A STUDY OF FIVE SOUTHEAST ALASKA COMMUNITIES
APPENDIX E, PART 1

PREPARED FOR
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For
Management Concepts, Inc.
As Part of The ANCSA 85 Report
Introduction

Section 23 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-1628 (1982), ("ANCSA" or the "Act")\(^{1/}\) requires the Secretary of the Interior (the "Secretary") to submit, through the President, a report of the status of the Natives and Native groups in Alaska, and summary of actions taken under this Act, together with such recommendations as may be appropriate. This report is due in 1985.

This part of the report is a legal analysis of the implementation of ANCSA. The first part of our analysis requires we consider the principal objectives of Congress when it passed ANCSA. This is done by analyzing the specific provisions of the Act and its legislative history. The second part of the analysis addresses the means by which the provisions of the Act were implemented. The parties responsible for the implementation have been Congress, federal executive agencies, the State of Alaska and its agencies, and Alaska Natives themselves, including their various entities. Implementation activities are manifested directly by subsequent amendments to ANCSA, in federal regulations, in state statutes and regulations and indirectly by administrative decisions, by court decisions and by private party actions.

\(^{1/}\) For the sake of consistency and easy reference hereinafter citations to ANCSA, its amendments and implementing legislation will be referenced to code sections in Title 43, Public Lands, (1982).
The final part of our analysis of the implementation of ANCSA compares the implementation activities against the intentions of Congress as reflected by Section 1601 of the Act, (Congressional findings and declarations of policy).

The legal analysis generally follows chronologically the implementation of ANCSA. It begins with the start up activities including enrollment, regional corporation incorporation and boundary delineation, and village and Native group certification.

The next part covers land settlement issues including land withdrawal, selection, survey and conveyance, and land management issues. The land management issues pertain to federal interim management, Joint State/Federal Land Uses Planning Commission activities, and village and regional corporation reconveyances.

Part three concerns cash settlement issues. This section discusses the distribution of Alaska Native Fund moneys, federal administrative problems which arose in the management of Native Fund moneys. This section also evaluates the impact on the Settlement Act on other federal welfare assistance programs.

The fourth part concerns the operation of ANCSA corporations under state corporation laws and federal regulatory laws applicable to the management of corporations. Under this umbrella are the issues of taxation, stock alienation, securities laws exemptions, merger of Native corporations, federal directives on the redistribution of Native corporation section 1606(i) resource revenues, and other corporate related questions.

The final part of this report presents a summary analysis of the implementation of ANCSA in light of the policy and goals set
forth in section 1601 of ANCSA. This summary also discusses some of the peripheral issues raised by ANCSA, including review of various acts for the benefit of Natives (e.g. allotment acts, the townsite act, special Indian programs),

Steps in Implementation of ANCSA.

I. Startup: Enrollment; regional corporation incorporation and boundary delineation; village and Native group certification.

Start-up activities include enrollment, regional corporation incorporation and village eligibility certification.

A. Enrollment.

The Secretary of Interior met his statutory deadline of December 17, 1973 to produce a roll of resident and non-resident Alaska Natives. However; the Secretary did not fulfill his duty under that section to prepare a roll of all Natives who were born on or before, and who were living on, December 18, 1971. Congressional amendments to ANCSA were necessary to reopen the roll to permit enrollment of Alaskan Natives who were not enrolled by the Secretary before the 1973 deadline. The Secretary's failure to enroll all Natives within the permitted time period was due primarily to under funding and under staffing of the Bureau of Indian Affairs which was primarily responsible for carrying out enrollment.²/ Certain decisions made for the

convenience of BIA personnel also contributed to the enrollment problems. For example, the forms prepared by the Secretary were not geared to the special problems which non-resident Natives faced in enrollment.

Section 1604 of ANCSA requires the Secretary to prepare a roll of all Natives who were born on or before, and who were living on, December 18, 1971. The Secretary was to prepare this list within two years of the enactment of ANCSA. Section 1604(a).

Preparation of the roll of the Alaska Natives was important for many reasons. Enrollment determined:

1. The identity of Alaska Natives who would share in the benefits of the Act;

2. The number of Natives residing within a village for purposes of village eligibility decisions by the Secretary;

3. The authorized shareholders of regional and village corporations who would elect directors to carry on the business of the corporation;

4. The date on which Alaska Native Fund moneys would be released to regional corporations for redistribution;

5. The number of shareholders in each regional corporation which, in turn, determined relative distributions of Alaska Native Fund moneys and resource revenues pursuant to Section 1606(i) of ANCSA;

6. The amount of land selections available to village corporations pursuant to Section 1613(a) of ANCSA;
7. Derivatively, the amount of land selections available to regions pursuant to Sections 1611(a), 1611(b), and 1613(h) of ANCSA.

The Secretary delegated to the Commissioner of the Bureau of Indian Affairs his duty to prepare a roll of Alaska Natives and the Commissioner assigned this responsibility to the Juneau Area Office of the BIA.\(^3\) In February 1972, the Juneau Area Director established the Enrollment Coordinating Office in Anchorage to coordinate and complete enrollment activities by December 17, 1973. The BIA, however, was experiencing a shortage of funds, manpower and facilities at that time. The BIA therefore contracted with regional Native organizations to carry on the process of obtaining enrollment applications. These organizations were the local Native associations and non-profit organizations which had lobbied for passage of ANCSA and from which the regional corporations were to be formed.

The Bureau enacted regulations for preparation of the roll of Alaska Natives on March 17, 1972. 16 C.F.R. § 43h (1972); redesignated as 43 C.F.R. § 69 (1983). The BIA regulations required that all enrollment applications be in writing, on forms provided by the Bureau and be filed in the Coordinator's office by March 30, 1973. Id. at 43h.6(d). Separate applications had to be made out for, and by, each Native, other than minor dependents of a household, or their sponsor. Id. at 43h.6(a) and

\(^3\) See, generally, GAO Report on Enrollment and Village Eligibility at 3-6.
(b). The application contained the applicant's social security number, name, address, sex, date and place of birth, degree of Native blood, permanent residence as of April 1, 1970, the location of his ancestral home, and -- for non-resident applicants -- their election regarding enrollment in the 13th region. Id. at 43h.6(c).

The Coordinator made initial determinations on eligibility. Id. at 43h.7(a). He based his decision on information contained in the application and on other records generally available to the BIA. Id. Notice of the Coordinator's decision was sent out to the applicant and his region and village. Id. at 43h.7(b) and (c). The Regional Solicitor decided all appeals. Id. at 43h.8(a). The Solicitor's decision was made on behalf of the Secretary and was final. Id. All other approved enrollment applications were made final by subsequent Secretarial approval of the Native roll. Id. at 43h.9.

The primary criteria for enrollment in a region and Native village was the place of the Native's permanent residence on April 1, 1970. Section 1604(b). Non-resident Natives could enroll in regions pursuant to certain options which included the following:

1. In the 13th Region, if they elected to do so;
2. In the region in which they resided on April 1, 1970 if they lived there without interruption for more than two years;
3. In any region where they had resided for ten or more years;
4. In the region in which they were born;

5. In the region from which their ancestors came. Id. at §43h.4. The regulations provided that minor children would be enrolled in the same region as their parents. A hardship provision was also included to allow family members to enroll to the same region regardless of their residence.

One problem which arose during the enrollment process was the lack of a definition for "permanent residence." Congress had used the 1970 enumeration date as the time to determine residency. This gave rise to the possibility that the standards for permanent residence used by the enumerators would be applied in the ANCSA. Fortunately, the BIA recognized the limitations of the definition of residence under the census enumeration and provided for a broader definition of permanent residence in his regulations. His action in adopting the broader definition is supported in legislative history. ______ Cong. Rec. 46963-46964 (daily ed. December 14, 1971) (statement of Sen. Stevens).

The GAO suggested that there existed a potential for abuse of the enrollment process by the contracted Native organizations which would benefit by larger enrollment in their own region, since each region participated in sharing in the Alaska Native Fund and certain land selections in the proportion the number of shareholders enrolled to their region bore to all enrolled Natives. (GAO Report on Enrollment and Village Eligibility, at 2) The GAO concluded that the Native organizations did not take advantage of the situation but also noted that the
Department of the Interior did not make any effort to confirm the accuracy of the information gathered by the Native organization. Id. at 3. False enrollment claims probably were deterred by the $10,000 fine and 5 year prison terms for fraudulent claims. Id. at 6.

Other problems faced by the Enrollment Coordinating Office were incomplete and inaccurate applications, especially out-of-state applications, complaints regarding 13th Region enrollment elections, and, generally the short deadlines for filing enrollment applications and appeals.\textsuperscript{4/} Many out-of-state Native applicants made mistakes or omitted material from their applications because of the absence of BIA assistance. Id. at 462. The Bureau attempted to correct clear errors on the form or return them to the applicants for correction. Often times, however, insufficient or incorrect return addresses on the applications made return impossible. The BIA ultimately hired additional temporary enumerators to work in eleven cities outside of the state to try to cure the incorrect and incomplete applications. Id.

The new regional corporations found it difficult to enroll all of their members by the March 30, 1973 enrollment deadline. Attempts by regional corporation personnel and Congressmen to

persuade the Secretary to extend the enrollment deadline were unsuccessful. Alaska Native Management Report, July 16, 1973 at 3; February 28, 1973 at 4-7. However, the BIA did extend the deadlines to appeal enrollment applications. Alaska Native Management Report, July 31, 1973 at 1. Enrollees could file appeals with the coordinating office which would be forwarded to the Regional Solicitor. The deadline for amendments was May 4, 1973, which was later extended to June 1. The final time amendments could be appealed was August 15. Alaska Native Association of Oregon, 417 F. Supp. at 463-4; 38 Fed. Reg. 21,403-404. The Bureau determined that this time frame was necessary to meet its own enrollment completion deadline of December 18, 1973. Alaska Native Association of Oregon, 417 F. Supp. at 464.

The Coordinator's enrollment application deadlines where later overturned in a case challenging the 13th region certification election. Alaska Native Association of Oregon v. Morton, 417 F. Supp. 459 (D.D.C., 1974). In part due to the complicated enrollment application and due to the Coordinators failure to accept amendments, the Court ordered that all amended applications in which Natives had elected to enroll to the 13th region were to be counted so long as they were filed before the August 15 deadline. This resulted in a favorable tabulation for the 13th Region and it was certified as an established region effective October 1, 1975 by Secretarial Order No. 2980. Regulations governing enrollment in the 13th Region were adopted on August 3, 1973. 41 Fed. Reg. 32422. The regulations tract
the regular enrollment regulations except that the former specifically provide for enumerators to assist in obtaining applications in each of the 12 regional corporations and in various urban localities in the continental United States. 43 C.F.R. § 69.5, 69.6.

In Koniaq v. Kleppe, 405 F. Supp. 1360 (D.D.C., 1975) aff'n in part, rev'd in part on other grounds at 580 F.2d 601 (9th Cir., 1978), the District Court held that residence is not determined conclusively by the roll, but that re-examination of residence is permissible where the eligibility of a village is properly in issue. In that case, the Secretary had determined that the number of actual Native residents in the village was less than shown by the roll. The Court, however, decided that the Secretary could not reduce "...the number of village residents without also adjusting the figures to add additional residents who were incorrectly excluded." Id. at 1373-1374.

Subsequent to Koniaq, Congress enacted clarifying legislation which reopened the Native roll. Pub. L. No. 94-204 §§ 1, 8, 89 Stat. 1145 (1976). First, the roll was reopened for a period of a year to allow individuals who failed to meet the March 30, 1973 filing deadline to file an enrollment application. Id. at § 1(a). Such enrollees would not effect the distribution of ANF funds, land entitlements of Native corporations or Native corporation eligibility determinations. The amendment also allowed enrollees of ineligible village corporations or Native groups to enroll to section 1618(b) reserve villages if the ineligible corporation was within the reservation boundaries.
Id. at § 1(b). It also allowed applicants properly enrolled to ineligible Native corporations to redetermine their place of residence in accordance with the criteria for residence applied in the final determination of eligibility. Id. at § 1(c). This redetermination also did not affect prior ANF distributions or any Native corporation land entitlements or eligibility determinations.

The Secretary published disenrollment regulations on March 30, 1976. 25 C.F.R. § 69.15. The disenrollment regulations set out the standards under which the Enrollment Coordinator and the Regional Solicitor could contest a person's enrollment status. 43 C.F.R. § 69.15(a). A contest could be based only on one of the following six grounds:

1. That the person died before or was born after December 18, 1971;
2. That the person was enrolled in the Metlakatla Indian Community as of April 1, 1970;
3. That the person has no Native ancestry;
4. That the person is not a citizen;

Id. at § 69.15(e).

In any case, no contest could be initiated after July 31, 1977 for ANCSA section 1604 enrollees or after January 2, 1978 for Pub. L. No. 94-204 enrollees (re-opened enrollment enrollees). Id. at § 69.15(c). All case files had to be reviewed by the Regional Solicitor and Coordinator no later than October 1, 1978. Id. at § 69.15(h).
The Secretary's disenrollment authority came under attack in *Sealaska Corporation v. Roberts*, 428 F. Supp. 1254 (D. Alaska, 1977). The case arose as a result of the regional corporation finding itself in the middle of conflicting legal claims. The enrollees had sued Sealaska in State Court to compel payments to them as shareholders while the Secretary informed Sealaska that he was contesting the enrollees' eligibility and would hold Sealaska responsible for any distributions to the enrollees.

Sealaska argued that the statement in the enrollment section in ANCSA that the Secretary's decisions regarding enrollment eligibility would be final, precluded any disenrollment authority the Secretary claimed to possess.

The Court, however, found that the Secretary had the power to disenroll individuals listed on both the original roll and as amended in 1976 due to the overriding intent of Congress to have a pure roll. *Id.* at 1258-1259.

The Court also held that the corporation properly withheld distributions from shareholders whose eligibility was being challenged. The Court invalidated the Secretary's regulations protecting Native corporations against liability for improper monetary distributions on the grounds that Congress intended fund monies to be distributed only to those who qualify for enrollment. *Id.* The 1976 amendments to ANCSA which provided that land distributions would not be affected by disenrollment proceedings added support to the Court's holding that disenrollment would affect monetary distributions. See Pub. L. No. 94-204 § 8(d).
In summary, the Secretary adhered to the initial statutory deadline set forth in ANCSA, but because of inadequate funding and staffing, and certain administrative deadlines established primarily for the convenience of BIA personnel, the Secretary was not able to achieve the principle of section 1604 of ANCSA; namely enrolling all eligible Alaskan Natives within two years. This failure was subsequently rectified in part by amendments to ANCSA which extended the enrollment period. Pub. L. No. 94-204 § 1.\(^5\)

B. Regional Corporation Incorporation and Determination of Regional Boundaries.

As discussed above, the Native roll was intended to identify all Natives who would participate in the Settlement Act. The enrolled Natives would not, for the most part, receive land and moneys directly. Rather, the Act provided that Natives should receive the benefits of the Act indirectly and collectively through regional and village Native corporations established pursuant to ANCSA under State law. Section 1606 of ANCSA mandated the creation of twelve regional corporation with the possibility of one additional corporation if a sufficient number of non-resident Natives elected to create one.\(^6\)

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\(^5\) See also, Metlakatla Indian Community Enrollment Act of 1980, Pub. L. No. 96-505, 94 Stat. 2743 (1980), providing an option to prior members of the Metlakatla Indian Community, and other Natives eligible for enrollment to the Community, to cancel any stock they may hold in an ANCSA Native corporation and re-enroll or apply for enrollment to the Metlakatla Indian Community for a period of two years after the enactment of this Act or from date of the Native's eighteenth birthday, which ever is later. Upon election to join Metlakatla, the Native's name will be removed from the ANCSA roll.

\(^6\) Village eligibility is discussed later in this memorandum.
Determining Regional Boundaries. Section 1606(a) of the Act requires the Secretary to divide the State of Alaska into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. The Secretary was to establish these boundaries within one year of the passage of the Act. The boundaries of these regions were supposed to approximate closely the areas of influence of twelve preexisting Native associations listed in section 1606.

The Secretary did not promulgate regulations to govern the boundary establishment process. Instead, Native associations could enter into boundary agreements which, absent objection from the affected parties, would be adopted by the Secretary. Alaska Native Management Report, March 13, 1973 at 4-7. Problems arose, however, when the Native associations or the regional corporations incorporated by the association disputed the boundaries established by the Secretary or by agreement between the Native associations. Id.

The Act contemplated that the boundary disputes would be resolved by arbitration. Id. at Section 1606(a). Nearly every region was involved in at least one boundary dispute. Alaska Native Management Report, 7, March 13, 1973. The Secretary took the position that the boundary disputes had to be settled by March 15, 1973. Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association, 502 F.2d 1323, 1325 (9th Cir., 1974). It appears the Secretary's desire to resolve boundary disputes by March 15,1973 was motivated by his need for
certainty in order to carry out subsequent responsibilities under the Act.

Although most of the regional boundary disputes were successfully arbitrated, at least two of the disputes proceeded to the federal courts. In *Central Council Tlingit and Haida Indians of Alaska*, Chugach contended, among other arguments, that the boundary established by the Secretary was final since arbitration was not completed by March 15, 1973. The Ninth Circuit decided that the Secretary had no authority to set a cut-off date for arbitration of disputes as to regional boundaries and that such cut-off date did not bind the Court in deciding whether to compel arbitration. The boundary dispute between Chugach and Sealaska was resolved finally by subsequent legislation. Pub. L. No. 94-204 § 11.

In an unreported Ahtna-Doyon case the Alaska District Court ruled on numerous contested points of law pursuant to a summary judgment motion. The Court concluded that arbitration between regions can occur after the Secretary establishes regional boundaries on December 15, 1972. The Court also held that Ahtna, Inc. and Doyon, Ltd. were the real parties in interest and not their respective Native associations that negotiated the prior boundary agreements. *Ahtna v. Doyon*, Civil No. A-198-72 (D. Alaska 1972).

**Regional Corporation Incorporation.** Section 1606(d) of ANCSA sets out the manner in which regional corporations were to be incorporated. Each of the twelve Native associations named five incorporators within the region who were responsible for
organizing the corporation. The Native associations had eighteen months to organize the regional corporations as for profit corporations, submit the articles of incorporation and bylaws to the Secretary for approval, and file the documents with the State of Alaska. Section 1606(e).

Native associations were the logical choice to organize the regional corporations since they actively pursued enactment of ANCSA and largely represented the same body of Natives who would ultimately hold stock in the regional corporations. Moreover, the Native roll would not be prepared for at least a year after the enactment of ANCSA which meant that a separate group of prospective stockholders could not be identified to act as incorporators. Consequently, regional corporations were managed by interim boards of directors appointed by the incorporators or Native associations until the final roll was approved and authorized board of Directors could be elected by shareholders of each region. See, e.g., "AVCP Board to Elect New Interim Board Members for Calista Corporation," Alaska Native Management Report, March 30, 1973 at 1.

During the first year after passage of ANCSA, Native associations also had authority to merge any of the twelve regions so long as the number of regions was not reduced to less than seven. Section 1606(b). Although no regions merged, at least two sent notification of their intent by December 18, 1972. Alaska Native Management Report, February 28, 1983 at 3 (Ahtna and Chugach).
In summary, the Secretary's only statutorily imposed duty with regard to the incorporation of regional corporations was to review each corporation's articles of incorporation and by-laws before the articles were submitted to the State. The Secretary conducted this review without causing delays in the incorporation of regional corporations.

There is no express authorization in the Settlement Act for the Secretary to oversee the corporate activities or functioning of the regional corporations and the Secretary did not make any attempt to do so. Initially, assistance in establishing land selection programs, and corporate operations could have been of some assistance to the corporations (at least, to the extent such services could have substituted for services which the corporations otherwise purchased from lawyers and consultants). However, generally the Secretary's oversight and assistance was neither desired nor sought by the regional corporations.

C. Village Eligibility Determination.

The Secretary was required to make eligibility determinations on more than two hundred villages within two and a half years after enactment of ANCSA. Section 1610(b). Villages found eligible could incorporate and be entitled to the land benefits described in section 1613 of ANCSA. A list of established Native villages ("listed villages") was set out in section 1610(b)(1) and these villages were deemed to be eligible unless the Secretary made a finding that fewer than 25 Natives resided in the village on the 1970 census enumeration date or
that the village was modern or urban in character or populated by a majority of non-Native residents. Section 1610(b)(2).

Southeast villages although listed in section 1615(a) were not "listed in subsection (b)(1)" and thus southeast villages could have been required to fulfill the eligibility criteria for unlisted villages. Section 1610(b)(3). Notwithstanding the technical language of ANCSA, southeast villages were treated as "listed" villages under the regulations. 43 C.F.R. § 2651.2(a)(1).

Unlike listed villages, unlisted villages carried the affirmative burden of establishing that at least 25 Natives resided in the village on the census enumeration date and that the village was not modern and urban in character. Section 1610(b)(3). An unlisted village would be found eligible and be added to the list upon the Secretary finding all necessary facts required by the subsection.

Any Native group which failed to meet the village eligibility standards could be considered for special land entitlements under section 1613(h)(2).

The initial proposed regulations enacted to implement the general land provisions of ANCSA, including village eligibility, met with broad disapproval by the Native community. Alaska Native Management Report, October 24, 1972 at 2. Even after redrafting, many Native villages would have been ineligible under the "modern and urban character" standards. Alaska Native Management Report, March 13, 1973 at 1. This wide spread dissatisfaction could have been avoided if the local Alaskan BLM
officials responsible for preparing regulations had consulted the Native community before the regulations were published. They did not do so, however. As a result of inadequacies in the initial proposed regulations final regulations were not adopted until May 30, 1973. The failure of the BLM to consult the Native community on village eligibility regulations contributed to unnecessary delays and an initial poor working relationship between the BLM and the Native community.

Once regulations were adopted, there was relatively little conflict between the BLM and Native villages concerning certification. That which did occur was precipitated mainly by third parties who felt threatened by village corporation land selections and sought to utilize village certification as a way to defeat village land selections. See, e.g., Stratman v. Watt, 656 F.2d 1321 (9th Cir., 1981), cert. dis'm. 102 S. Ct. 1744; see also, Alaska Native Management Report, January 31, 1974 at 3; September 16, 1974 at 1.

Village eligibility regulations. Under the regulations adopted on May 30, 1973 the Director in the Juneau Area Office of the BIA was responsible for making village eligibility determinations. 43 C.F.R. § 2651.2(a)(1973). For listed villages he was required to investigate and examine available records and evidence that could have a bearing on the eligibility of the village. Id. at 2651.2(a)(1). In the case of unlisted villages, an authorized official was required to submit an application for determination of its eligibility. Id. at 2651.2(a)(6). The application had to include prima facia
evidence of compliance with the requirements of eligibility under the regulations.

The eligibility regulations expanded on the language in ANCSA as follows:

1. Twenty-five or more natives had to reside in the village on April 1, 1970, but residence was presumed if a Native was properly enrolled to the village;

2. The village had to have an actual physical location evidenced by the occupancy of at least thirteen natives during 1970. However, no village "which is known as a traditional village" was disqualified if occupancy could be shown sometime during the ten years preceding 1970;

3. A village was deemed modern and urban in character only if it had all of the following attributes:
   a. Population over 600;
   b. Centralized water and sewer system serving a majority of residents;
   c. Five or more established businesses;
   d. Organized police and fire protection;
   e. Private resident medical and dental services;
   f. Fully maintained streets and sidewalks.

   *Id.* at 2651.2(b)(1),(2),(3).

Upon completion of his review, the Area Director published his proposed decision in the federal register and in local newspapers. *Id.* at 2651.2(a)(2). Any interested party could file a protest within thirty days of the protest. *Id.* at 2651.2(a)(3). In the absence of a valid protest, the decision
was final and would be published a second time in the federal register. *Id.* at 2651.2(a)(2).

If the proposed decision was protested, the Director would evaluate the protest and supporting evidence and render a decision on the eligibility of the village within thirty days of receipt of the protest. *Id.* at 2651.2(a)(4). The decision on appeal would be published and become final unless appealed to the Secretary by a notice filed with the Alaska Native Claims Appeals Board ("ANCAB"). *Id.*

ANCAB, referred to under the regulations as the "ad hoc Board," was established by the Secretary to hear appeals of BIA determinations of village eligibility and village land selections. Under the regulations, ANCAB was to be a fact finding board which would make recommended decisions to the Secretary. The Secretary was not bound by ANCAB's recommendations. ANCAB appointed Interior Office of Hearings and Appeals administrative judges to hear cases to insure compliance with provisions of the Administrative Procedures Act. *See,* GAO Report on Enrollment and Village Eligibility at 10. Under the regulations ANCAB would review the record and the decision recommended by the administrative law judges and then send its own recommendations to the Secretary without ever providing any opportunity for the parties to review the administrative judges decisions or submit exceptions.

Of the 215 villages listed in the Act, the BIA found 201 eligible and 14 ineligible. *See generally,* GAO Report on Enrollment and Village Eligibility at 9-14. ANCAB received twelve
appeals on the listed village determinations. All twelve appeals involved villages that the BIA determined were eligible. Only eight of the twelve appeals proceeded to hearing before the administrative judges. The judges upheld the BIA's determination of eligibility on seven of the eight cases. ANCAB recommended reversal of two of these decisions, and the Secretary accepted ANCAB's recommendation.

Of the three listed villages that ANCAB found ineligible, one did not have an identifiable physical location evidenced by occupancy consistent with Native culture and life style (Salamatoff), another failed to show proof of at least twenty-five resident Natives enrolled to the village (Pauloff Harbor), and the third failed to show an identifiable physical location and sufficient number of Native residents (Uyak).

The three ineligible villages filed suit in the United States District Court challenging the Secretary's decisions. Koniag, Inc. v. Kleppe, 405 F. Supp. 1360 (D.D.C., 1975). The District Court overruled the Secretary and reinstated the BIA's determinations that all three were eligible. The Secretary appealed the decision for all the villages except Pauloff. The District of Columbia Circuit Court of Appeals affirmed in part, rev'd in part, and remanded the case for administrative determination on the grounds that the secret procedure involved in ANCAB review of the administrative judges decisions denied due process to the parties and violated the ANCSA policy of maximum participation by Natives in matters that concern their property rights. Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601,

Unlisted villages faced a more precarious fate upon review of the BIA Director's decision by ANCAB. See, Report of the Secretary 1982, § 1610(b)(3). Thirty-one unlisted villages submitted eligibility applications. The BIA declared that twenty four of these villages were eligible and that seven were ineligible. Twenty-eight of these determinations were appealed (twenty-three eligible, five ineligible). Except for Eklutna's protest of Knik, the appeals of villages found eligible were made by non-Native third parties. Alaska Native Management Report, January 31, 1974 at 3. Ultimately only 20 of these appeals were decided by the administrative judges and ANCAB. ANILCA also resolved most of the pending issues on eligibility regarding unlisted villages. ANILCA §§ 1427, 1432.

In summary, once final village eligibility regulations were adopted, village eligibility determinations were made expeditiously by the Secretary, but third parties forced many of the Secretary's decision into adjudication. The adjudication process was long and expensive. Ultimately, most of the disputes were resolved by legislation as part of ANILCA.

D. Native Group Eligibility.

Native groups which could not qualify as villages under the standards set out in section 1610(b) could incorporate under the laws of the State of Alaska and seek a determination of
eligibility from the Secretary. Section 1613(h)(2). The only standard of eligibility set out in ANCSA appears in the definition of "Native group" set out in section 1602(d):

"'Native group' means any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality."

Thus, a Native group, under ANCSA, was 1) a Native entity, 2) with less than twenty-five members, 3) whose members resided in a specific locality, and 4) constituted the majority of residents of that locality.

Following the release of the first draft of ANCSA land regulations, regional corporations were concerned with the the failure of the regulations to resolve "the status of land rights of Native groups and their relation to village and regional withdrawal areas." Alaska Native Management Report, October 24, 1972 at 2.

The final regulations addressed these concerns by requiring Native groups to secure the concurrence of their respective regional corporation before submitting an application for land under section 1613(h)(2) and by restricting the amount of land available for selection by any group. 43 C.F.R. §§ 2653.2(b), 2653.6 (1973). Native group applications which failed to obtain regional corporation concurrence or exceeded the land selection recommendation of their regional corporation were rejected by the Secretary. Id. All group applications had to be filed by December 18, 1975 (the date on which all withdrawals automatically terminated unless selected by a Native corporation). Id. at 2653.1(a).
The Secretary did not enact any Native group eligibility regulations until April 7, 1976. 41 Fed. Reg. 14739. The deadline for selection applications was extended to April 16, 1976 in concert with withdrawals. 43 C.F.R. § 2653.6(a)(1982); See, p. 99. Pursuant to the regulations, any authorized representative of a Native group could submit an application for a determination of the group's eligibility. Id. at § 2653.6(a). The application had to identify the group's location by section, township, and range. Native members of the group had to be listed together with an account of the improvements on the location and periods of use of the locality by the members.

The Bureau of Indian Affairs was required to investigate and determine the factual basis of the group's application. To qualify as an eligible group the regulations required the following:

1. That the members of the group actually resided in (as of the 1970 census enumeration date) and are enrolled to the locality;

2. That the Native members of the group constitute the majority of the people residing in the locality;

3. That the group have an identifiable physical location;

4. That the members of the group use the locality as the place where they actually live (with the exception of members temporarily elsewhere for school);

5. That the group have the character of a separate community distinct from nearby communities; and,
6. That the group is composed of more than a single family. 

Id. at 2653.6(a)(4) and (5). Upon sufficient findings of fact the BIA had to issue a certificate of eligibility except that a certificate of ineligibility is issued if the BLM reports to the BIA that no land is available for selection. Id. at 2653.6(a)(6).

As of December 31, 1982 a total of 31 Native group applications had been filed. See, Report of the Secretary 1982 at section 14 (h)(2). Seven applications had been withdrawn or rejected due to the group being found to be an eligible village. Id. An unofficial status sheet from the ANCSA Office in Anchorage, dated May 13, 1983, shows a total of 27 group applicants: Eighteen (18) have been certified as ineligible (at least 10 have been appealed to the Interior Board of Land Appeals); Nine (9) have been certified as eligible either administratively or by legislation. This information has not been confirmed.

The Native group in Wisenak successfully challenged the regulatory requirement that land be available for Native group selection as a precondition for eligibility. Wisenak, Inc. v. Andrus, 471 F. Supp. 1004 (D. Alaska, 1979). The District Court held that although Native group selection rights are limited to those lands the Secretary is authorized to withdraw and convey, the Secretary had no discretion to deny an otherwise eligible Native group its land entitlement on the grounds that no land was
available for selection within the group's locality. *Id.* at 1009-1010.

Subsequent to the decision in *Wisenak*, the Secretary waived certain and clarified other regulations regarding group eligibility, including the availability of the land selection provision. Secretarial Order No. 3083 (June 17, 1982).

Finally, in *Tanalian, Inc., et al.*, 75 I.B.L.A. 316 (August 30, 1983), the IBLA was called upon to define the term "locality" as used in the definition of Native group in ANCSA. The IBLA held that "locality":

"...[M]ust encompass the greater area in which other residents live in the proximity, as compared with the population density of lands beyond the area so designated. Evidence of the extent to which residents of the area share common interests or concerns in the local amenities, facilities, and services may be received as indicative of the geographic area of the locality..."

*Id.* at 320.

In summary, the Secretary's delay in enacting eligibility regulations governing Native groups added unwarranted uncertainty to the resolution of land claims of Native groups. This delay has led some groups to resolve their status and land claims by legislation. Unfortunately, not all Native groups possessed the resources to obtain legislative responses to their outstanding applications and some have since been found ineligible. Whether legislatively approved Native groups and those groups that were subsequently denied eligibility by administrative action were afforded disparate consideration or were judged by different standards approaching a breach of the policies set out in section
1601(a) of ANCSA has not been ascertained in the research underlying this analysis.

II. Land Settlement Issues: land withdrawal; selections; survey and conveyance; and land management issues.

The land settlement portion of ANCSA was one of two major components of the Alaska Native Claims Settlement Act. The cash payments to the corporations was the other major component. Thus, the delays which have occurred in making land conveyances to the corporations has been a major disappointment in the implementation of the Act.

Congress clearly intended that the process of land withdrawal, selection and conveyance should occur rapidly. H.R. Rep. No. 92-746, 92 Cong., 1st Sess. 43 (1971) ("Conference Report"). This desire for a rapid settlement is reflected in the withdrawal, selection, and conveyance time requirements established by Congress in the Act. Nearly all land from which village and regional Native corporations were to select their land entitlements was automatically withdrawn by Congress upon enactment of ANCSA. Section 1610(a), 1613(h), 1615(a). Additional lands (deficiency withdrawals) which would be required by the corporations to fulfill their entitlements were to be withdrawn by the Secretary of the Interior within sixty days after the enactment of the Act or as soon thereafter as practicable. Section 1610(a)(3). All lands selected by Native corporations would continue to be withdrawn until the Secretary conveyed them pursuant to section 1613 of ANCSA. Section 1621(h)(1). All other withdrawals terminated four years after enactment of ANCSA unless otherwise designated in the Act.
Id. Section 1615 (southeast Alaska villages) and Section 11(a)(2) (State TA'd Selections) withdrawals terminated after three years. The Secretary had authority to terminate any withdrawal upon finding that the withdrawal was no longer necessary to accomplish the purpose of the Act. Section 1621(h)(4).

Village corporations were required to file land selections within three years after enactment of ANCSA. Section 1611(a)(1). Regional corporation had four years within which to make their selections. 1611(c)(3). The Act said that the Secretary was obligated to issue immediately a patent to village corporations after the corporations selected appropriately withdrawn lands. Section 1613(a). At the same time the Secretary was to issue a patent to the subsurface estate to the appropriate regional corporation. Section 1613(f).

The conveyance process has been anything but rapid. See, "Land Title Should Be Conveyed to Alaska Natives Faster," General Accounting Office Report to Committee on Energy and Natural Resources (Senate) and Committee on Interior and Insular Affairs (House), June 21, 1978. ("GAO Report on Conveyances."); See also, GAO Draft Report, November 7, 1983. The Department of the Interior's failure to meet the stringent goals of Congress in large part flowed from the sheer bulk of the land settlement:

\[7/\] This "immediate conveyance" requirement has been construed to mean a conveyance within a reasonable time under the circumstances. Cape Fox Corporation v. United States, 456 F. Supp. 784, 805-806 (D. Alaska, 1978) rev'd and remanded in part at 646 F.2d 399 (9th Cir., 1981).
Forty-four million acres of land had to be conveyed to more than two hundred and twenty entities. Furthermore many of these lands were subject to various degrees of use or interest of numerous federal agencies, the State of Alaska, and other third-party interests. The particular road blocks to conveyance which arose out of the process of implementation are analyzed below.

A. Withdrawal.

Congress withdrew public lands in and around Native villages from all forms of appropriations under the public land laws and from selection by the State of Alaska. Sections 1610(a), 1613(h), 1615(a) and 1615(d) as amended. These land withdrawals were to provide the inventory of lands available to satisfy Native corporation land selection entitlements authorized by section 1611 of ANCSA. Congress also authorized the Secretary to withdraw "deficiency" lands where section 1610(a) withdrawals were inadequate to match Native corporation land selection entitlements. Section 1610(a)(3).

Section 1610(a) "village site" withdrawals produced relatively fewer problems than the Secretary's deficiency withdrawals. The scope of the mandatory Congressional withdrawals was determined by the definition of "public lands" and by the description of the areas in which the public lands were to be withdrawn. "Public lands" is defined in the Act as:

"All Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the
Alaska Statehood Act, . . . or identified for selection by the State prior to January 17, 1969."

Section 1602(e). Consequently, so long as the United States retained title to land in Alaska (subject to the two exceptions noted above) such land was withdrawn for selection by a Native corporation pursuant to section 1610(a)(1) of ANCSA.

The Secretary did not adopt regulations governing his determination of the "smallest practicable tract" necessary to enclose federal installations until October 22, 1980. 43 C.F.R. § 2655. The delay in adopting regulations generated uncertainty as to the validity of Native corporation selections and caused delay of conveyances. See, Annual Report of the Secretary 1980, Section 3(e).

Under the adopted "3(e)" regulations, the State Director of the BLM determines the amount of lands necessary to operate a federal installation. 43 C.F.R. § 2655.2 (1982). The remainder is available for selection. Id. The federal holding agency must present sufficient information to prove up its claim of agency use of installation lands at the time of enactment of ANCSA and throughout the selection period of the appropriate Native corporation. Id. at Section 2655.3(d). Frequently lands around a federal installation are quite valuable. Additionally, many federal agencies are reluctant to "give up" lands they might someday need. These factors have tended to make "3(e)" determinations controversial decisions which are fought hard by both the involved Native corporation and affected federal agency.
Early in the implementation of ANCSA there was some confusion as to the scope of the section 1610(a)(1) village site withdrawal. The village site withdrawal provided that:

(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) the lands in each township that is contiguous to or corners on the townships that encloses all or part of such Native village; and

(C) the lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection. . .

Determining the number of townships that were withdrawn is relatively simple where townships are aligned in straight grids. However, some confusion arises in Alaska were township grids are not straight, but rather are offset by "standard parallels" or "correction lines" at every fourth township boundary. As a consequence of the offset, part of the outer ring of townships were not in physical contact with the second level of townships although they were adjacent or cornering by legal description.

In Appeal of Eklutna, Inc., 2 ANcab 214, 84 I.D. 982 (December 19, 1977), the Alaska Native Claims Appeal Board reconsidered its early decision, reversed itself, and held that townships, which by legal description have a common corner but are not in actual physical contact due to the location of a "standard parallel" or "correction" line, shall be considered as not cornering for purposes of section 1610(a) of ANCSA. Cf.,
Appeal of Tanacross, Inc., 2 ANcab 379, 85 I.D. 97 (May 12, 1978), where a township was excluded from a section 1610(a)(1)(C) withdrawal because it failed to share a common corner due to an offset made at the corner by the BLM to cure a survey error. Consequently, many village site withdrawals were reduced by two townships. The State of Alaska actively and aggressively opposed the Native position that cornering by legal description was sufficient.

Section 1610(a) withdrawals included lands which had been selected by the State and tentatively approved ("TA'd"), but not patented. Section 1610(a)(2). Only a portion of a Native corporation's total entitlement, however, could come from such lands. Section 1611(a)(1).

Section 1610(a)(3) authorized the Secretary to withdraw additional lands for selections in those instances where 1610(a)(1) withdrawals failed to cover a Native corporation's land entitlement. Pursuant to this section, the Secretary withdrew three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. The withdrawn lands were required to be of similar character to those which were located near the village. The deficiency withdrawal is more restricted due to the requirement that the public lands be "unreserved, vacant and unappropriated." Consequently, deficiency withdrawals could not include National Forest, Wildlife Reserve, or State TA'd lands. This limitation caused more problems for some Native corporations than others.
Most deficiencies in withdrawals occurred because Native corporations were unable to select enough acreage within village site withdrawals due to physical limitations in the land (e.g. lands submerged beneath ocean and inland navigable waters) or selection restrictions set out in ANCSA (e.g. State TA'd land selection limitations). In many cases Native corporations were left with insufficient selectable acreage within the village site withdrawal to cover their land selection entitlement.

No regulations were published governing withdrawals, including deficiency withdrawals. Instead, the Secretary relied on his Undersecretaries who together formed an advisory committee known as the Alaska Task Force to assess existing land withdrawals under section 1610 and make recommendations for particular deficiency withdrawals. The Task Force worked with Native corporations in determining formulas for reallocation of lands and gathering information Native corporation deficiency withdrawals priorities. See, Alaska Native Management Report, March 30, 1973 at 1; May 15, 1973 at 1; and May 29, 1973 at 4.

The Task Force established July 1, 1973 as a deadline for modifications to Native withdrawals. Id. May 15, 1973 at 1. Task Force discussions with Native corporations were necessary to identify lands which were of similar character and near in proximity to regional corporation Native villages. If an agreement could be negotiated sufficient lands to accommodate the balance of a Native corporations selection entitlements were withdrawn by public land order. See, e.g., Rowe v. United States, 464 F. Supp. 1060, 1068-1069 (D. Alaska, 1979). Aff'd.
in part and rev'd and remanded in part at 633 F.2d 99 (9th Cir. 1980).

The Secretary and his Task Force were unable to obtain amicable deficiency withdrawal agreements with all Native corporations. Deficiency withdrawals persisted to be a problem with many Native corporations including the Cook Inlet Region ("CIRI") and Chugach Natives region. Both corporations filed suit in the federal district court in Alaska claiming, among other things, that the deficiency withdrawals for the regional corporations and their respective villages were not similar in character and kind to the land on which the villages were located. See, Report of the Secretary 1975-1976 at Section 12. The District Court found against CIRI holding the Department of the Interior had complied with the requirements of the law regarding deficiency withdrawals. CIRI appealed the decision to the 9th Circuit Court of Appeals. Thereafter, CIRI negotiated a land settlement agreement which was implemented by legislation providing for alternative land withdrawals and selections for CIRI and its villages. See, Pub. L. No. 94-204 § 12, as amended by Pub. L. 94-456, Public Law 95-178, and section 1435 of Public Law 96-487. Legislative action and substantial negotiation between the Departments of the Interior and Agriculture, State of Alaska and Chugach Natives, Inc. was also necessary to resolve Chugach's inadequate withdrawals which did not occur until a settlement agreement was entered into in January 1983. See, Pub. L. No. 96-487 § 1430.
By December 18, 1975 all withdrawals terminated except for those on which Native corporations validly had made selection applications. Section 1621(h)(1). Withdrawal for purposes of selection under section 14(h) was maintained until October 1, 1976.

Many new withdrawals were authorized by special legislation. For example, Konig obtained special withdrawals in Public Law 94-204, §15. Section 9 of Public Law 94-204 rewithdrew lands for selection by the Klukwan village corporation. Sections 1415 - 1435 of ANILCA authorized withdrawals, selections, and exchanges for the benefit of various Native corporations. See generally, S. Rep. No. 96-413, 96th Cong., 1st Sess., Alaska National Interest Lands Report of Committee on Energy and Natural Resources of the United States Senate (November 14, 1979). Furthermore, section 1410 authorizes the Secretary to withdraw available lands for village corporation selection in those instances were the village did not select sufficient lands to obtain its full entitlement. Section 1621(j)(2).

In summary, physical limitations of the land combined with legal restrictions in ANCSA pertaining to the withdrawal or selection of lands within the village site withdrawals frequently resulted in the need for deficiency withdrawals. The Secretary's Alaska Task Force identified or negotiated adequate withdrawals in most situations but often faced severe shortages of land which were adequate for deficiency withdrawals. Some legal suits were filed to compel withdrawals of suitable lands. Many withdrawal problems were ultimately resolved by legislation.
B. Land Selections.

Native corporations selected their land entitlements from their respective withdrawal areas. Entitlements and selection options vary depending on whether the Native corporation is a regional corporation, a village corporation, a Native corporation organized pursuant to section 1613(h)(3) ("urban Native corporation") or an incorporated Native group.

Land that is selected by a Native corporation is immediately segregated. 43 C.F.R. § 2651.2, 2653.2(d)(1982). Segregation prevents the appropriation of selected land by third parties under the public land laws, and from selection under the Statehood Act. Section 1610(a)(1) and (2). Thus, selection of lands under ANCSA serves to extend the period of withdrawal of selected land until such time as the land is conveyed or the selection is relinquished. Section 1621(h).


The first set of regulations released by the BLM in September 1972 met with broad opposition from the Natives community. Alaska Native Management Report, October 24, 1972 at 2. After a second draft was issued and there was still considerable opposition to this draft, thereafter discussion and
and debate between the Native corporations and BLM followed the release of the second set of proposed rules and regulations. Alaska Native Management Report, March 30, 1973 at 1, 4-8. Work sessions were carried on over a period of two weeks by representatives of the Alaska Federation of Natives ("AFN") and the Department of the Interior's Alaska Task Force and Working Committee made up of all the Undersecretaries in Interior. Alaska Native Management Report, May 15, 1973 at 1,8. This work session resulted in the final set of regulations that was published on May 30, 1973.

The regulations require Native corporations to submit selection applications to the BLM together with proof of their authority to act on behalf of the corporation and, in the case of village corporations, a certificate of incorporation. 43 C.F.R. § 2650.2 (a), (b) and (c)(1982). The applications must be timely filed, must adequately describe the land selected, and must conform to the selection limitations applicable to the Native corporation submitting the application.

The selection regulations have remained in force as enacted except for minor revisions and additions. The selection regulations generally conform to the limitations and standards set out in the Act. Significant variances from or interpretations of selection provisions of ANCSA are discussed below.

Listed and unlisted villages which the Secretary finds eligible under Section 1610 were authorized to select lands pursuant to Section 1611. Section 1610 village corporation land
entitlements are set out in section 1613(a) and vary in acreage based on the enrollment of the village corporation.

Section 1611(a) and (b) list the legislative parameters of Section 1611 village corporation selections. Section 1611(a)(1) required villages to select lands from the section 1610(a) withdrawals, subject to the condition that they could not select more than 69,120 acres from State TA'd land or 69,120 acres from wildlife refuges or national forests. Section 1611(a)(2) required village selections to be contiguous and compact, except as separated by bodies of water or by lands which were unavailable for selection, in whole sections, and, if feasible, in not less than 1280 acre units. A 1980 amendment allows the Secretary to waive the whole section requirement under circumstances which promote land management or where another Native corporation owns the remaining section lands. Pub. L. No. 96-487 at §1402.

Southeast village corporations listed in Section 1615 of ANCSA were authorized to select lands pursuant to section 1615(b). All southeast village corporations may only select one township or 23,020 acres of land. Section 1615(b). Although, southeast village selections also had to be contiguous and compact, no "whole-section" selection requirement was imposed by ANCSA.

The BLM selection regulations combine section 1610 and 1615 village selection limitations in one subpart. 43 C.F.R.§ 2651.4. The limitations in the regulations generally reflect those listed in ANCSA. One exception, is the regulation which allows villages
(and regions) to select lands within two miles of a first class or home rule municipality so long as the village corporation is located in a community which is "itself a first class or home rule municipality..." *Id.* at 2650.6; *See also*, Section 1621(1). The language of the ANCSA provision does not suggest that an exception was intended to apply to municipalities that happened to have an ANCSA village corporation within their boundaries. *Id.* It may be inferred that such an exception was intended given that the vast majority of eligible Native villages were organized as second class cities in 1971 and thus avoided the municipal land selection limitation. In the absence of any supportive legislative history (which was not found in this research), however, the regulations clearly exceed the authority provided by the Act.

The regulations give village corporation selections priority over those of regional corporations. *Id.* at 2651.4. Although no specific authority exists in the Act for such a priority, it flows naturally from the statutory requirement that village corporations select contiguous and compact parcels first from their village sites and then from the nearest available lands. Moreover, the priority does little harm to regional corporations since they receive title to the subsurface of any lands selected by the village (with the exception of village selections within wildlife refuges and the Petroleum Reserve).

Regional corporations as a group, excluding the 13th Regional Corporation, were entitled to select 16 million acres under a complex formula set out in Section 1611(c) of ANCSA.
Regional corporations with disproportionately large numbers of village corporations within their boundaries acquire no land selections of their own. These "no-selection" regions receive automatic conveyance of the subsurface estate beneath their village corporation selections pursuant to section 1613(f). Whenever a village selects lands within a wildlife refuge or the Petroleum Reserve, the region must select other lands in lieu of the subsurface estate beneath the respective village's selection. Section 1611(a)(1).

Regions with few villages relative to their total land area are more likely to acquire their own land selections as a consequence of the entitlement computation in Section 1611(c). These regional corporations select their entitlements from section 1610(a)(1) village site and section 1610(a)(3) deficiency withdrawals. The only statutory limitation is that they must select townships in checkerboard patterns within section 1610(a)(1) village site withdrawals. Section 1611(c)(3).

Amendments to section 1610(c) of ANCSA allow regional corporations the option of selecting, or excluding from certain prior selections, any mineral estate that the United States has reserved to itself. Section 1611(c)(4).

Regional land selection regulations implement the checkerboard limitation. In addition, the regulations apply substantially the same standards of compactness and contiguity to regional corporation as are applied to villages, including the "whole-section" selection requirement. Regions objected to the whole section requirement in discussions preceding enactment of
the regulations, but to no avail. Alaska Native Management Report, May 15, 1973 at 1-8. The regional corporation selection limitations have not be overturned and, in fact, have been adopted by Congress in subsequent ANCSA amendments. See, Section 1611(c)(4)(C).

The four urban Native corporations are entitled to conveyance of 23,040 acres of surface estate "in reasonable proximity to [their respective] Municipalities." Section 1613(h)(3). Similarly, Native groups which incorporate and are found eligible are entitled to no more than 23,040 acres from the lands surrounding the group's locality. Section 1613(h)(2).

The regulations allow Urban Native corporations to select lands within 50 miles of their respective cities. There have been no indications that this is not a reasonable interpretation of the Acts provision for selections "in reasonable proximity to the municipalities." Section 1613(h)(3).

Similar standards have not been applied to Native groups. Indeed, under the regulations the Secretary declared groups ineligible if lands were not available for selection within the locality described in the groups application. 43 C.F.R.$ 2653.6(a)(6). The Secretary's denial of any selection rights based on this regulation was overruled in Wisenak Inc. v. Andrus, 471 F. Supp. 1004 (D. Alaska, 1979), as discussed above. The Court ordered that the Secretary should be given the opportunity to adopt proposed regulations which would allow in lieu selections for Native groups. At this time no such in lieu
regulations have been adopted and the Wisenak case is still in litigation on eligibility issues.

Finally, Native corporations strenuously objected to BLM regulations charging lands beneath non-navigable waters against their selection entitlements. Alaska Native Management Report, May 15, 1973 at 1-8. Chargeability remained a sensitive issue until Secretary Watt agreed to a negotiated settlement on several navigability questions in 1983. The newly adopted Interior policy will not charge submerged lands beneath non-navigable waters against Native corporation entitlements. Secretarial Order No. __________. Similar attempts to resolve questions of navigability determination have not been so successful. This matter is discussed below in the conveyance section.

In summary, land selection regulations enacted by the BLM generally reflect the selection limitations in ANCSA with limited exceptions. Disputes regarding the interpretation of the regulations and associated statutory language have been held to a minimum due primarily to extensive, if somewhat belated, consultation with Native corporations, and mandatory village corporation selection arbitration provisions. Finally, negotiated agreements with the executive branch have resolved major disputes regarding chargeability regulations associated with Native corporation land selections.

C. Survey and Conveyance.

Section 1612(a) of ANCSA requires the Secretary to survey the exterior boundaries of all areas selected by village corporations and designated for conveyance. In addition, the
Secretary must survey all fee inholdings within Native corporation conveyances and any other lands that are patented pursuant to ANCSA. Regulations conforming to the language of the Act were enacted on May 30, 1973. 43 C.F.R.§ 2650.5. As of December 31, 1982, the Secretary reported that surveys of the exterior boundaries of 181 village selections have been completed out of 220 required. However, completion of the fee parcel surveys and remaining exterior boundaries of Native corporation selections is not expected in the near future and will require substantially more funds and manpower than is presently available. See generally, Draft GAO Report; Alaska Land Conveyance Program, November 7, 1983.

ANCSA provides that the Secretary shall immediately convey lands to Native corporations after their selections. Sections 14(a), 14(e), 14(f). The Alaska Federal District Court subsequently held that the requirement for immediate conveyance did not mean instant conveyance but rather "requires conveyance within a reasonable time under the circumstances." Cape Fox Corporation v. United States, 456 F. Supp. 784, 806 (D. Alaska, 1978) reversed on other grounds at 646 F.2d 399 (9th Cir., 1981). The District Court stated that Congress contemplated that conveyances would not immediately follow selections of land by Native corporations. The Court cites as support the escrow account set up by Pub. L. No. 94-204 which would hold revenues derived from selected lands before such lands were conveyed to the Native corporations. The Court also found that an immediate conveyance interpretation would be inconsistent with, and in
conflict with, the Secretary's duty to reserve easements prior to conveyance (section 161(b)(3), section 1616(c)), his duty to make conveyances subject to valid existing rights (section 1616(g)), and with his duty to make the patent subject to the reconveyance requirements of section 1613(c).

Unfortunately, the determination of reservations in conveyance documents such as those listed in 

Cape Fox have impeded the conveyance process. Such reservations, and others including section 1613(c) village corporation reconveyance obligations, not only delay conveyances but also cloud land titles conveyed to Native corporations and diminish the economic value of the lands until title is cleared.

Interior's initial easement regulations (43 C.F.R. 2650.4-7(1973)) and statements of policy regarding public easements caused much concern among Native corporations because Interior was exceeding the requirements of the Act. See, Secretarial Order No. 2983 (reservation of local easements pursuant to section 1616(b)), and Secretarial Order No. 2987 (floating easements for transportation and energy purposes). Pursuant to these regulations and policy, the BLM broadly interpreted the Secretary's authority to reserve public easements.

Native corporations were not the only group to criticize Interior's approach to easement reservations. The Joint Federal State Land Use Planning Commission ("LUPC") in comments to the Assistant Secretary of the Interior, Royston Hughes, stated that the Department of the Interiors draft plan for reserving public
easements did not reflect the public discussion, policy analysis and legal research which were the basis for the position papers prepared by the LUPC, State of Alaska and the BLM State Office. See, Alaska Native Management Report, April 15, 1975 at 7; June 17, 1974 at 8. Although the emphasis of the comments reflect the concerns of the LUPC, the analysis reflected the sentiment of those who thought Interior was exceeding its easement reservation authority. A synopsis of LUPC's comments regarding the BLM's draft easement reservation plan follows:

1. That section 1616(b) does not authorize easements for dam sites, drill sites, power sites, and other functions not related to public access.

2. LUPC objected to the reservation of recreational access easements on water ways and water bodies where historical history of public used does not already exist.

3. As a procedural matter, the plan to discuss utility and transportations corridors along with local easements is a mistake due to the different considerations governing the reservation of the two kinds of easements. Such policy makes local easements harder to define than need be.

4. Interior's plan to dedicate certain easements of the State of Alaska concerned the LUPC.

5. LUPC raised questions as to the validity of shore-line, periodic, and site easements on major water transportation routes. LUPC believed only periodic site easements could be identified on major waterways and across
lands selected by village and regional corporations. LUPC also objected to the lack of general guidelines as to when the continuous linear, periodic linear or site easements were to be used which might naturally lead to arbitrary ad hoc decisions.

6. Like 5 above, the draft did not provide guidance for the establishment of easements along recreational lakes and bays.

7. The Department draft did not include definitions which might, for critical terms also lead to arbitrary administrative decisions.

8. LUPC objected to the lack of statements in the conveyance documents which would describe the permitted and prohibited use of reserved easements.

9. LUPC expressed the believe that section 17(b)(3) was not appropriate mechanism to provide private access to areas claimed under valid existing rights.

10. LUPC objected to a clause in the draft proposal which would allow the identification of situations requiring easements to be made in the future. The Commission believed that this clause might allow the Department to form additional easement policies without the need for public comment.

11. LUPC noted that the Department failed to set out general policy and criteria section which would govern the process of easement reservation.
12. LUPC questioned the length of time the Department draft allowed easements to be reserved for utility and communication purposes when there was no present need for these easements. The draft stated that such easements could be reserved if they might be necessary by the year 2001.

13. The proposed draft failed to state whether both banks or only one bank would be required to be reserved by easement on recreations rivers and streams.

14. LUPC objected to the Department draft policy of reserving easements to protect both the public and Native interest. LUPC stated that in their opinion Native use could be the basis for a reservation only in so far as it is public in character.

15. LUPC recommended that the administration adopt the Commission's procedure for identifying and reserving easements.

In 197_, the Secretary issued Secretarial Orders Nos. 2982 and 2987 which set out the Departments easements guidelines. In general, the principal objections of the LUPC and the Native groups were disregarded by the Secretary and the guidelines proceeded to include broad authority to reserve continuous coast line easements, easements for recreational use on Native lands, and non-specific floating easements for transportation and natural resource purposes.

Three separate suits were filed soon thereafter by Native corporations and by a sportsman group. These cases were consolidated and tried in the Federal District Court in Alaska.
Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska, 1977). At issue in the case was whether the Secretary was bound either by the easements recommended by the LUPC or the specific criteria used by the LUPC to identify public easements. In addition, the Court considered the propriety of particular easements that the Secretary had reserved in light of the legislative history of ANCSA.

The Court held that the Secretary was not bound to choose from easements recommended by the LUPC. The Court came to this conclusion based on the fact that the LUPC was designated merely an advisory group under the Act and that language which would have allowed the LUPC to identify and bind the Secretary to specific easements had been eliminated from the final drafts of legislation prior to enactment of ANCSA. Contrary to the Secretary's arguments that he had unfettered discretion to reserve easements, the Court decided that the Secretary was bound by the criteria set out in the Act. The Court opined that to disregard this criteria would make the actions of the Congress in setting them out meaningless. Id. at 675. The Court noted in its review of the legislative history of the easement provision that although other facets of the original Senate bill had been eliminated the underlying purposes and criteria of public easements had not changed and therefore the Secretary should be bound by these criteria. Id.

The Court then continues to decide the propriety and legality of some of the Secretary's specific easement reservations based on the criteria set out in section 17(b)(1).
In brief, the Court held that the purpose of easements along
waterways could be accommodated by the reservation of site
easements rather than continuous shoreline easements. In a
similar matter, continuous shoreline easements along major
waterways for recreational purposes and travel along the shore
were deemed to be void since there was no showing of necessity
for such uses. Moreover, the Court held that the criteria for
easement reservations did not include recreations use, rather it
only provided for access to other areas where recreation might
occur. Id. at 677-78. The Court held that river banks and river
bed easements were in excess of those necessary for access. The
Court noted that the State does not own the stream bed in all
major water ways and that such easements for Native access are
unnecessary.

Finally, the Court held that the Secretary could not reserve
floating easements for transportation of natural resources from
public lands. The Court noted that the settlement was intended
to be fair and just and that floating easements would create
severe clouds on title and impair the ability of natives to use
their lands, thus defeating the principal policy of the Act.

Following the Public Easement Defense Fund decision, the
Secretary on November 27, 1978, enacted new regulations
consistent with the decision. 43 C.F.R. §2650.4-7 (1982). Even
before the case was decided, the Secretary was negotiating
easement agreements with Native corporations which would allow
the parties to conform the easements to any subsequent decision
in the case. The decision in the Public Easement Defense Fund
gained further permanence by subsequent Congressional action in ANILCA which further enunciated easement policy that would apply to Native corporation lands in Alaska. 43 U.S.C. §1633(a), (b), and (c). These provisions state specifically that Secretarial easement reservation shall be governed by the criteria set out in section 17(b)(1). Subsection (a)(2) reflects easement reservation limitations imposed by the Alaska Federal District in the Public Easement Defense Fund Decision.

Subsection (a)(1) and (b) both expand upon the criteria which the Secretary must consider in reserving easements and expands his authority to require easements in the future. Subsection (a)(1) limits the Secretary's discretion to forego consideration of Native lifestyle and subsistence needs. The Secretary must demonstrate consideration of this criteria in every easement reservation. Thus, the Secretary has the burden of insuring that easements only minimally affect Native lifestyles and subsistence uses. Failure to design easements "so as to minimize their impact on Native lifestyles and on subsistence uses," can be the basis for a Native corporation or Native group to seek judicial relief. At the very least, this clause provides a bargaining tool for Native corporations in their negotiation of easement reservations. Subsection (b) authorizes the Secretary to acquire easements on Native lands, which are not reserved at the time of conveyance, by purchase, donation, or exchange under the authority of section 22(f) of ANCSA.
Conveyances under ANCSA are received subject to valid existing rights. ANCSA and its implementing regulations distinguish between "valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements" and lawful entries that lead to acquisition of title. 43 C.F.R. § 2650.3-1. Entries that lead to temporary interests are noted on conveyance documents as a condition or restriction on the title. Valid permanent entries that lead to a patent or its equivalent are excluded from conveyance.

Patents are issued to valid entries pursuant to section 22(g) (homesteads, headquarter sites, trade and manufacturing sites, or small tract sites). Indeed since ANILCA, pending applications for such entries (with certain exceptions) are automatically approved absent a timely filed protest. ANILCA § 1328; See e.g. Henietta Roberts Vaden, 70 I.B.L.A. ___ (January 20, 1983). Theoretically, this automatic approval provision reduced the incidence of adjudications and should lead to quicker conveyances. It is too early to tell whether in practice this objective has been achieved.

Confusion arose early in determining whether the State could create valid existing rights in pre-ANCSA TA'd lands. The Secretary concluded that the State did have the power to create fee interests, as well as less than fee interests with the option to obtain a fee which could be exercised after the enactment of ANCSA so long as the option existed prior to passage of ANCSA.
Valid Existing Rights Under the Alaska Native Claims Settlement Act, Sec. Order No. 3016; 85 I.D.1. (December 14, 1977); Cf. Appeals of the State of Alaska and Seldovia Native Association, Inc., 3 ANCAB 1, 84 I.D. 349 (June 9, 1977) (Open-to-entry leases are a less than fee interest that can be withdrawn for selection where as any fee interest created by the State in TA'd lands before the enactment of ANCSA are not subject to withdrawal).

Subject to limited exceptions, both the State of Alaska and the United States may create temporary interests such as a lease on contract before enactment of ANCSA when otherwise authorized and such interest will be preserved by section 14(g). \(^8\)/

D. Interim Management.

The United States may create temporary interests in land upon consultation with Native corporations, except that section 1618(b) "Reserve" village corporations can deny permission to create such interests. ANCSA section 1621(i); 43 C.F.R. § 2650.1(a)(2)(i) and (ii). Native corporations were reluctant to support such interim uses of selected lands until Congress authorized escrow accounts to hold revenues earned by these uses for the subsequent Native patentee. See, Section 2. Pub. L. No. 95-204.

Upon conveyance of the lands underlying temporary interests, administration of such interests remain with the State of Alaska.

or the United States unless the responsible entity waives administrative. 43 C.F.R. § 26504.3. The regulations diminish the Department of the Interior's ability to resist waiver by requiring the Secretary to find that the interest of the United States requires continuation of administration to avoid a waiver. Id.

D. **Cash Settlement**

Section 1605(a) of ANCSA established the Alaska Native Fund in the United States Treasury to which monies were deposited as appropriated by Congress or received from mineral resource revenues in Alaska. The purpose of the Fund was to pay a total cash settlement of $962,500,000 to Native corporations and Native individuals under ANCSA. Section 1605(a) contains a schedule of authorized appropriations which would be paid into the fund during each of the ten years following the enactment of ANCSA. Federal appropriations and payments to be $462,500,000. The remaining $500,000,000 deposited to the Fund from revenues derived from mineral leases and sales which would otherwise have been paid to the State of Alaska pursuant to the Alaska Statehood Act. Alaska Native Fund deposits also came from an overriding royalty on royalties, rentals and bonuses from the disposition of minerals on State TA'd and patented lands. Section 1608(c). The overriding royalty was two percent of the gross value of the minerals. At the time ANCSA was passed it was expected the Prudhoe Bay field would provide a substantial source of revenues for the Fund.

Distributions from the Fund were made at the end of each three months of the federal fiscal year, based on the relative
numbers of Natives enrolled in each region. Distributions commenced upon completion of the Native roll taken pursuant to section 1603 of ANCSA. All deposited appropriations and mineral revenues were distributed except for those reserved for payment of attorneys and other fees due pursuant to section 1619. Section 1605(c).

The Bureau of Indian Affairs initially prevailed in a dispute with the treasury department, and as a result the Alaska Native Fund was handled like a tribal trust fund and earned interest while on deposit. Report of the Secretary 1973. However, the Comptroller General later ruled that the Fund was not be considered an Indian trust fund and therefore balance on account would not earn interest of any kind. Report of the Secretary 1973. Thus, after 1973, the funds held in the Alaska Native Fund did not earn interest.

The proper distribution of funds in the Alaska Native Fund was considered in two cases. The first case decided that Natives enrolled to villages which elected to select their prior reservation lands and thereby deny themselves shareholder status in their respective regional corporation were not to be considered Natives enrolled to the region for the purpose of determining the distribution of the Alaska Native Fund monies. Doyon Ltd. v. Bristol Bay Native Corporation, 569 F.2d 491 (9th Cir.,) cert. denied 439 U.S. 945 (1978). Section 1618(b) reserved village corporation shareholders were enrolled initially to each region and only later made the election to acquire reserve lands and forfeit their right to receive distributions from the Fund.
Doyon contended such Natives should be counted as enrolled to the region for purposes of Fund distributions. The 9th Circuit Court, however, relied on legislative history to decide that "Natives enrolled in each region" was intended to refer the stockholders of the regional corporations and thus hold that natives enrolled to section 19(b) reserve village corporations would not be counted as native enrollees to their respective regional corporations for the purpose of computing distributions from the Alaska Native Fund. Alaska Native Fund monies held pending the litigation were distributed in accordance with the Court's final ruling on December 29, 1978. See Report of the Secretary 1978.


Delays in construction in the TransAlaska Oil Pipeline resulted in lesser revenues being deposited into the Fund under the revenue sharing provisions of section 1608 than had been anticipated at the time ANCSA was passed. As a consequence, the Transalaska Pipeline Authorization Act contained a provision which amended section 1608 of ANCSA by authorizing the sum of 5 million dollars to be appropriated from the United States Treasury into the Alaska Native Fund every six months of every fiscal year beginning with the fiscal year ending June 30, 1976,
as advanced payments chargeable against the revenues to be paid until such time as the delivery of North Slope crude oil commenced. Pub. L. No. 93-153 § 407 (1973). Thus, even after the Fund was completely paid off on December 10, 1981, revenue sharing funds continued to be paid into the treasury until the advances were reimbursed. Section 1608(g).

Revenue sharing deposits to the Alaska Native Fund decreased in the periods beginning approximately July, 1975, due to a legal dispute between the State of Alaska and the United States over mineral revenues collected from the Kenai National Moose Range. Funds derived from the Moose Range were deposited in a "suspense" fund in the treasury for distribution upon resolution of the dispute. Report of the Secretary 1976 at Section 9. The reduction in revenues received by the State derivatively caused a reduction in the amount the State was required to deposit to the Alaska Native Fund. The impact of the dispute over the Kenai Moose Range funds was more than offset when on June 30, 1980, the State of Alaska made an advance revenue payment to complete the 500 million dollar revenue sharing limitation established by section 6(a)(3) and (9) of the Alaska Native Claims Settlement Act. Report of the Secretary 1980 at section 9. The advance payment was in the amount of $292,598,066.52. Report of the Secretary 1981 at section 9.

Section 14 of ANILCA directed that the appropriations due to be made under ANCSA were to be deposited into the Alaska Native Fund on the first day of the fiscal year for which the monies were appropriated. This was to insure that the Secretary could
immediately invest the funds for the benefit of the Natives.
See, ANILCA Senate Report at 315.

Those village corporations which elected pursuant to section 1618(b) to take title to their former reserve lands did not receive any funds from the Alaska Native Fund. Unless such corporations were able to organize, receive title to their lands rapidly, and then develop their lands, those corporations found themselves in the position of having duties and responsibilities but no cash to pay for any expenses. In 1976, Congress recognized this problem and authorized a one time appropriation of $100,000 for planning, development and other purposes. Pub. L. No. 94-204 § 14. Urban Native Corporations were each granted $250,000 for the same purposes. Id.

Section 1606(j) of ANCSA required regional corporations to redistribute a portion of the funds they received from the Alaska Native Fund to their village and at large shareholders. The method of this distribution is discussed later in this report. One case arose which determined the Alaska Native Fund payments to individuals would have on their eligibility for food stamps. In Hamilton v. Butts, 520 F.2d 709, (9th Cir., 1975) the Court held that section 1606(j) and 1606(m) payments received by Alaska Natives were not "resources" for the purpose of determining whether native households were eligible for food stamps. Id. at 1714. The Court based its conclusion on language in the declaration of policy in section 1601 stating that the Settlement Act was not to "diminish any obligation of the United States or of the State of Alaska to . . . promote the welfare of natives .
... Or be construed to be ... curtail the activities ... federal agencies ... conducting grant programs in Alaska."

In summary the distribution of the cash portion of the settlement was implemented in conformity with the original intentions of Congress. The problems which arose involved "technical" interpretations of ANCSA and were resolved either by administrative decision or in a few instances by litigation. Such problems, while undesirable, are to be expected when the distribution involves a complicated process, with many participants and almost one billion dollars. Furthermore, Congress by amendment to ANCSA, or implementing legislation, acted to remedy those situations which resulted from unanticipated events (such as the delays in production from Prudhoe Bay) or simple oversights in the original legislation (such as the failure of 19(b) villages and Native groups to receive any funds whatsoever).


As the government that charters ANCSA corporations, the State of Alaska bears the burden of regulating Native corporation business activities. The State of Alaska's regulatory activities, however, are constrained by various conditions and restrictions imposed on Native corporations by ANCSA, its amendments, and other implementing legislation. The State of Alaska has enacted special corporate legislation to track and implement ANCSA. This section reviews the respective
implementation activities of the United States, the State of Alaska, and the Native corporations.

Regional corporations were required to incorporate under the laws of Alaska as for profit corporations and to submit their articles of incorporation and by-laws to the Secretary for approval within 18 months after December 18, 1971. ANCSA section 1606(d) and (e). All twelve regional corporations received approval from the Secretary of their articles before submission to the State and without any major problems or difficulties. Report of the Secretary June 30, 1973 section 1606(e). ANCSA also required that all regional corporation articles of incorporations could not be amended in the first five years following the enactment of ANCSA without the approval of the Secretary. Id. The Secretary reported that such review did occur and there are no indications that problems or disputes arose as result of such review. Report of the Secretary 1972.

In comparison to regional corporations, village corporations were established without the assistance or approval of the United States. Rather, each regional corporation was responsible for assisting and advising its respective Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of ANCSA. Id. at Section 1607(b). Moreover, for the first five years following the enactment of ANCSA, regional corporations were responsible for reviewing and approving any amendments to the articles of incorporation of village corporations and their annual budgets. Id.
Technically, corporations established by native groups and urban corporations pursuant to section 1613 of ANCSA are not village corporations as that term is defined in ANCSA. Id. at section 1602(j). Regional corporations, therefore, do not need to assist them in incorporating. Thus, Native groups and corporations organized pursuant to section 1613(h)(3) are left to organize on their own without any requirement for assistance or guidance from a regional corporation.\(^9\) In practice regional corporations did not make these fine distinctions but rather provided assistance to all village and group corporations.

ANCSA requires that regional and village corporation shareholders each be issued one hundred share lots of voting stock subject to restrictions on alienation for a period of 20 years after December 18, 1971. Id. at 1606(g), (h). Regional and village corporations also are required to conduct annual audits which were to be transmitted to their stockholders. Id. at Section 1606(o); Section 1607(c). Upon expiration of the 20 year period, Native corporations must cancel all restricted stock and reissue new shares in the appropriate classes to stockholders. Id. at Section 1606(h)(3) and 1607(c).

Amendments to the stock issuance provision authorize Native corporations, through an affirmative vote of a majority of their

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\(^9\) Many of the provisions in ANCSA are made applicable by reference to Native groups and corporations organized under Section 1613(h)(3). ANCSA frequently refers to the latter corporation by the term "urban corporation." A technical oversight on the part of ANCSA amendment drafters, however, has left the term "urban corporation" undefined.
shareholders, to impose additional restrictions on the ownership and right to alienate stock in native corporations. Id. at 1606(h)(3)(B). These provisions if adopted by December 18, 1991, could include, among other legally permissible restrictions, the denial of voting rights to non-Native shareholders and the granting of purchase right options to the Native corporation or immediate family of the stockholder desiring to sell his stock. Section 1606(h)(3)(B).

The stock restriction amendment supercedes Alaska corporation law by providing that the restrictions may be adopted by amending the articles of a Native corporation with a simple majority of the outstanding shares. Id. at Section 1606(h)(3)(C)(I), (p). Alaska law requires at least a two-thirds affirmative vote of the shares entitled to vote to amend articles of incorporation. A.S. 10.05.276. Furthermore, in order to remove any restrictions provided by this section, not only must an affirmative vote be obtained from a majority of the outstanding shares, but a majority must also must be obtained from the holders of those shares that are entitled to vote under the articles before the restriction is removed (i.e. Native shareholders or their descendants.) Id. at § (3)(C)(ii). Except for the lesser standard of "a simple majority of the outstanding shares," such a veto power in the hands of Native shareholders or their descendants is not all that different than requiring all classes of stock to approve a corporate action.

ANCSA provides that the stock of a deceased shareholder shall transfer by will or under the applicable laws of intestacy.
Section 1606(h)(2). In the event the deceased stockholder has no will and no heirs, the stock escheats to the regional corporation. These provisions also apply to village corporations, urban corporations and Native groups. Section 1607(c).

The distribution of Native corporation stock of deceased stockholders is not governed by the regular provisions of Alaska law applicable to the stock of non-ANCSA corporations. Instead, the State has enacted special legislation. Until December 18, 1991 Native corporation stock which is inalienable, except upon death or special conditions, is not subject to probate nor is the value of such stock considered part of the estate of the deceased stockholder. A.S. 13.16.705. The State authorizes regional corporations to determine to whom ANCSA Native corporation stock should be distributed. Persons claiming an ownership interest in the stock of a deceased shareholder must submit affidavits and other proof to the regional corporation for determination. If the regional corporation fails to accept the affidavit, the claimants remedy is to compel delivery of the stock by proceeding in the State Superior Court pursuant to A.S. 13.16.685.

This method of informal probate is functioning at the regional level with regard to regional corporation stock. In many instances, however, regional corporations are refusing to probate the stock of their village, urban, and native group corporations. In the absence of informal regional corporation probate, it appears that some village corporations are taking it upon themselves to make determinations on the distribution of
village corporation stock. A.S. 13.16.705 does not authorize village corporations to make these determinations and transfers. This lack of authority may result in recision of the transfer.

The State changed the normal rule applied to the spouses in testate shares where Native corporation stock is involved. See A.S. 13.11.012. Until December 18, 1991, a spouse will receive all Native corporation stock held by the deceased spouse in the absence of any children and one half the stock if there are children. This provision eliminates the parent's priority interest in any stock and the consideration of the spouses $50,000 dollar preference which would apply under normal intestate procedure. Compare A.S. 13.11.010.

Subsequent to the establishment of Native corporations under ANCSA, it became apparent that many of the village corporations and other small corporations established by the Act were not economically viable due to the high cost of administration in comparison to their revenues. For this reason, Congress amended the Act and added a section authorizing mergers of native corporation. Section 1627. Special legislative authority was necessary since native corporation stock was inalienable until 1991 and therefore eliminated the possibility of mergers. Pursuant to this section, Native corporation may merge with any other corporation or combination of corporations so long as a majority of the stockholders in each corporation agrees to such merger. The merger provision also provides guidance in altering or eliminating the special resource revenue dividends paid to at large shareholders. In addition, if a village corporation merges
it is required to convey its section 1613(f) privilege to withhold consent to mineral development activities of regional corporation to a separate entity composed of the respective Native village residence.

The federal merger provision supersedes state law in that only a majority of Native corporation shareholders in each corporation merging are required to approve such action. The State of Alaska requires an affirmative of at least two-thirds of the outstanding shares to approve a merger. The State of Alaska recognizes this departure from its laws in A.S. 10.05.005.(c).

The State went beyond mirroring federal mandates in its treatment of Native corporations authority to declare dividends and in reviving Native corporations which had been involuntarily dissolved. Native corporations in the State of Alaska now have the option of paying dividends in cash or property out of unreserved or unrestricted earned surplus of the corporation as other corporations are authorized to do or out of net profits for the fiscal year in which a dividend is declared and the preceding fiscal year except when the corporation is insolvent. A.S. 10.05.005.(d)(1) and (2). No other category of corporations in the State of Alaska may declare dividends out of net profit. Moreover, in calculating net profits Native corporations are authorized to include net profits derived from wasting assets (timber resources and subsurface estate) without regard to depletion of those assets. Id. at § (d)(2). This provision allows Native corporations to declare dividends based on resource revenues which otherwise would not be capable of showing
sufficient revenue in respect to their overall cost to allow the corporation to declare dividends. Equally convincing arguments can be made that the State's actions with regard to Native corporation authority to declare dividends is consistent with the policy of ANCSA in that the implementation of the Act should be "in conformity with the real economic and social needs of Natives." Some would argue that this provision permits bankrupting the corporation while others would say that this provision of State law allows the corporation to place money in the hands of shareholders who otherwise wouldn't see any benefits out of the Act.

Because many village corporations failed to submit annual reports to the State of Alaska and were thereafter involuntarily dissolved, the State enacted in 1982 a special provision which extended the period to revive an involuntarily dissolved village corporation. In many instances, the initial registered agent did not forward forms to subsequent village corporation management. As a consequence, many Native corporations did not receive notice of their failure to submit an annual report or corporation tax. The special State reinstatement provision allows a village corporation to revive itself by applying for reinstatement within one year of the effective date of the statute section. A.S. 10.05.005.(e).

Section 1620 of ANCSA (43 U.S.C. § 1620) affords special tax treatment under federal, state and local tax laws to ANCSA Native corporations. A subsequent amendment to section 1620 excludes of regional and village stock and section 7(j) distributions from
the gross estate of a descendant until January 1, 1992. A notable oversight in the inheritance tax exemption provision is the failure to include urban and Native group corporations within the scope of the provision thus leaving such stock vulnerable to the tax.

Further amendments were made to section 1620 in 1978. Section 1620(g), (h) and (j). These amendments were proposed in response to previous Internal Revenue Service tax rulings that resulted in putting large tax burdens on Native corporations which did not have any earned income. See, Conference Report, H.R. No. 95-1800, 95 Cong. 2d. Sess. at § 102, page 282; also see comments of Senator Gravel, Congressional Record 34602, 34603 (October 7, 1978) (Senator Gravel noted that it made no sense for Native corporations to be forced to pay federal tax burdens out of Alaska Native Fund monies when no real earned income was received.) Under one amendment any resource information or analysis received by a Native corporation from private corporations or a government entity is not to be deemed to be income to the Native corporation. Section 1620(g). This section is in force for a period of 20 years from the date of enactment of ANCSA or until the particular Native corporation has received conveyance of its full land entitlement, which ever first occurs.

Another amendment, subsection 1620(h), declares that a Native corporation is deemed to be "engaged in carrying on a trade or business." This status is necessary for a corporation to be able to claim ordinary and necessary business expenses.
Native corporations had attempted to claim costs incurred in connection with the selection or conveyance of land or assisting other Native corporations in the selection and conveyance of their lands under ANCSA. The IRS had ruled that Native corporation could not deduct these expenses due to the failure of being in the trade or business. *Id.*, H.R. No. 95-1800 at § 102. Subsection (h) cures this technical point.

In a similar vein, subsection (i) caused concern that Native corporation might be deemed personal holding companies because of the close and familial ties of many of their shareholders. This amendment eliminated the possibility that a Native corporation would be subject to special taxes as a consequence of being deemed a personal holding company.

The final amendments to this special tax exemption section was part of ANILCA. Subsection 1620(d), as originally enacted, exempted from State and local property taxes until December 18, 1991 Native corporation lands that remained undeveloped or unleased. Due to the extreme delay in conveyances this provision was likely to be of little benefit to Native Corporations. The ANILCA amendment therefore extended this property tax exemption for 20 years from the date title vested in the Native Corporation. The ANILCA amendment also made clear that developed or leased land could be returned to an undeveloped state and thus reactivate the property tax exemption. Native corporation lands remain tax exempt despite mineral exploration activities. In addition, Native corporations may exchange tax exempt properties and apply the tax exemptions to the properties obtained in the
exchange so long as the acquired property is obtained from the United States, the State of Alaska, another Native corporation, or a private party and provided further that the Native corporation does not receive a cash value greater than 25% of the value of the land exchanged from the private party. As a housekeeping matter the 1980 amendments to the tax provisions included urban corporations (corporations organized under section 1613(h)(3)) within the scope of the section amended by ANILCA.

The ANILCA real property tax exemption left open questions of when the exemption would apply because it failed to define the phrase "developed real property." Although the real property tax exemption is presently in force pursuant to ANCSA, effective January 1, 1984, the State of Alaska specifically recognizes the exemption under State statutes. A.S. 29.53.020(a)(9). The State law defines the terms "developed," "exploration," and "lease." A.S. 29.53.020(k). "Developed" is defined to mean:

"... A purposeful modification of the property from its original state that effectuates a condition of gainful and productive present use without further substantial modification; surveying, construction of roads, providing utilities or other similar actions normally considered to be component parts of the development process, which do not create the condition described in this paragraph, do not constitute a developed state within the meaning of this paragraph; developed property, in order to remove the exemption, must be developed for purposed other than exploration, and be limited to the smallest practicable tract of the property actually used in the developed state ..."

The State statutes also corporates a provision setting out when a property tax exemption can be reactivated:

"If property or an interest in property that is determined not to be exempt under (a)(9) of this section reverts to an undeveloped state, or if the lease is terminated, the
exemption shall be granted, subject to the provisions of (a)(9) and (k) of this section."

A.S. 29.53.020(1).

Whether the State definitions will reduce the uncertainty over when the real property tax exemption is applicable remains to be seen. However, the statute does refine the standards under which the decision of whether property is developed or not will be determined. For property to be developed it must be modified from its original state with a definite purpose in mind; the modification must result in a present gainful and productive use without the need for any substantial further modification; and unless one and two occur surveying, construction of roads, providing utilities or other similar actions shall not in and of themselves constitute development. Moreover, where property is found to be developed, the taxable property must be reduced to the smallest practicable tract of property actually used in the development. Simply modifying property so that it is in the condition for sale does not appear to fall within the category of a gainful and productive present use. Since most Native lands upon conveyance will be surveyed and subject to sale at any time without further modification. The road into a subdivision, for instance, would be subject to the tax since Native corporation employees or agents could utilize the road to provide access to the subdivision lots in their efforts to sell the lots. Such use is a present use which was the purposes for the road (i.e. access to a subdivision) and by definition is gainful and productive.

The ANILCA amendments also included a shareholder homesite provision. Under this provision an individual who receives a
homesite pursuant to a valid shareholder homesite program is not
taxed on the receipt of the homesite (section 1620(c)) and is
exempt from many State and local property tax so long as the
homesite remains undeveloped (section 1620(j)). The legislative
history of the shareholder homesite section states that a
conveyance of a homesite pursuant to a homesite program "will not
be considered a distribution of corporate assets provided certain
restrictions and covenants are observed." Sen. Rep. No. 96-413
at 312. The three conditions are first that the land conveyed
cannot exceed one and one half acres, second that the homesite
must be maintained as a single family residence for at least ten
years, and third the homesite cannot be subdivided. The failure
of any condition results in a loss of the "ANCSA conveyance
status." This section provides that if any of the conditions are
violated that all federal, state, and local taxes which would
have been incurred but for the subsection must be paid back to
the appropriate taxing authority in addition to interest.

The apparent motivation for the homesite program amendment
was to authorize village corporations to distribute additional
lands to its shareholders without the impediments of any kind of
taxes or standard state corporation formalities required for such
a transaction. It is doubtful, however, that this amendment is
adequately drafted to exempt corporations from applicable Alaska
corporate law.

As originally enacted, subsection 1620(c) established the
basis in ANCSA lands as the fair value of such land or interest
in land at the time of receipt. In 1980 an amendment to the
section made clear that the date of conveyance whether by patent or interim conveyance constituted "the time of receipt." This change eliminated the ambiguity that existed in identifying "the time of receipt." The amendment also makes clear that the basis value will be adjusted for "any expenditure, receipt, loss or other item properly chargeable to the capital account, including the cost of improvements and betterments made to the property." See Treasury Regulations Section 1.1016-2.

The basis amendment provided special treatment for interest in "a mine, well, other natural deposit, or block of timber." With these property interests, basis is determined at the "time of first commercial development." The modified rule reflects the concern of Native corporations that neither the extent or quality of mineral deposits or fair market value of timber could be determined with certainty at the time of receipt. See ANILCA Sen. Rep. No. 96-413 at 256-257. The legislative history of the section defines the time of first commercial development:

"For those purposes, the time of first commercial development shall be the first day of the taxable year in which (1) a deduction for depletion is allowed or allowable, (2) gain or loss is realized from disposal of minerals or timber with a retained economic interest, or (3) minerals in place or standing timber are sold or exchanged."

Id. at 257.

As a final note concerning the tax exemptions in section 1620, the State of Alaska has enacted a "mirror" statute which reflects most of the special tax treatment provided by section 1620. A.S. 43.80.015. However, at the present time, the State law requires updating to coincide with federal amendments that have been enacted since the State statute was drafted in 1972.
As with tax laws, Congress found it necessary to exempt Native corporations from various federal securities laws in order to avoid impeding the implementation of other ANCSA provisions. A 1976 amendment to ANCSA added section 1625 which exempts Native corporations from the Investment Act of 1940, the Securities Act of 1933 and the Securities Exchange Act of 1934. These exemptions will expire on December 31, 1991.

During the early stages of the implementation of ANCSA, when Native corporations were receiving cash from the Alaska Native Funds but had not yet received any conveyances of land, many corporations found it prudent to invest their cash holdings in certificates of deposit. Without a land base, Native corporations which invested in certificates of deposit risked being deemed an investment company and subject to registration under the 1940 Act. See, Sen. Rep. 94-361 at 15-18. Although the Securities and Exchange Commission had promulgated a temporary rule exempting Native corporations from registration requirements from most of the provisions of the 1940 Act, the statutory exemption eliminated any immediate risks and permitted Native corporations to plan for future investments. Id. at 16.

Exemption from the Investment Company Act was also necessary to expedite Native corporation mergers authorized by section 1627 of ANCSA. Prior to the granting of this exemption, the SEC had reversed itself and informed Native corporations that they would be required to make an application to the SEC stating that the terms of the merger were fair and equitable. Additionally extensive public hearings would have to be held before the SEC
would review the applications. The SEC exemption was necessary to eliminate unnecessary expenses and delays imposed by the federal securities laws. Id. at 16.

Prior to 1991, the only transfers or "sales" of ANCSA stock that will occur are through inheritance, special exempted transfers for professionals, court ordered transfer pursuant to a divorce or support proceeding, and through reissuance of stock pursuant to a merger. Since Native corporation stock is otherwise inalienable, and therefore without a "market" it did not seem necessary to subject Native corporations to the administrative burdens and requirements of compliance with the 1933 and 1934 Securities Acts.

The State of Alaska quickly discovered that there was a potential need to regulate the solicitation of proxies in Native corporation elections when Alaska courts were faced with two similar proxy battles among different factions of the boards of directors of two Native corporations. See McGarvey v. Aleut Corporation, No. 77-3745 (AK Sup. Ct. December 12, 1978); Brown v. Ward, 593 P.2d 247, (Alaska, 1979). The Superior Court in Aleut Corporation found that the shareholder proxies were obtained through the use of false representation and ordered a new election. The Court relied on common law for its decision but failed to analyze fully the standards by which the common law would be applied.

The Alaska Supreme Court in Brown v. Ward also found that proxies had been obtained through the use of misleading proxy statements. Like the Superior Court in Aleut Corporation, the
Supreme Court found that common law principles required the proxy solicitations to be free from materially false or misleading statements. Brown, 593 P.2d at 249. The Court then adopted federal standards of materiality and causation as a guide to be followed under Alaska common law.

At the same time that Aleut Corporation and Brown were being litigated, the State of Alaska enacted an amendment to the Alaska Securities Act of 1959 which required certain Native corporations to file proxy materials with the Administrator of securities at the same time it distributed the materials to its shareholders. A.S. 45.55.139. State law also prohibits any false and misleading statements to be filed with the Administrator. A.S. 45.55.160. Consequently, false or misleading statements in Native corporation proxy solicitations are now prohibited in Alaska and may be regulated by the Administrator.

The Alaska proxy regulations apply to proxy solicitations made by any person to at least thirty Alaska resident shareholders of a Native corporation which has total assets exceeding $1,000,000 and a class of equity securities held by 500 or more persons. See generally, AAC 3.08.300 et seq. Thus, the regulations only apply to regional corporations and a small number of the larger village corporations. However, common law standards set out in Brown still apply to solicitation of proxies in Native corporations that are not governed by the regulations.

_______v. Koniaq, No. ____________ (AK Sup. Ct. ________).
Certain provisions in ANCSA also regulate the management of corporate assets. Section 1620(a) authorizes the Secretary to recognize validly executed assignments made by regional corporations of their rights to receive payments from the Alaska Native Fund. This authority was added by amendment in 1978 to allow regional corporations to obtain credit advances to finance early start up activities before the bulk of their Alaska Native Fund revenues were available to them under the schedule set out in section 1605. See, Pub. L. No. 95-78 § 4 (1977). The Secretary could recognize any assignment provided the assignee accepted the assignment subject to any claim the United States had against the assignor Native corporation. Section 1628(b). This section also denies any stockholder of an assigned or corporation the right to bring a cause of action against the Secretary or the United States as a result of any properly recognized assignment. Section 1628(c).

Section 1606(i) was enacted to mitigate inequalities among the regions which result from some regional corporations receiving lands with oil, gas, coal, minerals or other subsurface resources, or timber while other regions receive lands without such valuable resources. This section provided for the sharing of revenues derived from these resources.

The Department of the Interior and other executive agencies responsible for administration of ANCSA adopted the approach that section 1606(i) only governed relationships between the regional corporations and therefore was not a matter on which the promulgation of clarifying regulations was appropriate.
The concept of section 1606(i) is simple--indeed, deceptively so--but implementation requires a tremendous amount of interpretation and judgment. Determining what is meant by "all revenues" involves complicated legal and accounting determinations. Furthermore, the amount of money which may be retained (or conversely, which must be distributed) is in the millions of dollars and potentially, in the hundreds of millions of dollars.

Given the lack of guidance provided by the general statutory language of section 1606(i), the amount of money at stake and the lack of authority for any outside entity to define and resolve the unknowns, it is hardly surprising that the twelve regional corporations would disagree among themselves on what revenues could be retained and what revenues had to be shared.

Section 1606(i) provides the following:

"Seventy percent 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 1604. The provisions of this subsection shall not apply to the 13th Regional Corporation if organized pursuant to subsection (c) hereof."

The only forum available for resolution of this dispute was litigation. Such litigation was commenced in 1972, and resulted in 5 published District Court decisions and 2 published Ninth Circuit decisions. In June, 1982, the twelve regional corporations, after 18 months of negotiations entered into a
settlement agreement. Because of motions to intervene filed by certain village corporations following the execution of the Settlement Agreement, the Agreement has not yet been approved by the Court.

The court decisions that preceded negotiations of the settlement agreement laid out the parameters of the settlement negotiations by defining and clarifying terms used in Section 1606(i). The principles established by these cases are as follows:

1. Section 1606(i) shared revenues include revenues from all timber and subsurface minerals received by a regional corporation both prior to and after issuance of a patent or interim conveyance. Aleut Corporation v. Arctic Slope Regional Corporation, 410 F. Supp. 1196 (D. Alaska, 1976).

2. a). "all revenues" as the term is used in subsection 7(i) includes non monetary benefits received by a regional corporation in exchange for the acquisition of section 7(i) resources or interest in those resources.

b). Section 19(b) village corporation enrollees are counted for purposes of computing the percentages used in making distributions under the resource revenue sharing provisions of section 7. Aleut Corporation v. Arctic Slope Regional Corporation, 417 F. Supp. 900 (D. Alaska, 1976).

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10/ The agreement is ____ pages long. Much of the agreement is devoted to establishing a uniform set of accounting principles and criteria for determining what revenue is subject to sharing and when.


5. Revenues received by regional corporation from an oil lease were all section 1606(i) resource revenues despite labeling of particular categories of consideration to which revenues were supposedly allocated. (e.g. oil company allegedly paid revenues over to Native corporation to compensate corporation for damage to subsistence lifestyle and culture of north slope Natives.) *Aleut Corporation v. Arctic Slope Regional Corporation*, 484 F. Supp. 482 (D. Alaska, 1980).

6. Sand and gravel are part of the subsurface estate for all purposes under ANCSA, including subsection 1606(i). *Chugach Natives, Inc. v. Doyon, Ltd*, 588 F.2d 723 (9th Cir., 1978).

State oil and gas tax laws make special provision for the revenue sharing formula set out in Section 1606(i) in ANCSA in order to avoid taxing these revenues twice. Section 1606(i) revenues which are received by Native corporations, other than the producing corporation, from oil and gas production is not a
production interest in their property and therefore a corporation deriving income from oil and gas solely by virtue of Section 1606(i) and (j) is not subject to the provisions of the corporate net income tax. 15 AAC 21.010(b). Moreover, distributions by Native corporations pursuant to Section 1606(i) are deduction in determining the taxpayers taxable production income for that year. Id. at Section 215. The deduction for acquisition costs of a producing oil and gas well is equal to the taxpayers basis of the lease or property under Section 21(c) of ANCSA. Id. at Section 250. Finally, Section 1606(i) and (j) revenue is not a production interest that is subject to the multistate tax compact. 15 AAC 20.410(d). However, the State reserves the right to tax Section 1606(i) and (j) revenue under other state tax provisions. Id.

The final federal provision dealing resource management is the land bank Section 1636. The land bank is a land planning and management mechanism which gives private land owners the opportunity to protect their real property from adverse protection, taxation and in some cases, State and federal judgments. In return for these benefits, land owners must agree to certain use and restriction and cannot sell any land interest for the duration of the agreement. Moreover, lands covered by the agreement must be managed consistent with adjoining State and federal land management lands that are to be prepared.

The lands bank offers Native corporate planners a way to avoid distribution of assets until final decisions are made regarding of the resources. Similarly, the land is also exempt
from taxation so long as it is in the land bank, thereby extending the tax moratorium in Section 1620(d) beyond the 20 year period.

The actual mechanism of the land bank is brought about in four sections: (a) establishment of the agreement; (b) terms of agreement; (c) benefits to private land holders; and (d) earned interim grant of benefits. As of December 31, 1982, the Secretary has not reported that any land bank agreements have been executed.

**SUMMARY ANALYSIS**

**A. Introduction**

Section 1601 of the Settlement Act sets forth seven (7) findings and declarations of policy. The first three declarations are broad in scope and positive, to the point of over-optimism, in outlook. The fourth declaration is directed toward the effect of ANCSA on post settlements between the United States and American Indians. It's primary applicability, therefore, is directed toward American Indians other than Alaska Natives. The final three declarations are narrow in scope and addressed towards specific non-Native policies of the federal government in Alaska. It is a relatively simple matter to evaluate the success (or lack of success) in accomplishing the last four policies. Analysis of the success in achieving the first three policies is much more complicated.

**B. Sections 1601(e), (f) and (g)**

Section 1601(e) of ANCSA states:

"(e) no provision of this chapter shall effect a change or changes in the petroleum reserve policy reflected in
sections 7421 through 7438 of Title 10 except as specifically provided in this chapter;"

At the time ANCSA became law, there was one petroleum reserve in Alaska (Naval Petroleum Reserve No. 4). That reserve was administered by, and under, the jurisdiction of the United States Navy. There was no active exploration or production occurring in the reserve (except for production from the Barrow Gas field to supply the community of Barrow with natural gas). The citations in Section 2(e) are to the general authority for creating and administering Naval Petroleum Reserves. The policy reflected in 2(e) was adhered to and implemented by the courts, the Native corporations, and the federal agencies but it was eventually abandoned by Congress. There are no court decisions, agency regulations, or other non-legislative actions which reflect non-adherence to this policy. Congress, however, in the Naval Petroleum Reserve Production Act of 1976, 42 U.S.C. §§ 6501 et seq. (1976), abandoned the principle applicable to the Naval Petroleum Reserve in Alaska by transferring jurisdiction over the Reserve to the Department of the Interior and dictating a program for exploration of the Reserve. It is certainly beyond the scope of this paper to determine the reasons for Congress' action, but it would seem such action was most likely motivated by the 1973 oil embargo and matters relating to the energy crisis of the 1970's more than by any consequences of the passage of ANCSA.

In conclusion, the achievement of the objectives of 1601(e) were mooted by subsequent Congressional action.

Section 1601(f) states:
"(f) no provision of this chapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this chapter;..."

Although stated in technical legal terms, the policy reflected in this declaration was Congress' desire to prevent damage suits against the United States for extinguishment of Alaskan Natives' aboriginal claims. Without some statute authorizing suit against the United States, there would be no basis for suit. This declaration makes clear nothing in ANCSA is intended by Congress to provide authorization for such suits. Since the courts have not permitted any such suits, we must conclude this policy is being implemented. Furthermore, the language of Section 1601(f) should be read in conjunction with the declaration of settlement set forth in Section 1603 which extinguishes all claims. In interpreting the scope of the settlement, both the Alaska Supreme Court and the Circuit Court of Appeals for the Ninth Circuit have held firmly against Native suits seeking to assert claims or rights which would derive from aboriginal title. United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska, 1977), aff'd 612 F.2d 1132 (9th Cir., 1980), cert den. 449 U.S. 888 (1980); Pauq-Vik, Inc. v. Wards Cove Packing Co., 633 P.2d 1015 (Alaska, 1981). Only the district court for the District of Columbia, in one of the first cases decided after passage of ANCSA, allowed the possibility of Natives being able to maintain claims based on aboriginal title. Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). However, even the Edwardsen case would
have permitted such actions against the United States or its officers, but only against third parties.\footnote{11/}

The possibility left open in Edwardsen was closed tight by ARCO.

Section 1601(g) states:

"(g) no provision of this chapter shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic Development Act of 1965, as amended [42 U.S.C.A. § 3121 et seq.], shall be interpreted to include lands granted to Natives under this chapter as long as such lands remain in the ownership of the Native village or the Regional Corporations."

This declaration makes clear that Congress did not want the federal agencies responsible for administering programs existing at the time ANCSA was passed and which provided economic assistance to Alaska Natives to reduce or limit such assistance because Alaska Native corporations received fee simple lands under ANCSA. Native participations in various economic development assistance programs only applied to certain categories of Indian lands. Senator Stevens wanted to ensure that Alaska Native corporations benefitted by the same development program listed in Section 2(g). See \footnote{11/} Cong. Rec. 46,963 (Daily ed., Dec. 14, 1971) (Comments of Sen. Stevens).

Sections 1601(d), (a), (b), and (c).

Section 2(d) states:

\footnote{11/} Although it could have cited section 1601(f) in reaching its conclusion, the court did not do so.
"(d) nor provision of this chapter shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;"

While it is possible Native groups which settled their claims with the United States prior to passage of ANCSA have advanced arguments to both Congress and the federal agencies that their settlement should be reconsidered in light of ANCSA, we know of no specific instances where federal agencies or the courts have done so using ANCSA as a precedent. We conclude, therefore, the agencies and the courts have implemented this policy well.

Section 2(a) states:

"(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;"

There are four separate elements to the policy declared in Section 2(a). The first element is there is "the immediate need . . . for settlement." Passage of ANCSA itself was the implementation or fulfillment of that need, and not the subsequent administration. The immediate settlement could have been disrupted or defeated by a suit challenging the constitutionality of the Settlement Act, but no such suit was ever filed. Today it seems extremely unlikely such challenge ever will be made and even if it is, it is extremely unlikely such challenge would be successful. Thus, Congress itself, by passage of ANCSA, fulfilled this element of the policy declared in Section 2(a).

The second element is that the settlement be a "fair and just" one. It is beyond the scope of this report to judge
whether the Settlement Act was "fair and just." The concept is laden with subjectivity. Certainly, to an Alaska Native who believed Alaska Natives "owned" all of Alaska, a settlement that offers title to only 10% of the land and only $962,500, such settlement may not appear "fair and just." Similarly, to someone who believed the United States had bought and paid for all of Alaska in 1867, and that aboriginal claims were noncompensable, any settlement may have appeared to go beyond the requirements of fairness and justice.

What can be said is that in 1971, Congress passed ANCSA. It represented years of effort by many groups working for many different reasons on (or against) its passage and that it was, of course, a compromise which was accepted at the time.

The principle means for implementation of the "fair and just" requirement was not the federal agencies or the courts, but rather Congress and the terms of the Settlement Act itself. There are, however, aspects of implementation which reflect on the fairness and justice of the Act. For example, the general principles applicable to land withdrawal and selection by the corporations did not work well in the coastal and urban areas of Alaska. Regions such as Cook Inlet, Sealaska and Chugach Natives, did not have available to them lands of the same value or quality as other regions. In response to these problems, and certainly, in part, because of its desire to adhere to the principle of fairness and justice, Congress responded with amendments to the Settlement Act which either directly modified the terms of the Act or provided the means for resolution of
problems through agency action. Similarly, where implementation was not meeting expectations, Congress, at least in some areas, took remedial actions. Thus, for example, Congress, when it realized the land conveyances were being made at a much slower rate than anticipated, required federal agencies to escrow fees and income from selected lands and to pay over such fees to Native corporations upon conveyance of the lands.

On the other hand, if the standard of what is a "fair and just" settlement is one which fulfills the objectives set forth in Section 2(b) and 2(c) of Congress' declarations of policy, then, for the reasons discussed below, there can be little doubt that neither Congress nor the federal agencies, notwithstanding their remedial efforts, did not achieve the fairness and justice contemplated by the Act.

The third element of Section 2(a) is that the settlement be of "all claims by Natives and Native groups of Alaska." The implementation of ANCSA has generally fulfilled this objective, but there have been some exceptions. The slow pace at which lands have been conveyed has meant that many elders who were alive at the time ANCSA was passed did not really see the benefits of ANCSA. It is also true that the question of young Natives who were not yet born on December 18, 1971 is unresolved. There is also a growing sense that the Settlement Act failed to address the collective claims of Natives as members of Indian tribes. These claims are not so much based in monetary terms as they concern the resolution or affirmation of the social and political status of Natives and the vitality of their tribal governments.
The fourth element of Section 2(a) is that settlement is one of claims "based on aboriginal land claims." The policy declared here is a recognition that Alaska Natives did, in fact, have valid aboriginal land claims and that those claims should be compensated. ANCSA itself was the means for implementing this objective. It should also be noted that this policy places a significant and often overlooked aspect of the Settlement Act. The Settlement Act was a narrow act to achieve the limited purpose of settling Alaskan Natives' land claims.

The policy and goals contained in section 2 of ANCSA are to some extent set forth as if they are separate from the remainder of the Act. That is to say, that the policies articulated in section 2 are general statements which would be compatible with numerous specific substantive provisions for settling Native aboriginal claims and hence section 2 is not directly tied to subsequent portions of ANCSA. When evaluating the implementation of ANCSA in light of section 2 it is therefore of paramount importance to determine whether a particular success or failure is due to the manner in which a substantive provision of ANCSA was implemented or to the provision itself. For example, as discussed below, section 2(e) expresses the policy that the policies applicable to Naval Petroleum Reserves are not to be modified by the provisions of ANCSA. We conclude the substantive provisions of ANCSA did not require modification of such policies and the Department of Interior implemented the various provisions of ANCSA in a manner consistent with the policy of 2(e). Thus,
both the substantive provisions of ANCSA and the manner of their contributed to the achievement of the policy.

Section 2(b), on the other hand, provides an example of where the substantive provisions of ANCSA are themselves in conflict with the express policy objectives. For example, section 2(b) says the Act should be implemented "rapidly, with certainty. . .without litigation." Yet, the complexity of the Act, the large number of participants in the process and the substantial social and economic interests of numerous persons, groups and entities which are impacted by the Act dictates that there will be litigation unless potential litigants are denied access to the courts. With a few minor exceptions, ANCSA does not prohibit access to the courts and hence could not reasonably be expected to be implemented "without litigation." Certainly, if Congress intended to implement ANCSA quite literally "without litigation," then the implementation process has been an absolute failure with respect to this objective. However, it would be unfair and incorrect, in our opinion, to say such failure is due to the failure of federal agencies to follow Congress' directions. Certainly, there is some of that (e.g. reservation of public easements) in which Interior's policy was blankly reported both before LUPC comments and after enacted (Public Easement Defense Fund) but a larger part of the failure to avoid all litigation is due to the complexity and social and economic magnitude of ANCSA itself. It is simply unrealistic to think that an act conveying 44 million acres of federal land to more than 220 entities would not result in litigation especially where
the land is unsurveyed and has been subject to many claims and uses by federal agencies, the State of Alaska, and third parties for more than 100 years prior to passage of the Settlement Act.

The remaining directives of Section 2(b) can be broken down into two components.

(a) "the settlement should be accomplished. . . .in conformity with the real economic and social needs of Natives. . . ."

The above quotation can be analyzed first in terms of its legal effect and in terms of the implementation of ANCSA. Section 2(b) presumes that Congress or the agencies responsible for the implementation of ANCSA knew what Natives needed economically and socially. Congress conducted research into Native needs which resulted in "Alaska Natives and the Land." Congress concluded from the study that Natives as a group suffered from near poverty conditions and required cash and institutions that could facilitate development of human and natural resources under Native control. Sen. Rep. No. 92-405 at 105. Thus, Congress enacted a settlement act with a substantial cash component, and a multi-tiered corporate structure. In the end, Congress gave no assurance that this scheme would work.

During the course of implementing the Act, federal agencies in several cases defined their objectives and authority narrowly with little regard for the economic and social needs of the Natives and their corporations. Some examples are the Treasury Department's refusal to pay interest on the periodic balance in the fund, the IRS rulings that Native corporations realized income upon receiving technical land selection assistance from government and private corporations despite the lack of any
earned income, and the Department of Agriculture's decision that Alaska Native Fund payments to Natives would disqualify them for food stamps. In these exemplary situations and others, Natives and their corporations had to rely on the courts and Congress to fulfill the policy objectives of the Act by court decision or legislative amendment. Butz, Section 1620(g), Pub. L. No. 94-204 § 5.

By selecting a state corporate structure for the settlement, Congress significantly altered the land ownership and social patterns that existed in Native villages before ANCSA. The concept of free alienation of land either directly or indirectly through the sale of Native corporation stock replaced prior "aboriginal occupation and use." The impact of rapid changes in land ownership rights on the "social and economic needs of Natives" are only beginning to be felt. The impacts manifest in situations that find for-profit village corporation discovering that they cannot adequately provide for the economic or social welfare of their shareholders without violating state corporations law or by attaining a level of business success that few corporations of any kind experience.

A businessman could have predicted the rate of success of Native corporations given the circumstances as they existed in 1971. Congress should be held to the same standard if and when it is called upon to address the reactions to ANCSA and its effect on the social and economic needs of Natives. Some reactions are already springing up in the form of organizations such as the United Tribes of Alaska and studies investigating
policy alternatives such as AFN's 1991 Issues Report. Congress will find it much more difficult, however, to legislate a resolution to problems involving the structure of ANCSA in the face of individual property rights created by the Act. In the present framework, Natives must decide for themselves if ANCSA meets their social and economic needs.

"(b) . . .with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska..."

The legislation history of the later part of section 2(b) focussed on Congress' intent "to avoid perpetuating in Alaska the reservation and trustee system." Sen. Rep. No. 92-405 at 108 (1971). Maximum participation in relation to an anti-reservation policy meant that Natives would run their corporations and own the land through their corporations without further intervention by the BIA or other federal executive departments whose job it was to oversee the activities of Natives and their tribes. Similarly, fee simple land held through corporations with ultimately alienable stock would not establish permanent racial institutions, or allow perpetual tax privileges as in the case with "trust" and "Indian" lands subject to trust relations with the federal government. Moreover, special consideration for allotment applications under ANCSA and ANILCA does not add to the categories of property enjoying special tax treatment since all such applications pre-date ANCSA. Allotments and Native
townsites are not part of the consideration for the extinguishment of aboriginal title under ANCSA and, consequently, are not part of the settlement. Congress thus has succeeded in avoiding perpetual special treatment for Natives with regard to the land and assets conveyed under ANCSA.

The ANCSA tax exemptions end in 1991 or soon thereafter when based on date of conveyance. However, the tax privileges provided by the ANILCA land bank extending the time tax exemptions may be in effect for an entire category of property: That which remains undeveloped. Section 1636. Although the land bank tax exemption does not benefit a single institution to the exclusion of others, we must assume that Congress abandoned its policy of avoiding special categories of tax exempt property.

Finally, Native participation refers to Native participation in the drafting of the Act as well as during implementation. Both were accomplished initially and in obtaining subsequent legislative. Participation is required by statute and regulation for corporations during the entire land selection process including the interim administration of selected lands.

We conclude that Congress' considerations of the economic and social needs of Alaska Natives was limited by the focus of ANCSA on land settlement and economic issues. The impact of fundamental changes in economic and social structures, particularly within the villages, have not been fully assessed. Some special categories of tax exemptions have been created in land but none are based on racial terms.

Section 2(c) states that:
"(c) no provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of the date of enactment of this Act."

Section 2(c) comprises three subparts. The last is the "2(c)" study directed by Congress to review the status of all federal programs designed to benefit Native people. The study was conducted and by admission of the Department of Interior suffered from poor planning and scheduling. Alaska Native Management Report, June 17, 1974 at 6-7; Report of the Secretary 1982. The study apparently also failed to consider programs primarily designed to benefit non-resident Alaska Natives. See, 13th Regional Corporation v. U.S. Department of Interior, 654 F.2d 758, 759 (D.D.C., 1980).

The first two components of section 2(c) state that ANCSA: 1) will not replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska; and 2) will not relieve, replace, or diminish any obligation of the United States or of the State to protect and promote the right or welfare of Natives as citizens of the United States or of Alaska. The legislative history associated with this section explains that this provision was intended to ensure "fair, equitable, and just treatment to the Native people and to Native areas." Sen. Rep. No. 92-405 at 109.
Both provisions notably fail to identify Natives as members or citizens of "Native communities" or "Indian tribes" as defined under federal Indian law. Specific reference to the federal governments obligations to Alaska Natives as members of such communities or tribes could have provided affirmation of a continuing trust relationship with the federal government. Instead, the legislative history emphasizes that section 2(c) was intended to protect Natives only in so far as their rights, privileges or obligations were co-extensive with other citizens, i.e. Non-Native citizens. Id. Had section 2(c) even fulfilled this lesser expectation there would have been no need for the 1976 amendment to ANCSA clarifying that payments and grants under ANCSA are not substitutes for benefits available under other programs. Section 1626. Consequently, we conclude that the first two sections of section 2(c) have failed to fulfill their purpose.

CONCLUSION

This section of the ANCSA 85 Report has evaluated the implementation of ANCSA from a legal perspective. To do that, we have divided the process of implementation into five parts.

The first part involved the start up phase during which time all major parties who were, or were to become, participants in the subsequent implementation process organized themselves, established working procedures, issued regulations, initial decisions, public land orders, and took other similar actions. Given the complexity of the tasks which had to be performed, and the large number of people who had to participate (both in
federal agencies and the Native community) and the lack of experience and precedent for implementation, we conclude the start up phase was implemented even better than could be expected. While it is true amendments to ANCSA were needed to rectify deficiencies which occurred during the start up phase, we conclude the major cause of the failure was the unrealistically optimistic timetables set forth in ANCSA itself. A greater commitment to funding and staffing the implementation process, and to educating the field level personnel to the purposes and objectives of ANCSA may have helped some in diminishing the problems and failures of the start up phase, but it is doubtful any level of staffing and funding could have prevented all difficulties or achieved the initial timetables of ANCSA since with increased staffing there were increased coordination problems.

The second part of our analysis addresses the land settlement issues including withdrawal, selection, survey and conveyance, and land management issues. We conclude that land withdrawals were impeded by physical limitations in the land and selection restrictions set out in ANCSA. Substantial delays in land conveyances have resulted from the lack of money and manpower available for surveying, third party protests of Native corporation eligibility, and as a consequence of belated enactment of regulations governing eligibility determinations and the selection and conveyance of land. Finally, rapid conveyance has been slow in part because of the sheer bulk of the settlement.
Part three of our analysis concerns cash settlement issues. We conclude that payments into the Alaska Native Fund were made in a timely fashion. The state accelerated its payments in 1980. The United States completed its payments on schedule, but Native corporations had to seek legislative remedies to acquire all interest earned on the fund.

Operation of ANCSA corporations under state and federal law is discussed in part four. Until 1991, ANCSA provides special treatment for Native corporations under some federal, state, and local tax laws, federal securities laws and some state corporate laws. After 1991, Native corporations generally will be subject to all laws applicable to an ordinary state corporation. Some special aspects of Native corporations, such as section 1606(i) and (j) resource revenue requirements, will survive indefinitely. Other restrictions authorized by ANCSA shall only apply if instituted before 1991. Section 1606(h)(3).

Part five presents a summary analysis of the implementation of ANCSA in light of the policy and goals set out in section 1601 of ANCSA together with our conclusions regarding the attainment of these goals in the implementation of the Act.