

## ***Brief Interpretive History of the Alaska Native Claims Settlement Act (ANCSA)***

By William Schneider

*The 50<sup>th</sup> anniversary of the Alaska Native Claims Settlement Act (ANCSA) is a chance to reflect on the long history of Native efforts to present their rightful claims to the land and the stark cultural differences between Native and settler culture that made settlement so long in coming. Therefore, it is also an invitation to discuss topics such as the impact of ANCSA's corporate structure, sovereignty, the extent of the Federal trust responsibility to Alaska Natives, and subsistence rights.*

*The following essay, attempts to capture in a general and brief way major themes in the movement to a Native land claims settlement, the key provisions of the Act, and some of the important developments since passage. For newcomers to the subject, the essay hopefully provides a framework to understand the historical developments that led to the Act and the implications of the settlement. Others may take issue with the interpretation of events and be frustrated by a less-than-comprehensive accounting of the entire Act.*

*The issues raised in ANCSA are ongoing and this story is not neatly contained nor concluded, but at this 50<sup>th</sup> anniversary a summary is timely. Fortunately, parts of the ANCSA story have been documented by people who lived through, participated in and wrote about the events as they unfolded, by legal scholars who have analyzed the evolution of federal Indian law in Alaska and the implications of ANCSA, and by historians who have examined historical developments leading to ANCSA against the backdrop of federal Indian policy and Alaska's particular historical relationship with Alaska Natives. There are many good sources available from these leaders and scholars that are highlighted in the annotated bibliography.*

*While this guide is a product of the Alaska Historical Society and the many researchers who contributed to it, William Schneider is the sole author of the following history essay and assumes all responsibility for its content and any flaws that it may contain.*

Some anniversaries grow in meaning as the event being commemorated continues to shape the course of history. This is the case with the Alaska Native Claims Settlement Act (ANCSA). The lengthy struggle by Alaska Native peoples to secure legal resolution of their land claims was settled in 1971, but the issues surrounding implementation of the settlement continue in the years since passage. Fifty years later, we take stock of the Act, not so much as an accomplishment or culmination, although it certainly was monumental, but also as a point in the continuing efforts by Alaska Natives to exert their rights to manage their land and the financial resources that were part of the settlement.

This overview addresses the issues that led to passage of ANCSA, the major elements of the Act, and the key amendments that followed. This is the story of an evolving relationship between Native and Settler, reflected in differences over land rights, legal rulings that defined Native opportunity, and a legislative solution that created Native corporations as a way to resolve Native land claims. Four themes frame the discussion in this history. First, this is a cross-cultural story that emphasizes the differences between Native and Settler aspirations and assumptions. Second, this is a story of the opportunities and limitations of the United States legal system to accommodate the needs of Alaska Natives. Third, this is about corporate structure and the role of

the Native corporations that negotiate difficult questions about who owns shares, how revenue is distributed, and the role of the corporation in serving and representing the Native community. Finally, this is about the economic success of the Alaska Native corporations.<sup>1</sup>

In this manuscript, I have used extensive endnotes for those who wish more detail on the issues described. Key points in the document are highlighted in bold for emphasis and to encourage discussion.

### Introduction

The Alaska Native Claims Settlement Act (ANCSA) became law on December 18, 1971.<sup>2</sup> It is tempting to claim the movement to address Native land claims began with Alaska Statehood in 1959 when the conflicting language of the Statehood Act opened the door for State selection of land while also prohibiting the new State from selecting any land that might be claimed by Alaska Natives.<sup>3</sup> Alaska Natives rose up in protest when the State began to select land and initiate development on lands claimed by them. Native concerns were not just limited to State actions. There was also concern about federal plans for development and disagreements over regulation of fish and game. The issue in each case was control of the land and the resources that Natives depend upon for survival. This was an impetus for Native groups to organize and mobilize.<sup>4</sup> These were issues that prompted action in the years after Statehood, but these issues have deeper roots in Alaska history.<sup>5</sup>

### Background: Conflicting Visions and Relationships with the Land

While Statehood marks the most recent era of Native land claims, Alaska Natives worked for more than a hundred years to defend their way of life and assert their right to the lands and the resources that sustain them in realms largely defined by Western social, economic, and legal structures. This is a contested history because Natives and Settlers had, and in some respect still have, different understandings and values. A big difference centers on what it means to have rights to land. In the Native traditions, customary use rights to land and resources were based on kinship and social ties that dictated terms of access for fishing, hunting, trapping, and gathering. Each Native group, in its own way, recognized a system of property relations that dictated land and resource use.<sup>6</sup> Land ownership, meaning the rights to control exclusion, inclusion, and inheritance use rights, were the purview of tribes, bands, clans, and extended families. This is unlike the Settler concept of individual ownership.<sup>7</sup> This generalization about Native conceptualization of land and use rights is offered to present what this author sees as a basic lived reality for many Native people and a perspective quite different from that of most others who come to the subject of land ownership from a perspective of individual purchase and sale.

### The Early History

The Russian expansion to Alaska, beginning in the latter half of the 18<sup>th</sup> century, was based on a desire to acquire furs; control of Native land was of little interest as long as the Russian fur traders could continue to extract valuable pelts from Native hunters.<sup>8</sup> When the United States acquired authority for Alaska in 1867 under the Treaty of Cession, the government assumed responsibility for the future of Alaska Natives, the so-called “uncivilized tribes.”<sup>9</sup> **The Alaska Treaty of Cession was the first time the U.S. government acknowledged responsibility to Alaska Natives and marks the beginning of a Trust responsibility.**<sup>10</sup> In the early years under United States administration (1867-1936), before the extension of the Indian Reorganization Act

to Alaska, the Federal Trust responsibility was based on the assumption that the best course for the government was to encourage Natives to change their lives and live like non-Native people. The question of their Aboriginal title to the land<sup>11</sup> lingered faintly in the background removed from social relations and government policy, but was recognized in key court cases such as *United States v Berrigan*<sup>12</sup> and in the First Alaskan Organic Act in 1884 that provided for the rights of Natives to the land they use for hunting, fishing, trapping, and other resource gathering.<sup>13</sup> **Despite any limitations on extent, the 1884 Organic Act is the earliest legislative action by the U.S. government to legally recognize Alaska Native land rights.** However, when Natives met with government officials and asked for clarification of their legal rights, they were told the only options available to them for acquiring their land were either reservations or allotments. Reservations were discouraged and allotments depended on demonstration of their conformity with the norms and practices of Western civilization.<sup>14</sup> Even though the law continued to recognize unresolved Native claims to land and the government's responsibility to Natives,<sup>15</sup> the Settler culture had little interest in and made little room to recognize or accommodate aboriginal ways of living. That is until the Tlingit and Haida Indians successfully demonstrated their possessory rights to land in Southeast Alaska, land where the federal government had issued permits and leases on Native land.

#### Legal Recourse for Native Claims in Southeast Alaska

The Tlingit and Haida Indians challenged the federal government's permitting and leasing land and their legal fight with the government began in 1929. It continued until 1959 when the federal court of appeals upheld the Tlingit and Haida possessory rights to land taken in the Tongass National Forest and Glacier Bay National Park and authorized compensation. The Tlingit and Haida Land Settlement Act legally recognized the aboriginal land rights of the Tlingit and Haida and the tribes were paid for land taken.<sup>16</sup> **This demonstrated the validity of Alaska Native claims in Western legal terms and was based on recognition of Aboriginal Title that had never been terminated.**<sup>17</sup> **This settlement paved the way for the larger statewide Alaska Native Claims Settlement Act.**

#### Statehood

In Alaska's movement to Statehood, Alaska Native land claims were sidelined as an issue for the federal government to settle.<sup>18</sup> Politicians like Ernest Gruening and Bob Bartlett were reluctant to even have Native claims mentioned in the statehood bill.<sup>19</sup> This is an indication of how wary politicians were of Native rights as a possible impediment to achieving the economic prosperity that Statehood might bring. The final language in the State Constitution provides for State selection of land in Section 6, but in Section 4 it disclaims rights to lands that might be subject to Native title.<sup>20</sup> Only one Native was a delegate to the Constitutional Convention and the issue of Native land rights was a minor discussion and was viewed as a federal problem.

Shortly after President Eisenhower signed the Alaska Statehood Act in 1959, the new state, eager to build a financial future, began to select land and propose development projects. Throughout the 1960s, Alaska Natives protested against incursions on their land. They wrote letters to officials describing how State actions were imposing on Native land and they called for settlement of their land claims.<sup>21</sup> They formed local organizations to represent regional interests.<sup>22</sup> The statewide Alaska Federation of Natives organized in 1966 and became a forum for the diverse Native population to meet and develop common recommendations.<sup>23</sup> This same year, William (Willie) Hensley wrote an essay that sparked his commitment to work for Native

land claims. The essay was titled “What Rights to Land Have the Alaska Natives: The Primary Issue.” Since then, this document has gained widespread attention because it argued Native rights within a legal and historical framework that could be understood and defended by Natives and non-Natives.<sup>24</sup>

Charlie Edwardsen, Jr. (Etok), an Iñupiat from the North Slope, was a key figure in the events leading up to land claims.<sup>25</sup> In response to the State sales and leases for oil exploration on the North Slope, land belonging to the Native people of the region, he wrote to Tlingit lawyer William Paul asking for help. He asked Paul to legally assert Native claim to the land. In a letter to Governor Egan in 1966, Paul initiated the legal claim of Native ownership of the North Slope.<sup>26</sup> The letter was signed by Iñupiat leaders, Guy Okakok, Samuel Simmonds, and Charlie Edwardsen, as well as William Paul, their legal counsel. Edwardsen’s biographer points out this was the first land claim from the Arctic and “the largest blanket claim in the history of the United States.”<sup>27</sup>

### Two Major Events Bring Alaska Native Land Claims to a Head

Two major events brought Alaska Native land claims to a head. First, in 1966, Secretary of the Interior Stewart Udall recognized the impact State land selections were having on Native land, so he issued a freeze on State land selection until Native land claims were settled.<sup>28</sup> **This stands out as one of the most, if not the most, strident exertions of the federal government’s Trust responsibility for Alaska Natives.** Udall’s land freeze pitted the State’s desire to develop against the Native desire for settlement of their land claims. There was a growing recognition that the land portion of any Native settlement was going to be very large.<sup>29</sup>

The other event that prompted resolution of land claims was the discovery in 1968 of oil at Prudhoe Bay on Alaska’s North Slope. The discovery was made on North Slope land that had been transferred to the new State of Alaska. Development could not proceed until claims were settled as well as the establishment of rights to build a pipeline across disputed Native land. Native land claims had to be settled if the oil was going to be drilled and transported to market. Governor Walter Hickel was under pressure to foster economic development on State lands.

In order to resolve their respective interests, Governor Walter Hickel established a Governor’s Task Force on Land Claims with representation from AFN, Native leadership from around the State, members of the State administration, and representation from the Department of the Interior. The Task Force was chaired by State Representative Willie Hensley. Their report was delivered in January 1968. One of the most significant recommendations was a call for a Native land settlement of 40 million acres.<sup>30</sup> This would prove to be close to the figure of 44 million acres that Congress eventually would sign into law. Other key provisions included in the Task Force report were a corporate business structure and revenue sharing between corporations.<sup>31</sup>

### The Bill and Amendments

The Alaska Native Claims Settlement Act that became law in 1971 is a corporate solution. It called for 44 million acres of land to be transferred to Alaska Native regional and village corporations. The settlement also included close to a billion dollars in cash to be used to develop business ventures that would generate revenue for Native shareholders.<sup>32</sup> To ensure this was a final settlement that would avoid future litigation over land and would provide unfettered access

to the oil as well as allow for a pipeline corridor, the Act abolished Aboriginal Title to the land.<sup>33</sup> **This helped ensure that the State and federal government could be free from future land claims that might impede development.**<sup>34</sup> Section 4B of ANCSA also abolished Aboriginal hunting and fishing rights. This means that on Native regional and village lands, villagers do not have management authority over fish and game resources, even though they own the land. Fish and game are managed by the State and the federal governments.

#### National Interest Lands

In another provision of ANCSA, Section 17 set aside federal lands as potential conservation units (national parks, preserves, wildlife refuges, and forests). After nine years of study and proposals, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. Title VIII of that legislation, recognized rural subsistence users and established a rural subsistence preference on federal land.<sup>35</sup> This provision was in part a recognition of the extinguishment of aboriginal hunting and fishing rights in ANCSA and the need to accommodate rural subsistence users. Because of the state constitution, the State of Alaska cannot comply with the rural preference in Title VIII of ANILCA.<sup>36</sup> As a consequence, Alaska fish and game are managed by two systems. The State of Alaska is in charge of fish and game management of subsistence on State land, and the federal government has jurisdiction on federal land.<sup>37</sup> **The federal response to subsistence is anchored, in part, in the Trust responsibility to Alaska Natives who depend on subsistence and whose Aboriginal hunting and fishing rights were extinguished under ANCSA.** The Title VIII provision also recognizes non-Natives living in rural Alaska and dependent on subsistence. Disputes over the State's right to manage navigable waters through federal land are now raising questions about the future of subsistence fishery management on waterways through federal land. For now, subsistence fisheries on rivers that run through federal land are under federal control.<sup>38</sup>

#### Key Amendments to ANCSA

Over the years since passage of ANCSA, there have been many amendments. One of the most important addressed who is eligible for shares of stock in the regional and village corporations. The original Act prohibited the sale or transfer of shares in stock for twenty years after passage. This provision was amended to extend the prohibition beyond the twenty years unless a majority of the shareholders vote to allow such sales. This was a major change because it helps to ensure that the ANCSA Native corporations remain in Native ownership. From a purely economic perspective, it raises challenges for infusing new shareholder leadership from the general population.<sup>39</sup>

The original Act stipulated only Alaska Natives born before passage of the Act on December 18, 1971 could become shareholders in the Native corporations.<sup>40</sup> The only way for those born after that date to acquire stock was by inheritance or gifts of shares. This posed an obvious problem for those born after passage. The Act was amended in 1988 and 1991 to accommodate Natives born after December 18, 1971 if a majority of corporation shareholders agree to make the change.<sup>41</sup> Not all corporations have agreed to make this change, posing economic and ethical dilemmas about who can and should benefit from the corporation's profits and how Native people identify with the regional corporation.<sup>42</sup> Both provisions (whether to open shares to the general public and who in the Native community born after 1971 should qualify for shares) pose difficult questions for shareholders about who can qualify to participate in ANCSA.<sup>43</sup> **The result**

**is that cultural, economic, and identity decisions must be resolved in the cauldron of a challenging Western economic and legal framework.**

### Native Allotments

ANCSA ended the 1906 Native Allotment Act that had provided up to 160 acres of land to qualified Native applicants. The final deadline to file for a Native allotment made it impossible for Alaska Natives serving in the military in Vietnam to apply. In 1998, Congress passed an amendment that created an exception for Alaska Native Vietnam veterans who were unable to apply in time to meet the original deadline.<sup>44</sup> The actual conveyance of land to veterans has been stalled by the lack of available lands for selection. In some cases, the only available land is miles from where the applicant lives or is of poor quality not suitable for occupancy or use.<sup>45</sup>

### Revenue Sharing

Recognizing the different potential of the regions for resource development, Section 7(i) of ANCSA calls for revenue sharing. Revenue accrued by Native corporations from mineral and timber on originally selected ANCSA land must be shared between all corporations on a 70 to 30 split.<sup>46</sup> Seventy percent of money earned by a Native corporation from mineral or timber development is redistributed to all the corporations and thirty percent is retained by the revenue generating corporation.<sup>47</sup> In the years since passage of the Act, Section 7(i) has been challenging to administer because the original act did not clearly define “revenue” or how revenue from leasing would be handled. It was not clear whether to classify gravel as subject to revenue sharing.<sup>48</sup> Resolution of these issues took time, but one measure of success of this provision is the report of \$2.5 billion in revenue sharing in the period between 1982 and 2017.<sup>49</sup> Economic success was not assured in the start up years. Some of the regional corporations suffered serious losses. To address this problem and to ensure a chance for recovery, Senator Ted Stevens convinced Congress to introduce a provision in the Internal Revenue Code to assist the ANCSA corporations.<sup>50</sup>

### Regional Corporations

Despite challenges, in the 50 years since passage of ANCSA, the Alaska Native regional corporations have become economic drivers for the stockholders, the State of Alaska, and the nation. Most significantly, they represent a major change in the business model of companies operating in Alaska because the revenue they produce is not taken from Alaska; it fuels the Alaskan economy.<sup>51</sup> Alaska Native corporations own businesses in many sectors of the economy including construction, government contracting, and service industries. In fiscal year 2017, the Resource Development Council of Alaska reported the combined revenue for all twelve Alaska Native regional corporations was \$9.1 billion, with an employment record of more than 15,000 people in Alaska during the previous year.<sup>52</sup> They reported a combined payroll of \$950 million. The *Alaska Business Report* for 2020 listed twenty-one Native corporations in their Top 49er listing.<sup>53</sup> This economic record is impressive, and share distributions are a boost to individual Native incomes, but this does not equate with prosperity for most Alaska Natives. However, of particular importance, the 7(i) provisions of ANCSA support village corporations and this has a significant local economic impact that meets tribal needs.<sup>54</sup> Also important in this regard is the recognition of tribal status at the village level.<sup>55</sup>

### A Work in Progress

ANCSA has raised serious cultural and economic challenges in areas, such as providing shares of stock to those born after passage of the Act, opening up shares for sale, determining profits for distribution to other corporations under 7(i), and establishing preferential hiring to encourage Native employment opportunities. Some of these issues remain, but the corporations have made progress overcoming and working through many of them.

At a very fundamental level, ANCSA represented an attempt by the U.S. Congress to address Native land claims using the tools of the Western legal system. The result was a corporate, not a tribal solution. It highlighted the use of Western law to define how Native claims could be formulated, codified, and administered under United States, not tribal, law. Native leaders worked within this framework to achieve the best possible results for their tribal members. Nevertheless, ANCSA is an economic and land settlement designed to provide financial footing and a land base for Native corporations. It is not grounded in the sovereignty of Native land ownership under tribal control. The 44 million acres represents a land base no different than private property and subject to State and federal regulation, particularly contentious in the area of fish and game management.

Part of what makes ANCSA continue to be important to us today is the persistent question of self-determination for Alaska Natives. How well has ANCSA addressed the dual goals of Native self-determination and the government's continuing responsibilities to uphold the Federal Trust for Alaska Natives? When ANCSA was enacted, it was praised by some as representative of President Nixon's new Indian policy. Nixon supported a change in perspective toward Native American relations and policies from one of "termination" to one of "self-determination," a move away from the old model of assimilation.<sup>56</sup> Answering the question of how well ANCSA has moved the needle from termination to self-determination is a complicated question. Robert Arnold posed it in his 1976 book, *Alaska Native Land Claims*,<sup>57</sup> and it is testimony to how difficult it is to draw a general conclusion that we are still asking the question. ANCSA provided land and wealth but removed Aboriginal Title to the land and Aboriginal hunting and fishing rights. ANCSA created a Western business structure for success, but this still remains foreign to many rural villagers who live a subsistence way of life. The 7(i) distributions have supported all the Native corporations at the regional and village levels providing a vehicle for village based tribal governments to help support basic services. Many amendments to ANCSA have helped shape the Act to meet needs overlooked or unanticipated in the original legislation, such as who can qualify and in what ways for corporate participation.

#### How ANCSA Differs from Other Native American Settlements

In 1871, four years after the United States purchased Alaska, Congress stopped making treaties with Native Americans. Unlike many Native groups in the rest of the country, there are no treaties signed with Alaska Natives. One argument is that this worked in their favor because they were not bound by previous agreements that extinguished their Aboriginal title. In 1941, the courts ruled in the *United States v. Santa Fe Railroad* case that Aboriginal title had legal standing in the courts.<sup>58</sup> This opened the door for arguing Native land claims in Alaska, a possibility that bore fruit in the Tlingit-Haida settlement in 1959. This further created legal opportunity for all Alaska Natives to argue their case against State selections of their land in the years after Statehood. Historian Stephen Haycox argues persuasively that if Congress had not put a stop to treaty making in 1871 and if there had been treaties in Alaska, there would be no

ANCSA in 1971 and Alaska Natives would be left with diminished land holdings and much fewer economic opportunities. This is based on the assumption that there would not have been good treaties negotiated in Alaska that would last through time. The Santa Fe Railroad decision opened up vast new possibilities for Alaska Natives, first with the Tlingit-Haida land claims and then with ANCSA. If there had been previously existing treaties, they most likely would have been far less generous than ANCSA.<sup>59</sup> In terms of acreage and payment, the ANCSA settlement dwarfs any of the treaty settlements that Native Americans received in the years before 1871, and the prosperity of Native corporations today is indisputable.<sup>60</sup>

Others have pointed out that provisions in some of the old treaties made with Native groups in the rest of the country, years before 1871, have favored Native management and Native access to hunting and fishing rights today. In some cases, these special rights established in the treaties extend even beyond reservation boundaries and have been upheld in modern judicial decisions.<sup>61</sup> Perhaps Alaska Natives could have negotiated for reservations that might have survived and provided greater sovereignty to Alaska Natives today, particularly on issues of fish and game.<sup>62</sup> That is a point of debate, but what we do know is that the overall record of treaty making and establishment of reservations reflects a dismal picture of Native loss of control over their landholdings.<sup>63</sup>

#### How ANCSA Compares with Other Aboriginal People's Land Claims: Two Examples *Yukon First Nations*

ANCSA was precedent setting and had an influence on Aboriginal people in other parts of the world. The Yukon First Nations of Yukon, Canada, shared similar interests with Alaska Natives, particularly those involving land rights. But their paths to settlement of claims and their achievements look somewhat different from the Alaska Native settlement. For instance, in Canada, the Yukon First Nations reference back to February 14, 1973 when they presented Prime Minister Pierre Trudeau a statement of their grievances and a vision for change.<sup>64</sup> In 1988, in the Yukon, an Umbrella Final Agreement with the Council of Yukon First Nations, the Government of Yukon, and the Government of Canada was finally reached. This Agreement sets out parameters for individual negotiations by each of the First Nations in the Yukon. Under the Final Agreements (FNFA), First Nations receive land and money as well as management authority on their land holdings. The section on Rights to Harvest (16.4.2 of FNFA) in the Umbrella Agreement provides special rights to First Nations to hunt and fish within their territories, within other First Nation territories where consent is granted, and on Crown land.<sup>65</sup> Like the Alaska Native land claims, the Canadian claims are based on a struggle to have all Aboriginal rights recognized, but their settlement is based on a negotiated process for settling each First Nation's claims separately. This differs from the legislated corporate solution that addressed all Alaska Natives in one act of the United States Congress. The retention of Aboriginal title to the land and the protection of hunting rights in the Canadian Yukon First Nations agreement stands in stark contrast to ANCSA's extinguishment of title and provisions for priority hunting and fishing rights.

#### *Māori Land Claims*

In New Zealand, Aboriginal land claims trace back to the Treaty of Waitangi in 1840, initiated by the Crown (under the authority of the Queen of England) and signed by chiefs from both the North and the South Islands. The Crown's explanation for the Treaty was to achieve authority



over Settlers and their demands for land, but it also described the constraints.<sup>66</sup> The actual understanding of the conditions of the Treaty differed in translation between the British and the Māori versions. The points of difference were over sovereignty, autonomy, “ownership,” and Māori concepts of sharing rights to live and sustain community on the land. Māori thought they were welcoming Settlers in mutual trust and that the land “belonged to the people who formed the local community,” reflecting the difference between a “social contract” and a “property conveyance.”<sup>67</sup> Article 2 of the Treaty proclaimed Māori rights and “Crown Pre-emption.” Māori would have title to their lands under Māori customary law and this title could be extinguished only by the Crown and not by individual sales.<sup>68</sup> This set up a contentious situation where the government had a monopoly as it began to buy up Māori land and re-sell it to Settlers. After 25 years of unbridled purchasing, the Crown finally set up a system whereby customary title would be investigated before land sales. This was reinforced in the Native Land Act of 1862 and 1865 that established the Native Land Court. The intent was to align Native land ownership with European principles of ownership.<sup>69</sup> The purpose was to convert the customary titles that could be held by tribes, sub tribes, or extended families into limited ownership by no more than ten people.

Māori Deputy Chief Judge, Caren Fox, points out that in terms of intended results, this Act and these policies look very much like the history of assimilation policies toward Native Americans.<sup>70</sup> By alienating ownership from tribes and creating single lot sales, Māori would be forced to live like the Settlers and would be easy prey for speculators seeking to buy their land. Adequate means of resolution to Māori land claims did not come until 1975 when the Treaty of Waitangi Act (amended in 1985) established the Waitangi Tribunal. This body is charged with hearing Māori land claims, reporting findings, and making recommendations to the New Zealand government for settlement.<sup>71</sup> Unlike the American and Canadian land claims, this is a judicial process featuring investigation of each claim based on the particular actions that had severed Māori rights to the land going back in some cases to the 1840 Treaty of Waitangi. Because of intensive settlement on the islands, it is often not possible to compensate Māori with the same land to which they hold claim.

### The Three Settlements

As different as the three land claims are, there are common threads - the struggle by Native people to assert rights to the land and a degree of sovereignty in systems of governance different from their own traditions. Each settlement has formative and guiding documents that play unique roles in shaping the recognition of land claims. In the case of ANCSA, Willie Hensley’s 1966 college essay was a personal awakening and a clear statement on Native rights argued within the terms of the Western legal system. This document stands out along with the testimonies of many Native leaders in Congressional hearings. Remembered as a rallying cry for land claims, the document was distributed pre-settlement to garner support, and it has been preserved on websites and in archival collections. It has become a benchmark in the study of land claims. Similarly, “Together Today for Our Children Tomorrow” represents the collective grievances of the Yukon First Nations, is recalled as their primary point of articulation with the National Government of Canada in 1973, and remains a touchstone to the struggles that led to settlements.<sup>72</sup> Yukon First Nations leaders proudly recall their leaders’ trip to Ottawa to present their grievances and claims to Prime Minister Trudeau. The 1840 Treaty of Waitangi in New Zealand, while initiated by the Crown, is a marker of the struggles and cultural misunderstandings between the Māori and the

government. The Treaty stands today as a beginning point and reference for adjudicating land claims.<sup>73</sup>

The Alaska Native Land Claims cascaded to a rapid legislative conclusion under the pressure of the land freeze and the Prudhoe Bay oil discovery. In contrast, the Yukon agreements were negotiated over time. All Yukon First Nations negotiated the parameters of an overall final agreement. Then, each individual Yukon First Nation negotiated with the territory and the federal government for their specific land claim. The result was the Umbrella Final Agreement and the individual agreements of each First Nation. They negotiated without the leverage of a land freeze, but there were developmental interests pressuring for resource development.<sup>74</sup> For the Māori, Settler pressure on their land marked a long history of Māori land claims. While there was not the impending urgency of development that marked the Alaska Native land claims settlement, long term Settler policies and occupation had seriously eroded their land base and now makes settlement of Aboriginal claims of original land that was taken more difficult and often impossible.

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### Endnotes

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<sup>1</sup> This document is not a legal analysis of ANCSA, a section-by-section analysis of the bill, nor a detailed description of the legislative process. Instead, this is intended as an overview of the historic landscape with major features of the law described, but with fuller detail reserved for more extensive book length treatment by others. For example, see Robert D. Arnold, *Alaska Native Land Claims* (Anchorage: Alaska Native Foundation, 1976), and Donald Craig Mitchell, *Take My Land, Take My Life: The Story of Congress' Historic Settlement of Alaska Native Land Claims, 1968–1971* (Fairbanks: University of Alaska Press, 2001). All researchers who approach the study of ANCSA will find Paul Ongtooguk's contributions valuable. The Alaskool website that he developed is a treasure trove of early documents and publications on the subject (<http://www.alaskool.org/default.htm>). In addition, Ongtooguk has taught classes in Alaska Native history and developed curriculum material on ANCSA.

<sup>2</sup> Alaska Native Claims Settlement Act of December 18, 1971, Pub. L. No. 93-203, [85 Stat. 688](#).

<sup>3</sup> Section 6 of the Alaska State Constitution allows for State selection of lands while Section 4 disclaims rights to land that might be subject to Native title. See Stephen Haycox, "Contingency and Alaska History: How Congress's 1871 Cessation of Treaty-Making Helped Create ANCSA a Hundred Years Later," in *The Big Wild Soul of Terrence Cole: An Eclectic Collection to Honor Alaska's Public Historian*, Frank Soos and Mary F. Ehrlander, eds. (Fairbanks: University of Alaska Press, 2019), 175-176. While Statehood marks an important point when the State deferred responsibility for Alaska Natives, Haycox reminds me that throughout the territorial years, responsibility for Natives was left to the federal government. By way of example, he notes: "A small piece of that surfaced in 1906 when schools in unincorporated territories were

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left to the jurisdiction of the federal government...and schools in incorporated areas were for white and mixed-race children, funded by a percentage of the new business tax. Natives in incorporated places were also left to the jurisdiction of the federal government” (personal communication, November 22, 2021).

<sup>4</sup> Project Chariot, a federally proposed plan to detonate an atomic bomb to create a port at Cape Thompson in Northwest Alaska, raised deep concerns in the Native community. This prompted the village council of the nearby Iñupiaq village of Point Hope to seek help. The Association on American Indian Affairs (AAIA) responded by sending its Executive Director, LaVerne Madigan, and Dr. Henry Forbes, Chairman of the Association’s Committee on Alaskan Policy, to meet with the villagers. This led to AAIA support for the first Iñupiat Paitot conference in 1961 at Barrow (now Utqiagvik). The meeting brought leaders from Northwest and Arctic Alaska together. They expressed their concerns about subsistence, the impacts of development plans, and governmental regulations on hunting (Dan O’Neill, *The Firecracker Boys: H-Bombs, Inupiat Eskimos, and the Roots of the Environmental Movement* (New York: Basic Books, 2007), 226-32). Just a year earlier, Barrow residents had clashed with a Fish and Wildlife Service official over the prohibition of spring waterfowl hunting and had approached the AAIA for help (Elizabeth James, “Toward Alaska Native Political Organization: The Origin of *Tundra Times*” *Western Historical Quarterly* 41 (Autumn 2012), 292). At issue was the enforcement of the ruling that prohibited spring waterfowl hunting at a critical time in the yearly subsistence cycle (Arnold, *Alaska Native Land Claims*, 96; Margaret Blackman, *Sadie Brower Neakok, An Iñupiaq Woman* (Seattle: University of Washington Press, 1989), 180-84). One of the results of the 1961 Iñupiat Paitot meeting was the expressed desire for a way to keep informed on Native issues. This was the basis for approaching Dr. Henry Forbes to support creation of the *Tundra Times*, a statewide Native newspaper (O’Neill, *The Firecracker Boys*, 236-37). Henry Forbes’ investment in the *Tundra Times* and faith in Howard Rock to guide it is described in a speech Forbes gave in Fairbanks in October of 1965, at which he stated: “The need was real; the plan was good, and the personnel just right. So I agreed to support the *Tundra Times* in its early stages” (Lael Morgan Collection, University of Alaska Fairbanks, Alaska and Polar Regions Collections, Box 7, Folder 17).

<sup>5</sup> In Southeast Alaska, the Alaska Native Brotherhood and Sisterhood, established in 1912, had a long history of organizing to fight for land rights, most notably their efforts beginning in 1929 to seek compensation for land taken and re-appropriated by the federal government. Their successful legal battle and continuing efforts in support of land claims laid the groundwork for the eventual passage of ANCSA (Peter Metcalfe, *A Dangerous Idea: The Alaska Native Brotherhood and the Struggle for Indigenous Rights* (Fairbanks: University of Alaska Press, 2014), 8).

<sup>6</sup> The concept of property relations may be the best way to emphasize the social, cultural, and personal relationships that marked the way Alaska Natives conceived of and how they ordered their lives in order to survive with each other and ensure access to the fish and game that sustained them. This conceptualization is proposed by Paul Nadasdy, in a discussion of Yukon First Nations land claims in Canada where he emphasizes the difficulties of merging European and Aboriginal concepts of property. While his study area is the Yukon, the discussion is applicable to Alaska and reflects the inevitable dilemmas of Aboriginal land claims agreements settled under European systems of justice. As Nadasdy acknowledges, there is a range of responses, and people often operate in both what we might recognize as traditional or customary ways of managing resource issues and in other cases Western legal ways. This complicates any

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generalizations. (Paul Nadasdy, “‘Property’ and Aboriginal Land Claims in the Subarctic: Some Theoretical Considerations,” *American Anthropologist* 104, No.1 (2002), 251.)

<sup>7</sup> The notion of land as private property held by *individuals* and subject to acquisition and alienation was foreign to Native groups but central to the Settler’s concept of civilization and the assimilationist policies that permeated much of the history. Instead, Native authority often rested in leaders who acted with the support of the tribe, band, clan, and extended family. Tuck writes, “The settlement process required Alaska Native leaders to negotiate in terms of land as property and people as land owners. These represent significant departures from the ways in which Alaska Native peoples have described their relationships to land and place” (Eve Tuck, “ANCSA as X Mark: Surface and Subsurface Claims of the Alaska Native Claims Settlement Act,” *Alaska Native Studies in the 21<sup>st</sup> Century, Proceedings from the Alaska Native Studies Conference 2013*, Beth Ginondidoy Leonard, JeaneTa’aw xiwaa Breinig, Lenora Ac’aralek Carpluk, Sharon Chillux Lind, Maria Shaa Tla’a Williams, eds. (2013), 262).

<sup>8</sup> The Treaty of Cession raises the question of what actually was purchased. There were the limited holdings of the Russian American Company, but no large tracts of land. Ernest Burch, therefore, suggests that there is an argument by some that the entire transaction was suspect as to what was actually purchased (Ernest Burch, “Native Claims in Alaska, An Overview,” *Etudes Inuit Studies* 3, No.1 (1979), 8).

<sup>9</sup> Article III of the Treaty of Cession states, “The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time adopt in regard to aboriginal tribes of the country.”

<sup>10</sup> The Federal Trust refers to the federal government’s responsibility to all Natives. The Trust has its roots in the history of federal rulings that relate to American Indians. The basic principle that guides the relationship is one of “wardship” as defined by Chief Justice Marshall in 1831. Natives are treated as sovereign nations, but the federal government functions as overlord with special responsibilities for the welfare of Natives beyond rights that might be gained by citizenship (Fact sheet, Administration for Native Americans, March 19, 2014, “American Indians and Alaska Natives: The Trust Responsibility”). See also David Case and David Voluck, *Alaska Natives and American Laws*, 3<sup>rd</sup> edition (Fairbanks: University of Alaska Press, 2012), 1. The responsibility established in the Treaty of Cession did not extinguish Native sovereignty.

<sup>11</sup> “Aboriginal Title” was the subject of an essay by Felix Cohen, in which he quoted a 1923 Supreme Court decision, *Cramer v. the United States*, where the Court found: “Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States” (Felix Cohen, “Original Indian Title,” *Minnesota Law Review* 32, No. 28 (1947), 30).

<sup>12</sup> *United States v. Berrigan*, 2 Alaska 442 (1905) June 21, 1905, United States District Court for the District of Alaska, No. 270.

<sup>13</sup> Section 8 of the Alaska Organic Act states: “That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them...” Section 8 has generally been accepted as applying to all lands in Alaska, but Stephen Haycox has pointed out: “As written, this section of the Organic Act applies only to filing mining claims. Mining claims could not be filed on any land utilized, occupied, or claimed by Natives or other persons. The provision that Natives were not to be disturbed in possession of any land actually in their possession has been taken out of context and used to argue for a blanket rational protection of Native lands in Alaska” (Stephen Haycox, “Complex Circumstances and Unforeseen Consequences: The End of Treaty-Making and ANCSA,” presentation at Alaska

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Historical Society Annual Conference, October 16, 2020. Recording of the presentation is available at: <https://alaskahistoricalsociety.org/about-ahs/conference/presentations/>, accessed January 14, 2022). This was further clarified in personal communication on August 12, 2021, where Haycox points to the specific reference to mining claims in the language in Section 8 that prefaces the protective clause on Indian land: "...and the laws of the United States relating to mining claims, and the rights incident thereto, shall from and after the passage of this act, be in full force and effect in said district."

<sup>14</sup> On December 14, 1898 Tlingit Chiefs met with Alaska Territorial Governor John Brady and were told that they needed to conform with White society if they were to succeed. He said, "God did not make the fields and did not make all the roads, but he made the men and men had to do all the labor. Now if any Tlingit in this country goes and does likewise and by his labor makes fences, improves ground and builds a house, it is the duty of every official to see that he is undisturbed" (Ted Hinckley, "'The Canoe Rocks - We do not know what will become of us' The Complete Transcript of a Meeting between Governor John Green Brady of Alaska and a group of Tlingit Chiefs, Juneau, December 14, 1898," *Western Historical Quarterly* 1. No. 3 (1970), 286). In 1915, Indian Chiefs and representatives from the Tanana River met with Delegate to Congress James Wickersham. Wickersham concluded their meeting by imploring them to take up the White man's ways. He said to one of the delegates: "You tell them that as soon as they have established homes and live like the white man and assume the habits of civilization they can have a vote" (From original transcript of the 1915 Tanana Chiefs meeting in Fairbanks, Alaska. State Library Historical Collection, Wickersham State Historical Site Manuscripts, 1884-1970s. ASL-MS-0107-38-001).

<sup>15</sup> Indian Citizenship Act of 1924, Public Law 68-175, 43 Stat. 253, recognized that citizenship did not abrogate land rights. The Act states: "Provided that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

<sup>16</sup> Peter Metcalfe explains: "The land ownership issue came down to who was entitled to occupy areas long used by Alaska Natives for subsistence purposes. The U.S. government, without regard for any prior claims by the Native people, issued use permits for fox farms, recognized mining claims, and granted land title to cannery owners and others" (Metcalfe, *A Dangerous Idea: The Alaska Native Brotherhood and the Struggle for Indigenous Rights*, 21). Joaquin Estus points out that the compensation amount was set well below the actual value of the land when it was taken (personal communication, July 9, 2021). William Paul, the Tlingit lawyer who initiated the claim against the government, went on to play a prominent part in the larger statewide land claims movement.

<sup>17</sup> The final settlement of the Tlingit-Haida case in 1959 was bolstered by a 1941 decision involving Arizona Indians and the Santa-Fe Railroad. The case, *United States v. Santa Fe Railroad*, confirmed the Arizona Natives' Aboriginal title (Haycox, "Contingency and Alaska History," 174).

<sup>18</sup> While there was some discussion of Native land claims at the Constitutional Convention, notably by Marvin (Muktuk) Marston, delegate Vic Fischer noted that the delegates generally considered Native land claims an issue to be addressed by the federal government (Victor Fischer, *Alaska's Constitutional Convention* (Fairbanks: University of Alaska Press, 1975), 137-39).

<sup>19</sup> Stephen Haycox, "The Uneasy Relationship of Biography and History in Alaska: Anthony Dimond, Ernest Gruening, and Bob Bartlett," *Alaska History* 34, No. 2 (Fall 2019), 57.

<sup>20</sup> Haycox, "Contingency in Alaska History," 175-76.

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<sup>21</sup> See for instance, John Luke from Tanacross Council writing on behalf of Chief Andrew Isaac and stating: “Our people and the people we represent wants us to fight hard for our blanket claim first then State can do whatever they want with it” (Letter from John Luke to Senator Ernest Gruening, January 15, 1968. In Gruening Papers. Box 718, Folder: “Office Correspondence Land-1-2 Indian land bill 5, 1964,” Ernest Gruening Papers, Alaska and Polar Regions Collections, University of Alaska Fairbanks).

<sup>22</sup> Twenty-two Native organizations, including the Alaska Federation of Natives, were listed in “They Play Increasingly Important Roles-Department of the Interior Compiles Major Native Organizations in Alaska,” an article in the *Tundra Times* on July 14, 1971 (*Tundra Times Online Archives*, Tuzzy Consortium Library, Utqiagvik (Barrow), Alaska, <http://ttip.tuzzy.org/index.htm>). One of the most important organizations was the Arctic Slope Native Association (ASNA), comprising the villages of Alaska north of the Brooks Range and extending west to east from Point Hope to Kaktovik. They organized to protest state and federal leasing of lands for mineral development on the North Slope. They enlisted the support of the Tlingit lawyer William Paul, Sr. to represent them and present their claim (Hugh Gallagher, *Etok: A Story of Eskimo Power*, (St. Petersburg, Florida: Vandamere Press, 2001 edition), 119-23). See also Mitchell, *Take My Land, Take My Life: The Story of Congress' Historic Settlement of Alaska Native Land Claims, 1960-1971*, 129-131.

<sup>23</sup> In 1984, Marilyn Richards paid tribute to Nick Gray who helped organize the Cook Inlet Native Association, Kuskokwim Valley Native Association, Fairbanks Native Association, and Copper River Native Association. She pointed out that Gray’s dream was for all of the Native organizations to join as one strong voice. “His legacy, however, remains in what he envisioned. The first meeting of the Alaska Federation of Natives included many members of associations Gray helped create” (Marilyn Richards, “Remembering Nick Gray, Philosopher, Visionary,” *Tundra Times*, June 20, 1984). The first meeting of what would become the Alaska Federation of Natives was held over five days in Anchorage (October 18-22, 1966) and was financed by the American Association on American Indian Affairs, Cook Inlet Native Association, and the Village of Tyonek. The people of Tyonek had successfully challenged oil exploration on land established as a reservation for them in 1915 and received a cash settlement. They used this money not only to assist their village, but to help other Alaska Native groups to identify needs and promote change. This is how they were able to help support the first statewide gathering of Alaska Natives (Letter and report on First Statewide Alaska Native meeting, October 18-22, 1966, Box 343, Folder “1978, Indians 2-General-1966-1967,” Ernest Gruening Papers, Alaska and Polar Regions Collections, University of Alaska Fairbanks). See also “Alaska: The Tycoons of Tyonek,” *Time Magazine*, July 1, 1966, and “Tyonek Indians in Alaska Accept \$11M Offers for Oil and Gas Leases,” Media Contact Office, Secretary, U. S. Department of the Interior, Indian Affairs, May 15, 1964 ([www.bia.org](http://www.bia.org)). The minutes to that first statewide meeting also are found under the Gruening Papers reference listed above.

<sup>24</sup> The essay was written for a graduate course in Constitutional Law at the University of Alaska in 1966. When it was reprinted in 2001, Hensley wrote in the introduction about the impact his research had on his decision to work for land claims: “It was as if scales were lifted from my eyes at the conclusion of that spring semester. If the state land selection continued, it was clear that the hope of retrieving Native land or getting compensation, would perhaps never come. I knew we had to act and to act quickly” (Hensley, William. “What Rights to Land Have the Alaska Natives?: The Primary Question’ – May 1966. With May 2001 Introduction.” Page 1: [http://www.alaskool.org/projects/ancsa/WLH/WLH66\\_1.htm](http://www.alaskool.org/projects/ancsa/WLH/WLH66_1.htm), accessed July 4, 2021). The essay

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was one of the first historical compilations of how Alaska Natives were treated under Western law. The conclusion of the essay is a rallying cry: “Will America treat a small uneducated, and culturally different people with more than equal justice, when these people offer no threat but hope that they will be allowed their living lands to live and hunt upon as freely as may be possible in a rapidly changing and ever-evolving society?” (Ibid, 8: [http://www.alaskool.org/projects/ancsa/WLH/WLH66\\_8.htm](http://www.alaskool.org/projects/ancsa/WLH/WLH66_8.htm), accessed July 4, 2021). The essay is referenced here to point out how it has become a hallmark document in the history of ANCSA.<sup>25</sup> Willie Hensley recalls his connection with Edwardsen: “Well, Etok, Charlie Edwardsen, from Barrow actually was more knowledgeable initially. He learned about me from Brenda Itta because I was going to school in D.C., George Washington, and she was working for Senator Gruening after she went to Haskell Institute where BIA sent Indians to learn a skill. She told Etok about me. At that point Etok had learned about land issues when he was in high school down in [Mount] Edgecumbe and I think he learned from William Paul who was the first Native attorney and so at that time, Etok was helping organize... Anyway, they were trying to decide how far south to make their claim because there were no such thing as regional claims. Remember this was 1966, seven years after Statehood and so the provisions in the Statehood Act that allowed the State to select 103 million acres was in process” (Statement by Willie Hensley during panel discussion by Native leaders, Oliver Leavitt and Willie Hensley, at the Alaska Historical Society Annual Conference, October 14, 2021. The recording of this session is available at: <https://alaskahistoricalociety.org/about-ahs/conference/2021-conference-presentations/>, accessed January 14, 2022).

<sup>26</sup> Mitchell. *Take My Land, Take My Life*, 129-131. Later, William Paul’s son, Frederick Paul, was the attorney representing the Arctic Slope Native Association in their land claims activities (Fred Paul, *Then Fight For It!: The Largest Peaceful Redistribution of Wealth in the History of Mankind and the Creation of the North Slope Borough*. Victoria, British Columbia, Canada: Trafford Publishing, 2003, 140-144).

<sup>27</sup> Gallagher, *Etok: A Story of Eskimo Power*, 122-23. Edwardsen, like others who lived on the North Slope, knew there were rich oil reserves on the land, and they wanted to ensure that the North Slope residents benefitted from any development (Ibid, 176). During the debate by the Alaska Federation of Natives (AFN) over language in the land claims bill, Edwardsen, Eben Hopson, Sr., and Joe Upicksoun maintained that a fair settlement had to account for the vast area of their region compared to other regions, their low population compared to other regions, and the abundant resources that the nation would be eager to develop. Don Mitchell has chronicled in detail the efforts of the Arctic Slope Native Association to demonstrate the disparity between their oil rich region, vast size, and low population and their vulnerability to lose the most of any region if a settlement did not account for these factors (Mitchell, *Take My Land, Take My Life*, 346-491). The Arctic Slope Native Association would reject any proposal that did not account for these factors. At this point in the negotiations, AFN needed a united front and they needed the Arctic Slope Native Association. So AFN members reached a compromise: they agreed that the land distribution would be based on the principle of “lands lost.” Each region would be granted acreage based on the size of their region, in comparison to the total acreage of the state and the available acres in the proposed legislation. Land would be distributed according to the region’s relative size to other regions (Arnold, *Alaska Native Land Claims*, 236; Mitchell, *Take My Land, Take My Life*, 484). Revenue from mineral development would be shared among the regions (Arnold, *Alaska Native Land Claims*, 136). These two provisions, settlement based on land lost and revenue sharing, were incorporated into the final settlement (Ibid, 137). The Arctic

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Slope Native Association still had objections and voted no on the final language proposed by AFN (Mitchell, *Take My Land, Take My Life*, 492). See also a letter to President Richard M. Nixon, December 18, 1971 from Arctic Slope Native Association, Joseph Upicksoun, President and Charles Edwardsen, Jr. Executive Director, reported in the article, “Why the Arctic Slope Inupiat said NO to ANCSA,” *Alaska Native News*, Volume 2, September 1984, 16 (reproduced on <http://www.alaskool.org/>).

<sup>28</sup> Secretary Udall’s “land freeze” in 1966 brought State land selection and development to a halt and facilitated the move to settle land claims (Arnold, *Alaska Native Land Claims*, 117-18).

<sup>29</sup> When passage of ANCSA was finally announced, Walter Hickel, a past and future governor of Alaska and past Secretary of the Interior remarked on how shocked he was to learn about the extent of Native claims and how conceivable it was that they might very well lay claim to all of Alaska. He referenced the Federal Field Committee publication, *Alaska Natives and the Land* (Federal Field Committee for Developmental Planning in Alaska. Washington: Government Printing Office, 1968). This document was prepared in order to brief Congress as they approached debate on Alaska Native land claims. As Secretary of the Interior, Hickel stated in his testimony on land claims, “...basically our position has been that if there is not a legal claim there is at least a moral claim. It was never really faced up to even in the Statehood Act” (*Hearings on H.R. 1343, H.R. 10193, and H.R. 14212 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 91<sup>st</sup> Cong. 101 (1969) (statement of Walter Hickel, Secretary of the Interior)). He would reiterate this claim at the 1971 AFN Convention after President Nixon’s taped address to the delegates where Nixon announced that he had signed the Alaska Native Claims Settlement Act (Madelyn Shulman, “Nixon Pens Bill into Law: ‘I want you to be the first to know...’ Nixon says.” *Tundra Times*, December 22, 1971). Governor Hickel was under pressure to solve the land claims so the State could begin to utilize land selection to foster development.

<sup>30</sup> One recommendation of the Task Force was for a grant of 40 million acres to the villages (“Proposal for Settlement of the Alaska Native Land Claims: A Report.” Governor’s Task Force on Native Land Claims. Submitted by Willie Hensley, Chairman. Governor Walter Hickel, Juneau, January 10-16, 1968.) Years later, Hickel recalled in an interview with Ronald Spatz: “After I was elected governor, I put together a group called the Governor’s Special Task Force on Native Land Claims to study this issue. They recommended that 40 million acres of Alaska’s 365 million be conveyed to Native Alaskans through for-profit corporations while allowing Natives to continue to use the remaining federal lands for subsistence purposes” (ANCSA@30 interview by Ronald Spatz with Walter Hickel. LitSite Alaska website, <http://www.litsitealaska.org/index.cfm?section=History-and-Culture&page=ANCSA-at-30&cat=Interviews&viewpost=2&ContentId=735>).

<sup>31</sup> Corporate structure is discussed in the Task Force Report in general terms under “Miscellaneous,” Point 6, p. 6. See also Arnold, *Alaska Native Land Claims*, 153. Another section of the Task Force Report to Governor Hickel called for the State to make royalty payments as part of the land settlement. A version of this provision became incorporated in Section 9 of ANCSA under Revenue Sharing and pertains to minerals. Section 9 (b) states: “With respect to minerals...State shall pay into the Alaska Native Fund from the royalties, rentals, and bonuses hereafter received by the State.” Arnold explains further: “The act established the Alaska Native Fund in the U.S. Treasury and authorized the appropriation of \$462.5 million to be paid into it over an 11-year period. It also provided for the payment of \$500 million into the fund from revenues obtained from certain mineral resources from federal and



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State lands in Alaska. Such payments (chiefly based on oil and gas), by the State and federal governments would continue until the total amount was reached” (Arnold, *Alaska Native Land Claims*, 151-152).

<sup>32</sup> On the “corporate solution,” Charles Wilkinson points out how drastic it really was: “Because ANCSA land was held by state-chartered private corporations, not tribal governments, Alaska state regulatory law applied on all of it. This led to one especially ominous consequence, ANCSA extinguished all aboriginal hunting and fishing rights, making subsistence living—the core of cultural and economic life in bush Alaska—subject to state law, the situation that treaty tribes in the lower forty-eight states fought so hard to prevent” (Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W.W. Norton & Company, 2005), 237).

<sup>33</sup> Section 1603 (b) of ANCSA states: “All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished” (Alaska Native Claims Settlement Act of December 18, 1971, Pub. L. No. 93-203, 85 Stat. 689).

<sup>34</sup> Jenny Bell-Jones notes: “This action removed any cloud on the land title. It did not prevent future litigation over other matters” (personal communication, July 7, 2021).

<sup>35</sup> Section 801 of Title VIII, Part 4 of ANILCA states: “In order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs ...and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents” (43USC160. Alaska National Interest Lands Conservation Act of December 2, 1980. Pub. L. No. 86-487).

<sup>36</sup> Section 804 of Title VIII of ANILCA states three conditions for providing a rural preference in times of resource shortage. Local residency is one of the criteria and this conflicts directly with the Common Use Provisions of the Alaska State Constitution that prohibits favoring any particular user group. Article 8, Section 4 of the State Constitution states: “Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.” Sections 3, 15, and 17 are explicit on this point.

<sup>37</sup> The dual system of management creates a contentious situation for subsistence users and managers of the resources. The State, eager to gain management control of all Alaska fish and game, tried to comply with the federal requirements for a rural subsistence preference, but the efforts were defeated in key legal challenges (*Madison v. Alaska Department of Fish and Game* (1985) and *McDowell v. State of Alaska* (1989)), and in several ballot initiatives and special sessions of the legislature (“Subsistence-Alaska’s Contentious History,” *Anchorage Daily News*, May 12, 2002: A-8.) Without an amendment to the constitution, the State is bound to uphold a prohibition against favoring certain categories of users such as rural subsistence residents.

<sup>38</sup> In 1985, Katie John, an Ahtna elder, challenged the State’s right to regulate her access to the fishing site of Batzulnetas on the upper Copper River. Her claim that the federal government protected her rights to fish at the site under Title VIII of ANILCA was finally upheld in federal court after years of legal challenge (William Schneider, “When a Small Typo Has Big Implications,” *Alaska History* 36, No. 1 (Spring 2021), 14-16).

<sup>39</sup> Stephen Colt points out the economic drawbacks: “The prohibition removed the threat of takeover as a powerful discipline mechanism and eliminated the actual takeover as a corrective

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mechanism. Finance theory suggests that with no takeover threat and no information feedback from a market in shares, shareholders would be forced to monitor their corporation's performance in costlier and less effective ways" (Stephen Colt, "Alaska Natives and the 'New Harpoon:' Economic Performance of the ANCSA Regional Corporations," *Journal of Land Resources and Environmental Law* 25, No. 2 (2005), 158).

<sup>40</sup> Maude Blair explains that ANCSA, at its inception, was a legal document signifying settlement of claims with Alaska Native people living on December 18, 1971, and not with future generations (Maude Blair, "Issuing New Stock in ANCSA Corporations," *Alaska Law Review* 33, No. 2 (2016), 274).

<sup>41</sup> The pertinent legislation is Public Law 100-241-February 3, 1988. Reference is to "Alaska Native Claims Settlement Act Amendments of 1987. Specific reference is to Sec.4(B)(i)(I). See also J. Tate London, "'The 1991 Amendments' to the Alaska Native Claims Settlement Act: Protection for Native Lands?" *Stanford Environmental Law Journal* 8 (1989), 219-20.

<sup>42</sup> Arctic Slope, Ahtna, NANA, Doyon, Sealaska, and Calista Regional Corporations voted to create and issue shares of stock to those born after December 18, 1971 (Blair, "Issuing New Stock," 278). In the case of Sealaska, the shareholders voted in 2007 to extend shares to those born after December 18, 1971, but have struggled with the question of whether to extend shares to those who are less than ¼ blood quantum Alaska Native. One-quarter blood quantum is the federal government's standard definition for determining Native status and is what is in the original ANCSA legislation (Section 2 under definitions). As time passes, the number of Natives with ¼ or more Native blood quantum is decreasing and the existing shareholders must decide whether to extend shares to those Natives with less than ¼ Native blood quantum (Rosita Worl, "Blood Quantum Inclusion or Exclusion, Survival or Extinction." Presentation at the Sharing our Knowledge Clan Conference – Indigenous Perspectives on Climate Change, Sealaska Heritage Institute, Juneau, September 27, 2019.

[https://www.sharingourknowledge.org/program\\_pdfs/2019\\_program.pdf](https://www.sharingourknowledge.org/program_pdfs/2019_program.pdf)). Blair summarizes the dilemma shareholders face: "Overall, though, the decision to issue additional stock is one that must carefully balance the need of the community, the resources of the corporation, and the shared vision for the future" (Blair, "Issuing New Stock," 286).

<sup>43</sup> Meghan Sullivan, "Alaska Natives' Complicated Identities," *Indian Country Today-Digital Indigenous News*, July 15, 2021 (<https://indiancountrytoday.com/news/alaska-natives-complicated-identities>).

<sup>44</sup> This was titled, Alaska Native Veterans Land Allotment Equity Act, Public Law 105-276, October 21, 1998. Amendments were proposed in 2002, 107<sup>th</sup> Congress, 2d session, House of Representatives, Report 107-744, "Alaska Native Veterans Land Allotment Act" 1 Section 432, Sec.41(a) of Public Law 105-276. The current program is titled, "Alaska Native Vietnam Era Veterans Land Allotment Program" and is authorized under the John D. Dingell, Jr. Conservation Management and Recreation Act of 2019, Section 1119. Public Law No. 116-9, (03/12/2019). Land selection extends through December 29, 2025.

<sup>45</sup> For instance, in Southeast Alaska, the Tongass National Forest is not available for allotments, and on the North Slope, the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge are similarly not available to allotment applicants (Van Ness Feldman, LLP. "Interior Department Moves Forward with Alaska Native Vietnam Era Veterans Land Allotment Selections," *National Law Review*, Vol. XI, No. 218 (2 pages), August 6, 2021). See also Linda Hersey, "TCC Says Land Options Limit Applications for Allotments," *Fairbanks Daily News-Miner*, November 10, 2021.

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<sup>46</sup> Jenny Bell-Jones makes the important point that the revenue sharing provision does not apply to their natural resource development in other locations than originally selected lands (personal communication, July 7, 2021).

<sup>47</sup> Referencing James Linxwiler, Aaron Schutt describes the arrangement: “Without the sharing of the revenues from timber and mineral development with Natives statewide, there would have been a gross disparity between the ‘have not’ regional corporations and the ‘haves’” (Aaron Schutt, “ANCSA Section 7(i): \$40 Million Per Word and Counting,” *Alaska Law Review* 33, No. 2 (2016), 234).

<sup>48</sup> *Ibid.*, 235, 242-45.

<sup>49</sup> Ethan G. Schutt and Aaron M. Schutt, “The Grand Compromise: The ANCSA Section 7(i) Settlement Agreement,” *Alaska Law Review* 34, No. 2 (2017), 202.

<sup>50</sup> Donald Mitchell reports how this worked in the case of Doyon Ltd.: “Doyon intentionally created the [\$]238 million paper loss in order to take advantage of a provision Ted Stevens had quietly arranged for Congress to insert into the Internal Revenue Code that allowed ANCSA corporations to sell their operating losses to other corporations (which then were authorized to use the losses to lower their own tax liabilities)” (Mitchell, *Take My Land, Take My Life*, 507-08).

<sup>51</sup> This is an observation made by Haille Bissett, Executive Director of the Alaska Native Village Corporation Association and Aaron Schutt, Alaska Regional Association Chair and President and CEO of Doyon Ltd. on the November 12, 2021 “Talk of Alaska” statewide radio program. Schutt stated, “Clearly our corporations have had a lot of economic success, created a lot of opportunity as Hallie said, reversed the model of the extractive industries of Alaska and bring that success home.” Bissett put it this way: “People used to say we are a three-legged stool, oil and gas, military, and everything else, but I would argue the ANC’s [Alaska Native Corporations] are the fourth leg and you have a chair and we bring a little bit of stability to the State economy that way.” (“ANCSA at 50: The Role of Native Corporations in Alaska’s Economy.” Hosted by Lori Townsend, November 12, 2021, Alaska Public Media.

<https://www.alaskapublic.org/2021/11/12/ancsa-at-50-the-role-of-native-corporations-in-alaskas-economy/>)

<sup>52</sup> Writing in 2005, James Mills reported, “Currently, most Native corporations offer hiring preference to Alaska Natives in some form either to Native Americans, Alaska Natives, shareholders. or those closely related to shareholders of ANCSA stock. These corporations provide jobs for 3,100 Alaska Natives within the state and hiring of Alaska Natives is considered to be part of ‘the Native corporations’ commitment to welcoming shareholders and Native participation in company operations and growth” (James P. Mills, “The Use of Hiring Preference by Alaska Native Corporations after *Malabad v. North Slope Borough*,” *Seattle University Law Review* 28, No. 239 (2005), 404-05). The thrust of Mills’ article concerns the effort of the federal government to provide a legal basis for Native corporations to offer Native preference hiring and the State objection to any racially based criteria for preferential hiring. At the time of his writing, it seemed to Mills that a priority hire based on status as a shareholder might avoid State challenge. Of course, not all Alaska Natives are shareholders of any Native corporation, and others are shareholders in corporations other than the corporations located where they were born or grew up. In fact, as Meghan Sullivan points out, Alaska Native identity is complicated. Enrollment in tribes and corporations may be forms of identity, but some Natives are neither and maintain other forms of cultural identity that shape their reality as Alaska Natives (Meghan Sullivan, “Alaska Natives’ Complicated Identities,” *Indian Country Today-Digital Indigenous*

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News, July 15, 2021, <https://indiancountrytoday.com/news/alaska-natives-complicated-identities>). The complexity of identity defies use of one or more criteria to determine eligibility for benefits such as preferential hiring.

<sup>53</sup> *Alaska Business Report*, <https://www.akbizmag.com/>

<sup>54</sup> Tim Bradner underscored how the 7(i) provisions support village corporations. He is quoted as stating: “The section 7(i) of the claims act required that 70% of the natural resource revenues be shared with all other regional and village corporations” (“ANCSA@50: The Journey Continues,” Podcast #3, November 18, 2021. Hosted by Rhonda McBride. KTOO-TV. Minute 42:50. <https://media.ktoo.org/wp-content/uploads/2021/11/11.18.21-ANCSA%4050-PODCAST-3.mp3>). The significance of the 7(i) distributions was recognized early on by Alexander Erwin who wrote: “Also the important provision for village and regional corporations is a unique innovation which provides the potential for corporations undertakings of a social and economic nature with corporations based on tribal or ethnic membership” (Alexander Erwin, “Contrasts Between the Resolution of Native Land Claims in the United States and Canada Based on Observations of the Alaska Native Land Claims Movement,” *Canadian Journal of Native Studies* 1 (1981), 132). Section 7(j) requires that revenues from natural resource wealth is shared with Alaska Native village corporations. Under this provision of the Act, regional corporations distribute 50 percent of the Section 7(i) revenues they receive to Alaska Native village corporations and stockholders at large (“How ANCSA Revenue Sharing Works,” *Alaska Business Magazine*, Volume 36, Number 1, January 2020, <https://digital.akbizmag.com/issue/january-2020/how-ancsa-revenue-sharing-works/>, accessed January 27, 2022). For more information about revenue sharing, see: “The Revenue Sharing Provisions of ANCSA: Sections 7(i) and 7(j)” section of the ANCSA Regional Association’s webpage “About the Alaska Native Claims Settlement Act” (<https://ancsaregional.com/about-ancsa/>, accessed January 27, 2022); and the original wording under “Corporate Funds Distribution” in the 1971 Alaska Native Claims Settlement Act.

<sup>55</sup> The 1993/1994 Tribal Recognition Act is an example of an attempt, years after ANCSA, to clarify tribal authority and opportunities for Native tribal members to manage village affairs (Press release: “Interior Publishes Revised List of Alaska Native Tribes Eligible for Services from Bureau of Indian Affairs,” October 15, 1993.) This position is reinforced by Secretary of the Interior, Order Number 3335, “Reaffirmation of the Federal Trust Responsibility to Federally Recognized Tribes and Individual Indian Beneficiaries,” Sally Jewell, Secretary of the Interior, August 20, 2014.

<sup>56</sup> Barbara (Bobbie) Kilberg worked in President Nixon’s White House and on at least three public occasions spoke about his commitment to ANCSA, his commitment to changing Indian policy, and his commitment to redefining the government’s relations with Natives from “assimilation to self-determination.” She told presidential historian Richard Norton Smith: “...it basically redefined Native American policy from one of assimilation to one of self-determination. And part of that also included two major land mass returns. One was Lu[Blue] Lake, which belonged actually to Taos people, which had been taken inappropriately by the Bureau of Land Management ...And the Alaska Native land claims which were both very important and a great economic importance, including the ability to drill oil” (Interview with Richard Norton Smith at the Gerald Ford Presidential Foundation, May 5, 2010). President Nixon addressed Congress on several occasions and presented his Indian policy. Particularly notable was the July 8, 1970 address (Richard Nixon, “Special Message to the Congress on

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Indian Affairs,” July 8, 1970, President’s Speech File, 1969–1974; President’s Personal Files (White House Special Files: Staff Member and Office Files) Boxes 41-95).

<sup>57</sup> Arnold. *Alaska Native Land Claims*, 279-280.

<sup>58</sup> *United States v. Santa Fe Pacific Railroad Co.* 314 U.S. 339 (1941).

<sup>59</sup> This is the argument presented in Haycox, “Contingency in Alaska History,” 171-79.

<sup>60</sup> Jenny Bell-Jones cautions that we need to keep in mind that if ANCSA had been implemented as originally intended the “generosity” would have been short-lived when original restricted shares were recalled and replaced with shares that could be publicly traded, at which point lands and money would quickly have moved out of Native control (personal communication, August 16, 2021).

<sup>61</sup> The most dramatic example of this concerns the Boldt decision in Washington State where extensive Native fishing rights established under treaties in 1854 and 1855 were upheld by Federal District Court Judge George Boldt in 1974. In his decision, Boldt stated, “...treaty tribes have been systematically denied their rights to fish off their reservations.” His ruling was upheld in the Supreme Court in 1979 (Jovana Brown, “Treaty Rights: Twenty Years after the Boldt Decision,” *Wicazo Sa Review* 10, No. 2 (1994), 2). The rulings in the state of Washington reflect the language in the Department of Indian Affairs Manual, Section (b) - Off-Reservation Hunting, Fishing, Gathering by Indians. It states: “Non-exclusive treaty hunting, fishing, trapping, and gathering rights outside the boundaries of Indian reservations have been reaffirmed for some Tribes by federal courts. In these cases, a state may not deny those rights, but may enforce reasonable conservation regulations applicable to all citizens of the state” (*Indian Affairs Manual*, Part 56, Chapter 1. Fish, Wildlife, and Recreation Authority and Responsibilities. #16-64, Issued February 13, 2017, 1-2).

<sup>62</sup> Will Mayo, in his review of the transcript from the 1915 Tanana Chiefs meeting with Judge Wickersham, reflected on the chiefs’ rejection of reservations. His perspective is shaped by his personal knowledge of tribes today who have benefitted from treaties, and he laments the chiefs’ reluctance to pursue reservations. From this perspective, he said: “I think that the reading of the transcript is a little bittersweet for me. I can’t ever read that transcript without interjecting myself in the conversation and saying, ‘Guys, listen up, this is really amazing, an amazing opportunity.’ But of course, the chiefs could not understand the experience of tribes in the rest of the country” (Will Mayo, “Alaska Native Leader Will Mayo Shares His Perspective on the 1915 Tanana Chiefs Meeting,” in *The Tanana Chiefs: Native Rights and Western Law*, William Schneider, editor (Fairbanks: University of Alaska Press, 2018), 51).

<sup>63</sup> The history of reservations is marked by the government’s policies and private actions to encourage Native Americans to take up allotments and abandon reservations. Ironically, Judge James Wickersham who convened the 1915 Tanana Chiefs meeting in Fairbanks pointed to the success of the Puyallup Indians. Yet, he was himself a participant in the dissolution of their reservation lands. Referencing Wickersham’s participation at the Tanana Chiefs Meeting, Pierre Castile notes: “Of course he failed to mention that the reservation had been abolished in part through his efforts and that its land base was almost completely gone—some of it into his hands” (George Pierre Castile, “The Indian Connection: Judge James Wickersham and the Indian Shakers,” *Pacific Northwest Quarterly* 81, No. 4 (1990), 129).

<sup>64</sup> The historic document is “Together Today for Our Children Tomorrow: A Statement of Grievances and An Approach to Settlement by the Yukon Indian People” (Whitehorse: The Council for Yukon Indians, 1977). In his presentation at the 2020 Alaska Historical Society Conference’s session on the history of ANCSA, Grand Chief Peter Johnson of the Yukon First

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Nations referenced the importance of this document and the presentation to the Prime Minister (Alaska Historical Society Annual Conference, October 16, 2020. Recording of the presentation is available at: <https://alaskahistoricalsociety.org/about-ahs/conference/presentations/>, accessed January 14, 2022).

<sup>65</sup> Section 16.4.2 states under Right to Harvest, “Yukon Indian Peoples shall have the right to harvest for Subsistence within their Territorial Territory and with the consent of another Yukon First Nation in that Yukon First Nations Traditional Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have rights of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to settlement agreement” (The Government of Canada, The Council for Yukon Indians, and the Government of the Yukon. Umbrella Final Agreement, May 29, 1983 (updated January 18, 2019), Section 16.4.2.).

<sup>66</sup> William Hobson explained to the Māori that “...the British people were free to go wherever they chose and the Queen was always ready to protect them. She was also ready to restrain them, but her efforts were futile because outside British territory she had no authority to do so” (Claudia Orange, *The Story of A Treaty*, Archives New Zealand, Department of Internal Affairs, Wellington, 2013 (February)).

<sup>67</sup> Steven C. Bourassa and Ann Louise Strong, “Restitution of Land to New Zealand Māori: The Role of Social Structure,” *Pacific Affairs* 75, No. 2 (Summer 2002), 250, 254.

<sup>68</sup> He Pou Herenga Tangata He Pou Herenga Whenua He Pu Whanre Korero, *150 Years of the Māori Land Court*, Ministry of Justice, Crown (2013), 12.

<sup>69</sup> Bourassa et al. state: “The Native Lands Act 1862 and the Native Lands Act 1865 were intended to ‘encourage the extinction of native proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown’” (Bourassa et al., “Restitution of Land,” 234).

<sup>70</sup> Māori Deputy Chief Judge Caren Fox, “Reconciliation: Use of Oral History in the Waitangi Tribunal.” Plenary Address, National Oral History Association Conference. Oklahoma City (2013).

<sup>71</sup> In her 2013 presentation at the National Oral History Association Conference, Judge Fox described how the Tribunal relies on oral history, genealogies, tribal settlement stories, songs, dances, and eyewitness accounts to determine findings (Ibid).

<sup>72</sup> The Council for Yukon Indians. “Together Today For Our Children Tomorrow, A Statement of Grievances and an Approach to Settlement by the Yukon Indian People.” Whitehorse, Yukon, Canada, 1973.

<sup>73</sup> The Waitangi Treaty Grounds commemorate Māori culture and the historic signing of the Treaty of Waitangi between the Māori chiefs and the British government.

<sup>74</sup> The Mackenzie Valley Pipeline Inquiry was conducted by Chief Justice Thomas Berger to investigate the impact of a proposed pipeline route from the Northern Yukon south through the Mackenzie River valley to markets. The plan, if followed, would have connected with the Prudhoe Bay oil field. Berger held village meetings in communities that would potentially be impacted by this development. A conclusion of his inquiry was that villagers wanted land claims settled before any major development (Thomas Berger, *Northern Frontier, Northern Homeland, The Report of the Mackenzie Valley Pipeline Inquiry, Vol. 1* (Ottawa: Printing and Publishing Supply and Services, 1977), 191). This study became a model that Berger followed years later in an assessment of the Alaska Native Claims Settlement Act (Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (New York: Hall and Wang, 1985).