaska Native Claims Settlement Act (ANCSA)⁵ in order to extinguish aboriginal title to Alaska, to compensate Alaska Natives for this interest in lands, and to provide for Natives the ownership of lands and the opportunity to earn business profits. The traditional model of federal Indian policy includes federal recognition of an Indian tribe, the reservation of lands to be held in trust for that tribe by the federal government, and the requirement that this tribe sue under the Indian Claims Commission Act⁶ for compensation for the extinguishment of the tribe's aboriginal title to other lands it occupied since time immemorial.⁷ In ANCSA, Congress sought to resolve claims of aboriginal title without resort to tribes, reservations and litigation over aboriginal title⁸--it created Native-owned corporations and authorized the conveyance of fee title to 40 million acres of public lands in Alaska⁹ and the payment of \$962.5 million to these corporations in settlement of the claims of aboriginal title to Alaska by its Natives. ANCSA represented a turn away from federal trust oversight of land and resources¹⁰ in favor of fee ownership of Native lands and resources, and free alienability of the stock of the Native corporations, and the magnitude of the settlement was unprecedented.¹¹

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

⁶ 25 USC 70 to 70v-3.

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

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

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

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

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

It is appropriate to evaluate ANCSA upon the passage of twenty years¹² because many of the provisions of ANCSA exposing lands, resources and stock to the risks of the free market contained a twenty year "grace period", and because many of these provisions, which were thought most basic to the essential policy and philosophical underpinnings of ANCSA, have been criticized¹³ and, in some instances, significantly altered,¹⁴ particularly by the 1991 Legislation.¹⁵

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

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

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

¹⁴ ANCSA has been amended by every Congress since enactment and more such amendments are pending as this is written. There are approximately 10 separate major amendments including:

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

The result is something different than the original conception of ANCSA, something which has come to resemble, in certain limited ways, traditional federal Indian policy, at least to the extent ANCSA now seeks to preserve the ANCSA land base and corporate structure from economic forces to ensure perpetual ownership by Natives.¹⁶ For example, undeveloped ANCSA lands now cannot be taxed, or taken in satisfaction of debts or in bankruptcy proceedings¹⁷; ANCSA stock which was to be freely alienable after 20 years now is not alienable unless a corporation so elects, and the one-time issuance of corporate shares can be augmented by issuance of shares to new shareholders (for instance, to those born after adoption of ANCSA)¹⁸; ANCSA corporate lands and resources, originally intended to be fully subject to economic forces, can be "parked" in "Settlement Trusts" exempt from creditors¹⁹; and notwithstanding ANCSA's effort to resolve Native claims without resort to tribal entities, such entities and their sovereign powers have spontaneously arisen as public issues²⁰. ANCSA was an experiment, and it has been flexibly adapted to conform to experience. ANCSA's numerous amendments constitute a clear and accurate appraisal of the merits of the original enactment, and a response to the real needs of Alaska Natives as they have developed and come to be understood.

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

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

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

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

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

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

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

¹⁷ Section 11 of the 1991 Legislation (101 Stat. 1806, 43 USC § 1636(d). Previously, such lands would have become subject to property taxation twenty years after conveyance. 43 U.S.C. § 21(d).

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

¹⁹ Id., § 10, 43 U.S.C. § 1629(e).

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

An evaluation of ANCSA after twenty years must focus primarily on ANCSA lands and ANCSA business entities. ANCSA was primarily a land settlement, not social legislation²¹, and not a settlement between sovereign governments. Thus its primary focus was on land-- on Native corporations obtaining unrestricted title to land, and then developing this land for economic purposes or holding it for Native uses.

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

However, the history of ANCSA lands is not one of uniform success. The original expectation was that ANCSA would convey resource wealth to Native corporations, but this did not uniformly occur in practice. Alaska is as large as a small continent, and its lands (and resources) are not distributed equally. The land conveyance distribution scheme of ANCSA occurred in large part in specific 25 township land withdrawals surrounding those Alaskan Villages which possessed ANCSA Village Corporations. If resources were not in those withdrawals, no benefits might be obtained. As an example, the giant North Slope oil fields of Prudhoe Bay and Kuparuk lie between two ANCSA Village Corporations, outside the land withdrawals of either, and thus these oil fields were unavailable for selection by either. This experience was repeated around the state, and the original expectation of great mineral wealth being located on ANCSA lands proved, in many cases, to be unrealized. Almost all the \$363 million in net resource revenues received by ANCSA corporations since 1971 came from petroleum and timber on lands not originally available through ANCSA.²² Rights to these lands were acquired through land exchange²³ and/or amendments to ANCSA²⁴ and almost all (95%) of

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

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

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

Similarly, there has been outstanding business successes among ANCSA Regional Corporations. Doyon, Ltd. (Doyon), NANA Regional Corporation (NANA), CIRI, Sealaska and ASRC all have generated significant profits, often in areas unrelated to their resource wealth. But three Regional Corporations have reorganized under Chapter 11 of the bankruptcy code²⁸ and one major source of income for all ANCSA corporations has been the sale of net operating losses²⁹ under special tax legislation.³⁰

02 Aboriginal Title

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

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

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

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

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

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

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

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

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

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

asserted by Alaska Natives. These claims were not resolved prior to the admission of the State of Alaska to the Union and the initiation of the development of Alaska's lands³². The continued assertions of aboriginal title disrupted many developments in Alaska that were crucial to the national interest, such as the development of the Prudhoe Bay oilfield and the construction of the Trans-Alaska Pipeline, as well as land conveyances to Alaska; thus an orderly and mutually acceptable means of extinguishing this aboriginal title, and appropriately compensating it, needed to be found.³³

[1] Federal Common Law Doctrine of Aboriginal Title

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

The American doctrine of aboriginal title is based on European international law³⁴ and has been judicially recognized in the United States since at least 1823.³⁵ Aboriginal title constitutes a possessory right not unlike a leasehold which establishes an exclusive right of occupancy enforceable against all save the United States, and which cannot be extinguished except by the express action of the federal government.³⁶

[a] Creation of Aboriginal Title

Aboriginal title is created by the exclusive use and occupancy since time immemorial of lands³⁷ by groups³⁸ of aboriginal peoples and by the use of such lands in the traditional way.

[b] Extinguishment of Aboriginal Title

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

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

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

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

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

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

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

Extinguishment of aboriginal title may lawfully be accomplished only by the federal government, not by states or private parties.³⁹ Extinguishment of aboriginal title is accomplished by express action of Congress, by congressionally authorized conquest, by congressionally authorized purchase, or by express federal actions authorized by Congress and clearly inconsistent with the continued existence of aboriginal title. A federal lease⁴⁰ or federal patent⁴¹, or even a long-standing history of administrative actions inconsistent with the continued existence of aboriginal title⁴² is not sufficient to extinguish aboriginal title. This property right is not protected by the Constitution. There is no right to compensation for taking such title⁴³ but the United States has consistently paid such compensation as a matter of equity.⁴⁴

Traditionally, obtaining compensation from the United States for an extinguishment of aboriginal title was an arduous process. Until the passage in 1946 of the Indian Claims Commission Act⁴⁵, a tribe wishing to obtain compensation from the United States had to seek a special jurisdictional statute giving the Court of Claims jurisdiction over its claim.⁴⁶ Upon passage of the Indian Claims Commission Act in 1946, special legislation was no longer required, and such actions were brought before the Indian Claims Commission. Adjudication of such claims has been criticized because of the great length of time and cost that is involved, as well as the use of an adversarial process.⁴⁷

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

[2] History of Aboriginal Title to Alaska

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

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

⁴¹ Cramer v. United States, *supra*.

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

⁴³ Tee Hit-Ton, *supra*.

⁴⁴ Cohen, "Original Indian Title", *supra*.

⁴⁵ 25 U.S.C. §§ 70-70v3.

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

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

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

[a] Treaty of Cession.

The United States purchased Alaska from Imperial Russia in 1867 pursuant to the Treaty of Cession⁴⁹ for \$7,200,000. The Treaty of Cession did not contain an explicit reservation of aboriginal title. Rather, Article 3 of the Treaty, in identifying the rights of the existing inhabitants of Alaska, stated with respect to Natives that they would be subject to future U.S. statutory enactments. Article 3 states in part as follows:

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

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

However, Article VI of the Treaty of Cession also stated, in part, that the cession ". . . is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions . . . by any parties, except merely private individual property holders. . . ." This language in Article VI was incorrectly held in Miller v. United States⁵² to have extinguished aboriginal title in Alaska. The Court of Claims subsequently held that Article VI did not extinguish aboriginal title to Alaska, instead holding it was narrowly directed at extinguishing the rights of the Russian-American Fur Company to lands in Alaska.⁵³ There had been in Alaska significant disruption of aboriginal title by private action, and these private actions had occasionally been supported by the courts.⁵⁴ The holding in Tlingit and Haida as to the

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

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

⁵⁰ Treaty of Cession, *supra*, Article III.

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

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

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

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

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

[b] Organic Act of 1884.

The issue of aboriginal title was much more clearly addressed in the Organic Act of 1884⁵⁷, which established the Land District of Alaska. In that statute, Congress stated as follows:

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

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

[c] Territorial Organic Act of 1912.

The Territorial Organic Act⁵⁹ extended the public land laws to Alaska. Section 3 of the Territorial Organic Act provides that ". . . the Constitution of the United States, and all the laws thereof, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. . . ." ⁶⁰

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

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

⁵⁶ supra, 369 F.Supp. 1359.

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

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

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

⁶⁰ Id. § 3.

⁶¹ Id. § 9.

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

[d] Alaska Statehood Act.

The Alaska Statehood Act⁶³ protected the aboriginal rights of Alaska Natives in two ways. First, in section 4 of the Alaska Statehood Act, the State of Alaska and its people disclaimed any rights to the lands held by Alaska Natives under claim of aboriginal right. Section 4 provides in relevant part as follows:

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

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

Second, Section 6(b) of the Alaska Statehood Act⁶⁵ grants to the State of Alaska the right to select and receive conveyance to more than 102 million acres of lands, but such lands must be "vacant, unappropriated and unreserved" at the time of its selection by the State:

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

03 ENACTMENT OF ANCSA

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

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

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

⁶⁵ *Id.*, Section 6(b).

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

[1] Events preceding ANCSA

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

[a] Statehood Act Selections and Conveyances.

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

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

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

The legal significance of a TA was, at the outset, unclear⁶⁹, particularly in light of the unresolved status of aboriginal title and the disclaimer in Section 4 of the Statehood Act. However, almost immediately upon receipt of TAs, the state held competitive sales and sold "conditional" oil and gas leases of lands on the Central Arctic Coastal Plain, as apparently authorized by Section 6(g) of the Statehood Act. In 1967, the Prudhoe Bay Oil Field was discovered on TA'd lands lying between the Colville and Canning Rivers. In 1969, in the same area, the Kuparuk River Oil Field was discovered, and in October of 1969, the fledgling State government held another competitive oil and gas lease sale of adjoining TA'd acreage and received successful bids of nearly \$1 billion. All of the State selections and TA's statewide had

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

⁶⁸ Alaska Statehood Act, Section 6(g).

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

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

[b] Native Claims.

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

[c] The Freeze and the Super Freeze.

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

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

In 1968 the BIA filed an application under the Pickett Act⁷³ for withdrawal of all claims not otherwise withdrawn in Alaska.⁷⁴ On January 17, 1969, Secretary Udall responded to the BIA application by promulgating PLO 4582.⁷⁵ PLO 4582 has been referred to as "the Super Freeze."⁷⁶ The Super Freeze withdrew all unreserved public lands in Alaska from all forms of

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

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

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

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

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

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

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

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

Another Department of the Interior response to the assertion of Native claims to Alaska was to direct the Federal Field Committee for Development Planning in Alaska to investigate the issue of Native land claims and to report to Congress. The report was issued October 1, 1968.⁷⁷ This report analyzed the assertion of Native claims to Alaska and made a remarkably accurate forecast of the form of their resolution.

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

[2] Enactment of ANCSA.

[a] Process of Enactment.

The Native community, the oil industry, the State of Alaska, and others heavily lobbied for ANCSA for three years.⁷⁸ There was not, however, a unity of vision about the terms of the proposed settlement and, thus, Congress could not settle upon a single legislative vehicle for ANCSA. The House alone considered six different bills in 1971.⁷⁹ As 1971 drew to a close, there were major discrepancies between the bills passed by the House of Representatives⁸⁰ and the Senate⁸¹. A Conference Committee was appointed to resolve the differences between the bills and ANCSA was the result.⁸²

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

⁷⁷ Alaska Natives and the Land, *supra*.

⁷⁸ *See* note 16, *supra*.

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

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

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

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

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

[b] The Policy of ANCSA.

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

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

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

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

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

[1] Summary of Provisions.

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

⁸⁴ 43 U.S.C. § 1601 (b) and (c).

⁸⁵ 43 U.S.C. § 1601(b)

⁸⁶ 43 U.S.C. § 1601(c).

ANCSA fundamentally provides as follows: Section 2⁸⁷ establishes overall policies for ANCSA; Section 4⁸⁸ extinguishes aboriginal title; Section 5⁸⁹ provides for the enrollment of Alaska Natives by the Secretary of the Interior; Section 7⁹⁰ provides for the incorporation of 12 land-owning and "for profit" Regional Corporations one non-land-owning Regional Corporations for non-residents, and the issuance of stock in these corporations to Natives on the rolls; Section 8⁹¹ similarly provides for the incorporation of about 225 Village Corporations within the Regional Corporation geographic areas, either as "for profit" or non-profit corporations⁹² and the issuance of separate stock to those Natives enrolled to a Village; Section 6⁹³ provides for the establishment of the Alaska Native Fund and the payment to the Regional Corporation over the following ten years of \$962.5 million to the Native corporations. Of this sum, \$462.5 million came from the Federal Treasury, and, pursuant to Section 9⁹⁴, \$500 million came from 2% of the royalties and bonuses received by the state from conditional leases of its TA'd lands and from federal leases it received at statehood, and from 2% of royalties and bonuses received by the federal government from Federal leases in Alaska remaining in federal ownership; Section 11⁹⁵ provides for the withdrawal of 25 townships of lands surrounding each of about 225 Villages, including lands TA'd to the state, and for "deficiency" withdrawals; Section 12⁹⁶ provides for selection of such lands by the Village and Regional Corporations; Section 14⁹⁷ provides for the conveyance of such lands to the Regional and Village Corporations "immediately after selection." Additional provisions of ANCSA include Section 7(i)⁹⁸, which provide for the payment by the Regional Corporation of 70% of its mineral revenue to the other Regions; Section 16⁹⁹, which establish land withdrawals for nine southeastern Alaska Villages; and Section 21¹⁰⁰, which originally provided for tax exemptions until 1991. Third-party rights are

⁸⁷ 43 U.S.C. § 1601

⁸⁸ 43 U.S.C. § 1603

⁸⁹ 43 U.S.C. § 1604

⁹⁰ 43 U.S. C. § 1606.

⁹¹ 43 U.S.C. § 1607.

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

⁹³ 43 U.S.C. § 1605.

⁹⁴ 43 U.S.C. § 1608.

⁹⁵ 43 U.S.C. § 1610.

⁹⁶ 43 U.S.C. § 1611.

⁹⁷ 43 U.S.C. § 1613.

⁹⁸ 43 U.S.C. § 1606(i).

⁹⁹ 43 U.S.C. § 1615.

¹⁰⁰ 43 U.S.C. § 1620.

protected in Sections 11¹⁰¹, 14(c) and (g)¹⁰², 16¹⁰³, and 22(b) and (c)¹⁰⁴. Under Section 19¹⁰⁵, existing Indian reservations could elect to receive the surface and subsurface of their reservation lands in fee and receive nothing further under ANCSA, or elect to become a Village Corporation and receive only the surface lands, and money, provided it by ANCSA.

[2] Section 4--Extinguishment of Aboriginal Title

Section 4¹⁰⁶ is broadly drafted to extinguish all aboriginal title and claims based on aboriginal title, and to establish that all prior federal conveyances constituted extinguishment of aboriginal title. Section 4(a) provides as follows:

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

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

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

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

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

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

¹⁰¹ 43 U.S.C. § 1612.

¹⁰² 43 U.S.C. § 1613(c) and (g).

¹⁰³ 43 U.S.C. § 1615.

¹⁰⁴ 43 U.S.C. § 1621(b) and (c).

¹⁰⁵ 43 U.S.C. § 1618.

¹⁰⁶ 43 U.S.C. § 1603.

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

There are four major cases interpreting Section 4.

First, Edwardsen v. Morton¹⁰⁸ 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 v. Morton 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 Section 4(c) and that the United States had a legal obligation to pursue these claims on behalf of Natives.

This decision led to the filing of United States v. Atlantic Richfield, et al.¹⁰⁹ This lawsuit was filed by the United States on behalf of the Inupiat Eskimos of the North Slope of Alaska against the various oil companies and oil field service companies which 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 the purpose of Section 4 was to extinguish all aboriginal title to avoid litigation and to end the divisiveness that had come to exist between Natives and non-Natives in Alaska.¹¹⁰

Thereafter, two other suits were brought to extend the theory of aboriginal claims in a manner to avoid this broad interpretation of Section 4.

First, the People of the Village of Gambell v. Clark¹¹¹ asserted aboriginal rights to hunt and fish on the Outer Continental Shelf 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 Outer Continental Shelf (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 Supreme Court.¹¹² On remand, the Ninth Circuit held¹¹³ that aboriginal rights to the OCS were not extinguished by §4(b) and remanded the case to the District Court to determine: (l) if

¹⁰⁸ 369 F. Supp. 1359 (D. D.C. 1973).

¹⁰⁹ 435 F. Supp. 1009 (D.C. Alaska 1977), aff'd 612 F.2d 1132 (9th Cir. 1980), cert. den., 449 U.S. 888, 101 S. Ct. 243 (1980).

¹¹⁰ U.S. v. Arco's suggestion, 612 F.2d at 1136, that the United States might itself be liable for damages for the extinguishment of third parties led to an unsuccessful claim for such damages in Inupiat Community of the Arctic Slope v. U.S., 680 F.2d 122 (Ct. Cl. 1982).

¹¹¹ 746 F.2d 572 (9th Cir. 1984).

¹¹² This part of the case was vacated on appeal and remanded Sub nom Amoco Production Co. v. Hodel, 107 S.Ct. 1395 (1987).

¹¹³ Gambell v. Lujan, 869 F.2d 1273 (9th Cir, 1989).

such rights actually existed; and (2) if so, such rights were extinguished by the Outer Continental Shelf Lands Act.¹¹⁴ No ruling has yet been issued by the District Court on remand.

Finally, in Inupiat Community of the Arctic Slope v. United States¹¹⁵, it was asserted that the Inupiat Community established aboriginal rights to sea ice based on subsistence 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.

[3] Provisions Relating to Corporations and Shareholders

[a] Section 7--Regional Corporations.

Sections 7(a) and (b)¹¹⁶ created twelve land-holding Regional Corporations covering all of Alaska, and Section 7(c)¹¹⁷ created a Thirteenth Region, for non-resident Natives, which would be conveyed no land by the United States. Because the twelve 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.¹¹⁸

Under ANCSA § 7(d)¹¹⁹ the twelve Regional Corporations are organized under existing Alaska corporate law, which contains a number of special provisions for ANCSA corporations.¹²⁰ There has been very little litigation concerning the formation of the Regions.

¹¹⁴ 43 U.S.C. § 1331, et seq.

¹¹⁵ 746 F.2d 570, cert. den., 106 S. Ct. 68 (1985).

¹¹⁶ 43 U.S.C. § 1606(a) and (b).

¹¹⁷ 43 U.S.C. § 1606(c).

¹¹⁸ 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 Sections 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 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.

1971 U.S.C. & AN, p. 2250. In large part, the confidence of Congress has proven to be well placed.

¹¹⁹ 43 U.S.C. 1606(d).

¹²⁰ See, e.g., Alaska Stat. 10.06.960.

Apart from one reported case relating to the boundary between two Regions,¹²¹ the primary reported litigation in this area related to the Thirteenth Region, which was initially organized, then successfully challenged in litigation challenging the enrollment procedures, then reorganized.¹²²

Originally, under ANCSA § 7(g),¹²³ stock was issued only to natives of quarter blood quantum or more¹²⁴ who were alive on December 18, 1971.¹²⁵ 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 who were born after 1971, who are not initially enrolled, or who were over 65 years of age.¹²⁶ These changes have resolved criticism of the "one time" nature of the original enactment, and have given needed flexibility to stock issuance.

[b] Section 8--Village Corporations.

ANCSA § 8(a)¹²⁷ required the organization of Village Corporations under Alaska corporate law as part of the receipt of lands or any benefits under ANCSA. Section 11(b)¹²⁸ enumerated 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 had granted it Village status. ANCSA § 3(c)¹²⁹ requires that Village Corporations possess at least 25 shareholders. In addition, ANCSA § 10(b) and the regulations¹³⁰ 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 lifestyle . . . [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. . . ." Like many of the other complex and untested provisions of ANCSA, these regulatory requirements for Village eligibility led to litigation¹³¹ which was

¹²¹ Central Council of Tlingit & Haida Indians v. Chugach Corp., 502 F.2d 1323 (9th Cir. 1974).

¹²² Alaska Native Association of Oregon v. Morton, 417 F.Supp. 459 (D.D.C., 1974).

¹²³ 43 U.S.C. 1607(g).

¹²⁴ 43 U.S.C. 1602(b).

¹²⁵ 43 U.S.C. 1604(a).

¹²⁶ 43 U.S.C. 1606(g) and (h), as amended.

¹²⁷ 43 U.S.C. 1607(a).

¹²⁸ 43 U.S.C. 1610(b)

¹²⁹ 43 U.S.C. 1602(c).

¹³⁰ 43 C.F.R. 2651.2(b)(2), (3), and (4).

¹³¹ Koniag v. Andrus, 580 F.2d 601 (9th Cir. 1978), cert. den. 439 U.S. 1052 (1979).

resolved by settlement only after many years of protracted negotiation and perhaps overzealous prosecution for criminal fraud on the part of some of those seeking Village status.

[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, 1991.¹³² One of the most significant amendments to ANCSA is to allow the continuation of this restriction after 1991, unless a corporation opts to allow stock sale. See 1991 Legislation.¹³³ 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.¹³⁴

[d] Sections 5 and 7(g) -- Native Roll and Shareholders

In a manner similar to the 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 was minimal. A "Native" was defined in § 3(b)¹³⁵ as an Alaska native of one-quarter or greater blood quantum, or, ". . . in the absence of proof of 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 . . ." ANCSA §5(a)¹³⁶ 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.¹³⁷ 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.¹³⁸

[4] Sections 6, 7(i) and 7(j), and 9 -- Provisions Relating to Payment of Funds to Native Corporations

ANCSA contained three basic provisions relating to the payment of money to Native Corporations: (I) the payment of funds to Native Regional Corporations from the Alaska Native

¹³² P.L. 92-203, § 7(h)(I).

¹³³ 43 U.S.C. § 1629b-1629d.

¹³⁴ 43 U.S.C. 1607(c), as amended.

¹³⁵ 43 U.S.C. 1602(b).

¹³⁶ 43 U.S.C. 1604(a).

¹³⁷ Section 1 of the Act of January 2, 1976, P.L. 94-204 (89 Stat. 1145).

¹³⁸ See 43 U.S.C. § 1606(g)(I)(B)(i)(I) and (II).

Fund, which funds originated from the federal and state governments; (2) the sharing of resource revenue between Regions under of § 7(i); and (3) the payment of a portion of § 7(i) funds to Village Corporations and individual shareholders not enrolled in Villages under § 7(j).

[a] Sections 6 and 9 -- The Alaska Native Fund.

In substance ANCSA amounted to an extinguishment of aboriginal title and in return the payment of money and the grant of title to lands of Native Corporations. ANCSA § 6(a)¹³⁹ provided that \$962.5 million would be deposited into the Alaska Native Fund, established in the United States Treasury; \$462.5 million¹⁴⁰ of this sum was authorized to be appropriated from federal funds;¹⁴¹ an additional \$500 million which was derived pursuant to the revenue sharing provisions of ANCSA § 9¹⁴² was also to be deposited in the Alaska Native Fund.¹⁴³

ANCSA § 9 created two sorts of royalty interests to be paid until the \$500 million figure was reached: (1) Under § 9(b) and (c), one such royalty was to be paid by the State of Alaska to the United States and consisted of (a) 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; (b) 2% of all rentals and bonuses received by the State after passage of ANCSA from leases or sales of such land; and (c) 2% of funds received by the State from former federal leases when the State acquired title under § 6(h) of the Alaska Statehood Act. (2) The second such royalty was 2% of funds received by the United States under the Mineral Lands Leasing Act¹⁴⁴ after the passage of ANCSA. Except for this provision, 90% of all such royalties rentals and bonuses received by the United States under the Mineral Lands Leasing Act would have been paid to the State pursuant to the terms of the Mineral Lands Leasing Act.¹⁴⁵

The effect of ANCSA § 6(a)(3)¹⁴⁶ and ANCSA § 9¹⁴⁷ therefore was that the State paid the lion's share of \$500 million of the ANCSA settlement. The legislative history of ANCSA¹⁴⁸ suggested that the State agreed with this result.

¹³⁹ 43 U.S.C. § 1605(a).

¹⁴⁰ This sum represents a compromise between the House figure of \$425 million and the Senate figure of \$500 million. H.Rep. 92-746, Dec. 13, 1971, 92nd Cong. 1st Sess., 1971 USCC & AN p. 2252.

¹⁴¹ 43 U.S.C. § 1605(a)(1).

¹⁴² 43 U.S.C. § 1609.

¹⁴³ 43 U.S.C. § 1605(a)(3).

¹⁴⁴ 30 U.S.C. § 181, et seq.

¹⁴⁵ 30 U.S.C. § 191.

¹⁴⁶ 43 U.S.C. § 1605(a)(3).

¹⁴⁷ 43 U.S.C. § 1608.

¹⁴⁸ House Conf. Rept. 92-746, Dec. 13, 1971, 1971 U.S.CC&AN 2248.

The natives will be paid . . . \$500 million from mineral revenues received from lands in Alaska hereafter conveyed¹⁴⁹ 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 the \$500,000 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.

The legislative history may overstate the level of agreement of the State to 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.¹⁵⁰ Thus, ANCSA contained two extraordinary provisions: First, § 10(a) provides a one year statute of limitations for ". . . any civil action to contest the authority of the United States on the subject matter or the legality of this Act . . ."¹⁵¹. Second, ANCSA § 10(b)¹⁵² provided that the State's land selection and conveyance rights would be suspended if it challenged the lawfulness of ANCSA.

It is obvious from these provisions that a tension existed between ANCSA on the one hand, and the State on the other. This tension was in part resolved when the one year statute of limitations on challenges to the lawfulness of ANCSA passed without litigation being filed.

ANCSA § 6(a)¹⁵³ 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 was passed, \$50 million in the fiscal year following passage of ANCSA, \$70 million in the third, fourth and fifth

¹⁴⁹ The legislative history is incorrect in its statement that these funds are to come only from lands which 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.

¹⁵⁰ The State attorney general had previously issued a contrary opinion. (1969 Op. Atty. Gen. No. 6, Supp.).

¹⁵¹ 43 U.S.C. § 1609(a). The constitutionality of this statute of limitations was upheld in Paul v. Andrus, 639 F.2d 507 (9th Cir. 1980).

¹⁵² Section 10(b) of ANCSA provides in relevant part as follows:

In the event 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 selection shall be made, no tentative approval shall be granted, and no patent shall be issued for such lands during the pendency of such litigation.

¹⁵³ 43 U.S.C. § 1605(a).

fiscal years, \$40 million for the transition quarter in 1976 when the United States changed fiscal years, and \$30 million each of the remaining five fiscal years.¹⁵⁴

The § 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. The 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 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 have in many instances remained 20 years later.

The size of the Alaska Native Fund contributed much 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.

[b] Section 7(i)--Sharing Mineral Wealth Between Regional Corporations.

ANCSA Section 7(i)¹⁵⁵ is a key part of the settlement represented by ANCSA of the claims held by Alaska Natives. Section 7(i) requires a 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.¹⁵⁶ The intent of this provision has been stated 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.

The sharing requirements of § 7(i) have been broadly construed by the courts ". . . in order to achieve a rough equality of assets among all the Natives."¹⁵⁷ The subject of revenue sharing between ANCSA Regional Corporations under ANCSA § 7(i) is enormously

¹⁵⁴ 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] fiscal year among the Regional Corporations.

¹⁵⁵ 43 U.S.C. § 1606(i).

¹⁵⁶ Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp., 517 F.Supp. 1255 at 1257 (D.Ak. 1981).

¹⁵⁷ Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 732 (9th Cir. 1978).

complicated and resulted in seven years of litigation and the many reported decisions cited, infra. 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 of this Act. The provisions of this subsection shall not apply to the Thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

Section 7(i) thus accomplishes two things: (1) it provides to each Regional Corporation a financial share of the § 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 § 7(i) revenues is calculated as follows:

(1) Its share of the § 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 which are subject to sharing to determine the share of that Regional Corporation 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 twelve 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 § 7(i) distributions.

However, the amounts actually retained by a Regional Corporation under § 7(i) are further limited by § 7(j) of ANCSA¹⁵⁸ which provides that 50% of funds received by a Regional Corporation under § 7(i) are to be distributed to the at-large shareholders and the Village Corporations of that Region.¹⁵⁹ 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 7(i) resources.¹⁶⁰

¹⁵⁸ 43 U.S.C. § 1606(j).

¹⁵⁹ See further discussion, infra, at X.04[4](c).

¹⁶⁰ Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp., supra; see also: Chugach Natives, Inc. v. Doyon Ltd., 588 F.2d 723 (9th Cir. 1978) at 732. Accord, Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527 (9th Cir. 1984) at 529: ". . . [a]s noted above, Section 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).

Like much of the rest of ANCSA, § 7(i) did not contain an adequate legislative definition of its basic terms. For instance, it was unclear whether the § 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 was affected. Moreover, § 7(i) requires the sharing of resource revenues in a manner which Regional Corporations might wish to avoid. The result was seemingly endless¹⁶¹ and extremely costly¹⁶² litigation respecting the payment funds pursuant to § 7(i). The litigation proceeded for 7 years to attack the obligations and ambiguities of § 7(i) seriatim.

This litigation culminated in a 121 page "Section 7(i) Settlement Agreement" entered into on June 29, 1982, between all twelve resource-holding ANCSA Regional Corporations. The "Section 7(i) Settlement Agreement" was accompanied by a 37 page master's report; these documents were approved by the Court and form the basis for dismissal in 1983 of Aleut Corp. v. Arctic Slope Regional Corp.¹⁶³

ANCSA Village Corporations unsuccessfully sought to intervene as a matter of right in order to prevent the approval of the Settlement Agreement.¹⁶⁴

The "Section 7(i) Settlement Agreement" represents an effort by the twelve Regional Corporations to resolve the cycle of litigation and to bring certainty to the application of § 7(i). In essence, the "Section 7(i) Settlement Agreement" represents an effort by the Regional Corporations to correct the deficiencies of ANCSA by a detailed agreement in order to render possible 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, however, that all § 7(i) litigation has ended. The Section 7(i) Settlement Agreement has, however, narrowed the scope of such litigation to the application of its extensive and rigid terms. It also took steps to control litigation: it exclusively adopted arbitration proceedings, and provided that the prevailing party in such an arbitration would receive his costs and attorney's fees pursuant to the Alaska Rules of Civil Procedure. With 12 parties incurring legal fees, this has proven to be an effective in terrorem financial deterrent to frivolous arbitrations.

¹⁶¹ 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); reversed in part sub nom Doyon Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978); Aleut Corp. v. Arctic 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 Regional Corp., 484 F.Supp. 482 (D. Alaska 1980).

¹⁶² The amount and cost of litigation arising out of § 7(i) has been criticized in Aleut Corp. v. Arctic Slope Regional Corp., 484 F.Supp. 482, at 485, n. 5 (D. Alaska 1980) and in Branson, Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations under Corporate Law, 8 UCLA Alaska L.Rev. 103, 137 (1979).

¹⁶³ Judgment of dismissal entered June 3, 1983, No. A75-53, U.S.D.C., D.Alaska.

¹⁶⁴ Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527 (9th Cir. 1984).

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

A third essential element of the monetary settlement effected by ANCSA is § 7(j)¹⁶⁵ which ensures that at least some of the funds paid under ANCSA were received by all corporate stockholders, and 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 of the Act (Alaska Native Fund) and under subsection (i) of this section . . . and all of the net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less 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) . . .¹⁶⁶

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 § 7(j) income.

The first sentence of § 7(j) is absolutely clear: during the first five years, Alaska Native Fund moneys, § 7(i) moneys, and ". . . all other net income . . ." were mandated to be distributed to all shareholders and to Villages. This ensured some immediate personal benefit should accrue from ANCSA.

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 litigation¹⁶⁷ seeking to clarify the ambiguity.¹⁶⁸

¹⁶⁵ 43 U.S.C. § 1606(j).

¹⁶⁶ The phrase "subsection to it" probably was probably intended to read "subsection (m)". ANCSA § 7(m) relates to the distribution and allocation of funds to at large and village shareholders.

¹⁶⁷ Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp., *supra*.

¹⁶⁸ In Ukpeagvik Inupit Corp. v. Arctic Slope Regional Corp., *supra*, the Court recognized a significant ambiguity in § 7(i) as follows:

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 & 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 net

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." In addition, the Court concluded that, as to resource revenues derived from its own lands, only that portion of § 7(i) funds a Regional Corporation "pays to itself" under § 7(i) is subject to sharing with Village Corporations and at-large shareholders under § 7(j).¹⁶⁹

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."¹⁷⁰

[5] Provisions Relating to Native Lands.

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. However, there was no simple grant of contiguous lands: in ANCSA, lands are withdrawn for selection under § 11, selected under § 12, and conveyed under § 14 to Native Village Corporations and Native Regional Corporations (and reconveyed to third parties) under a complex array of authorities, in various estates in land, in varying amounts and for various purposes all over the state. Fundamentally, three to seven townships of surface interest in lands around Village Corporations are granted in fee to those corporations, while the subsurface (mineral) interests in these lands and fee title to the entire estate in other lands, are granted to the twelve Alaska Regional Corporations, while residents and entrymen on such lands are protected.

[a] Section 11(a)(1) and 12(a) -- Village Withdrawals and
Selections

Initially, it was foreseen that ANCSA lands were to bear a much more financially significant role in the life of ANCSA corporations than has proven to be the case. A recent economic analysis reflects that almost all resource revenues received by ANCSA corporations

income" by requiring "net income" to be distributed under the second sentence)." *Id.*, 517 F.Supp. at 1258-59.

¹⁶⁹ *Id.*, 517 F.Supp. at 1261.

¹⁷⁰ *Id.*, at 1262. Other commentators have questioned whether Regional Corporations are the "foundation for the settlement". See Berger, *Village Journey*, *supra*.

has come from lands originally not available under ANCSA.¹⁷¹ Many ANCSA lands have not been developed, and so ANCSA lands continue to offer extraordinary development opportunities.¹⁷² Still, even if these extensive land holdings are never developed, land remains a crucial element of Native life and culture. ANCSA corporations are thus landholding entities with an important public role similar to that of the State and federal governments, notwithstanding the level of private profit derived from such lands.

The 25 townships of lands surrounding a Village (except lands in National Parks as in the Naval Petroleum Reserve Number 4) were withdrawn for Village selection in ANCSA Section 11.¹⁷³ The 11(a)(1) withdrawals included, under Section 11(a)(2)¹⁷⁴ lands that were tentatively approved to the State of Alaska for conveyance pursuant to Section 6(g) of the Alaska Statehood Act.¹⁷⁵ If there were insufficient lands to allow the Village Corporation to select its entire entitlement in the 11(a)(1) withdrawal, then ANCSA § 11(a)(3)¹⁷⁶ authorized the Secretary to make "deficiency" withdrawals in other lands.

Section 12(a) of ANCSA,¹⁷⁷ authorized the Village Corporations to select lands within their withdrawals until December 18, 1974. Under § 12(a), no more than three townships could be selected from lands TA'd to the state, withdrawn under § 11(a)(2) and no more than three townships could be selected within a National Wildlife Refuge or within a National Forest.

Section 12(b) of ANCSA¹⁷⁸ provided that additional surface acreage (totalling 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 conveyance provisions were complex, ambiguous and heavily litigated. Much of this litigation was brought by the State of Alaska¹⁷⁹ or other holders of third party rights aggrieved by BLM

¹⁷¹ See "Financial Performance of Native Regional Corporations", supra, and text accompanying Notes 21 through 25, supra.

¹⁷² For example, the 1991 Alaska Miners Association convention devoted an entire day to presentation by Regional Corporations.

¹⁷³ 43 U.S.C. § 1610.

¹⁷⁴ 43 U.S.C. § 1610(a)(2).

¹⁷⁵ Act of July 7, 1958, PL 85-508 (72 Stat. 339; 48 U.S.C. note prec. 12).

¹⁷⁶ 43 U.S.C. § 1610(a)(3).

¹⁷⁷ 43 U.S.C. § 1611(a).

¹⁷⁸ 43 U.S.C. § 1611(b).

¹⁷⁹ 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.

decisions. So many administrative appeals were filed that the Department of Interior created the Alaska Native Claims Appeals Board ("ANCAB") from 1976 to 1982 to hear them all.¹⁸⁰ A Native 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.

[b] Regional Corporation Withdrawal Selections

The subsurface of lands was withdrawn for Regional Corporations by § 11(a). The Regional selection obligation is not clear in § 12; some of § 12 actually addresses conveyance rights of Regional Corporations more properly included in § 14. The Department of the Interior regulations governing Regional Corporation selections¹⁸¹ most clearly establish the various Regional Corporation selection obligations. For example, as to § 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 to two basic types of interests in lands: the subsurface to Village lands under ANCSA § 14(f)¹⁸² and surface and subsurface interest in other lands pursuant to § 12(c) and 14(h)(1) and (8).

¹⁸⁰ The number of reported decisions (especially in administrative appeals) is simply staggering. A 1986 Department of the Interior publication, Information Interior: Alaska Native Claims Settlement Act, as Amended, U.S. Dept. of the Interior, Division of Information and Library Services, Washington, DC, July 1986, lists judicial and administrative decisions citing provisions of ANCSA. Organized by section, and ignoring judicial decisions, this publication lists the following amounts of decisions in administrative appeals citing §§ 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 Township 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 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 citations to Interior administrative decisions through 1986. Even allowing for some duplication, this was a huge amount of litigation over a benefit granted by statute.

¹⁸¹ See 43 CFR. § 2652.

¹⁸² See discussion infra at X.04[5][c].

Pursuant to § 14(f) of ANCSA¹⁸³, the Regional Corporation receives title to the subsurface estate when the surface estate is conveyed to a Village Corporation. A question inevitably arises about the precise meaning of "subsurface". This 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."¹⁸⁴ Later versions of the bills included the phrase "subsurface" to denominate the interests conveyed to the Regional Corporation. A Ninth Circuit decision held, in deciding the ownership of sand and gravel, that "subsurface" means mineral estate.¹⁸⁵

These "split estate" lands are also subject to the further rights of the Village Corporation established in ANCSA § 14(f) to consent to the exploration, development or removal of minerals from these lands within the Native Village boundaries.¹⁸⁶

Section 12(c)¹⁸⁷ creates an additional 16 million acre entitlement for Regions. Under § 12(c), the surface and subsurface interest in an additional 16 million acres of lands are allocated directly to the eleven land owning Regional Corporations.¹⁸⁸ 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 "acres v. population" dispute was longstanding in the Native community as it sought passage of ANCSA and § 12(c) represents a compromise of the issue.¹⁸⁹

[c] Section 14 -- Village and Regional Conveyances.

Section 14(a) of ANCSA¹⁹⁰ 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]mmmediately after selection"¹⁹¹ 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

¹⁸³ 43 U.S.C. § 1613(f)).

¹⁸⁴ See Chugach Natives v. Doyon, Ltd., *supra*, 588 F.2d at 726.

¹⁸⁵ *Id.* See also Tyonek Native Corp. v. Cook Inlet Region, Inc., 853 F.2d 727 (9th Cir., 1988).

¹⁸⁶ This consent right is discussed *infra* in Section X.04[6][g].

¹⁸⁷ 43 U.S.C. § 1611(c).

¹⁸⁸ Excluding Sealaska, because of the Tlingit-Haida settlement discussed *supra* at Section X.02[2].

¹⁸⁹ See Arnold, Alaska Native Land Claims, *supra*, at pp. 136-37, 150-51, and 257-58.

¹⁹⁰ 43 U.S.C. § 1613(a)

¹⁹¹ *Id.*

land conveyancing program finally began to become effective.¹⁹² 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. ANILCA § 1415¹⁹³ created an "automatic conveyance" procedure to break the logjam on conveyances with respect to certain "core township" Village lands.

The Regional Corporations' rights to Village subsurface under § 14(f) was discussed, supra, at § 04[5][b]. The Regional Corporations were also conveyed surface and subsurface title in up to 2 million acres of additional lands pursuant to § 14(h)(1) and 14(h)(8).¹⁹⁴ Section 14(h)(1) lands are for purposes of preserving cemetery and historical sites and may not be utilized for mineral development purposes,¹⁹⁵ while § 14(h)(8) lands are freely conveyed to the Regional Corporation for any usage whatsoever.

Section 14(h) provides that the 2 million acres to be conveyed pursuant to that subsection is to be ". . . located outside the areas withdrawn by . . . ANCSA section 11." (Emphasis added.) The regulations provide that reverse.¹⁹⁶ This obvious divergence between the statute and the regulations has not been litigated, but has been responsible for at least one Regional Corporation being significantly underserved on its 14(h)(8) acreage allocation. Either litigation or, preferably, legislation or suspension of the regulations will occur in the future to resolve this problem. There are significant mineral successes on statutorily approved 14(h)(8) Regional selections.¹⁹⁷

ANCSA contemplated land conveyances only by patent. However, patents require survey under ANCSA § 13¹⁹⁸, which are rare in remote areas of Alaska. Instead, BLM issued regulations providing for interim conveyances (IC's¹⁹⁹) on the basis of protraction diagrams and this option is now acknowledged by statute: ANCSA § 22(j)(1)²⁰⁰ now accords IC's the finality and status of patents and further provides that the boundaries of the lands so IC'd

¹⁹² 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.

¹⁹³ 43 U.S.C. § 1641.

¹⁹⁴ 43 U.S.C. 1613(h)(1) and (8).

¹⁹⁵ See second proviso in 43 C.F.R. 2653.5(a).

¹⁹⁶ 43 C.F.R. §§ 2653.3(b) and 2653.1(b) together provide that § 14(h)(8) allocations will be made from lands "previously withdrawn under section 11 . . . of the Act which are not otherwise appropriated." See also 43 C.F.R. § 2652.9(a).

¹⁹⁷ See: ANILCA § 1418. The Red Dog Mine is located on such a selection made by NANA.

¹⁹⁸ 43 U.S.C. § 1612.

¹⁹⁹ 43 C.F.R. 2650.0-5(h).

²⁰⁰ See 43 U.S.C. § 1621(j)(1), an amendment to ANCSA created by ANILCA.

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.²⁰¹ In addition, there is a two-year statute of limitations on Secretarial decisions made in relation to ANCSA²⁰² which buttresses the finality of IC's.

The ownership of submerged lands underlying navigable waters has been the subject of a number of pieces of legislation. Currently, 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.²⁰³ Basically, the State of Alaska owns lands under navigable waters (except where withdrawn at Statehood²⁰⁴) and the Native corporations own the beds of the above-referenced non-navigable waters within its selections, although the State and the Native corporation can agree to the contrary.²⁰⁵

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.²⁰⁶ The Secretary is obligated to consult with Native corporations prior to making any agreement with respect to selected lands,²⁰⁷ and is obligated to escrow any monies received from such lands.²⁰⁸ 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 land exploration activities on such lands, and accords substantial deference to the wishes of the Native corporations. A Native corporation possesses no right for a Native corporation to authorize the severance of minerals from lands prior to the time it obtains title.

[d] Land Exchanges.

Section 22(f) of ANCSA²⁰⁹ and § 1302(h) of ANILCA²¹⁰ provide special authority for the exchange of lands by Native corporations, the Secretary of the Interior, and the State of

²⁰¹ 43 U.S.C. § 1637.

²⁰² 43 U.S.C. § 1632(a).

²⁰³ See 43 U.S.C. § 1431; "Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of Lands v. U.S.", ____ I.D. ____, Solicitor's Opinion M36911 (Supp. I), April 20, 1992, at n. 43.

²⁰⁴ See Utah Division of State Lands v. U.S., 482 U.S. 193 (1987). The extent of Alaska's rights to submerged inland and offshore lands in the Arctic is presently being litigated in Alaska v. United States, Original No. 84, U.S. Supreme Court, and Alaska v. U.S., No. A-87-450 Civ. (U.S.D.C., D.Ak.).

²⁰⁵ See 43 U.S.C. § 1631 (e).

²⁰⁶ Section 22(i), 43 U.S.C. § 1621(i). See Cape Fox Corp. v. U.S., 646 F.2d 399 (9th Cir. 1981); Cape Fox Corp. v. U.S., 4 Cl.Ct. 223 (1983).

²⁰⁷ 43 C.F.R. § 2650.1(a)(2)

²⁰⁸ Section 2, P.L. 94-204, note following 43 U.S.C. § 1613.

²⁰⁹ 43 U.S.C. § 1621(f).

Alaska.²¹¹ Both statutes allow the Secretary of the Interior to exchange lands on other than an equal value basis, where the Secretary determines it to be in the public interest.²¹²

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 § 204(j) of FLPMA²¹³ 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 holding patterns in the state, and there were several outstanding successes.²¹⁴ 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.²¹⁵

Thereafter, another significant political controversy arose in Congress concerning a proposal to grant oil and gas rights to Native corporations in the Arctic National Wildlife Refuge in exchange for Native land holdings in other Refuges.²¹⁶ Legislation was introduced to block these exchanges without Congressional approval,²¹⁷ litigation was filed,²¹⁸ and the proposal was indefinitely delayed.

As a result it cannot presently be said that all land exchange proposals will offer a dependable vehicle for acquisition of desired lands. For such an approval promptly to be effectuated, it is particularly important that the environmental community not strongly disfavor it.

²¹⁰ 16 U.S.C. § 3192.

²¹¹ For additional Alaska authority, see Alaska Statutes 38.50.010, et seq.

²¹² Note that the Alaska statutes do not contain such a proviso. AS 38.50.020 requires that "[t]he land . . . which the state receives in exchange made under this chapter shall be equal to or exceed the appraised fair market value of the land . . . exchanged by the state."

²¹³ 43 U.S.C. § 1714(j).

²¹⁴ The Cook Inlet Land Exchange (see, State v. Lewis, 559 P.2d 630 (Ak. 1977), cert. den., 432 U.S. 901 (1978)), the NANA Red Dog exchanges, and the ASRC exchanges into the Arctic National Wildlife Refuge (ANWR) and Cape Halkett in the Naval Petroleum Reserve - Alaska are successful examples of such land exchanges, although each such exchange required special legislation. See footnotes 22 and 23, supra.

²¹⁵ See National Audubon Society v. Hodel, 606 F.Supp.825 (D. Alaska 1984).

²¹⁶ See: United States Department of the Interior, "Acquisition of Selected Inholdings in Alaska National Wildlife Refuges", Final Legislative Environmental Impact Statement, December 1988.

²¹⁷ H.R. 3601, S. 2214, 100th Cong. 1st Sess.

²¹⁸ Trustees for Alaska v. Horn, No. A87-118 Civil (D.Ak. 1987).

[e] Section 16 -- Southeastern Alaska Native Corporations

As discussed, supra, at Section 02[1](b) and [2], 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.²¹⁹ 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."²²⁰ Congress instead provided in ANCSA § 16²²¹ 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; the Natives in the cities of Sitka and Juneau, pursuant to ANCSA § 14(h)(3)²²² were granted a township "in reasonable proximity to the municipalities", and later the Village of Klukwan was granted in ANCSA § 16(d)²²³ a selection right to a township of land when later decided to become a Village Corporation under ANCSA after first deciding to accept surface and subsurface rights to its former reservation under § 19.²²⁴ In addition, Congress provided that the § 12(c) "land loss" formula²²⁵ was to exclude Sealaska, the Regional Corporation for Southeastern Alaska.

ANCSA § 16(c)²²⁶ 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.²²⁷ ANCSA § 19²²⁸ provided for the revocation of existing Indian reservations in Alaska and for the

²¹⁹ Tlingit & Haida Indians v. United States, 177 F.Supp. 452 (Ct.Cl. 1955)

²²⁰ 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).

²²¹ 43 U.S.C. § 1615.

²²² 43 U.S.C. § 1613(h)(3).

²²³ 43 U.S.C. § 1615(d).

²²⁴ See discussion, infra, at X.04[5][f].

²²⁵ See discussion, supra, at Section X.04[5][b].

²²⁶ 43 U.S.C. § 1615(c).

²²⁷ See Case, Alaska Natives and American Law, supra, Chapter 3.

²²⁸ 43 U.S.C. § 1618. See also, 33 C.F.R. § 2654.

election of the Village Corporation which 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 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 in ANCSA. Special provision for Klukwan was made in ANCSA § 16(d).²²⁹

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.²³⁰

[6] Provisions Relating to Third Party Rights.

[a] Valid Existing Rights.

All ANCSA withdrawals and conveyances are made subject to valid existing rights under ANCSA § 11(a)(1)²³¹ and § 14(g)²³². 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, for instance, 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 corporation pursuant to ANCSA § 11(a)(2).²³³

[b] 14(c) Reconveyances by Village Corporations.

As complex as the land conveyancing process under ANCSA is, ANCSA recognized that not every form of present or future third party interests could be provided for. Subsections 14(c)(1)-(4)²³⁴ therefore provide 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 beacon and navigation sites occupied on December 18, 1971. The 14(c) program has been difficult for a number of reasons: no funding was provided to complete it; it requires

²²⁹ 43 U.S.C. § 1615(d).

²³⁰ Doyon Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (1978).

²³¹ 43 U.S.C. § 1610(a)(1).

²³² 43 U.S.C. § 1613(g).

²³³ Seldovia Native Association, Inc. v. Lujan, 904 F.2d 1335 (9th Cir. 1990).

²³⁴ 43 U.S.C. § 1613(c)(1)-(4).

Native corporations to take land from themselves and give it to non-Natives; and § 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. Some litigation has resulted, but there are not yet sufficient reported decisions to lend a great deal of clarity to these requirements²³⁵.

[d] Native Allotments

ANCSA § 18²³⁶ revoked allotment authority in Alaska. Section 18(a) provided that the approximately 7,000 allotment applications pending on December 18, 1971²³⁷ should be approved. (If this occurred, then the Native is not eligible for a patent of a primary place of residence pursuant to § 14(h)(5).²³⁸) Lands in allotments are charged against the 2 million acres made available to Regional Corporations made in ANCSA § 14(h) pursuant to the terms of ANCSA § 14(h)(6).²³⁹ However, this attempted legislative resolution of allotment policies in Alaska was not successful because it became bogged down in litigation. The subject was revisited in ANILCA § 905 in an effort to obtain summary approval for the still-pending applications.²⁴⁰

[e] § 17(b) Easements

Another in the myriad difficulties arising between existing land uses and ANCSA land grants occurred with reference to the issue of public rights-of-way and easements across ANCSA lands. ANCSA § 17(b)²⁴¹ provided for the reservation of public easements across ANCSA lands ". . . and at periodic points along the course of major waterways which are reasonably necessary to guarantee . . . a full right of public use and access for recreation and 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 energy, and floating rights-of-way for "ditches and canals" pursuant to 43 U.S.C. 945 and for railroads,

²³⁵ See, e.g., Donnelly v. U.S., 850 F.2d 1313 (9th Cir. 1988)(trespass not protected by § 14(c)); Buettner v. Kivilco, 860 F.2d 341 (9th Cir. 1988)(occupance under Forest Service special use permit sufficient under § 14(c)(1)); Hakala v. Atxam Corp., 753 P.2d 414 (Ak. 1988)(guide's cabin site sufficient to establish primary place of business under § 14(c)(1).

²³⁶ 43 U.S.C. § 1617.

²³⁷ Alaska Natives and American Laws, at p. 138.

²³⁸ 43 U.S.C. § 1613(h)(5).

²³⁹ 43 U.S.C. § 1613(h)(6).

²⁴⁰ 43 U.S.C. § 1634.

²⁴¹ 43 U.S.C. § 1616(b).

telegraph and telephone lines pursuant to 43 U.S.C. ¶ 975.²⁴² The broad attempts of the public user groups and the FSLUPC to subjugate Native lands to public uses were rejected by the Courts.

[f] § 21(j) -- Shareholder Home Sites

ANCSA provided a variety of ways for Native individuals to obtain title to lands.²⁴³

ANCSA provided, in § 21(j)²⁴⁴ for the exemption from the income tax 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". 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. . . ." Many Village Corporations are seeking to create § 21(j) shareholder homesite programs at this time. The most significant problems are with satisfying state subdivision statutes which require plats, access, minimum lot size, etc. However, unlike all other December 18, 1991 deadlines in ANCSA, the deadline for § 21(j) conveyances was not extended by the 1991 Legislation. Amendatory legislation is currently being sought to resolve this problem.

[g] 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 the Village Corporation and the subsurface is owned by the Region. Congress provided in ANCSA § 14(f)²⁴⁵ some ill-defined protection for Village Corporations when the Region wishes 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 a Native Village shall be subject to the consent of the Village Corporation.

The extent of Village Corporation consent required pursuant to Section 14(f) has been a topic of lively and unresolved disagreement between Village and Regional Corporations.²⁴⁶ The

²⁴² Alaska Public Easement Public Defense Fund v. Andrus, 435 F.Supp. 664 (D. Alaska 1977).

²⁴³ As discussed above, ANCSA § 18 provided for the approval of allotments, ANCSA § 14(h)(5) provided for the approval of a primary place of residence, ANCSA § 14(c)(1) provided for the grant of title to a primary place of residence in a Village, and ANCSA § 22(b) provided for various public land entrymen.

²⁴⁴ 43 U.S.C. § 1620(j).

²⁴⁵ 43 U.S.C. § 1613(f).

²⁴⁶ At least one court has sought to resolve this issue *in dicta*. See, Aleut v. Arctic, 421 F.Supp.862 at 866 n. 4, (D. Alaska 1976). A somewhat more judicially restrained footnote on the subject is found in the appeal of

phrase "within the boundaries of a Native Village" is variously argued to include all Native Village lands, or in the alternative, only those lands in the Village with buildings on them. It is fair to say that, in the face of a lack of clear judicial resolution of the meaning of the phrase "within the boundaries of any Native Village . . .," the Regional and Village Corporations have (1) sustained the ambiguity and avoided the final resolution of this dispute in litigation by pursuing mutually acceptable compromise; and (2) these mutually acceptable compromises may take many different forms--any party intending to do business with a Regional Corporation on split estate land should determine at the outset what the nature of this Region's and Village's resolution is prior to any attempt to negotiate a transaction with either the Region or the Village.

It is noteworthy that provisions relative to mergers between a Village Corporation and other Village Corporations or Regions contained in Section 30 of ANCSA²⁴⁷ provide that the plan of merger or consolidation shall provide that the Village's Section 14(f) consent rights be conveyed "as part of the merger or consolidation, to a separate entity composed of the Native residents of such Native Village."²⁴⁸ The purpose of this provision apparently was to ensure that the Section 14(f) consent rights (which presumably are intended to effect 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.

[7] Provisions Relating to Taxes and Creditor's Rights.

[a] § 21.-- Property Tax Exemption

Under ANCSA § 21(d)(1),²⁴⁹ ANCSA lands are not subject to taxation unless they are leased, developed or subdivided. The original term of this provision expired in 1991. Due to the delay in conveyance, ANILCA extended the term of § 21(d)(1) to 20 years after conveyance. However, as discussed, *infra*, at § 04[1][c], the 1991 Legislation now makes perennial the period of property tax holiday on undeveloped land.

The meaning of the term "developed" used in this provision is unclear. The only judicial interpretation of that term is found in two related Alaska Supreme Court decisions.²⁵⁰ Together, these cases interpret state law²⁵¹ to hold that lands which were improved ceased to be "developed" when they are materially altered and otherwise undeveloped ANCSA lands are

that decision, Chugach v. Doyon, 584 F.2d at 732, n. 19, but the issue still was not resolved, and the issue was not further refined by the Section 7(i) Settlement Agreement.

²⁴⁷ 43 U.S.C. § 1627(e).

²⁴⁸ This entity is usually a tribal council for the village.

²⁴⁹ 43 U.S.C. § 1622(d)(1). See also 1991 Legislation, 43 U.S.C. § 1636(d)(1)(a) discussed further, *infra*.

²⁵⁰ Kenai Peninsula Borough v. Cook Inlet Region, Inc., 807 P.2d 487 (Alaska 1991), and Kenai Peninsula Borough v. Tyonek Native Corp., 807 P.2d 502 (Alaska 1991).

²⁵¹ Alaska Statute 9.45.030(m)(1).

"developed" and subjected to state and local taxation where the lands are subdivided into parcels sufficiently small to maximize the revenue from the property. However, vacant lands do not lose their property tax exemptions if they are subject to mineral exploration.²⁵²

[b] Land Bank

The "land bank" provisions of ANCSA were added by ANILCA § 907.²⁵³ The land bank program provided the desirable result of protecting ANCSA lands from real property taxes and assessments, and from judgments to recover moneys owed by Native corporations. Unfortunately, the provisions of the statute were so complex in requiring an agreement approved by the Secretary that few corporations used the provision as originally drafted.

[c] Automatic Land Bank

Another significant provision of the 1991 Legislation was to create a new provision²⁵⁴ providing for automatic land bank protections, "so long as such land and interests are not developed or leased or sold to third parties from -- (i) adverse possession . . . (ii) real property taxes . . . (iii) judgments resulting from . . . (i) Title II . . . (ii) other insolvency . . . laws or (iii) other laws generally affecting creditors rights . . . (iv) judgments . . . and (v) involuntary distributions or conveyances related to the involuntary dissolution of a native corporation. . . ." For purposes of the statute, the term "developed" was defined²⁵⁵ so as to encompass a "purposeful modification of land . . . from its original state that effectuates a condition of gainful and productive present use . . ."²⁵⁶ Mineral exploration does not make lands "developed" pursuant to the automatic land bank provisions but it is unknown whether state taxing authorities will seek to impose taxes on vacant, subdivided lands.

[8] Land Planning, (d)(2), and ANILCA.

Alaska has traditionally had three political constituencies in reference to its lands: statehood advocates, Natives, and conservationists. ANCSA § 17 attempted to rationalize the relationship between the first two, and pave the way for the third.

[a] Land Planning

Many of the difficulties in implementing ANCSA flowed from land use conflicts. In general, the only way to resolve these conflicts was to engage in litigation.

²⁵² Id. See also 43 U.S.C. § 1636(d)(1)(A).

²⁵³ 43 U.S.C. § 1636.

²⁵⁴ 43 U.S.C. § 1636(d).

²⁵⁵ 43 U.S.C. § 1636(d)(2)(A)(i).

²⁵⁶ This definition essentially restates the State law discussed in Section X.04[7][a]

Originally, this was not intended to be the case: The bill passed by the Senate²⁵⁷ granted broad regulatory and planning powers to the Joint Federal -- State Land Use Planning Commission (FSLUPC). Section 17(a) of ANCSA²⁵⁸ deleted the regulatory and enforcement powers of the FSLUPC, leaving this body only with advisory power.²⁵⁹ While it remained influential, the FSLUPC could have played a more pivotal role in resolving the endless land use conflicts that arose had it held real powers. One obvious problem with the FSLUPC was that there were three interest groups relative to ANCSA lands issues -- federal and state governments, and the Natives. The FSLUPC only provided formal recognition and membership to the federal and state governments. A more authoritative role would only have been successful had formal Native corporation representation been supplied.

[b] Section (d)(1) Withdrawals

Section 17(d)(1) and (d)(2) provided for the withdrawal of massive tracts of lands. Section (d)(1) provided that for a period of 90 days after passage of ANCSA, all unreserved public lands in Alaska were withdrawn. Thereafter, the Secretary was directed to withdraw such public lands in Alaska ". . . to ensure that the public interest in these lands is properly protected . . ." ²⁶⁰ Acting under this authority, the Secretary of the Interior initially withdrew (d)(1) lands to create buffer lands around (d)(2) withdrawals, but eventually exercised his authority to include all unreserved public lands in Alaska in his (d)(1) withdrawals.²⁶¹ The purpose of this provision was stated as follows:

The Secretary is authorized, where appropriate, under his existing authority, to withdraw public lands . . . in a manner which will protect the public interest and

²⁵⁷ § 24 of S. 35, 92d. Cong. 1 St.Sess.

²⁵⁸ 43 U.S.C. § 1618(a).

²⁵⁹ This omission was the subject of a scathing dissent by Congressman Saylor included in the legislative history in which it is stated:

It must be stated at the outset that providing an equitable legislative settlement . . . is not the only purpose of H.R. 10367. An additional or underlying purpose of this legislation is that it authorizes the first step in a long series of actions which will profoundly affect the future economic, social and political development of the State of Alaska. H.R. 10367 proposes to do this without coordination and planning, primarily for the benefit of special interests. . . .

1971 USCC & AN at pp. 2241-2246.

The exercise of FSLUPC's advisory powers is exemplified in FSLUPC A Commission Study 30: Selected Legal Memoranda, Jan. 1978, Vols. I and II.

²⁶⁰ 43 U.S.C. § 1618(d)(1).

²⁶¹ Pub. Land Order No. 5180, 37 Fed.Reg. 5583-5584 (March 9, 1972) as amended by Pub. Land Order No. 5418, 39 Fed.Reg. 11547 (March 24, 1974).

avoid a "land rush" and massive filings on public lands in Alaska immediately following the exploration of the so-called "land freeze".²⁶²

[c] Section (d)(2)

The (d)(2) withdrawals were far more controversial. Section (d)(2) authorized the Secretary to make (d)(2) withdrawals of 80 million acres of unreserved public land to reserve them for possible addition to the National Park, Forest, Wildlife Refuge and Wild and Scenic River Systems, and such withdrawals were made almost immediately.²⁶³

When the ANCSA (d)(2) withdrawals were ready to expire, the Secretary of the Interior exercised further withdrawal authority under § 204 of FLPMA²⁶⁴ to place an additional layer of withdrawal upon these lands. Eventually, many of these lands were fully withdrawn by Executive Order issued by President Carter under authority of the Antiquities Act.²⁶⁵ These withdrawals created bitter political controversy and they were unsuccessfully challenged in litigation²⁶⁶ They played a central role in forcing the passage of ANILCA in 1980, which has offered a more coherent (albeit still highly controversial) resolution of Alaskan land status than the procession of land freezes, (d)(1) and (d)(2) withdrawals, FLPMA withdrawals, and Antiquity Act withdrawals which preceded it.

Together, PLO 4582 (the Superfreeze) and the withdrawals under § 11(a) and 17(d)(1) and (d)(2) stymied mining and oil and gas operations and leasing on Federal and some State lands from 1967 to 1980.²⁶⁷

[9] Net Operating Loss Transactions

Many Native Corporations came under significant economic pressure as a result of the delay in transferring lands. Eventually, Bering Straits Native Corporation (BSNC), along with its advisors, initiated an effort to engage in the sharing of the tax benefits of net operating loss

²⁶² 1971 USCC & AN at 2249.

²⁶³ See, e.g., Pub. Land Orders Nos. 5169-5188, 37 Fed.Reg. 5572-5591 (March 9, 1972).

²⁶⁴ 43 U.S.C. § 1714. See, e.g., Pub. Land Order No. 5654, 43 Fed.Reg. 59756 (November 17, 1978).

²⁶⁵ 16 U.S.C. § 431.

²⁶⁶ Alaska v. Carter, No. A-78-291 (D. Ak.) complaint filed October 30, 1978, and Anaconda Copper Co. v. Andrus, 14 Env't. Rep. Cas. (BNA) 1853 (D.Ak. 1980). As a sidenote, Joseph Rudd, a long member of the Foundation, was killed in an airplane crash while returning from a meeting concerning Alaska v. Carter.

²⁶⁷ This effect was the subject of Joseph Rudd's "Who Owns Alaska", supra, and was the reason the RMMLF Special Institute was held in 1978 (see note 12, supra).

(NOL) transactions. Senator Stevens was instrumental in obtaining a series of statutes which clarified the authority of all Native Corporations to enter into such transactions.²⁶⁸

These NOL transactions have been instrumental in recapitalizing many Native Corporations. It was recently estimated that NOL transactions were responsible for payments to Regional Corporations alone of \$445 million,²⁶⁹ and many additional large transactions were entered into by various ANCSA Village Corporations. These transactions fundamentally involved tax sharing transactions between an ANCSA corporation possessing NOLs, and a profitable non-ANCSA corporation. There is a substantial amount of administrative litigation currently ongoing before the Internal Revenue Service concerning the propriety and amount of these transactions under the tax statutes; if successful, the result will be, for many corporations, a "second chance" to achieve the financial benefits of ANCSA for their shareholders.

[10] Sovereignty, Tribes, and Indian Country

It is clear that Congress desired to enact ANCSA without resort to tribes, tribal entities, or the reservation system.²⁷⁰ Notwithstanding that Congressional intent, sovereignty has spontaneously arisen as a public issue in Alaska. Sovereignty is perhaps as much an issue of cultural and sociological empowerment as it is of political power, and very well may assist the Native community in meaningful ways to adjust to and survive intact myriad social pressures.

The sovereignty movement in Alaska has been much more aggressively pursued in Bush Villages than it has in urbanized areas or among the Regional Corporations. There are a number of reported cases relating to the assertion of tribal status or sovereign immunity by an unrecognized tribal entity and the State and Federal Courts have in part reached different results in such litigation.²⁷¹

The law is far from settled. The problem in Alaska has been establishing the presence of "tribes" and "Indian country". In January, 1992 the Ninth Circuit in Native Village of Tyonek v. Puckett determined that "Indian country" encompassed the ANCSA land holdings of the Village Corporation for that Village. This holding was vacated sua sponte in March, 1992 and the case remanded to the District Court. This reversal is not surprising in light of the lack of a record and

²⁶⁸ See Sections 60(b)(5) of the Tax Reform Act of 1984 as amended by Section 1804(e)(4) of the Tax Reform Act of 1986, Act of October 22, 1986, PL 99-514, as repealed by Section 5021 of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) Act of November 10, 1988.

²⁶⁹ Institute of Social and Economic Research, "Financial Performance of Native Regional Corporations", supra.

²⁷⁰ Section 2(b) states that ANCSA itself was not intended to create tribes or reservations. This provision was not preemptive: § 2(c) is a savings clause stating that ANCSA does not replace or diminish any other right Natives may have.

²⁷¹ See, e.g., Native Village of Tyonek v. Puckett, supra; Native Village of Venetie v. Alaska, supra, Native Village of Venetie v. Alaska, 944 F.2d 548 (9th Cir. 1991). Accord., Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988).

the clear Congressional intention that ANCSA lands are not to be considered "Indian Reservation" lands.²⁷²

A number of such cases are actively being litigated and more clarity should exist in a few years.

[II] Subsistence

There has been a long-standing controversy about the rights of American Indians and Alaska Natives to utilize game resources in a traditional manner, free of State-imposed bag and season limits. In the Lower 48 context, the issue is usually presented as one of treaty rights.²⁷³ In Alaska there were no treaties, and the issue has generally become known as "subsistence."

The version of ANCSA originally passed by the Senate²⁷⁴ contained a provision protecting "the Native peoples' interest in and use of subsistence resources and the public lands."²⁷⁵ This was omitted in ANCSA as enacted. This omission was probably a significant mistake. It led to two decades of strife and the adoption of an extensive subsistence provision in ANILCA. Title VIII of ANILCA provided, *inter alia*, for a priority for subsistence resources on federal lands, access to federal lands for subsistence purposes, a series of regional subsistence councils, a requirement that the State of Alaska could manage game on federal lands only if it provided a "rural preference for subsistence", and, in § 810 of ANILCA²⁷⁶ for an EIS-like analysis of the subsistence impacts of federal land use decisions.²⁷⁷

Title VIII essentially resolved subsistence issues on Federal lands. However, Alaskans are a politically independent lot and greatly resented in ANILCA's requirement that a "rural preference" be accorded the use of fish and game on federal lands in Alaska as a condition to State management. In addition, the State's allocation of its own fish and game resources on its own lands to commercial fishing, sport hunting and fishing, and subsistence is extraordinarily controversial. The State attempted in 1986 to provide a "rural preference."²⁷⁸ Litigation

²⁷² ". . . The 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". 1971 USCC & AN, p. 2253. This term may be the same as "Indian Country".

²⁷³ See, e.g., U.S. v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974), 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976). See also: Cohen, Handbook of Federal Indian Law, *supra*, Chapter 8. _

²⁷⁴ S. 25, 92d Cong. 1st Sess.

²⁷⁵ 1971 USCC & AN, p. 2250.

²⁷⁶ 16 U.S.C. § 3120.

²⁷⁷ See, e.g., Amoco Production Co. v. Gambell, *supra* (OCS subsistence impacts); Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988)(Subsistence mining impacts). See also: Law of Federal Oil & Gas Leases, § 27.06[01].

²⁷⁸ Alaska Stat. 16.05.258(c).

successfully challenged this statute.²⁷⁹ A number of political initiatives on subsistence have been taken since, one of which led to an special session of the State Legislature which was being concluded just as this paper was being written.

05 CONCLUSIONS

[1] Benefits of ANCSA.

ANCSA's benefits include mainstream economic involvement and success; training of a population of Native managers; creation of uniquely Native model of economic success; economic self-determination resulting from business and proprietorship ethic; ANCSA business corporations have become powerful mainstream political and cultural tools.

[2] Difficulties with ANCSA.

ANCSA possessed several difficult features

[a] ANCSA's statutory vagueness and complexity led to preoccupation with unclear legislative intent, litigation, many legislative amendments, uncertainty, and high operating costs in the first ten years, as the meaning of ANCSA was fleshed out.

ANCSA's ambiguity and dizzying complexity was caused by these factors:

(i) the initial delay in enactment allowed creation of third-party land rights in entrymen, the State, Municipal governments, those claiming under the State and others. This prevented simple ANCSA land provisions; and

(ii) Legislative compromise and haste in drafting new and untested concepts.

The sheer magnitude of the amount of litigation which occurred relative to ANCSA lands and § 7(i) is testament to one of the most significant problems of ANCSA: its essential complexity and ambiguity required huge amounts of litigation and amendatory legislation which dissipated Native Corporation resources. Congress subsequently took action with NOLs to restore, in part, Native corporation assets dissipated in delay and litigation.²⁸⁰ A congressional resolution of the ongoing IRS challenges to NOL transactions would help restore the lost opportunities, and the lost confidence in ANCSA as a viable settlement vehicle caused by delay and litigation.

[b] Some unfortunate Native corporations made serious business mistakes in 1975-78 that continue to burden them today.

²⁷⁹ McDowell v. State, 785 P.2d 1 (Ak. 1989).

²⁸⁰ See Notes 13 and 29, supra. State of Alaska v. Morry, __ P.2d ___, No. 3866, July 10, 1992 (Alaska)

The corporate model facilitated land development, but it has not functioned perfectly, particularly in Bush Villages, because there did not exist a mainstream economic infrastructure or experience and ANCSA corporations did not have a clear business niche -- i.e., ANCSA created 250 start-up corporations without a clear economic goal or product.

[c] Because of a lack of tribal entities and other defining institutions, the corporations became a cultural focal point and means of cultural identity, and occasionally a hotly contested political battleground. These are not roles for-profit corporations easily and naturally fulfill without some adaptation. Those Regional Corporations with the most political stability have the best economic performance.

[d] The need for permanence -- for a guarantee of continued Native ownership -- became clear as 1991 approached.

[3] Changes to ANCSA During Twenty Years' of Implementation- -From Economic Darwinism to the Automatic Land Bank.

[a] Land exchanges to obtain valuable resources. The most successful resource developments have been on exchanged lands, or lands obtained by special enactments.

[b] Section 7(i)--the Settlement Agreement exemplifies evolving business maturity and an improved relationship offset between Regions; it has significantly lessened conflict and litigation.

[c] ANILCA -- the passage of this landmark legislation lessened political opposition to ANCSA by settling land issues relative to the State and the conservation community. The passage of ANILCA in 1980 also resolved ANCSA land issues and roughly coincided with the completion of the heavy cycle of litigation by ANCSA Corporations and marked the beginning of the mature business phase in which most ANCSA corporations are presently involved.

[d] 1991 Legislation. Heavy criticism of ANCSA was stilled by the 1991 Legislation which resolved several important issues, especially for the more economically vulnerable corporations. continued restriction on stock alienation; settlement trusts; automatic Land Bank and stock issuance to "afterborns". These changes ensured a continued existence for ANCSA corporations.

[e] NOL's. ANCSA Corporations recapitalized with Operating Losses and "Basis" Transactions to recapture years of lost opportunity spent in resolving ANCSA's ambiguities, organizing businesses, and obtaining land conveyance.

[4] Unresolved Issues.

After ANILCA the Section 7(i) Settlement Agreement, the 1991 Legislation exchanges, and other changes, ANCSA is finally a "mature" statute. Most of its drafting and conceptual problems have been resolved for the moment. The primary unresolved issue is whether and to what extent ANCSA's modernizing economic impact will be supplemented in two critical areas

of Native tradition: the recognition of tribal entities with sovereign powers, and the protection of subsistence rights on State and Federal lands in Alaska.

[a] Sovereignty/Tribes/Indian Country.

Five years ago, there was a great tension between ANCSA Regional Corporations and Village-based sovereignty advocates. These factions are now reaching an accommodation based on the mutual acknowledgment of the validity of the other's importance to the Native community. ANCSA is here to stay. It has become a part of the Native social fabric, and its recent changes render it more certain to achieve continued Native control of Native resources (particularly, undeveloped land, and Native corporate stock). However, a lasting and permanent resolution of Native issues (particularly in Bush Villages) also probably requires a social and cultural focus beyond ANCSA's for profit business corporations.

Issues to be defined in the future include: Whose land? ANCSA Corporation land? Trust land? State land? Only Tribal/IRA land? Can sovereign entities tax and regulate ANCSA land development?

[b] Subsistence.

Will the State establish a rural preference to provide State assumption of game management on Federal lands.

[c] Future Directions

ANCSA is part of a process. The Native Community is synthesizing for itself a complex 20th century culture, with elements of tradition and modernity. This is the achievement of one basic goal of ANCSA: in the words of ANCSA § 2, "a settlement in conformity with the real economic and social needs of Natives." This synthesis will be accomplished by Natives, for Natives.

06 Comparison of ANCSA With Proposal to Resolve Northwest Territories Aboriginal Claims

It is presumptuous in the extreme to attempt to comment on the efforts of another country to resolve aboriginal claims. However, twenty years of experience with ANCSA cannot be ignored, and some comments are offered.

[1] Form of Nunavat/Northwest Territories Settlement. There exist two prongs to the Nunavat Settlement:

[a] Voter Approval of Nunavat.

On May 4, 1992, 54% of voters in the Northwest Territories voted to divide into two territories, creating in the future the Territory of Nunavat, with an area of 772,000 square miles, inhabited by 17,500 Eskimos, 80% of the total population. Residence, voting, and participation in government are not restricted to Inuits. There is an ominous economic problem: News reports

suggest that currently unemployment in Nunavat is 50%, and there are not sufficient trained workers to occupy all government posts.

[b] Inuit Land Claims Settlement Proposal.

The Canadian government has also proposed a land settlement under which the Inuit would receive hunting, trapping and fishing rights, ownership of 136,000 square miles of Nunavat, and about US \$500 million paid over 14 years in exchange for extinguishment of claims to the remaining 80% of Nunavat. If accepted in November 1992, the Canadian government will create the Nunavat Territory by 1999.

[2] Comparison with ANCSA.

In certain ways, the Nunavat Land Claims proposals bear striking similarities to ANCSA in 1971. Apart from protection of subsistence rights and land ownership, there is no acknowledgment or creation of permanent Inuit institutions, such as tribal self-government, and no insurance that Nunavat's government won't be taken over by non-Inuits in the future. The Nunavat proposal may also suffer by comparison with ANCSA because there is no specified means of creating badly needed economic activity in undeveloped Arctic areas.

On the other hand, the Nunavat settlement provides for subsistence hunting and fishing rights, which ANCSA failed to do. This will probably avoid future problems.

Nunavat appears to be a beginning; it does not appear sufficiently developed, nor does it possess the permanence nor the completeness, to constitute the end point in Canadian policy for the Inuit. What we have learned in ANCSA is that the failure to provide for recognized and functioning cultural entities with a perennial existence and perennial ownership of assets, and the lack of political will to take on difficult cultural issues will create conflicts that must be addressed later.

99/216/other/ANCSA