ANCSA SECTION 7(I): $40 MILLION PER WORD AND COUNTING

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INTRODUCTION

"Alaska is often the exception, not the rule."[1] And so it is with both the Alaska Native Claims Settlement Act of 1971[2] (ANCSA or the "Act") and the unique revenue sharing provision contained at Section 7(i) of the Act.[3] When the United States Congress passed ANCSA, it made a dramatic change in the policy of the United States government related to aboriginal land claims. Instead of setting lands aside for reservations for Alaska's Native people,[4] Congress directed the creation of twelve for-profit regional corporations and more than 200 village corporations;[5] allowed them to select forty million acres of land that the United States would convey in fee simple to the corporations;[6] and provided $962.5

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1. Sturgeon v. Frost, 136 S. Ct. 1061, 1070 (2016).
2. Alaska Native Claims Settlement Act of 1971 (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629 (2012)).
3. ANCSA § 7(i).
4. *See* ANCSA § 2(b) ("Congress finds and declares that . . . the settlement should be accomplished . . . without creating a reservation system or lengthy wardship and trusteeship . . . ."); *see also* H.R. REP. No. 92-746, at 40 (1971) (Conf. Rep.), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2253 ("[T]he conference committee does not intend that lands granted to Natives under this Act be considered 'Indian reservation' lands for purposes other than those specified in this Act. The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.'").
5. ANCSA §§ 7, 8, 11.
6. ANCSA § 12. Approximately four million additional acres were set aside to be conveyed to villages with former Indian reservations that chose to opt out of the ANCSA structure: Teltin, Venetie, and Artic Village in the Doyon Region; and Elim, Gambell, and Savoonga in the Bering Straits Native Corp. Region. *See* ANCSA § 19.

million in compensation to the corporations.[7]

The resource revenue-sharing provision contained in Section 7(i) is an important and unique element of ANCSA.[8] The two sentences that comprise the original Section 7(i) facilitated the passage of the Act,[9] dominated the early interactions amongst and between regional and village corporations,[10] and have had enormous economic impact on Alaska Native corporations in the decades since passage of the Act.[11] Section 7(i) still has important consequences for Alaska Native corporations and their resource development partners more than forty years after the passage of ANCSA. As highlighted by the title of this article, the amount shared between Alaska Native corporations pursuant to Section 7(i) is enormous, well in excess of $2 billion.[12]

7. *See* ANCSA § 6 (creating the "Alaska Native Fund" at the United States Treasury and providing that "$462,500,000 from the general fund of the Treasury" and "$500,000,000 pursuant to the revenue sharing provisions" be available to fund the settlement).

8. ANCSA § 7(i). There has been significant scholarship regarding ANCSA generally. *See, e.g.*, DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS, 165–98 (3d ed. 2012); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 4.07[3] (Neil Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK]; Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of The Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107 (2008); James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 ROCKY MTN. MIN. L. INST. 12 (2007); James E. Torgerson, *Indians Against Immigrants—Old Rivals, New Rules: A Brief Review and Comparison of Indian Law in the Contiguous United States, Alaska, and Canada*, 14 AM. INDIAN L. REV. 57 (1989); Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132 (1976). Regarding some specific provisions of ANCSA, see, e.g., Gregory S. Fisher & Erin "Faith" Rose, *Selling Ice in Alaska: Employment Preferences and Statutory Exemptions for Alaska Native Corporations 40 Years After ANCSA*, 31 ALASKA L. REV. 1 (2014); Kathryn A. Black et al., *When Worlds Collide: Alaska Native Corporations and the Bankruptcy Code*, 6 ALASKA L. REV. 73 (1989). Surprisingly little has been written about Section 7(i). *See* CASE & VOLUCK, *supra*, at 43, 176–77; COHEN'S HANDBOOK, *supra*, § 4.07[3][b]; Lazarus & West, *supra,* at 153–64.

9. *See* ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 137 (1976); *see also* Interview with Margaret Brown, President and Chief Executive Officer (Retired), Cook Inlet Region, Inc., Anchorage, Alaska (Apr. 26, 2016).

10. *See, e.g.*, Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527 (9th Cir. 1984); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978); Ukpeagvik Inupiat Corp. v. Arctic Slope Reg'l Corp., 517 F. Supp. 1255 (D. Alaska 1981).

11. *See, e.g.*, Press Release, Arctic Slope Reg'l Corp., ASRC Reaches Historic Milestone in Revenue Sharing (Apr. 6, 2015), http://www.asrc.com/PressReleases/Pages/ASRC-Historic-Revenue-Sharing.aspx (announcing that ARSC has distributed over $1 billion to other Alaska Native Corporations pursuant to Section 7(i) obligations).

12. *See id.*; NANA REG'L CORP, INC., *Red Dog Mine*, http://www.nana.com/regional/resources/red-dog-mine (last visited Sept. 12, 2016) ("NANA has distributed $820 million to other regions and at-large shareholder[s] via the 7(i) sharing provisions."); Press Release, Sealaska Corp., Sealaska Announces

This article will review the history of Section 7(i), compare ANCSA's structure to other aboriginal land settlement structures worldwide—with a focus on revenue-sharing mechanisms (or lack thereof)—, and review the years of litigation focused on Section 7(i) that followed the passage of ANCSA. The article will then review the Settlement Agreement reached between the twelve Alaska Native regional corporations regarding Section 7(i) and the various consequences and outcomes of that Agreement since its signing in 1982. The article ends with a discussion of the interesting tax and bankruptcy issues associated with Section 7(i), as well as several current, unresolved issues regarding Section 7(i) and the Settlement Agreement.

HISTORY OF SECTION 7(I)

The history of Section 7(i) must be read in context with the overall history of ANCSA. ANCSA was an ambitious attempt to rapidly settle the land claims of multiple ethnic Native groups in Alaska over an immense land area and was complicated by the specific land histories in different areas of the state.[13]

The Alaska Federation of Natives (AFN) was the statewide organization formed in 1966 primarily to represent Alaska Native interests with regard to land claims.[14] One issue that arose among AFN's members was the knowledge that natural resources were not equally distributed across the various regions of the state.[15] It was also well known that certain groups across Alaska needed and used more land than others within their traditional areas due to concentrations of fish and game, cultural practices, population densities, and geographic features.[16]

As land claims settlement ideas progressed, the so-called "land-loss formula" emerged as a remedy to the unequal land usage issue. Under the formula, Native groups that historically used greater land areas and were therefore giving up more territory under the land claims settlement

December Distribution Totaling $11.7 Million (Nov. 15, 2013), http://www.sealaska.com/news/item/2013-11-15/sealaska-announces-december-distribution-totaling-117-million (noting "Sealaska has paid more than $317 million in [the Section 7(i)] pool").

13. *See* S. REP. NO. 91-925, at 57–58 (1970) (explaining how the Committee had to consider "the bewildering diversity" of Alaska Native tribes' differing "patterns of their historic use of the land."); ANCSA § 2(b) ("Congress finds and declares that . . . the settlement should be accomplished rapidly . . . .").

14. *See* ALASKA FED'N OF NATIVES, *History*, http://www.nativefederation.org/about-afn/history/ (last visited Oct. 27, 2016).

15. *See* Interview with Margaret Brown, *supra* note 9.

16. *See* S. REP. NO. 91-925, at 59 (finding that "[t]here are great differences in the intensity and in the continuity of land use by the Native people of Alaska.").

received more entitlement under ANCSA.[17] The "land loss" formula was one half of "the foundation for a settlement acceptable to Native regions having mineral potential and those without, and those having large populations and those only lightly populated;" the other half was revenue sharing from natural resource development.[18]

Origins of the Revenue Sharing Idea

The first time a Section 7(i)-like provision arose was in the 1968 Senate version of a bill titled the Alaska Native Claims Settlement Act.[19] In that bill, the largest proportion of resource revenue was still retained by the local Native group at seventy-five percent, with the next largest amount to the area regional corporation at twenty percent; but, importantly, five percent was to be paid to a statewide corporation to be organized and charged with a mission of economic development.[20] In the legislation preceding ANCSA, this was a first attempt to require sharing of resource revenue derived from one region with other Alaska Natives statewide.

AFN board members first discussed the idea of revenue sharing from mineral development at a three-day board meeting from May 15 to 18, 1969. The board directed that mineral revenue resource sharing be included in the drafts of AFN's positions with the following distribution: "25% village, 25% regional, [and] 50% statewide to all regions on [a] population basis."[21]

A month later, on June 20, 1969, AFN published a position paper which included the first documented mention of the revenue-sharing principle that became Section 7(i):

> All mineral interests should be granted to the regional corporation in whose area the minerals are found, and any revenues received by a regional corporation from those interests should be divided in the following ratio: 50% to the regional corporation in whose area the mineral is found, and 50% to be divided among all of the other regional corporations on a population basis.[22]

17. ANCSA § 12.
18. ARNOLD, *supra* note 9, at 137.
19. Alaska Native Claims Settlement Act of 1968, S. 3859, 90th Cong. (1968).
20. *Id.* at § 9.
21. Minutes of Board Meeting of May 15–18, Alaska Fed'n of Natives (1969) (Alice E. Brown papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with author).
22. Position with Respect to the Native Land Claim Issue 6–7, Alaska Fed'n of Natives (June 20, 1969) (Alice E. Brown papers, Archives & Special Collections,

Later in 1969, the idea of revenue sharing was introduced to Alaska Native land claims legislation, first in amendments to Senate Bill 1830:

> Each regional corporation shall be entitled to fifty per cent of the net proceeds derived from the sale, lease, permit, development, use or other disposition of lands, interests in lands, and minerals to which it acquires a patent under subsection 12(b)(3) and (4) of this Act. The remaining 50 per centum of such net proceeds shall be distributed among all the other regional corporations in direct proportion to the Native population of such other regions . . . .[23]

The bill's use of fifty percent to be shared among other regions became one of the more consistent sharing proportions in legislative proposals to follow.

Two bills addressing Alaska Native land claims, known as the Alaska Federation of Natives (AFN) bills, were introduced in the new Congress of 1971.[24] Introduced by Senators Fred Harris (Oklahoma) and Ted Kennedy (Massachusetts) and Representative Lloyd Meeds (Washington), these bills featured "full title to 60 million acres of land, an initial payment of $500 million, perpetual sharing in minerals from lands given up, and the establishment of regional corporations."[25]

The House bill required that revenue derived from timber and subsurface resources be distributed on a population basis to all Alaska Natives: "In order that all Natives may benefit equally from any minerals discovered within a particular region, each corporation must share its mineral revenues with the other 11 corporations on the basis of the relative number of stockholders in each region."[26]

The Senate bill, in contrast, had a structure that required fifty percent of the revenues from timber and subsurface resources be shared with the other regional corporations.[27] Ultimately, "[t]he Conference Committee of both houses of Congress adopted a compromise provision requiring the resource-owning Corporation to share 70% of its timber and

Consortium Libr., Univ. of Alaska Anchorage) (on file with author). The AFN position paper was later incorporated into the Congressional record. *See Alaska Native Land Claims Pt. 1: Hearings on H.R. 13142 & H.R. 10193 Before the H. Subcomm. on Indian Affairs of the Comm. on Interior & Insular Affairs*, 91st Cong. 49, 50 (1969).

23. Alaska Native Claims Settlement Act of 1969, S. 1830, amendment no. 221, 91st Cong. § 9(g)(2) (Oct. 2, 1969).

24. *See* S. 835, 92d Cong. (1971) (A bill providing a settlement of the Alaska Native land claims); H.R. 7039, 92d Cong. (1971) (same).

25. ARNOLD, *supra* note 9, at 137.

26. H.R. REP. NO. 92-523 at 6 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 2192, 2196.

27. Alaska Native Claims Settlement Act, S. 35, 92d Cong. § 9(j)(1) (1971).

subsurface resource revenue among all of the Corporations."[28] This became the language of Section 7(i).

Section 7(i) and Amendments

The original text of Section 7(i) was only two sentences:

> Seventy per centum 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 Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to Section 5. The provisions of this subsection shall not apply to the Thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.[29]

These two sentences were a significant part of the political compromise in the Alaska Native community relating to ANCSA that facilitated both the passage of the Act and its implementation in Alaska. Without the sharing of the revenues from timber and mineral development with Natives statewide, there would have been a gross disparity between the "have not" regional corporations and the "haves."[30] Through Section 7(i), Congress:

> intended to achieve a rough equality in assets among all the Natives. . . . (The section) insures that all of the Natives will benefit in roughly equal proportions from these assets. . . . Congress required that 70 percent of all revenues from the development of timber and subsurface resources be distributed among the Regional Corporations.[31]

Congress has amended Section 7(i) twice since 1971 to address specific issues as they arose. In 1995, Congress amended Section 7(i) to make clear that net operating loss sales, and other federal tax benefits, are not shareable revenues.[32] This amendment was in direct response to then-

28. Report of the Special Master Pursuant to Fed. R. Civ. P. 53, at 3 (Mar. 28, 1983) (on file with author) [hereinafter Special Master Report]; *see* Aleut Corp. v. Arctic Slope Reg'l Corp., 417 F. Supp. 900 (D. Alaska 1976).

29. ANCSA § 7(i), Pub. L. No. 92-203, 85 Stat. 688, 693 (codified as amended at 43 U.S.C. § 1606(i)).

30. Linxwiler, *supra* note 8, at § 12-03[3][a].

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

32. Alaska Native Claims Settlement Act, sec. 109, § 7(i), 109 Stat. 353, 357 (1995) ("For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a

pending Ninth Circuit litigation in *Bay View, Inc. ex rel. AK Native Village Corps. v. Ahtna, Inc.*[33]

In 1998, Congress amended ANCSA including a significant amendment to Section 7(i).[34] Incorporating the ANCSA settlement agreement provisions regarding sand, gravel and rock,[35] the amendments exclude those resources from ANCSA sharing. The full text of Section 7(i), following the 1998 amendments, is as follows:

> (1) (A) Except as provided by subparagraph (B), 70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.
> (B) In the case of the sale, disposition, or other use of common varieties of sand, gravel, stone, pumice, peat, clay, or cinder resources made during a fiscal year ending after October 31, 1998, the revenues received by a Regional Corporation shall not be subject to division under subparagraph (A). Nothing in this subparagraph is intended to or shall be construed to alter the ownership of such sand, gravel, stone, pumice, peat, clay, or cinder resources.
> (2) For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.[36]

Section 7(i) has not been amended since 1998.

Section 7(i) and ANCSA's Corporate Share Structure

Three distinct groups were to be beneficiaries of resource revenue sharing under Section 7(i): regional corporations, village corporations, and at-large shareholders. The share structure of regional and village

Regional Corporation.").

33. 105 F.3d 1281 (9th Cir. 1997). The *Bay View* case and decision is discussed *infra* at E.2.a.

34. *See* ANCSA Land Bank Protection Act of 1998, sec. 8, § 7(i), 112 Stat. 3129, 3134 (1998).

35. *See* Section 7(i) Settlement Agreement (June 29, 1982) (on file with author). A current version of the Settlement Agreement with two amendments made since 1982 is available at: http://www.lbblawyers.com/ancsa/7i%20Settlement%20Agreement%20AMENDED.pdf [hereinafter Settlement Agreement].

36. ANCSA § 7(i).

corporations explains how the ultimate benefits of resource development from ANCSA lands reach Alaska Natives individually and collectively.

Under ANCSA, regional corporations were directed to enroll eligible Alaska Natives and issue each 100 shares.[37] Each Alaska Native eligible for enrollment in a regional corporation was also potentially eligible to be enrolled in a village corporation within the same region, where they would be issued 100 shares of village corporation stock.[38] Those shareholders enrolled in a regional corporation but who were either not eligible or chose not to be enrolled in a village corporation have come to be called at-large shareholders.[39]

Section 7(j) provided one mechanism for sharing the economic benefits of resource development with village corporations and at-large shareholders:

> 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 1605 of this title (Alaska Native Fund), and under subsection (i) of this section (revenues from the timber resources and subsurface estate patented to it pursuant to this chapter), and all other 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 . . . .[40]

In sum, at-large shareholders are entitled to direct payment of their share of 7(i) revenue while village corporations and regional corporations receive the population proportionate share of Section 7(i) revenue.

The Significance of Section 7(i) Sharing

The sharing of natural resource revenue under Section 7(i) has had enormous impact on the finances of Alaska Native corporations, both regional and village. Well over $2 billion has been shared under the provision since 1971.[41] Many village corporations rely on annual

37. ANCSA §§ 5, 7.

38. *See* ANCSA §§ 5, 7, 8 (providing eligibility requirements and benefits for enrollment in regional and village corporations).

39. Linxwiler, *supra* note 8, at §12.03[3][b].

40. ANCSA § 7(j).

41. *See* Press Release, Arctic Slope Reg'l Corp., *supra* note 11 (noting ASRC had shared over $1 billion under Section 7(i)); NANA REG'L CORP., INC., *supra* note 11 ("NANA has distributed $820 million to other regions and at-large

distributions of Section 7(j) money for large percentages of their income.[42]

Planned and future projects, including the Donlin Gold Project on Calista Corporation land, also model and plan for Section 7(i) sharing as a part of the project economics. In the recently published draft environmental impact statement for the Donlin project, the report notes: "As with all subsurface resource development projects on ANCSA regional corporation lands (excluding industrial minerals), 70 percent of project royalties received by Calista would be shared with other regional corporations under Section 7(i) of ANCSA."[43] The report estimates annual royalties to Calista would average $55.4 million, 70 percent of which—or $38.8 million—would be subject to sharing under Section 7(i).[44]

COMPARISON TO OTHER ABORIGINAL LAND SETTLEMENTS

To better understand the unique aspects of ANCSA and Section 7(i), it is useful to review the ways in which the United States and other countries have dealt with aboriginal title issues and land claims settlements outside of Alaska.[45] The concept of Section 7(i) does not have an analogue anywhere else in the world. A number of countries, especially the former British colonies of Canada, New Zealand, and Australia, recognize the legal incidence of aboriginal title, and certain rights and privileges regarding the same. However, none has entered a comprehensive settlement with multiple indigenous groups where resources on the lands of one require some sort of revenue sharing with other groups.

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shareholder[s] via the 7(i) sharing provisions."); Press Release, Sealaska Corp., *supra* note 11 (noting "Sealaska has paid more than $317 million in [the section 7(i)] pool.").

42. *See* ALEXANDRA J. MCCLANAHAN, ALASKA NATIVE CORPORATIONS: SAKUUKTUGUT, 'WE ARE WORKING INCREDIBLY HARD' 77 (2006) ("'For some village corporations, it's the only income,' said Tom Hawkins, Chief Operating Officer of Bristol Bay Native Corporation."); *see, e.g.*, OLGOONIK CORP. & SUBSIDIARY, FINANCIAL STATEMENTS AND SCHEDULES 3 (2009), https://www.propublica.org/documents/item/10592-olgoonik-fin-10 (showing that Section 7(j) income was 43% of the corporation's net income in 2009, with Section 7(j) receipts totaling $727,624 out of $1,691,587 in net income).

43. DONLIN GOLD PROJECT, DRAFT ENVTL. IMPACT STATEMENT, 3.18-42, http://www.donlingoldeis.com/Documents/8%20Environmental%20Analysis %20Social.pdf.

44. *See id*. at 3.18-41.

45. This section is not intended to address in any depth the issues faced by indigenous peoples around the world who have faced and continue to face aboriginal land claims challenges, many of which remain unresolved. *See, e.g.*, LAWRENCE E. SUSSKIND & ISABELLE ANGUELOVSKI, ADDRESSING THE LAND CLAIMS OF INDIGENOUS PEOPLES 52–54 (Mass. Inst. of Tech. Program on Human Rights & Just. ed., 2008), http://web.mit.edu/publicdisputes/projarea/pdf/ indigenous_ peoples.pdf.

United States

In the United States, the doctrine of aboriginal title has been recognized since *Johnson v. M'Intosh* in 1823.[46] While important, the use and occupancy rights established under the doctrine of aboriginal title are not equivalent to other forms of recognized title under United States law.[47] Aboriginal title, for instance, can be extinguished by purchase, conquest, abandonment, or the death of all members of the tribe holding the title.[48] Since the time of *M'Intosh*, the United States government has implemented a practice of purchasing aboriginal lands by treaty, and later through lands claims.[49]

ANCSA differed from the historic practice of settling aboriginal title claims in several significant ways. First, Congress did not attempt to tie the settlement of land claims through ANCSA directly to aboriginal title of Alaska Natives. This change was recognized and explained in House Report Number 92-523, which accompanied a predecessor bill to ANCSA:

> It has been the consistent policy of the United States Government in its dealings with Indian Tribes to grant to them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the lands by placing such lands in the public domain, and to pay the fair value of the titles extinguished. This procedure was initiated by treaties in the earlier part of our history, and was completed by the enactment of the Indian Claims Commission Act of 1946. . . .[50]

The House report recognized that ANCSA was not following this policy: "The pending bill does not purport to determine the number of acres to which the Natives might be able to prove an aboriginal title."[51] Importantly, this change from requiring proven aboriginal title in exchange for either a reservation—which usually encompassed some diminished land base within the original area of proven aboriginal title—and/or compensation for extinguished aboriginal title probably helped facilitate the concept of Section 7(i). It is easier to require sharing of mineral wealth when there is no proven aboriginal title to a particular land base and its associated minerals.

46. 21 U.S. 543 (1823).
47. *See* CASE & VOLUCK, *supra* note 8, at 60–61 (distinguishing Native occupancy rights from Fifth Amendment property rights).
48. *Id*.
49. *Id*. *See* ARNOLD, *supra* note 9, at 2–11 (tracing history of Alaska land ownership).
50. H.R. REP. No. 92-523, at 4 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 2192, 2193–94.
51. *Id*.

ANCSA also introduced a corporate model and authorized the creation of the corporations to hold the land. Interestingly, Congress has employed the use of a corporate model on several other occasions involving Native Americans. In the Indian Reorganization Act of 1934, Congress provided that:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe . . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law . . . .[52]

Since then, a number of American Indian tribes have used Section 17 corporations to hold various business interests. But other than the basic corporate form, Section 17 corporations do not share any other attributes with ANCSA corporations and there is no analogous provision to Section 7(i).

In 1978 in the case of the Narragansett Tribe in Rhode Island, Congress provided for the creation of a state-chartered, non-profit corporation as the entity to receive a combination of private and state lands and money, in settlement of aboriginal title claims.[53] As with the case of section 17 federal corporations, the Narragansett Tribe of Indians Corporation does not share any of the attributes of ANCSA corporations and there is no analogous provision to Section 7(i).

Canada

The Canadian government has addressed aboriginal title and other First Nation issues in ways similar to the United States by (1) recognizing aboriginal title; and (2) negotiating settlements with First Nation groups.[54] No equivalent to ANCSA exists in Canada. There is a growing

52. Indian Reorganization Act of June 18, 1934, Pub. L. No. 73-383 § 17, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 5124 (2016), formerly codified at 25 U.S.C. § 477 (2012)).

53. Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (codified as amended at 25 U.S.C. §§ 1701–1716 (2012)); *see also* 37 R.I. GEN. LAWS §§ 37-18-1 to 18-18 (creating the corporation under Rhode Island law).

54. *See* Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257 (Can.); Calder v. Attorney General of British Columbia, [1973] S.C.R. 313 (Can.); ABORIGINAL SELF-GOVERNMENT IN CANADA 17–18 (John H. Hylton ed., 2d ed. 1999); Torgerson, *supra* note 8, at 75 (noting that in 1973, the Supreme Court of Canada "acknowledged the existence of aboriginal title").

concept of resource revenue sharing in Canada's aboriginal land settlements; but it is focused on sharing revenue between the various governments, including the local tribal government whose traditional lands are used for resource development.[55]

Canada has settled First Nation aboriginal title claims in recent decades, including in the Yukon Territories and British Columbia. One such settlement was with the Nisga'a Nation in British Columbia.[56] The agreement "constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation."[57] Nothing in this Agreement affects, recognizes or provides any rights under section 35 of the Constitution Act, 1982 for any aboriginal people other than the Nisga'a Nation.[58] In short, Canada has no equivalent to Section 7(i) in its aboriginal land settlements.

Australia and New Zealand

Australia recognizes the incidence of aboriginal title.[59] In 1993, the Australian Parliament enacted the Native Title Act, which recognized aboriginal title, set forth procedures for establishing title by specific aboriginal groups, and provided for the ability of aboriginal groups to negotiate compensation for both past and future acts affecting such title.[60]

Australia has at least two examples of aboriginal land claims settlements with similarities to ANCSA, but no equivalent to Section 7(i). In 1976, the Australian Parliament settled aboriginal land claims in the Northern Territory with the Aboriginal Land Rights Act (ALRA).[61] The ALRA, like ANCSA, used the corporate form to structure Aboriginal land holdings.[62] In the case of the ALRA, land trusts were formed to hold the

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55. *See* KEN S. COATES, SHARING THE WEALTH: HOW RESOURCE REVENUE AGREEMENTS CAN HONOUR TREATIES, IMPROVE COMMUNITIES, AND FACILITATE CANADIAN DEVELOPMENT 10 (MacDonald-Laurier Inst. ed., 2015), http://www.usask.ca/icngd/publications/reports/Reports-Files/MLI-resource-revenue-sharing.pdf.

56. *See* Nisga'a Final Agreement dated Apr. 27, 1999, http://www.nnkn.ca/files/u28/nis-eng.pdf.

57. *Id*. at ch. 2, ¶ 22.

58. *Id*. at ch. 2. ¶ 33.

59. *See Native Title Act 1993* (Cth) s 10 (Austl.) [hereinafter NTA]; *see also Mabo v Queensland [No. 2]* (1992) 175 CLR 1 (Austl.).

60. *NTA 1993* ss 4(1), 10 (Austl.) (recognizing aboriginal title); *NTA* at pt 3 (application for determination of native title); *NTA* at s 48 (compensation for acts lessening the value of native title).

61. *See Aboriginal Land Rights (Northern Territory) Act of 1976* (Cth) (Austl.) [hereinafter ALRA]; *see also* Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1349–53 (1992) (comparing ANCSA to ALRA).

62. *See* ALRA s 4 (granting land to aboriginal land trusts).

land.[63] Governance of those lands was provided by land councils, composed of aboriginals from the area.[64] While the ALRA anticipated that land councils would receive rents and royalties for economic development activities on the lands, it has no mechanism for sharing those revenues with other councils established by the act.[65]

In 1995, the Australian Parliament authorized the creation of the Indigenous Land Corporation (ILC).[66] The ILC is a corporate entity established to "assist Aboriginal and Torres Strait Islander people acquire and manage land to achieve economic, environmental, social and cultural benefits."[67] The corporate mission of the ILC and its corporate form closely resemble some aspects of ANCSA corporations, but there is no provision analogous to Section 7(i) for resources developed from ILC lands.

New Zealand has recognized aboriginal title at least since the Treaty of Waitangi, executed between the Queen of the United Kingdom and the tribes of New Zealand in 1840.[68] New Zealand also has engaged in land settlements with various Maori groups.[69] Somewhat like ANCSA, land transferred to Maori groups pursuant to settlements are made to

63. *Id*. at s 5 (function of land trust to hold title to land).

64. *Id*. at s 13 (requiring land councils to consent to granting of interest in land held by land trust).

65. *See id*. at s 16 (establishing payment of rents including mining interests).

66. *Land Fund & Indigenous Land Corp. (ATSIC Amends.) Act 1995* (Cth) s 191A (Austl.); INDIGENOUS LAND CORP., http://www.ilc.gov.au (last visited July 15, 2016).

67. *See About Us*, INDIGENOUS LAND CORP., http://www.ilc.gov.au/Home/About-Us (last visited July 15, 2016) (summarizing provisions of *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191B (Austl.)).

68. Treaty of Waitangi, Feb. 6, 1840 (N.Z.). *See also* Treaty of Waitangi Act 1975, sch. 1 (N.Z.). The English text of the treaty is reprinted as Schedule 1 of the Treaty of Waitangi Act of 1975. *Id.* The second article of the treaty is a familiar restatement of aboriginal title:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries [sic] and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Id. at sch 1, art 2.

69. *See, e.g.*, Waikato Raupatu Claims Settlement Act 1995, pt 2 (N.Z.).

corporate entities, in this case trusts.[70] But there is no equivalent to Section 7(i) in the settlement legislation.

THE EARLY YEARS OF SECTION 7(I): PRE-SETTLEMENT AGREEMENT CONFUSION & LITIGATION

The brevity of Section 7(i) and lack of definitions of the terms used in it led to annual litigation among and between regional and village corporations in the 1970s.[71] The first cases required the courts to interpret ANCSA and establish basic principles.

In 1974, Doyon filed a civil action against NANA Regional Corporation in the District Court of the District of Columbia.[72] The court issued a memorandum decision in May 1976.[73] The case resolved basic issues related to Section 7(i). The first was whether Section 7(i) provided for the sharing of net or gross revenue.[74] The term "revenue" is not defined in ANCSA, and the court noted that "[n]either legislative history argument [was] persuasive" because Congress was focused on "debating the percentage of such revenues to be shared."[75]

The second issue the court addressed—one of the most important and lasting choices facing regional corporations—was the distinction between generating resource revenues as an active or passive landowner:

A Regional Corporation can generate revenues from its subsurface estate in one of two ways. It can take the role of an "active" landowner and itself explore for, develop and produce the resource, most likely

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70. *See id.*, at ss 18–24.

71. *See* Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978); Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53 (D. Alaska 1975) (six decisions from this docket are discussed *infra*). *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-121, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS 6 n.10 (2012) ("The 7(i) distribution was the subject of much litigation in the 1970s . . . ."); TANANA CHIEFS CONFERENCE, INC., INTERIOR REGION POST ANCSA IMPACT ANALYSIS VOLUME II, Sec. 13, at 8 (1983) ("The most litigation regarding implementation of ANCSA by the Native corporations has been in the area of 'revenue sharing.' 'Revenue sharing' refers to a system established by 43 USC 1606 [sic] for the sharing of income from settlement assets between Native corporations.").

72. Doyon, Ltd. v. NANA Reg'l. Corp. (*Doyon v. NANA*), No. 1531-74 (D.D.C. 1974) (unreported mem. op.) (on file with author). Within Doyon, the challenges of Section 7(i) were recognized immediately and discussed at an organizational meeting in early 1973. *See* Minutes of the Reorganization Committee, Tanana Chiefs Conference at 2 (Feb. 19, 1973) (on file with author).

73. *Doyon v. NANA*. Several issues addressed in the memorandum decision were also at issue in the Aleut and Doyon cases discussed *infra* including pre-patent revenues, non-monetary forms of consideration, and the special case of Section 19(b) Natives.

74. *See id.* at 5–12.

75. *Id.* at 6–7.

expending considerable sums of money in the process. Alternatively, it may act as a "passive" landowner and contract with another party which undertakes at its expense all the necessary exploration, development, and production of the resource.[76]

As discussed below, the distinct choice between active and passive land ownership became a major source of conflict and dominated the structure of the later 1982 Settlement Agreement. The court noted Congress's express desire for equality amongst the regions under the settlement and concluded that "equality will not be retained if the resource-owning region must bear the entire burden of producing the revenues" without the ability to offset the associated expenses.[77] The court further proposed "strictly limit[ing] [the] net concept allowing only deductions which are directly related to the production of § 7(i) revenues."[78] The court expressly disallowed "land selection expenses, salaries of regular corporate employees, or overhead or administrative expenses."[79]

One additional administrative matter decided was the timing of required distributions under Section 7(i) and interest on late payments.[80] The court held that a regional corporation was "required to pay interest on all distributable amounts which it fails to distribute within ninety (90) days after the end of the fiscal year in which the section 7(i) revenues are received."[81]

In April 1975, the Aleut Corporation (along with four other regional corporations) filed suit against Arctic Slope Regional Corporation (ASRC).[82] Later, each of the remaining six regional corporations was joined as a defendant in a long-running case "between the 'haves' and 'have-nots'."[83] In 1976, the District Court for the District of Alaska issued four orders (hereinafter *Aleut I, II, III,* and *IV*) establishing several basic principles for interpreting and implementing Section 7(i).[84]

76. *Id.* at 9.
77. *Id.* at 10.
78. *Id.* at 11.
79. *Id.* Notably, this is one of the few areas where the regional corporations incorporate provisions into the Settlement Agreement directly contrary to the judicial precedent of earlier litigated cases. *See* Settlement Agreement, *supra* note 35, at 45–46, 67 (first designating land selection costs as allowable passive Section 7(i) costs; then designating the same of general and administrative costs).
80. *See Doyon v. NANA* at 14.
81. *Id.*
82. Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53 (D. Alaska 1975).
83. Special Master Report, *supra* note 28, at 4.
84. Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut I*), 410 F. Supp. 1196 (D. Alaska 1976); Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut II*), 417 F. Supp. 900 (D. Alaska 1976), *rev'd in part sub nom.* Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978); Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut III*), 421

In *Aleut I*, the court resolved an important early issue of "whether the revenues received by a regional corporation from timber or a subsurface resource prior to issuance of a patent formally conveying to the regional corporation title to the land" are subject to Section 7(i).[85] The issue came down to the phrase "patented to it" in Section 7(i): ASRC argued that the phrase meant that only lands where the patent had issued from the United States to the regional corporation were subject to Section 7(i).[86]

The court was unconvinced, finding that the language was "not that clear" and could "also refer to the type of lands subject to Section 7(i), rather than the question of when such lands come under 7(i)."[87] Turning to the legislative history, the court noted that "[s]ince Congress realized there would be certain delays in the issuance of patents, . . . it is reasonable to conclude that Congress did not intend the actual issuance of a patent to be critical to the operation of Section 7(i)."[88] The court observed that a ruling which held that only lands patented to a regional corporation were subject to Section 7(i) would encourage all sorts of gamesmanship with regard to the structuring of resource transactions prior to patents issuing.[89] For example, a regional corporation might "attempt to receive artificially large bonus payments prior to patent, in conjunction with a proportionately smaller royalty percentage generating revenues subsequent to patent."[90] The court concluded that "revenues received from timber resources and the subsurface estate are not excluded from the sharing formula of section 7(i) solely for the reason that they are received prior to the issuance of a patent or interim conveyance to the land from which they are properly attributable to."[91]

In *Aleut II*, the court addressed three critical issues.[92] First, the court determined whether payments made to regional corporations by third party companies for the right to explore for natural resources on ANCSA land were shareable under Section 7(i).[93] Eleven of the regional corporations agreed that those payments should be shareable; ASRC

F.Supp. 862 (D. Alaska 1976), *rev'd in part sub nom.* Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978); Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut IV*), 424 F. Supp. 397 (D. Alaska 1976), *aff'd sub nom.* Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978).

85. *Aleut I*, 410 F. Supp. at 1198.
86. *See id.* at 1199.
87. *Id.*
88. *Id.* (citing 43 U.S.C. § 1621(j) (1971)).
89. *Id.* at 1200.
90. *Id.*
91. *Id.*
92. *Aleut II*, 417 F. Supp. 900, 902 (D. Alaska 1976), *rev'd in part sub nom.* Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978).
93. *Id.*

disagreed.[94] The court held that the "crucial language is '[a]ll revenues . . . from the . . . subsurface estate,'" thus making clear that payments for exploration rights should be subject to Section 7(i).[95]

Second, the court addressed whether nonmonetary consideration received by a regional corporation related to a resource transaction was subject to Section 7(i).[96] While all parties agreed with the general principle that all benefits received should be subject to sharing under Section 7(i), there was a disagreement over how to value those benefits.[97] The court stated that "non-monetary and indirect benefits should be discouraged in the context of section 7(i) because of the problems that they invite," and held that non-monetary benefits should be valued at the greatest of:

> (a) the fair market value of the non-monetary benefit received;
>
> (b) the cost or detriment to the entity furnishing the non-monetary benefit; or
>
> (c) the difference between the royalty or other cash consideration actually received and that which would have been received but for the furnishing of the non-monetary benefit.[98]

The last issue in *Aleut II* involved how to count the number of "Natives enrolled" in each region.[99] This issue was important for both the distribution formula under Section 7(i) and for distribution of funds from the Alaska Native Fund under section 6(c) of the Act.[100] The issue arose in the Doyon and Bering Straits Regions, where several villages elected to take title to former reserve lands under section 19(b) of the Act.[101] The counting methodology was important because both the formula for dividing money under section 6(c)—the Alaska Native Fund—and Section 7(i) depended upon both the total number of eligible Natives enrolled under the Act and the proportion of Natives enrolled in each region. If Natives who were members of villages that made the section 19(b) election were counted, the percentages would slightly favor Doyon and Bering Straits.[102]

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94. *Id.* at 902–03.
95. *Id.* at 903 (quoting ANCSA § 7).
96. *Id.* at 902.
97. *Id.* at 903.
98. *Id.* at 904.
99. *Id.*
100. *See id.* at 904–06.
101. *See id.* at 905–06; *see also* ANCSA § 19, 43 U.S.C. § 1618 (2012) (discussing villages that opted out and received larger land entitlements in fee).
102. *Aleut II*, 417 F. Supp. at 906.

The court again turned to the legislative history for guidance and found several strong arguments for excluding Natives enrolled to 19(b) villages, in particular that "Congress attempted to create equality in the operation of the provisions of ANCSA where that was feasible."[103] But the court ultimately eschewed the historical arguments, instead holding that the "clear statutory language, and the fact that the members of section 19(b) villages are still within the framework of ANCSA" required the counting of those Natives for the purposes of section 6(c) and Section 7(i).[104]

In *Doyon, Ltd. v. Bristol Bay Native Corp.*,[105] the Ninth Circuit addressed whether "Native members of villages which elected to take title to reserve lands in lieu of all other benefits under the Act may be counted by the Regional Corporations for purposes of calculating their proportional shares of the [Alaska Native] Fund."[106] As noted above, the formula for distribution depended in part on how many Alaska Natives were enrolled to each regional corporation and in part on the total number of enrolled Alaska Natives statewide. Slight variations in the numbers mattered greatly because, as the court noted "$962,500,000 will ultimately be deposited [in the Alaska Native Fund] for distribution to the Regional Corporations . . . in quarterly installments . . . according to the 'relative numbers of Natives enrolled in each region."[107] The court recognized that its disposition of the issue would directly impact calculations of the proportionate share for each regional corporation under Section 7(i) and village corporations under section 7(j).[108]

As with all the other early Section 7(i) cases, the court found that the language used in the Act was subject to multiple interpretations and turned to the legislative history, finding "Congress intended the regions to share as nearly as possible on an equal basis, and did not intend to sanction disparate distribution of the Fund based on unforeseen semantic problems."[109] The court therefore concluded that "the term 'Native' in certain portions of the Act was intended to refer to *stockholders* of the Regional Corporations" and not to include Natives enrolled to village corporations which elected to acquire title to their former reserves.[110]

In *Aleut III*, the court decided two issues: whether sand and gravel was a surface or subsurface resource and whether the term "all revenues"

103. *Id.* at 905.
104. *Id.* at 906.
105. 569 F.2d 491 (9th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978).
106. *Id.* at 494.
107. *Id.* at 493 (quoting ANCSA § 6, 43 U.S.C. § 1605(c) (2012)).
108. *Id.* at 494 n.7.
109. Doyon, Ltd. v. Bristol Bay Native Corp., 568 F.2d 491, 494 (9th Cir. 1978).
110. *See id.*

used in Section 7(i) meant gross or net revenues.[111] The sand and gravel issue was critically important for a couple of reasons: first, for split estate lands—those in which a village corporation owns the surface estate and a regional corporation owns the subsurface—the issue defined which type of entity owned an important and economically valuable resource; second, if sand and gravel was a subsurface resource, revenue derived from the resource could be subject to Section 7(i) sharing.[112]

The court approached the issue by first addressing the split-estate lands. The court reviewed the legislative history and found that there Congress had used differing language regarding the subsurface estate. In some cases, the bills provided that regional corporations would receive "all minerals covered by mining and mineral leasing laws" and in other bills, including the final ANCSA, regional corporations received "subsurface estate".[113] The court found persuasive the argument that if sand and gravel were a subsurface resource, it would render the surface estate worthless in the case of development of the resource because "sand and gravel only can be extracted through open pit mining which totally destroys the surface."[114] Ultimately, the court held that for split-estate lands "sand and gravel are part of the surface estate and are not subject to revenue sharing under Section 7(i)."[115]

Turning to the case of regional corporation lands where the corporation owns the surface and subsurface estates, the court found "[a] somewhat different situation."[116] It noted the purpose of Section 7(i) was "to achieve a rough equality in assets among all the Natives" and that sand and gravel was an important and valuable resource, especially when "located near one of the developing centers [in Alaska]."[117] Thus, while acknowledging the "somewhat anomalous" result, the court held that for fee regional corporation lands, sand and gravel were a part of the subsurface estate and subject to Section 7(i) sharing.[118]

With regard to the concept of whether "all revenues" referred to gross or net revenues, the court began by reviewing the *Doyon, Ltd. v. NANA Regional Corp.* decision and "accept[ed] much of the reasoning of

111. *Aleut III*, 421 F.Supp. 862, 864 (D. Alaska 1976), *rev'd in part sub nom.* Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978).

112. *See id.* at 864 (discussing the importance of the issue in determining which corporation receives the patents and revenues).

113. *Id.* at 864–65 (quoting H.R. 7039, 92d Cong. (1971) and H.R. 10367, 92d Cong. (1971)).

114. *Id.* at 866.

115. *Id.* This holding was later reversed. Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978).

116. *Aleut III*, 421 F. Supp. at 867.

117. *Id.*

118. *Id.*

Judge Gasch on this issue."[119] Building on the decision of the *Doyon* court, the court reviewed the legislative history of ANCSA and noted that the House bill, H.R. 10367, "spoke only in terms of 'revenues'" but also required 100% of resource revenue be shared.[120] The court found it "extremely unlikely" that Congress would require a corporation to share 100% of the revenue and absorb all of the expenses associated with the resource revenue.[121] This result also matched the Senate bill which "specifically referred to 'net revenues.'"[122]

In *Aleut IV*, the court decided the relatively straightforward issue of whether ASRC should be required to sequester funds in secure and liquid investments during the pendency of the litigation involving Section 7(i).[123] The court began by agreeing with the parties that Alaska state law controlled the decision as to available remedies.[124] Accordingly, recognizing the "harsh nature" of the requested remedy and that Alaska statute provided a "complex statutory scheme" for such remedies, the court held that the common law remedy of sequestration was preempted and unavailable to the plaintiffs.[125]

Two years later, in 1980, the court issued another order (*Aleut V*), reaching the merits of revenues generated by ASRC related to oil and gas exploration on its lands.[126] There, ASRC had received approximately $30 million from oil and gas companies for the rights to explore for and produce oil and gas from ANCSA subsurface estate owned by ASRC.[127] ASRC claimed that $13.9 million of the revenue received was not related to its subsurface and therefore was not shareable under Section 7(i).[128] In rejecting ASRC's arguments, the court noted that it had "previously interpreted section 7(i) broadly so as to further the section's 'obvious egalitarian purpose.'"[129]

The court made several important rulings that carry through to other Section 7(i) litigation and the Settlement Agreement. First, it held that

119. *Id.* at 868 (citing *Doyon v. NANA*, Civ. No. 1531-74 (D.D.C. 1976)).

120. *Id.*

121. *Id.*

122. *Id.* (quoting Alaska Native Claims Settlement Act, S. 35, 92d Cong., §9(j)(1) (1971)). Presciently, the court noted: "Certainly adoption of a net position will increase the litigation and complicate the proceedings in this case and those that may follow on the disbursement of 7(i) funds." *Aleut III*, 421 F. Supp. at 869.

123. *Aleut IV*, 424 F. Supp. 397, 398 (D. Alaska 1976), *aff'd sub nom.* Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978).

124. *Id.* at 398–99.

125. *Id.* at 400.

126. Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut V*), 484 F. Supp. 482 (D. Alaska 1980).

127. *Id.* at 483–84.

128. *Id.* at 484.

129. *Id.* (quoting *Aleut I*, 410 F. Supp. 1196, 1200 (D. Alaska 1976)).

"revenues received by a regional corporation that are attributable to, directly related to, or generated by the acquisition of an interest in the corporation's subsurface estate are revenues subject to the sharing provisions of section 7(i)."[130]

Second, the court held that there is a rebuttable presumption that revenues received are subject to Section 7(i) when "received under an agreement, or a group of agreements that are regarded as one transaction, which has as its ultimate object the acquisition of an interest in the subsurface estate."[131] In order to rebut the presumption, the resource owning regional corporation would have the burden of proving that the consideration received for certain elements of the transaction are for non-Section 7(i) assets owned by the corporation, and "that the consideration has actual value."[132]

Third, the court held that it was not bound by the contracting parties' "allocation of revenues to a particular element of consideration" in its determination of whether the revenue is subject to Section 7(i) sharing.[133] Instead, the court noted that it "must examine the claimed elements of consideration to determine whether they have substance."[134]

The court next addressed ASRC's specific arguments: that revenues received were for reasonable damages to the surface estate, liquidated damages for unreasonable damages to the surface estate, and compensation for indirect damage to the subsistence lifestyle and culture of ASRC's Native shareholders.[135] With regard to damage to the surface estate, the court found that any revenues received for such damage was directly related to the subsurface as "[a]n oil and gas lease carries with it the right to use as much of the surface as may be reasonably necessary to exploit the oil and gas."[136] The court also rejected ASRC's allocation for liquidated damages characterizing the argument as an "after the fact rationalization" because the agreements did not contain liquidated damages clauses.[137]

Finally, distinguishing between the corporation as a legal person and its shareholders, the court held that "a claim against the oil companies for damage to [ASRC's Native shareholders'] subsistence life-style and

130. *Id.* at 485.
131. *Id.*
132. *Id.* at 485–86.
133. *Id.* at 486.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 487.

culture" was not a claim held by ASRC because those "interests are not held by the regional corporation."[138]

In *Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*,[139] a village corporation sued the regional corporation for its region claiming that it was entitled to fifty percent of all net income from the regional corporation.[140] This claim was in addition to the undisputed right to receive its share of the fifty percent of the revenue received by ASRC pursuant to Section 7(i) and its proportionate share of not less than ten percent of the funds received by ASRC from the Alaska Native Fund.[141] Specifically at issue was whether Section 7(j) required regional corporations to share with the village corporations and at-large shareholders in its region fifty percent of its net income derived from its business activity unrelated to resource development of its own lands.[142] Several regional corporations participated as *amici curiae*, asserting that being forced to share fifty percent of income not related to subsurface resources "would seriously undercut, if not destroy, *amici's* continued existence as functioning business organizations."[143]

The court found the language of the Act to be ambiguous and turned to the legislative history.[144] The House and Senate Conference Committee specifically addressed the distribution of "50 percent of all revenues received from the subsurface estate," but also provided "[t]his provision does not apply to revenues received by the Regional Corporation from their investment in business activities."[145] Finding this to be persuasive, along with additional language from Section 7(j) excluding the landless thirteenth regional corporation from making any type of distribution to other regional or village corporations from its business activities, the court held that regional corporations were not required to distribute net income not related to timber and subsurface resources to village corporations.[146]

138. *Id.*
139. 517 F. Supp. 1255 (D. Alaska 1981).
140. *Id.* at 1255–56, 1258.
141. *Id.* at 1258.
142. *See id.* ("The heart of the present dispute is whether the words 'funds from such sources,' used in the second sentence, mean that fifty percent of 'all other net income' (first sentence) must be distributed, in perpetuity, among the Village Corporations and at-large stockholders.").
143. *See* Memorandum of Doyon as Amici Curiae Supporting Defendants at 2, Ukpeagvik Inupiat Corp. v. Arctic Slope Reg'l Corp., 517 F. Supp. 1255 (D. Alaska 1981) (No. A81-326 Civil) (on file with author).
144. *See Ukpeagvik*, 517 F. Supp. at 1259–60.
145. *Id.* at 1260 (quoting H.R. REP. NO. 92-746, at 36 (1971) (Conf. Rep.), *as reprinted in* 1971 U.S.C.C.A.N. 2192, 2247, 2249).
146. *Ukpeagvik*, 517 F. Supp. at 1261.

In its concluding paragraph, the court noted the regional corporations' "need for a strong economic foundation to build upon."[147] It found that the requirement to pay fifty percent of the regional corporations' net income and fifty percent of their retained Section 7(i) revenues to village corporations and at-large stockholders "would erode the economic strength" and "weaken the foundation for the settlement" contrary to the intent of the Congress in ANCSA.[148]

In *Chugach Natives, Inc. v. Doyon, Ltd.*,[149] the Ninth Circuit addressed an important question that arose as soon as ANCSA passed: whether sand, gravel, and rock resources were a part of the subsurface estate and therefore subject to Section 7(i) revenue sharing.[150] As with other early challenges and litigation, the language of Section 7(i) itself did not provide direct guidance on the issue.[151] The district court in the *Aleut* litigation had only muddled the matter further by anomalously providing for differing definitions of "subsurface estate" depending on whether the land was held entirely by regional corporations or whether the fee was shared by the regional and village corporations.[152]

The Ninth Circuit began by noting that "[n]o party argued for this result below."[153] Instead, all parties—which included all twelve regional corporations—agreed that "the interpretation of 'subsurface estate' must be the same regardless of who owns the surface estate."[154] Accordingly, the court turned to legislative history and found "instructive" several reports from government authorities—which all referenced sand, gravel, and crushed stone in describing subsurface estates—to support its conclusion that sand and gravel are part of the subsurface estate.[155] The court also found supportive evidence in an opinion letter of the Associate Solicitor of the Department of the Interior and a subsequent ANCSA amendment conveying the subsurface estate of certain lands to Koniag, Inc.[156] Thus, the Ninth Circuit ended one of the most litigated and important early questions of ANCSA Section 7(i) by holding that sand and gravel are part of the subsurface estate.[157]

147. *Id.* at 1262.
148. *Id.*
149. 588 F.2d 723 (9th Cir. 1978).
150. *Id.* at 724–25.
151. *Id.* at 725–26.
152. *Id.* at 725.
153. *Id.* at 726.
154. *See id.*
155. *Id.* at 729–32 (emphasis added).
156. *Id.* at 729–30.
157. *See id.* at 732.

Following all of the litigation during the first few years of implementing ANCSA, the regional corporations were growing weary.[158] In 1976, Doyon Vice President Tim Wallis summarized the challenges for Alaska Native Corporations in implementing Section 7(i) before the Senate Committee on Interior and Insular Affairs:

> The problems involved in implementing section 7(i) are many and complex. Virtually all the Regional Corporations have or will become involved in expensive and protracted litigation. In addition to the inherent disincentives involved in separating economic benefits from responsibility for resource development, the uncertainties surrounding section 7(i) compound the disincentive to economic development. . . .
>
> [T]he uncertainties of section 7(i) are frustrating the accomplishment of the purpose of the act [ANCSA]. One of the primary purposes of the Act is to effectuate a rapid settlement, with minimal litigation, thereby creating a climate in which the Natives can expeditiously develop their resources and achieve economic independence.
>
> Instead, section 7(i) creates a lawyers' and accountants' dream and a Regional Corporation's nightmare. It will be literally decades before the issues are completely resolved. The cost, both in terms of dollars and acrimony between the Regional Corporations, will be substantial. The section results in the diversion of resources which should be put to more beneficial use. It also makes impossible long-range corporate planning and is a disincentive to economic development.[159]

Doyon's board, in fact, passed a resolution stating the corporation was "in favor of the repeal of Section 7(i)" because it was "expending

158. It is important to remember that there was other litigation between the regional corporations, between regional corporations and the United States, and between regional corporations and the State of Alaska regarding other ANCSA issues. *E.g.*, Central Council of the Tlingit & Haida Indians of Alaska v. Chugach Native Ass'n, 502 F.2d 1323 (9th Cir. 1974) (case between regional corporations involving boundary disputes); Ahtna, Inc. v. Doyon, Ltd., Civ. No. A-198-72 (D. Alaska 1973) (case between regional corporations involving boundary disputes); Arctic Slope Reg'l Corp. v. Morton, Civ. No. 73-1563 (D.D.C. 1974) (case between regional corporation and United States regarding land selection regulations); Seldovia Native Ass'n, Inc., 2 ANCAB 1, 1, 10–11 (U.S. Dep't of Interior June 9, 1977) (appeal of an ANCSA § 14(a) decision); *see also* Linxwiler, *supra* note 8, at § 12.03[4][a] ("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 Alaska.").

159. *Implementation of the Alaska Native Claims Settlement Act: Hearing Before the S. Comm. on Interior and Insular Affairs*, 94th Cong. 90–91 (1976) (statement of Tim Wallis, Vice President of Doyon).

large amounts of money for litigation to resolve the uncertainties of Section 7(i)" and that the uncertainty "severely handicaps a region in developing its resources and serves as a divisive element in cooperation among the regions."[160]

Similarly, in a memorandum to the Doyon board of directors a few years later, Doyon's outside attorney, Arthur Lazarus, summarized the *Aleut* litigation and decisions, "The *Aleut* case, however, did not provide a happy solution to the Section 7(i) problem. Instead, the litigation proved to be time-consuming, expensive and, most important, a significant drain upon the talent and energy of senior management in all the Corporations involved."[161] Doyon was not alone in its litigation fatigue, and the ANCSA regional corporations soon turned to settlement discussions for Section 7(i) disagreements.

But before a global settlement could be reached, several village corporations sued, attempting to insert themselves into both the litigation among the regions and the settlement agreements in *Aleut Corp. v. Tyonek Native Corp*.[162] As late as the eve of settlement, five village corporations sought to intervene to protect their interests in the sand and gravel resources that were subject to the *Aleut* litigation and the settlement discussions.[163]

The Ninth Circuit affirmed the joinder denial as untimely, holding that "intervention on the eve of settlement following several years of litigation was not timely and that to permit it would have prejudiced the rights of the regions impermissibly."[164] The court noted that it made its decision assuming that "the regions did not represent the [interests of the] villages in the section 7(i) litigation" and that the villages would have an ability to later litigate the distinct but related issue of the ownership of sand and gravel resources on ANCSA split estate lands.[165]

160. Resolution of Doyon Bd., No. 76-13 (Mar. 19, 1976) (on file with author).

161. Memorandum from Arthur Lazarus, Jr., P.C., Fried, Frank, Harris, Shriver & Kampelman LLP, to Doyon Bd. of Dirs. 2 (July 9, 1982) (discussing proposed settlement of Section 7(i) litigation) (on file with author). *See also* FED.-STATE LAND USE PLANNING COMM'N FOR ALASKA, ALASKA NATIVE CLAIMS SETTLEMENT ACT 1971–1979 110 (1979) ("Additional 7(i) issues and interpretations will continue to surface and cause problems for Native corporations. . . . [T]he problems described above underscore the language difficulties and absence of instructive legislative history which have made implementation of this section difficult.").

162. 725 F.2d 527 (9th Cir. 1984).

163. *Id.* at 528.

164. *Id.* at 530.

165. *Id.* at 529–30. The issue of the split estate ownership and use of sand and gravel resources arose later in *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991 (9th Cir. 1994).

THE ANCSA SECTION 7(I) SETTLEMENT AGREEMENT

The leaders of the ANCSA regional corporations recognized the futility of constant and ongoing litigation. By the late 1970s this realization led to the discussion of a comprehensive settlement agreement.[166]

In 1981, Sealaska Corporation invited the other regional corporations to a meeting in Warm Springs, Oregon to discuss settlement of the protracted litigation between the regions regarding Section 7(i).[167] Sealaska observed that "[t]he stakes are very high," but "the litigation ought to be resolved by the affected corporations rather than by the court, if at all possible."[168] All twelve regions participated and sent their presidents and attorney representatives.[169]

Following the Warm Springs meeting, teams of attorneys, accountants, and other experts began working on the settlement agreement.[170] The task was not easy. As the Special Master appointed by the *Aleut* court later reported:

> By November 1981, however, the early momentum toward settlement did not seem sufficient to overcome a number of remaining hurdles. An initial draft of a settlement agreement was something of a chimera: at several critical points it contained alternative approaches which affected the construction of the balance of the proposed agreement.[171]

But the group worked hard over the winter of 1981–82 through a series of drafting committee meetings, and six settlement conferences that involved "dozens of Corporation executives, attorneys, financial advisors and other experts."[172]

On June 29, 1982, a final settlement agreement was reached among the twelve regions, subject to the ratification by each corporation's respective board of directors.[173] The document was 121 pages long with its two appendices.[174] In essence, the Section 7(i) Settlement Agreement "represent[ed] an effort by the Regional Corporations to correct the deficiencies of ANCSA by a detailed agreement in order to render

166. Briefing of Doyon Bd. of Dirs., ANCSA 7(i) Historical Synopsis 5 (Aug. 20, 1981) (on file with author).
167. *See id.* at 6.
168. *Id.*
169. Interview with Margaret Brown, *supra* note 9.
170. *See* Special Master Report, *supra* note 28, at 12.
171. *Id.* at 11.
172. *Id.* at 12.
173. Settlement Agreement, *supra* note 35.
174. *Id.*

possible commercially viable resource development without litigation . . . ."[175]

Doyon held a board meeting on September 24, 1982, where its board considered and approved by resolution the Section 7(i) Settlement Agreement.[176] Each of the other eleven regional corporations also ratified the Settlement Agreement.[177]

The Settlement Agreement, broadly described, was structured to define what revenues were subject to Section 7(i) sharing, what expenses were allowed to be taken against such revenues, and the administrative procedures necessary to annually administer the program among the regional corporations.[178] The article defining revenues subject to sharing is structured, unsurprisingly, to address many of the concepts earlier litigated including the timing and recognition of revenue, non-cash revenue, revenue received prior to patent, borrowing, reimbursements or credits for costs, and affiliated entity transactions.[179] The Settlement Agreement also adheres to the early decision by the courts to distinguish between active and passive revenue and the allowable deductions against revenue in each case.[180]

The Settlement Agreement broke new ground in that it defined procedures for calculating distributable revenues using either itemized allowable costs or a "standard deduction."[181] It also set up a fairly extensive compliance mechanism requiring annual reporting by each

175. James D. Linxwiler, *The Alaska Native Claims Settlement Act: The First Twenty Years*, 38 ANNUAL ROCKY MTN. L. INST. 28 (1992). *See also* Special Master Report, *supra* note 28, at 1 ("[T]he agreement substitutes a Uniform System of Accounting and Reporting for the present chaos of twelve Regional Corporations applying disparate, though equally defensible, accounting methods for determining net revenues available for distribution.").

176. Resolution of Doyon Bd., No. 82-53 (Sept. 24, 1982) (on file with author).

177. *See* Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53, at 5 (D. Alaska June 3, 1983) (order dismissing case following settlement) (on file with author).

178. Settlement Agreement, *supra* note 35, at 15, 43, 71.

179. *Id.* at 15–27. *See Aleut I*, 410 F. Supp. 1196, 1200 (D. Alaska 1976) (subjecting revenue received prior to patent to sharing); *Aleut II*, 417 F. Supp. 900, 903 (D. Alaska 1976) (holding that revenue includes "benefits of every sort so long as such are received . . . in exchange for rights granted in the timber resources and subsurface estate received by a regional corporation pursuant to ANCSA"); *Aleut V*, 484 F. Supp. 482, 484–85 (D. Alaska 1980) (defining revenue subject to sharing broadly); *Doyon v. NANA*, Civil No. 1531-74 (D.D.C. May 5, 1976) (on file with author) (stating revenue includes consideration of any kind [whether] received directly or indirectly).

180. *See* Settlement Agreement, *supra* note 35, at 45–60 (defining allowable passive cost deductions and allowable active cost deductions). *See Doyon v. NANA*, No. 1531-74, at 9, 11 (defining generation of revenue by active and passive landowners and allowing netting of some expenses from revenue, only those "which are directly related to the production of § 7(i) revenues").

181. Settlement Agreement, *supra* note 35, at 68–71.

regional corporation to all eleven other regions, the sharing of certain records and financial reports among the regions, and audit procedures.[182] The Agreement also provided that arbitration would be the sole dispute resolution mechanism for all disputes related to Section 7(i).[183] The Settlement Agreement also had relatively extensive provisions to settle and true up past transactions between the regions.[184]

The Settlement Agreement has been amended twice. In 1990, following several years of arbitration regarding Sealaska timber resources,[185] the regions unanimously agreed to amend the Agreement. The amendment deleted Article II, Section 9 from the original Agreement and added a dozen new pages of allowable active 7(i) costs to Article III, Section 3 of the Agreement.[186]

In 2001, the regions unanimously agreed to amend Article II, Section 2(b) of the Settlement Agreement regarding resource contract scholarships for shareholders or members of their families.[187] The amendment allows regional corporations to exclude from Gross Section 7(i) Revenues up to $250,000 per year in scholarships paid directly by a third party as part of a contract or lease related to 7(i) resources.[188] Alternatively, the regional corporation may provide up to $250,000 in scholarships directly from such revenues it receives from a third party related to Section 7(i) resources.[189]

The Settlement Agreement has not been amended since 2001. This is due, in part, to a requirement of unanimous approval by all twelve regional corporations for any amendment to the Agreement.[190]

SECTION 7(I) SINCE THE SETTLEMENT AGREEMENT

The Settlement Agreement had its intended effect and greatly reduced the amount of litigation involving the regional corporations and Section 7(i). It also has had some unintended consequences, discussed

182. *Id.* at 71–84.
183. *Id.* at 84; *but see id.* at 84 (declining to apply arbitration requirement to federal, state, or other income taxes under Section 7(i) of the Agreement).
184. *See id.* at 91–100, 121 (providing agreed-upon gross revenues and deductions for past fiscal years).
185. The Sealaska arbitration proceedings are discussed *infra*.
186. *See* First Amendment to the Section 7(i) Settlement Agreement (Oct. 22, 1990) (amending Article III, § 3) (on file with author).
187. *See* Amendment No. 99-1 to the Section 7(i) Settlement Agreement (Oct. 27, 2001) (amending Article II, Section 2) (on file with author).
188. *Id.* at 1–2.
189. *Id.*
190. Settlement Agreement, *supra* note 35, at 108.

below, including almost a decade of annual disputes that were the subject of several arbitration cases between the regional corporations.[191]

Section 7(i) as a Deterrent to Natural Resource Exploration and Development

One of the most significant and long-lasting criticisms of the Settlement Agreement, and Section 7(i) generally, is that Section 7(i) acts as a deterrent to natural resource exploration and development by regional corporations on their own lands.[192] The deterrent arises from the one-sided nature of Section 7(i) and the Settlement Agreement, whereby a regional corporation must share seventy percent of the revenue it derives but has much less ability to pass on or share with other regions expenses incurred in unsuccessful exploration efforts.

The discussion of this issue is current.[193] But Native corporations also recognized the disincentive in the early 1970s. For example, regional corporation Doyon hosted a meeting with its region's village corporations in 1975 where the topic was raised by Doyon's president, John Sackett:

> I'd like to show you what Doyon's problem is if we make money in Resource Development. I'd like to run through an example of what happens if we make a net profit . . . . The first thing I would have to do is from a little section of the Act which says that we have to share 70/30 with the other regions. . . . [T]hat is one of the most frustrating parts of the Act. Why should we do anything out there since we have to give it all away to everybody?[194]

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191. The Settlement Agreement subjects all disputes involving Section 7(i) between the regional corporations to binding arbitration. *Id.* at 84.

192. *See, e.g.*, Kathleen McCoy, *Hometown U: How Long Will Alaska Native Corporations Last? And How Will They Change?*, ALASKA DISPATCH NEWS (Apr. 24, 2016), http://www.adn.com/article/20160424/hometown-u-how-long-will-alaska-native-corporations-last-and-how-will-they-change (noting one respondent to a University of Alaska study characterized Section 7(i)'s sharing as an "excessive tax that should be closer to a 50-50 split").

193. *See, e.g.*, Presentation by Aaron M. Schutt to the Alaska Native Law Section of the Alaska Bar (Dec. 12, 2007), http://www.lbblawyers.com/ancsa/7(i)%20Discussion%20(12_12_07).pdf (discussing impediments to resource exploration and development caused by Section 7(i)).

194. Transcript of Doyon/Village Meeting of Aug. 28–29, 1975 at 3 (on file with author). *See also* Aaron M. Schutt, *ANCSA Section 7(i) Settlement Agreement: Impediments to Mineral Development*, Presentation to Alaska Native Bar Section (Dec. 12, 2007), http://www.lbblawyers.com/ancsa/7(i)%20Discussion%20(12_12_07).pdf (describing disincentives to landowning regions regarding self-financed exploration under the Settlement Agreement). *Contra* Andrew Guy, *Donlin Gold Project Will Improve Lives in Kuskokwim Country*, ALASKA DISPATCH NEWS (Feb. 13, 2016), http://www.adn.com/article/20160213/donlin-gold-

In some relevant respects, the Section 7(i) sharing requirement is analogous to a multi-owner situation in hydrocarbon development, in which:

> any co-owner may develop hydrocarbons on jointly owned lands without the consent of other co-owners. In such circumstances, the "operating" co-owner assumes the total risk of any dry holes, but must account to the other co-owners for the net profits of production—typically on a well-by-well basis, after recovering out of revenues the non-operating co-owners' pro-rata share of drilling, completion, and day-to-day operating costs.[195]

The analogy for a regional corporation is that it may develop a subsurface resource, but in the event of an unsuccessful exploration effort, it may not pass on the pro-rata costs of exploration to the other regional corporations. In the successful case, it is subject to the seventy percent sharing burden of Section 7(i) less allowable deductions under the Settlement Agreement.[196] Thus, like a joint owner of hydrocarbons considering exploration efforts, there are strong incentives for regional corporations exploring their own lands. In the case of a joint hydrocarbon owner, the incentive is to get the pre-approval and participation of co-owners prior to commencing exploration efforts. In the case of a regional corporation, there is a large incentive to have exploration conducted by third parties who bear exploration risk but also get full value of a successful exploration program.

Post-Settlement Litigation and Issues

The Settlement Agreement eliminated much of the previously annual litigation between the regions, but it did not resolve all issues related to 7(i) and 7(j). In particular, village corporations were not parties to the Settlement Agreement and in two related cases discussed below, village corporations filed suit to resolve the issue of whether net operating loss tax benefits were subject to sharing under Sections 7(i) and 7(j). In addition, there was a period of years of disputes following the signing of

project-will-improve-lives-kuskokwim-country ("Through ANCSA's 7(i) and 7(j) revenue sharing provisions, the Donlin Gold project will provide revenue to all Alaska Native regional and village corporations, including Calista. The Donlin Gold project offers an opportunity to satisfy the intent of ANCSA to benefit all Native corporations . . . .").

195. Christopher S. Kulander, *Old Faves & New Raves: How Case Law Has Affected Form Joint Operating Agreements (Part One)*, 1 OIL & GAS, NAT. RES. & ENERGY J. 1, 7–8 (2015) (*citing* Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 574 (8th Cir. 1924)).

196. *See* Settlement Agreement, *supra* note 35, at 9.

the Settlement Agreement that resulted in several arbitration cases being filed. And there are new and emerging issues related to Section 7(i).

In *Bay View, Inc. ex rel. AK Native Village Corps. v. Ahtna, Inc.* (*Bay View I*),[197] a class of village corporations brought suit claiming that Sections 7(i) and 7(j) required ten regional corporations to share proceeds from the sale of net operating losses (NOLs).[198] The *Bay View I* court described NOLs as "a tax shelter device whereby a profitable company buys the losses of an unprofitable company and sets those losses off against its own taxable income."[199] Congress prohibited the sale of NOLs generally in the 1984 Deficit Reduction Act, but Senator Ted Stevens "managed to carve out an exception for Alaska native corporations, authorizing them to sell their NOLs."[200] Due to the combination of the unique procedural rules applicable to ANCSA natural resources, bad management and investments by regional corporations, and a crash in timber prices, ten regional corporations sold $1.5 billion in losses, generating $425 million.[201] The ten regions agreed not to share the NOL revenue under Section 7(i) as a part of a Mutual Assistance Agreement.[202] A class action lawsuit by village corporations and at-large shareholders against the ten regional corporations ensued.[203]

The *Bay View I* plaintiffs claimed that the NOLs were largely derived from losses attributable to natural resources subject to Section 7(i), therefore the NOLs should be subject to 7(i).[204] While the appeal was pending, Congress amended ANCSA to make clear that NOLs were not subject to Section 7(i) sharing.[205] On appeal, Bay View argued that the 1995 amendments were an unconstitutional taking under the Fifth Amendment and that the taking was not for a "public use" and thus in violation of the Fifth Amendment.[206]

The Ninth Circuit held that the Fifth Amendment claim was premature given that Bay View had a remedy under the Tucker Act and could sue the United States in the Federal Court of Claims.[207] With regard to the "public use" argument, the court held that "assuming the 1995

197. 105 F.3d 1281 (9th Cir. 1997).
198. *Id.* at 1284.
199. *Id.* at 1283.
200. *Id.* (citing Pub. L. No. 98-369, § 60(b)(5), 98 Stat. 494, 579 (1984)).
201. *Id.* at 1283–84.
202. *Id.* at 1284.
203. *Id.*
204. *Id.*
205. *See id.* (citing Pub. L. No. 104-42, § 109, 109 Stat. 353, 357 (1995) (codified as amended at 43 U.S.C. § 1606(i)(2)) ("For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.").
206. *Id.*
207. *Id.* at 1285.

Amendment constituted a taking, Congress had a rational reason for deciding it was for public use . . . [to] 'avoid future costly litigation.'"[208]

In *Bay View, Inc. v. United States* (*Bay View II*),[209] the Federal Circuit addressed the Tucker Act claim of the *Bay View* plaintiffs.[210] Bay View claimed "a taking, a breach of trust, and a breach of contract."[211] The Court of Federal Claims dismissed Bay View's case, holding that "the 1995 amendment was not a taking because the revenues received from NOL sales were not revenues 'from the timber resources and subsurface estate'"; ANCSA did not create a trust relationship between village corporations and the United States; and ANCSA was not a contract or treaty.[212] The court elaborated on the dispute about the nature of NOL revenue:

> Accurately characterized, the NOL proceeds are a product of the tax status of the Regional Corporations, not the product of timber resources. Thus, applying the terms of ANCSA, the NOL sales generated revenues from the sales of financial interests related to tax status, not from tangible timber or mineral estates.[213]

Finally, in *Oliver v. Sealaska Corp.*,[214] an individual at-large shareholder brought suit contending that "the § 7(i) settlement improperly deprive[d] him, other at-large shareholders, and the Village Corporations of monies due them from revenue sharing under ANCSA."[215] The Ninth Circuit affirmed the district court decision holding that "nothing in the text of the revenue-sharing provision creates an express private right of action to enforce the section's mandates" and finding that the facts did not support an implied private right of action.[216]

Arbitration under the Settlement Agreement

Since the Settlement Agreement was signed in 1982, there have been several disputes resolved by arbitration between regional corporations regarding Section 7(i). The first set of arbitration cases related to Sealaska timber resources.

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208. *Id.* at 1286 (quoting 141 CONG. REC. S11345 (daily ed. Aug. 3, 1995)).
209. Bay View, Inc. v. United States (*Bay View II*), 278 F.3d 1259 (Fed. Cir. 2001).
210. *Id.* at 1265.
211. *Id.* at 1263.
212. *Id.*
213. *Id.* at 1264.
214. 192 F.3d 1220 (9th Cir. 1999).
215. *Id.* at 1223.
216. *Id.* at 1223–25.

Sealaska timber arbitration

The first arbitration case involved timber resources owned by Sealaska.[217] There, the Aleut, Ahtna, Bristol Bay, Calista, Cook Inlet, Doyon, and Koniag corporations "claim[ed] that Sealaska had understated its shareable revenues for the 3 1/4 year period [from January 1, 1982 through March 31, 1985] by nearly $20 million."[218] This was the first major test of the Settlement Agreement.

The dispute arose over the "appropriate valuation date upon which to base the fair market value" of harvested timber Section 7(i) resources.[219] Sealaska was actively developing its timber resources and argued that "fair market value of a log should be based on the log's value at or near the time it actually is sold," whereas the other regional corporations argued that the "log's value should be determined as of January 1 of the year in which it is harvested."[220] The issue was contested in a multi-year arbitration proceeding that ended with a four-week hearing in 1988, where a majority of the arbitration panel found in favor of the claimants and against Sealaska and ordered payment of an additional $17 million under Section 7(i).[221]

Sealaska initiated litigation in federal district court, filing for a preliminary injunction while simultaneously asking the court to reopen the earlier *Aleut* cases.[222] Meanwhile, the prevailing regional corporations filed a case in Alaska state court, *Aleut Corp. v. Sealaska Corp.*,[223] to enforce the arbitration award. Sealaska removed the state court case to federal district court and all of the issues were decided together with the federal court upholding the binding nature of the arbitration provisions of the Settlement Agreement and rejecting Sealaska's other arguments which attempted to relitigate issues addressed in the arbitration.[224]

In February 1989, the Sealaska board met and "authorized payment totaling $14,865,000 to eleven other regional . . . corporations" to end the disputes relate to the 1982 to 1985 timber.[225] Sealaska issued a news release which stated, in part:

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217. Aleut Corp. v. Sealaska Corp., AAA No. 75199002386 (Prelim. Op. of Arbitrators) (Aug. 11, 1988) (McGough, Arb.) (on file with author); *id.* (Decision and Award of Arbitrators) (Nov. 23, 1988) (McGough, Arb.) (on file with author).
218. Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut VI*), No. A88-515 Civil, at 7 (Jan. 24, 1989) (on file with author).
219. *Id.*
220. *Id.* at 7–8.
221. *Id.* at 8.
222. *Id.* at 2–3.
223. No. 3AN-87-3652 (3d Dist. 1989).
224. *Aleut VI*, No. A88-515 Civil, at 9–20.
225. Press Release, Sealaska Corp., Sealaska Corporation Will Not Appeal 7(i)

> Because of the uncertainty and high risk associated with the January 1 valuation requirement the Sealaska Corporation Board of Directors has directed that Sealaska cease the active harvest of ANCSA timber until and unless an agreement can be reached among the Regional Corporations that allows a rational and prudent approach to timber valuation.[226]

Later in 1989, the regional corporations again expressed their weariness of the constant and draining battles involving Section 7(i)—in this case the annual arbitrations. Sealaska proposed a settlement "amending the Section 7(i) Agreement by adopting an in-place value approach to measuring revenues from the active development of Sealaska's Section 7(i) timber."[227] The regional corporations all agreed to the new methodology and amended the Settlement Agreement in 1990.[228]

Chandler Lake land exchange arbitration

Another post-Settlement Agreement arbitration involved a land exchange between Arctic Slope Regional Corporation (ASRC) and the National Park Service called the Chandler Lake Land Exchange.[229] The exchange, completed in 1983 just after the ratification of the Settlement Agreement, traded 101,272 acres of surface estate owned by ASRC within Gates of the Arctic National Park for 92,160 acres of subsurface estate within the Arctic National Wildlife Refuge.[230]

The exchange was controversial for a number of reasons, not the least of which was the avoidance of Section 7(i) under the Settlement Agreement. Under the Settlement Agreement, "[i]f surface is traded for surface, or for subsurface, or for surface and subsurface, revenues from the property received in trade shall not be subject to sharing under this Agreement or Section 7(i)."[231]

In 1986, Aleut Corporation and Bristol Bay Native Corporation

Arbitration Ruling, at 1 (Feb. 9, 1989) (on file with author).

226. *Id.* at 3.

227. Byron Mallott, CEO of Sealaska Corp., Letter to Morris Thompson, President of Doyon (Mar. 30, 1989) (on file with author).

228. First Amendment to the Section 7(i) Settlement Agreement (Oct. 22, 1990) (Amending Article III, Section 3) (on file with author).

229. Aleut Corp. v. Arctic Slope Reg'l Corp., AAA No. 75113030986 (Mar. 28, 1989) (Morris, Arb.) (on file with author) [hereinafter *Mar. 28 Arbitration*]; U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-90-5, FEDERAL LAND MANAGEMENT: CHANDLER LAKE LAND EXCHANGE NOT IN THE GOVERNMENT'S BEST INTEREST (Oct. 1989), http://www.gao.gov/assets/150/148368.pdf [hereinafter GAO 90-5]. The transaction is also referred to as the Kaktovik Land Exchange, including in the arbitration proceedings on the matter.

230. GAO 90-5, *supra* note 229, at 2.

231. Settlement Agreement, *supra* note 35, at 39.

demanded arbitration regarding the Chandler Lake land exchange pursuant to the Settlement Agreement.[232] The claimants contended that revenue derived from the lands received by ASRC in the exchange were subject to Section 7(i) under several theories: (1) the lands received were in fact ANCSA lands prior to the trade; (2) the Chandler Lake exchange was a component of multiple contemporaneous trades between the United States and ASRC subject to Section 7(i); and (3) ASRC violated the covenant of good faith and fair dealing under Alaska law by structuring the transaction to avoid Section 7(i).[233]

The arbitration panel ruled against the claimants on all of their major theories. First, it held that "ASRC and the United States, parties to the [Chandler Lake land exchange], did not intend to merge" the other somewhat contemporaneous land exchanges between the two parties with the Chandler Lake exchange.[234] It next held that the Chandler Lake land exchange "was a trade of surface for subsurface within the meaning of Article II, Section 6(g) of the 7(i) Settlement Agreement and revenues from the Kaktovik subsurface are exempt from the Section 7(i) distribution requirements."[235] Finally, while noting that "ASRC openly and candidly admitted that they structured the trade for the Kaktovik subsurface so as to qualify that trade under Section 6(g)," the panel found "ASRC was not deceitful, was not in bad faith and was not unfair in structuring a trade that was specifically invited by language in the [Settlement Agreement]."[236]

Despite finding for ASRC on all major points, the panel did find that ASRC failed to properly allocate costs to deduct against certain Section 7(i) revenues: "In the absence of an allocation of such costs, . . . the Settlement Agreement requires that such costs be denied in their entirety."[237] The panel therefore found that ASRC owed an additional $828,040 of Section 7(i) shareable revenue to the other regions, including interest.[238]

In 1990, after studying the exchange, the GAO released a highly critical report entitled *Chandler Lake Land Exchange Not in the Government's Best Interest*.[239] The report discussed Section 7(i), noting:

> The exchange was structured in a way that the revenue-sharing provisions of the law did not apply. If Arctic Slope had obtained

232. *Mar. 28 Arbitration*, *supra* note 229, at 3–5.
233. *Id.*
234. *Id.* at 13.
235. *Id.* at 15.
236. *Id.* at 18.
237. *Id.* at 19.
238. *Id.* at 21.
239. GAO 90-5, *supra* note 229, at 1.

> [Arctic National Wildlife Refuge] subsurface lands under the 1980 law, rather than the Chandler Lake exchange, it would have been required to share any revenues derived from these lands with 11 other Alaska regional corporations.[240]

The GAO also found that the land exchange was structured specifically to avoid Section 7(i) sharing obligations.[241] The GAO noted that between 1984 and the date of the report, "ASRC ha[d] received about $30 million from its oil company partners for the exclusive right to conduct exploratory activities," revenue that would have been shareable for other ANCSA land under Section 7(i).[242] The GAO's most noteworthy criticism of the exchange was that the Department of the Interior allowed ASRC to drill a test well on the land it received without retaining any right to the data or well results for the government.[243] As a result, the GAO was not able to analyze whether the exchange was value-for-value[244]—a result required by the Settlement Agreement.

Despite the arbitration panel finding in favor of ASRC, the tension between the Chandler Lake exchange lands and Section 7(i) reappears each time the larger congressional debate about opening the Arctic National Wildlife Refuge (ANWR) to oil and gas exploration gains traction.[245] As a part of the larger debate, some Alaska regional corporations attempt to make any potential earnings ASRC might receive from future oil and/or gas development on its lands within ANWR shareable under Section 7(i) of ANCSA.[246]

Tax, Bankruptcy, and Emerging issues

The interaction between Section 7(i) and the federal tax and bankruptcy laws has resulted in several interesting cases. In addition, due to the complexity of ANCSA, regional corporations, and resources, the

240. *Id.* at 4.
241. *Id.* at 21–22.
242. *Id.* at 21.
243. *Id.* at 18–19.
244. *See id.* at 20–21 ("[T]he village and regional corporations' ability to select land with such high oil and gas potential increases the likelihood that Interior's $5.9 million valuation of the rights exchanged may substantially understate the financial interests the government gave up."). *See also* U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-88-179, CONSIDERATION OF PROPOSED ALASKA LAND EXCHANGES SHOULD BE DISCONTINUED (Sept. 29, 1988), http://gao.gov/assets/150/146943.pdf (criticizing six other proposed land exchanges between the Department of Interior and various Native corporations involving Arctic National Wildlife Refuge land).
245. *See, e.g.*, KONIAG, INC., SHAREHOLDER NEWS 2 (July 2006), https://www.koniag.com/wp-content/uploads/2010/06/SHNL-2006-Jul.pdf.
246. *Id.*

future will undoubtedly present issues that the parties to the Settlement Agreement had not anticipated. For instance, two issues have recently arisen regarding the sale of carbon credits and conservation easements.

Tax

ANCSA includes a section regarding taxation,[247] but it does not address the interaction between Section 7(i) and federal taxes at all. As a result, Alaska Native Corporations sought guidance from the Internal Revenue Service in the 1970s.[248]

About the same time the regional corporations were litigating the intricacies of Section 7(i), a regional corporation sought tax guidance from the Internal Revenue Service regarding the tax consequences of distributions made pursuant to Sections 7(i) and 7(j).[249] The regional corporation sought a ruling on a number of ANCSA-specific topics, including:

> Whether [a corporation] must include in gross income the money earned from its timber and subsurface estates that is divided annually with other Regional Corporations pursuant to Section 7(i) of the Act; and
> Whether [a corporation] must include in gross income amounts allocated to it from other Regional Corporations under Section 7(i) of the Act.[250]

The I.R.S. began its analysis by noting that "the Act itself is silent on the tax treatment to be accorded the natural resource revenues divisible among the Regional Corporations pursuant to Section 7(i)."[251] It concluded that a regional corporation should "include in its gross income . . . only that amount of monies earned from its timber and subsurface estates that it retains after meeting the distribution requirements of Section 7(i) of the Act."[252]

247. 43 U.S.C. § 1620.
248. *See* I.R.S. Priv. Ltr. Rul. 81-38-123 (June 26, 1981) (giving tax consequences for village corporation of receipt of Section 7(j) distributions); I.R.S. Tech. Adv. Mem. 79-49-013 (Aug. 14, 1979) (giving tax consequences for regional corporation related to resource exploration transactions); I.R.S. Gen. Couns. Mem. 36,720 (May 6, 1976); *see also* The Alaska Native Management Report, *IRS Ruling Request May be Filed Within 90 Days*, at 1 (Jan. 31, 1974) (noting regional corporations were requesting an IRS ruling on various subjects including Section 7(i) receipts) (on file with author).
249. *See* I.R.S. Gen. Couns. Mem. 36,720.
250. Alaska Native Management Report, *supra* note 248, at 3.
251. *Id.* at 6.
252. *Id.*

With respect to the second question of distributions received by a regional corporation from another regional corporation under Section 7(i), the conclusion was that such distributions were to be included in income.[253] The I.R.S. concluded that the amounts distributed to village corporations and at-large shareholders pursuant to Section 7(j) were best characterized as "ordinary dividends" for tax purposes, noting that there "is no language in Section 7(j) upon which to base a distinction between the taxability of the corporate funds distributed to Village Corporations and the funds distributed to the Native shareholders."[254]

As noted above, Congress amended Section 7(i) in 1995 to make clear that the net operating loss sales, and other federal tax benefits, are not shareable revenues: "For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation."[255] The Settlement Agreement makes most forms of state and federal taxes, exempting corporate income taxes, allowable Active Section 7(i) costs, but excludes federal and state tax issues from the otherwise fully encompassing, mandatory arbitration provision.[256]

Bankruptcy

Two regional Native Corporations have gone through the process of bankruptcy.[257] One law review article anticipated that Section 7(i) could pose a major issue in a bankruptcy case: "Because section 7(i) and section 7(j) income is without parallel in commercial law, the Bankruptcy Code provides no hints as to whether section 7(i) and section 7(j) income is treated differently from other kinds of income."[258] The article further notes that both a Native corporation and its creditors in a bankruptcy will likely compete for the Section 7(i) income as one major source of cash to satisfy the adverse interests of the debtor and the creditors.[259]

253. *Id.* at 7.
254. *Id.* at 8.
255. Alaska Native Claims Settlement Act, Amendments sec. 109, § 7(i), 109 Stat. 353 (1995) (codified at 43 U.S.C. § 1606).
256. *See* Settlement Agreement, *supra* note 35, at 48–50 (noting taxes as allowable Active Section 7(i) Costs); *id.* at 84 ("No arbitration shall be held concerning the Federal or State income tax consequences of revenues, deductions, distributions, or any other income tax issues under Section 7(i) or this Agreement.").
257. Chugach Alaska Corp. v. United States, 34 F.3d 1462 (9th Cir. 1994); *In re* Bering Straits Native Corp., No. 2-86-00002 (Bankr. D. Alaska Mar. 5, 1986). At least one village corporation has also gone through bankruptcy. *In re* Haida Corp., No. 5X-85-00007 (Bankr. D. Alaska May 15, 1985).
258. Black et al., *supra* note 8, at 114.
259. *Id.* at 113.

In the case of regional corporation Bering Straits Native Corporation (BSNC), Section 7(i) played an outsized role in its bankruptcy case but not necessarily in the way predicted by the referenced law review article.[260] BSNC went bankrupt after making poor investments in several industries during its early years.[261] In the same time period, BSNC also failed to pass through $13.2 million it received from Congress on behalf of the village corporations in its region, money from the Alaska Native Fund portion of ANCSA.[262] In its bankruptcy, the village corporations became BSNC's biggest creditors.[263]

BSNC discharged its debt to the village corporations in its region by transferring by special warranty deed its subsurface estate below each respective village's surface estate.[264] The special warranty deed for each village corporation transferred the subsurface estate subject to, among other things, the "Section 7(i) Settlement Agreement agreed to as of June 29, 1982, and filed with the U.S. District Court of the District of Alaska on April 6, 1983, in *Aleut Corp. v. Arctic Slope Regional Corp.*" and "[t]hat certain Section 7(i) Trust Agreement described in the [Fourth Amended Plan of Reorganization]" approved by the bankruptcy court on January 4, 1989.[265] In addition, the deed provided for ongoing intervention rights by BSNC to ensure compliance with Section 7(i) and the Settlement Agreement—an unusual, maybe unprecedented provision in a deed:

> If notice is properly and timely given in the manner described above but Grantee is or will be incapable of satisfying any obligation arising now or in the future under Section 7(i) of ANCSA, the Section 7(i) Settlement Agreement, or the Section 7(i) Trust Agreement, then Grantor or Trustee may bring a civil action within 30 days of such notice to enjoin such transaction

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260. *See* Section 7(i) Trust Agreement, Bering Straits Native Corp., Brevig Mission Native Corp., Golovin Native Corp., King Island Native Corp., Koyuk Native Corp., Mary's Igloo Native Corp., Shaktoolik Native Corp., Shishmaref Native Corp., Sitnasuak Native Corp., Sound Quarry, Inc., St. Michael Native Corp., Stebbins Native Corp., Teller Native Corp., Unalakleet Native Corp., Wales Native Corp., and White Mountain Native Corp., Trustors (Jan. 20, 1989) (on file with author) (describing subsurface estate grants to village creditors with monitoring by BSNC for 7(i) compliance).

261. *See* Lori Thompson, *Between Worlds – The Consequence of Inexperience*, JUNEAU EMPIRE (Jan. 17, 1999), http://www.akhistorycourse.org/modern-alaska/between-worlds-the-consequence-of-inexperience (summarizing various financial decisions by the corporation).

262. Mark Baumgartner, *Alaska's Natives Getting Hard Lesson in Modern Business, Regional Corporations Run into Financial Difficulties*, CHRISTIAN SCI. MONITOR (Apr. 21, 1986), http://www.csmonitor.com/1986/0421/adire.html.

263. *Id.*

264. *See, e.g.*, Special Warranty Deed and Assignment, Bering Straits Native Corp. to Teller Native Corp. (Jan. 20, 1989) (on file with author).

265. *Id.* at 2.

> until Grantee provides reasonable assurances of its ability to satisfy all such obligations that it has or may incur.[266]

BSNC, in short, achieved a novel solution to fulfill obligations to its creditors in the bankruptcy while ensuring ongoing compliance with Section 7(i) and the Settlement Agreement.

Carbon Credits

The potential for sales of carbon credits is an emerging issue involving Section 7(i) and regional corporations. "A 'forest carbon offset,' is a metric ton of carbon dioxide equivalent (CO2e)—the emission of which is avoided or newly stored—that is purchased by greenhouse gas emitters to compensate for emissions occurring elsewhere."[267] In 2015, the California Air Resources Board extended the geographic area of forested lands eligible to participate in its program to include the southeast and southern coastal areas of Alaska.[268]

The Settlement Agreement did not squarely anticipate carbon credit transactions. It defines Section 7(i) resources subject to sharing as follows: "The timber resources (other than timber acquired by merger with a Village Corporation) and resources from the subsurface estate in ANCSA Lands. Timber resources include both standing timber and future growth."[269] While in some ways, a carbon credit sale is similar to sale of tax net operating losses, in other ways, carbon credits are tied more directly to the commercial value of a Section 7(i) shareable resource. Like a net operating loss, the sale of carbon credits does not involve a contract for the physical separation of a resource from ANCSA lands, or exploration for such a resource. However, when pairing the Settlement Agreement definition of a timber resource—which includes "standing timber and future growth"—with the definition of what is eligible for a carbon credit, it is clear that there is an argument that carbon credits are subject to Section 7(i). Importantly, the application of sharing under the Settlement Agreement does not require the physical act of harvesting timber, as Gross Section 7(i) Revenues are defined, in relevant part, as:

> all revenues (including money, benefits and any other thing of value) received by a Corporation that are attributable to, directly related to, or generated from the exploration, development,

266. *Id.* at 3.
267. Christine Yankel, *FAQ Forest Carbon Projects*, THE CLIMATE TRUST (Aug. 1, 2014), http://www.climatetrust.org/forest-carbon-projects-faq/.
268. Press Release, Cal. Air Resources Board, Air Resources Board Approves Rice Cultivation Carbon Offset Protocol, Expands Forestry Offset Protocol (June 25, 2015), http://www.arb.ca.gov/newsrel/newsrelease.php?id=736
269. Settlement Agreement, *supra* note 35, at 2.

> production, lease, sale or other exploitation of, or the disposition of any interest in, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.[270]

This issue has yet to formally arise under the Settlement Agreement, but may turn on whether a carbon credit is found to be a "sale or other exploitation of" or "the disposition in any interest in" an ANCSA timber resource.[271]

A relevant policy consideration also militates in favor of required sharing of carbon credit transactions. The Settlement Agreement and the Section 7(i) litigation that precipitated the agreement favor the sharing of revenue.[272] If carbon credit sales were found to be non-shareable, regional corporations would have a strong economic incentive not to enter into either active or passive development of a timber resource. Instead, regional corporations would be incentivized to transact carbon credit sales involving the same resources and keep 100% of the proceeds. This runs contrary to the *Aleut V* decision, which "recognized that it must avoid interpretations which 'would encourage the resource controlling corporation to devise all sorts of contractual schemes for maximizing its present revenues at the expense of its sister corporations.'"[273]

Conservation Easements

The sale of conservation easements is also becoming more prevalent for ANCSA corporations, and is largely an emerging and untested area for purposes of Section 7(i). The IRS defines conservation easement transactions as follows:

> Conservation easements permanently restrict how land or buildings are used. The "deed of conservation easement" describes the conservation purpose(s), the restrictions and the permissible uses of the property. The deed must be recorded in the public record and must contain legally binding restrictions enforceable by the donee organization under state law. The property owner gives up certain rights but retains ownership of

270. *Id.* at 3.

271. *Id.*

272. *See Aleut II*, 417 F. Supp. 900, 903 (D. Alaska 1976) (agreeing, as a general principle, that "'all revenues' should include benefits of every sort so long as such are received by a regional corporation in exchange" for ANCSA timber and subsurface rights). *See also* Special Master Report, *supra* note 28, at 19 ("With minor exceptions, any consideration received by a Regional Corporation attributable to the sale or disposition of any interest in its § 7(i) resources must be included in distributable revenues.").

273. *Aleut V*, 484 F. Supp. 482, 485 (D. Alaska 1980) (quoting *Aleut I*, 410 F. Supp. 1196, 1200 (D. Alaska 1976)).

> the underlying property. The extent and nature of the donee organization's control depends on the terms of the conservation easement. The organization has an interest in the encumbered property that runs with the land, which means that its restrictions are binding not only on the landowner who grants the easement but also on all future owners of the property.[274]

Conservation easements have not been tested in the context of Section 7(i), although there have been several recent transactions involving ANCSA lands.[275] Conservation easements differ significantly from carbon credits in that the regional corporation would generally only receive a tax benefit as consideration for the granting of the easement.[276] The 1995 amendments to ANCSA specifically amended Section 7(i), as follows: "for purposes of this subsection the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation."[277] As was the case with the net operating losses in the *Bay View* litigation, the benefit a regional corporation receives from a conservation easement would likely be characterized as "a product of the tax status of the Regional Corporation[]" and not subject to Section 7(i) sharing.[278]

CONCLUSION

When Congress enacted ANCSA, it endeavored to create an equitable land settlement with Alaska's Native people. An important part of the equity was internal economic parity between the various Alaska Native groups. Congress used the revenue sharing mechanism of Section 7(i) to help minimize the creation of "haves" and "have nots."

But the simplicity and brevity of the original language of Section 7(i) led to a decade of litigation, followed by a detailed Settlement Agreement, further followed by almost another decade of arbitration under the

274. INTERNAL REVENUE SERV., CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE ch. 1 (last updated Jan. 3, 2012), https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Conservation-Easement-Audit-Techniques-Guide#_Toc116.

275. *See, e.g.*, PEDRO BAY CORP., *Pedro Bay Corporation Conservation Easement Project Description* (Oct. 19, 2015), http://www.pedrobaycorp.com/index.php/latest-news/310-pedro-bay-corporation-conservation-easement-project-description (listing recent transactions); BRISTOL BAY HERITAGE LAND TRUST, AGULOWAK CONSERVATION EASEMENT, http://www.bristolbaylandtrust.org/agulowak-conservation-easement (last visited June 14, 2016).

276. *See* INTERNAL REVENUE SERV., *supra* note 274, at ch. 2 (noting tax benefits are the most common form of compensation).

277. Alaska Native Claims Settlement Act, Amendments sec. 109, § 7(i), 109 Stat. 353 (1995) (codified at 43 U.S.C. § 1606).

278. *Bay View II*, 278 F.3d 1259, 1264 (Fed. Cir. 2001), discussed at E.2.a., *supra*.

Settlement Agreement. That history was likely not the intent of Congress. Ultimately, however, Section 7(i) has resulted in the sharing between the regional corporations of several billion dollars of revenue derived from resources from ANCSA lands. And it has quietly played an important role in economic equity and the success of Alaska Native corporations.