THE GRAND COMPROMISE: THE ANCSA SECTION 7(I) SETTLEMENT AGREEMENT

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ABSTRACT

In 1982, Alaska's twelve regional Native corporations finalized and executed a settlement agreement ending a decade of litigation involving Section 7(i) of the Alaska Native Claims Settlement Act. The 121-page Settlement Agreement is complex and covers a number of issues. The Agreement annually governs the distribution of tens of millions in revenue shared between the regional corporations pursuant to Section 7(i). This Article reviews the history of the Settlement Agreement, with emphasis on the negotiations that led to it, as well as the legal challenges regarding the Agreement since its execution. This Article also reviews the Agreement, section-by-section, and provides insight from court cases, arbitration decisions, and other analysis of sections in the Agreement. Finally, this Article recommends that the twelve regions consider amending the Agreement to modernize it and address issues that have arisen since 1982 that were not anticipated by the drafters of the Agreement. This Article is a follow-on to ANCSA Section 7(I): $40 Million Per Word and Counting, which reviewed the history of Section 7(i).

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INTRODUCTION

In 1982, twelve regional corporations, created pursuant to the Alaska Native Claims Settlement Act[1] (ANCSA or the "Act"), entered into a settlement agreement that ended a cycle of litigation, which had persisted for almost a decade over the simple concept contained in Section 7(i) of the Act.[2] Section 7(i), a key component of the Act, requires ANCSA regional corporations to share 70% of revenue derived from timber or subsurface resources with the other eleven regional corporations. Specifically, Section 7(i) provides:

> Except as provided by subparagraph (B), 70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.[3]

The Section 7(i) Settlement Agreement (the "Settlement Agreement" or the "Agreement") is an important and complicated document that has governed the distribution of $2.5 billion in revenue shared since 1982.[4] In Volume 33:2 of *Alaska Law Review*, tied to the journal's 2016 symposium

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1. Alaska Native Claims Settlement Act of 1971 (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–29 (2012)).

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

3. ANCSA § 7(i).

4. *See* McDowell Group, Economic Benefits of ANCSA Section 7(i) and 7(j) Revenue, 1 (Jan. 2017) ("Between FY1982 and FY2015, a cumulative total of $2.5 billion in 7(i) revenue has been received by all ANCs combined.") (on file with authors); Press Release, Arctic Slope Reg'l Corp., ASRC Reaches Historic Milestone in Revenue Sharing (Apr. 6, 2015), http://www.asrc.com/Press Releases/Pages/ASRC-Historic-Revenue-Sharing.aspx (announcing that ASRC has distributed over one billion dollars to other Alaska Native Corporations pursuant to Section 7(i) obligations); *Red Dog Mine*, NANA REG'L CORP., INC., http://www.nana.com/regional/resources/red-dog-mine (last visited Sept. 17, 2017) ("NANA has distributed approximately $820 million to other regions and at-large shareholder[s] via the 7(i) sharing provisions . . . . "); Press Release, Sealaska Corp., Sealaska Announces December Distribution Totaling $11.7 Million, http://www.sealaska.com/news/item/2013-11-15/sealaska-announces-december-distribution-totaling-117-million (last visited Sept. 14, 2017) (noting "Sealaska has paid more than $317 million into [the Section 7(i)] pool").

reflecting on the forty-five years of ANCSA's existence, we described the challenges of Section 7(i) revenue-sharing and how the Settlement Agreement had resolved contentious litigation among Native Corporations. This Article provides a more detailed description of the Settlement Agreement itself by providing a section-by-section analysis of the Agreement. After describing the Settlement Agreement's history,[5] the Article then reviews the two amendments to the Settlement Agreement since 1982. Next, the Article conducts a complete sectional analysis of the Agreement and reviews several legal challenges made against the Agreement since its execution. The Article concludes with an analysis of the possible amendments to the current version of the Settlement Agreement.

I. HISTORY OF THE SETTLEMENT AGREEMENT

The simplicity of the original language of Section 7(i), and the lack of implementing regulations, led to a decade of litigation between the regional corporations.[6] Aided by the Special Master appointed by court order in *Aleut Corp. v. Arctic Slope Regional Corp.* (*Aleut II*)[7] to assist in managing the complex, multi-party litigation, the leaders of the ANCSA regional corporations recognized the futility and extraordinary cost of constant and ongoing litigation.[8] Complications were exacerbated by

5. For a more detailed review of the history of Section 7(i), see Aaron M. Schutt, *ANCSA Section 7(I): $40 Million Per Word and Counting*, 33 ALASKA L. REV. 229, 231–37 (2016).

6. *See, e.g.*, Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53 (D. Alaska 1975) (six decisions from this docket are discussed *infra*); Doyon, Ltd. v. NANA Reg'l. Corp. (*Doyon v. NANA*), No. 1531-74, at 4 (D.D.C. 1974) (unreported mem. op.) (on file with authors) (discussing numerous issues including the meaning of "all revenues," the interest charge for late distributions, and the agreements subject to distribution under Section 7(i)). The Aleut Corp. v. Arctic Slope Reg'l Corp. case led to five orders issued between 1976 and 1980, several of which were appealed to the Ninth Circuit: Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut I*), 410 F. Supp. 1196 (D. Alaska 1976); Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut II*), 417 F. Supp. 900 (D. Alaska 1976), *rev'd in part sub nom* Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut III*), 421 F. Supp. 862 (D. Alaska 1976), *rev'd in part sub nom* Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut IV*), 424 F. Supp. 397 (D. Alaska 1976), *aff'd sub nom* Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut V*), 484 F. Supp. 482 (D. Alaska 1980); *see also* Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978). This article will not review the litigation history in detail. For a more detailed review, see Schutt, *supra* note 5, at 242–53.

7. 417 F. Supp. 900 (D. Alaska 1976), *rev'd in part sub nom*. *Aleut III*, 421 F. Supp. 862 (D. Alaska 1976), *rev'd in part sub nom Aleut IV*, 424 F. Supp. 397 (D. Alaska 1976), *aff'd sub nom Aleut V*, 484 F. Supp. 482 (D. Alaska 1980).

8. The very first court decision on Section 7(i), *Doyon v. NANA*, No. 1531-74, at 8, recognized that the congressional desire to minimize litigation and its costs "ha[d] not been altogether fulfilled." *See also* Memorandum from Elizabeth

Sealaska Corporation, which was at the time the largest of the 7(i) payor regional corporations, due to its abundant timber resources, along with several other regional corporations, failing to distribute "potential § 7(i) revenues, citing the substantial uncertainties . . . in attempting to account for such revenues with the small amount of guidance presently available."[9]

Due to these costs and disagreements, by the late 1970s, the regional corporations began discussing a comprehensive settlement agreement regarding Section 7(i) obligations. After first meeting in 1977,[10] several regional corporations began "a series of meetings concerning 7(i) . . . to sit down and hammer out the principles of the 7(i) and to come up with a document" that the various regions could ratify.[11] Several regional corporations met again in 1979 "to discuss and assess the 7(i) problem and to study the possibility of an out-of-court settlement of the issues."[12] An initial sharing agreement, entitled 'A 7(i) Revenue Sharing Agreement,' was drafted by Cook Inlet Region, Inc. and circulated among all the other corporations.[13]

After years of intermittent meetings, Sealaska Corportation invited the other regional corporations to meet in Warm Springs, Oregon in 1981.[14] Sealaska observed that "[t]he stakes are very high," but "the litigation ought to be resolved by the affected corporations rather than by the court, if at all possible."[15] All twelve regions participated and sent their presidents and attorney representatives.[16]

Ingraham, Legal Counsel, Doyon, Ltd., to Tim Wallis, President, Doyon, Ltd. 1 (June 8, 1981) (on file with authors) ("[T]o continue the litigation on deductions as well as other regions' revenues would require a minimum of two years, at an average expenditure of $300,000 per year for outside attorneys' fees and costs.").

9. Briefing of Doyon Bd. of Dirs., ANCSA 7(i) Historical Synopsis 6 (Aug. 20, 1981) (on file with authors).

10. In 1977, several regional corporations began a series of meetings to develop an agremeent that the various regions could ratify. Minutes of Board Meeting of February 14, Koniag, Inc. 15 (1978) (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Library, Univ. of Alaska Anchorage) (on file with authors).

11. Minutes of Koniag, Inc. Bd. of Dirs. 15 (Feb. 14, 1978) (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with authors).

12. Briefing of Doyon Bd. of Dirs., *supra* note 9, at 5.

13. *Id.* at 5.

14. *Id.* at 6.

15. *Id.*

16. *See* Interview with Margaret Brown, President and Chief Executive Officer (Retired), Cook Inlet Region, Inc., in Anchorage, Alaska (Apr. 26, 2016) (on file with authors).

In reviewing "the first 'composite draft' Section 7(i) settlement agreement" circulated in June 1981, Doyon's legal counsel noted "three essential requirements to a satisfactory settlement."[17] First, the regional corporations were in agreement that the definitions of "revenues" should track, as closely as possible, court decisions that had construed the word to maximize sharing of resource revenues.[18] Second, the regional corporations concurred that any agreed-upon deductions should be reasonable, and that the reporting requirements should be clear and further the aim of transparency in revenue sharing and costs.[19] Third, the parties agreed that binding arbitration ought to be the exclusive means for Section 7(i) dispute resolution.[20]

Following the Warm Springs meeting, the corporations held regular settlement conferences and drafting meetings.[21] The Special Master later reported that "the many dozens of Corporation executives, attorneys, financial advisors and other experts attending each meeting openly debated each and every issue connected with 7(i)."[22] The result was a draft settlement agreement that, in the Special Master's words, was "something of a chimera: at several critical points it contained alternative approaches which affected the construction of the balance of the proposed agreement."[23]

Section 7(i)'s simple drafting as to revenues leaves many possible approaches to what types of costs a regional corporation might fairly incur and should be counted against revenues and recovered by that corporation because such a cost supports and advances the generation of revenue that is required to be shared under Section 7(i). For example, with regard to the deductions side of the equation, Doyon's team noted that "[s]ince there [were] no rules to date on deductions, the whole deductions area [was] very cloudy."[24] The difference between the various regions' approaches to these questions was dramatic.[25] The Special Master and the

17. Memorandum from Elizabeth Ingraham, Legal Counsel, Doyon, Ltd. to Sam Kito, Dir., Doyon, Ltd. 1 (June 5, 1981) (on file with authors).

18. *Id.*

19. *Id.*

20. *Id.*

21. *See* Report of the Special Master Pursuant to Fed. R. Civ. P. 53, at 19 (Mar. 28, 1983) [hereinafter Special Master Report] (on file with authors) ("The Agreement's provisions for revenue accounting follow the expansive definition of § 7(i) Revenue previously expressed by the Court.").

22. *Id.* at 12.

23. *Id.* at 11.

24. Memorandum from Elizabeth Ingraham, *supra* note 8.

25. *See id.* at 1–2 (discussing how "regions might well be allowed virtually all—or virtually none—of their claimed deductions," depending on which categories are disallowed).

team from the twelve regions had the task of reconciling these differing viewpoints from the summer of 1981 until the summer of 1982.

On June 29, 1982, the twelve regions reached a final settlement agreement, subject to the ratification by at least ten of the twelve corporations' respective boards of directors.[26] The document was 121 pages long including two appendices. The Settlement Agreement:

> Represent[ed] an effort by the twelve Regional Corporations to resolve the cycle of litigation and to bring certainty to the application of § 7(i). In essence, the "Section 7(i) Settlement Agreement" represent[ed] an effort by the Regional Corporations to correct the deficiencies of ANCSA by a detailed agreement in order to render possible commercially viable resource development without litigation; it exhaustively defined terms and concepts, established detailed accounting procedures, and established a consensus among the Regions on policies for development of resources.[27]

All twelve regional corporations ratified the Settlement Agreement.[28]

A. Amendments to the Agreement

The regional corporation parties to the Settlement Agreement have amended the Agreement twice since 1982. In 1990, following several years of arbitration about the active harvest of Sealaska timber resources,[29] the regions unanimously agreed to amend the Agreement. The amendment deleted Article II, section 9—a provision addressing the harvest of timber

26. *See* Settlement Agreement, *supra* note 2, at 103 (showing the ten signatures of regional corporations on the Settlement Agreement); Memorandum from Jim Mery, Senior Counsel, Doyon, Ltd., to Doyon Bd. of Dirs. (Sept. 2, 1982) (on file with authors) (discussing how the agreement would be null and void without at least ten signatures).

27. James D. Linxwiler, *The Alaska Native Claims Settlement Act: The First Twenty Years*, 38 ANNUAL ROCKY MTN. L. INST. 28 (1992); *see also* Special Master Report, *supra* note 21, at 1 ("[T]he Agreement substitutes a Uniform System of Accounting and Reporting for the present chaos of twelve Regional Corporations applying disparate, though equally defensible, accounting methods for determining net revenues available for distribution.").

28. *See* Doyon Bd. Resolution No. 82-53 (Sept. 24, 1982) (on file with authors); *see also* Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53, at 5 (D. Alaska June 3, 1983) (order dismissing case following settlement) (on file with authors).

29. *See* Aleut Corp. v. Sealaska Corp., AAA No. 75199002386 (Prelim. Op. of Arbitrators) (Aug. 11, 1988) [hereinafter Sealaska Arbitration Decision] (McGough, Arb.) (on file with authors); *see also* Aleut Corp. v. Sealaska Corp., AAA No. 75199002386 (Decision and Award of Arbitrators) (Nov. 23, 1988) (McGough, Arb.) (on file with authors) (regarding the distribution and interest associated with timber resources under Section 7(i)).

for a corporation's own account—from the original Agreement and added a dozen new pages.[30] This amendment, incorporated into Article III, section 3 of the Agreement, mostly defined allowable active 7(i) costs for timber.[31]

The negotiations that led to this amendment began after the Sealaska Board of Directors, in 1989, "directed that Sealaska cease the active harvest of ANCSA timber until and unless an agreement can be reached among the Regional Corporations that allows a rational and prudent approach to timber valuation."[32]

By late March 1989, Sealaska and the eleven other regions entered a Memorandum of Understanding outlining a term sheet that would later form the basis of the 1990 amendments.[33] At about the same time, the regions were considering another set of amendments to deal with the net operating loss (NOL) issues and the interactions with Section 7(i) then being debated between the regions and village corporations.[34] Concurrent with the general NOL matter were related issues raised by the Mutual Assistance Agreement (MAA) among a majority of the regional corporations.[35] The MAA helped Calista Corporation avoid a likely bankruptcy by backstopping a commercial loan with future Section 7(i) receipts and sales of Calista's own NOL transactions, which gave Calista the financial flexibility to restructure its various business interests.[36] Despite these issues, the regional corporations did not adopt the proposed NOL amendments to the Agreement, in part because Congress amended Section 7(i) to explicitly exclude tax benefits from the definition of revenue, including revenue from NOL transactions.[37]

30. *See* First Amendment to the 7(i) Settlement Agreement (Oct. 22, 1990) (amending Article III, § 3) (on file with authors).

31. *Id.*

32. Press Release, Sealaska Corp., Sealaska Corporation Will Not Appeal 7(i) Arbitration Ruling, at 2 (Feb. 9, 1989) (on file with authors).

33. Letter from Byron Mallott, Chief Exec. Officer, Sealaska Corp., to Morris Thompson, President, Doyon, Ltd. (Mar. 30, 1989) (on file with authors).

34. *See* Memorandum from Nathan Bergerbest, Gen. Counsel, Doyon, Ltd., William Timme, Middleton, Timme & McKay, Chris McNeil, Jr. Gen. Counsel, Sealaska Corp., and Mark Kroloff, Vice President and Gen. Counsel, CIRI, on Regional Corp. CEOs and Gen. Counsel (Dec. 11, 1990) (on file with authors).

35. *See* Mutual Assistance Agreement between Ahtna, Inc., Arctic Slope Reg'l Corp., Bering Straits Native Corp., Chugach Alaska Corp., Cook Inlet Region, Inc., Doyon, Ltd., Koniag, Inc., Sealaska Corp. and Calista Corp., at 3 (Feb. 13, 1991) [hereinafter Mutual Assistance Agreement] (on file with authors) (agreeing to "assist Calista in obtaining financing from the Bank").

36. *See id.* at 3 (agreeing to "assist Calista in obtaining financing from the Bank").

37. Alaska Native Claims Settlement Act of 1995, Pub. L. 104-42, 109 Stat. 353, 357 (1995) ("For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the uses of losses incurred or credits earned

In 2001, the regions, for the second time, unanimously agreed to amend Article II.[38] This time, the regions rewrote section 2(b) of the Settlement Agreement, regarding resource contract scholarships for shareholders or members of their families.[39] The amendment allowed regional corporations to exclude from their Gross Section 7(i) Revenue calculations up to $250,000 per year in scholarships paid directly by a third party as part of a contract or lease related to Section 7(i) Resources.[40] Alternatively, the amendment allowed the regional corporation to provide $250,000 in scholarships directly from revenue it received from a third party related to Section 7(i) Resources.[41]

B. Sectional Analysis of the Settlement Agreement

Article I – Parties and Definitions

Article I details the parties to the Settlement Agreement and defines a long set of terms. The parties were explicitly limited to ANCSA regional corporations, which own the valuable natural resources and are required to share revenues from those natural resources under Section 7(i), but are then obligated to share half of 7(i) payments received from other regional corporations to their respective at-large shareholders and village corporations under Section 7(j).[42] Doyon's counsel, Arthur Lazarus, recognized that the exclusion of village corporations as parties to the Settlement Agreement posed a risk because of the adversity of interests between the two groups. Lazarus wrote that "[s]ome features of the proposed Agreement will tend to reduce the size of the 70% resource revenue pool. . . . Obviously, these provisions may stimulate legal challenges to the Agreement."[43] Lazarus's observation proved prescient,

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by a Regional Corporation.").

38. *See* Amendment No. 99-1 to Section 7(i) Settlement Agreement (Oct. 27, 2001) (amending Article II, § 2) (on file with authors).

39. *Id.*

40. *Id.* at 1.

41. *Id.*

42. *See* Settlement Agreement, *supra* note 2, at 1. The fact that village corporations were not included as parties was likely due to the combination of the adversity of interests on some important points and the impracticality of negotiating with roughly two hundred entities. But the lack of inclusion resulted in several disputes with village corporations post-Settlement Agreement. *See infra* notes 192–98 and accompanying text.

43. Memorandum from Arthur Lazarus, Jr., P.C., to Doyon Bd. of Dirs. 8–9 (July 9, 1982) [hereinafter Lazarus Memo] (on file with authors) (discussing proposed settlement of Section 7(i) litigation).

as several village corporations and at-large shareholders sued regional corporations in the 1990s, challenging several aspects of Section 7(i) and the Settlement Agreement.[44]

The long list of defined terms includes the concepts of passive and active development of ANCSA Section 7(i) Resources, which were first articulated in the *Doyon v. NANA* decision in 1976.[45] Passive development is essentially the approach of leasing resource-prospective lands to a third party company that explores, develops, and produces that resource and then pays lease rentals, royalties, or some other form of compensation to the regional corporation as compensation for the resource. By contrast, active development is the process where the regional corporation directly participates in those exploration, development, and production activities on its own or through some form of a joint venture. For the purposes of the Settlement Agreement, the difference between the two is when a resource-owning corporation "has made a Substantial Investment of Risk Capital," which is defined as an investment greater than 10% of the fair market value of the investment into exploration or development of the ANCSA resource and at least $500,000.[46] In *Aleut Corp. v. Sealaska Corp.*[47] (the "Sealaska arbitration"), arbitrators described passive revenues as "generally those revenues derived from a contract to sell to a third party the right to develop, produce and sell resources which are in their natural state."[48]

The parties defined Section 7(i) Resources as follows: "The timber resources (other than timber acquired by merger with a Village Corporation) and resources from the subsurface estate in ANCSA Lands. Timber resources include both standing timber and future growth."[49] Gross Section 7(i) resources are defined as: "all revenues (including

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44. *See infra* notes 199–212 and accompanying text; *see, e.g.*, Oliver v. Sealaska Corp., 192 F.3d 1220, 1222 (9th Cir. 1999) (discussing the revenue sharing claims of ANCSA); Bay View, Inc. *ex rel.* AK Native Village Corps. v. Ahtna, Inc., 105 F.3d 1281, 1284 (9th Cir. 1997) (involving litigation over the revenue from net operating losses).

45. *See Doyon v. NANA*, No. 1531-74, at 9 (D.D.C. 1974) (unreported mem. op.) (on file with authors) ("A Regional Corporation can . . . take the role of an 'active' landowner and itself explore for, develop and produce the resource. . . . Alternatively, it may act as a 'passive' landowner and contract with another party which undertakes at its own expense all the necessary exploration, development and production of the resources.").

46. Settlement Agreement, *supra* note 2, at 3–5 (defining Gross Passive Section 7(i) Revenues, Gross Active Section 7(i) Revenues, and Substantial Investment of Risk Capital).

47. AAA No. 75199002386 (Prelim. Op. of Arbitrators) (Aug. 11, 1988) [hereinafter Sealaska Arbitration Prelim. Op.] (McGough, Arb.) (on file with authors).

48. *Id.* at 6.

49. *Id.* at 2.

money, benefits and any other thing of value) received by a Corporation that are attributable to, directly related to, or generated from the exploration, development, production, lease, sale or other exploitation of, or the disposition of any interest in, the Corporation's Section 7(i) Resources."[50] This definition is remarkably similar to, albeit slightly expanded, the *Aleut Corp. v. Arctic Slope Regional Corp.*[51] (*Aleut V*) court's definition: "[R]evenues received by a regional corporation that are attributable to, directly related to, or generated by the acquisition of an interest in the corporation's subsurface estate are revenues subject to the sharing provisions of section 7(i)."[52]

Furthermore, the Agreement defines fair market value as "[t]he amount of money which an informed purchaser, willing but not obliged to buy, would pay an informed seller, willing but not obliged to sell, for particular property, goods or services. In determining the Fair Market Value of land, consideration shall be given to all uses to which the land is suited and might in reason be applied."[53] The concept of fair market value was a major issue in the Sealaska arbitration in the late 1980s.[54]

Additionally, the Agreement defines a Section 7(i) Resource Contract as:

> Any contract or group of contracts for the exploration, development, production, lease, sale or other exploitation of, or the disposition of any interest in, a Corporation's Section 7(i) Resources, including contracts permitting one or more of such activities, and also including contracts relating to Section 7(i) Resources to which a Corporation has succeeded pursuant to Section 14(g) of ANCSA.[55]

This language closely tracks the early cases. In *Aleut II*, the court held that revenue received from contracts for exploration for subsurface resources were shareable.[56] In *Aleut V*, the court held that there is a rebuttable presumption that revenues are shareable when "received

50. *Id.* at 3.
51. 484 F. Supp. 482 (D. Alaska 1980).
52. *Id.* at 485.
53. Settlement Agreement, *supra* note 2, at 7.
54. *See* Sealaska Arbitration Prelim. Op., *supra* note 47, at 24–34; Schutt, *supra* note 5, at 261–62 (discussing the Sealaska timber arbitration).
55. Settlement Agreement, *supra* note 2, at 9; *see also* ANCSA § 14(g), 43 U.S.C. § 1613(g) (providing that "[a]ll conveyances made [pursuant to ANCSA] . . . shall be subject to valid existing rights," including prior federal leases, contracts, permits, rights-of-way and easements).
56. *Aleut II*, 417 F. Supp. 900, 902–03 (D. Alaska 1976).

under an agreement, or a group of agreements that are regarded as one transaction, which has as its ultimate object the acquisition of an interest in the subsurface estate . . . ."[57]

Article II – Revenues

Article II of the Settlement Agreement addresses revenues. Overall, the Agreement attempts to broadly construe revenues and subject as much as possible to Section 7(i).[58] In addition, Article II addresses and incorporates many of the holdings of the early court decisions into its framework for Section 7(i) Revenues.

For example, section 1(b) provides that "if Section 7(i) Revenues are received in a form other than cash or cash equivalents, the Fair Market Value at the time of receipt shall be included in Gross Section 7(i) Revenues."[59] This closely matches the holding in *Aleut II*, which measured non-cash receipts as the greater of:

> (a) the fair market value of the non-monetary benefit received;
> (b) the cost or detriment to the entity furnishing the non-monetary benefit; or
> (c) the difference between the royalty or other cash consideration actually received and that which would have been received but for the furnishing of the non-monetary benefit.[60]

The *Aleut II* court further stated that "non-monetary and indirect benefits should be discouraged in the context of section 7(i) because of the problems that they invite."[61]

The Agreement also makes clear that revenues received prior to patent or interim conveyance are revenues subject to distribution.[62] This tracks the holding in the *Aleut I* decision.[63]

Subsection 1(d) addresses borrowing. It provides that loans secured by Section 7(i) Resources, or their proceeds, are not Section 7(i) Revenues "to the extent that the proceeds of such borrowing or sale are used . . . to finance or refinance Development, Production or Post-Production Costs

57. *Aleut V*, 484 F. Supp. 482, 485 (D. Alaska 1980).
58. *See* Special Master Report, *supra* note 21, at 19 ("The Agreement's provisions for revenue accounting follow the expansive definition of § 7(i) Revenue previously expressed by the Court.").
59. Settlement Agreement, *supra* note 2, at 15.
60. *Aleut II*, 417 F. Supp. at 904.
61. *Id.*
62. Settlement Agreement, *supra* note 2, at 15.
63. *Aleut I*, 410 F. Supp. 1196, 1200 (D. Alaska 1976).

in connection with the exploitation of Section 7(i) Resources . . . ."[64] However, to the extent that a corporation secures borrowing with Section 7(i) Resources that are "greater than the Corporation's Distributable Share of Net Section 7(i) Revenues," then there is a "recognition of Gross Section 7(i) Revenues."[65] This was not a popular provision among the regional corporations, who recognized that treating borrowing this way would hinder their ability to raise capital for projects unrelated to Section 7(i) Resource development.[66] Nevertheless, the Special Master insisted upon its inclusion.[67]

In 1988, Chugach Alaska Corporation secured $13 million of debt to The Travelers Insurance Company and The Travelers Indemnity Company with "all of the standing and downed timber located on certain land conveyed to [Chugach]" and rights necessary to harvest the timber including rock, sand, and gravel.[68] Chugach did not disclose the loans or security interests in its annual Section 7(i) reports to the other regional corporations for 1988, 1989, or 1990.[69] When Chugach filed for bankruptcy in 1991,[70] each of the other regional corporations became creditors in part because of Article II, section 1(d).[71] Chugach and the eleven other regional corporations entered a settlement agreement in June 1992 to resolve these issues.[72] This episode with Chugach demonstrates the value to the other regional corporations of assuring that borrowings against Section 7(i) Resources can serve as a mechanism that is economically equivalent to revenue and should therefore be shared at the time of the loan.

Section 3 addresses the allocation of revenue between the surface and subsurface estates—the same issue addressed in *Aleut V*. It excludes from Gross Section 7(i) Revenues any compensation received by a regional corporation for surface rights only to the extent permitted by the Settlement Agreement.[73] There is an inherent tension in allocating

64. Settlement Agreement, *supra* note 2, at 15.
65. *Id.* at 18–19.
66. Lazarus Memo, *supra* note 43, at 5.
67. *Id.*
68. Chugach Settlement Agreement between Chugach Alaska Corp. and Arctic Slope Reg'l Corp., Ahtna, Inc., The Aleut Corp., Bering Straits Native Corp., Bristol Bay Native Corp., Calista Corp., Cook Inlet Region, Inc., Doyon, Ltd., Koniag, Inc., NANA Reg'l Corp., and Sealaska Corp., at 1–2 (June 17, 1992) [hereinafter Chugach Settlement Agreement] (on file with authors).
69. *Id.* at 3.
70. *See In re Chugach Alaska Corp.*, 147 B.R. 214, No. A91-00207-3-DMD, at 214 (AK LBR 1991) (discussing Chugach Alaska Corporation's objection to IRS claims).
71. Chugach Settlement Agreement, *supra* note 68, at 1.
72. *Id.*
73. Settlement Agreement, *supra* note 2, at 27; *see also Aleut V*, 484 F. Supp. 482, 485 (D. Alaska 1980).

revenues as between the surface and subsurface when a regional corporation owns both because revenues attributable to the surface are not shareable. But on the other hand, accessing the subsurface to develop and produce valuable resources often requires the construction of facilities at the surface that burden the surface estate and should therefore be a compensable event. These tensions therefore require a balance of these competing realities. Section 3 attempts this balance by capping the allocation to surface estate at the lesser of fair market value for the surface rights or the valuation provided in the agreements at issue.[74] In both the Agreement and the *Aleut V* decision, the burden of proof regarding the valuation is upon the land-owning regional corporation.[75]

Section 6 addresses land exchanges. The regional corporations knew that land exchanges involving ANCSA lands were possible, if not inevitable, as the land ownership patterns among the three main landowners in Alaska—the federal government, the state government, and the ANCSA regional corporations—were implemented at the detailed, local level from the broad legislative framework of ANCSA. ANCSA's land selection pattern combined with existing and desired federal conservation units, in particular, made for certain awkward land ownership. An example was the Cook Inlet Land Exchange, which Congress authorized in 1976.[76] The Agreement's structure tracks the logic of revenue derived from ANCSA interests: where a corporation exchanges subsurface interest, alone or in combination with any other interest, for some other interest, revenue derived from the new interest is shareable up to the fair market value of the subsurface interest.[77] In contrast, trading a surface estate interest for another interest does not create a sharing obligation under the Agreement from the new interest because revenue derived from the surface interest, excepting timber, would not have been shareable.[78]

74. Settlement Agreement, *supra* note 2, at 27.

75. *Id.*; *Aleut V*, 484 F. Supp. at 485. In *Aleut V*, the court's language establishing the rebuttable presumption is limited to the subsurface estate, but the Special Master Report two years later expanded this concept to timber resources as well. *See id.* at 485–87; Special Master Report, *supra* note 21, at 20 ("[T]he Agreement adopts a rebuttable presumption that any revenues connected with any disposition of subsurface or timber resources are shareable.").

76. *See* Alaska Native Claims Settlement Act Amendments of 1976, Pub. L. No. 94-204, 89 Stat. 1145 (codified as amended in scattered sections of 43 U.S.C.); Act of Oct. 4, 1976, Pub. L. No. 94-456, 90 Stat. 1934 (identifying Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area). *See generally Cook Inlet Land Exchange*, 30-YEAR ANNIVERSARY NEWSLETTER (Oct. 2006) (on file with authors).

77. Settlement Agreement, *supra* note 2, at 25–27.

78. *See id.* at 32; Oliver v. Sealaska Corp., Civ. No. A96-0343, at 8 (D. Alaska Sept. 24, 1997) (unreported order on motion to dismiss) ("Article II, subsection

Section 6 was tested just a year after the Settlement Agreement became effective. "[Arctic Slope Regional Corporation (ASRC)] openly and candidly admitted that they structured the trade for the Kaktovik subsurface so as to qualify that trade under section 6(g). ASRC was not deceitful, was not acting in bad faith, and was not unfair in structuring a trade that was specifically invited by language" in the Settlement Agreement.[79] But other regional corporations were concerned that the exchange of certain ASRC surface lands within a federal conservation unit for potentially extremely valuable subsurface estate should have made the received subsurface land subject to 7(i) sharing like other ANCSA subsurface lands.

Section 7 addresses sand and gravel resources. The regional corporations had litigated the topic of sand and gravel from the time of ANCSA's passage in 1971 until the Settlement Agreement in 1982.[80] This was one area where the regional corporations limited the impact of prior court rulings. In the original Agreement, the regional corporations recognized that Ninth Circuit decisions ruling that sand and gravel were Section 7(i) Resources had imposed tremendous difficulty in bookkeeping for the many small transactions involving sand and gravel.[81] The Settlement Agreement therefore excluded from Gross Section 7(i) Revenues the first $100,000 of gross revenues derived from sales of "sand, stone, gravel, pumicite or cinder resources" each fiscal year.[82] The section also provides that if Congress amended ANCSA to exclude sand and

6(g) of the Settlement Agreement is the converse of ANCSA subsection 7(i) in that it is designed to provide that revenues received from the disposition of surface estate (other than timber) are not subject to sharing.") (on file with authors).

79. Aleut Corp. v. Arctic Slope Reg'l Corp., AAA No. 75113030986, at 18 (Mar. 28, 1989) [hereinafter ASRC Arbitration Prelim. Op.] (Morris, Arb.) (on file with authors).

80. *See, e.g.*, Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527, 528 (9th Cir. 1984); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 725–26 (9th Cir. 1978), *rev'g Aleut III*, 421 F. Supp. 862, 864 (D. Alaska 1976); *see also* Koniag, Inc. v. Koncor Forest Res., 39 F.3d 991 (9th Cir. 1994) (discussing rock resources rather than sand or gravel).

81. Settlement Agreement, *supra* note 2, at 35 (referring to *Chugach Natives, Inc.*, 588 F.2d at 732).

82. *Id.* At least one village corporation opposed this provision because "the villages are giving up their right to a portion of the § 7(i) sharing revenues, but do not gain any guarantee of sand and gravel ownership in return." Ukpeagvik Inupiat Corp., Position Paper (Mar. 9, 1983) (on file with Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Library, Univ. of Alaska Anchorage).

gravel from the requirements of Section 7(i), they would no longer be considered Section 7(i) Resources under the Settlement Agreement.[83] The 1998 amendments to ANCSA did in fact exclude such resources.[84]

Section 8 addresses mergers of a regional corporation and any other corporation.[85] The section makes clear that following such a merger, Section 7(i) Resources and Revenues remain subject to sharing under the Agreement.[86] The section also states that the merger or consolidation transaction itself does not trigger a Section 7(i) Revenue recognition event.[87] This was an important consideration given that NANA and Ahtna had merged with the majority of the village corporations in each of their respective regions.[88] As such, the question of the impact of Section 7(i) with regard to the then recently completed mergers was a non-issue.

Article III – Deductions

Article III addresses deductions. Unlike revenues, deductions received almost no attention in the litigation during the 1970s. Nevertheless, the issue was squarely on the minds of Settlement Agreement negotiators. In a memorandum summarizing the draft Settlement Agreement, Doyon's attorney noted: "[B]y the end of 1980, the litigation promised to become even more burdensome as the focus of the court proceedings moved from gross revenues to the complex and extremely difficult question of allowable deductions."[89]

The Special Master's report made several important observations regarding the Settlement Agreement's allowance for deductions. First, it noted that the "deduction rules operate in three dimensions: what categories of costs may be deducted; when costs should be recognized; and what constitute allowable costs within the categories."[90] The Special

83. Settlement Agreement, *supra* note 2, at 35.

84. *See* ANCSA Land Bank Protection Act of 1998, Pub. L. No. 105-333, § 8, 112 Stat. 3129, 3134 (codified as 43 U.S.C. § 1606(i)).

85. Settlement Agreement, *supra* note 2, at 36.

86. *See id.*

87. *See id.*

88. *Ownership of Lands*, NANA REG'L CORP, INC., http://www.nana.com/regional/ lands/subsistence/ (last visited Sept. 14, 2017) ("In 1976, a merger of the area's regional corporation and ten of the eleven village corporations resulted in NANA's ownership of both the surface and subsurface acreage, with the exception of the surface acreage Kikiktagruk Iñupiat Corporation (KIC) retained."); LYDIA L. HAYS, ALASKA NATIVE TRIBES, ANCSA CORPORATIONS AND OTHER ORGANIZATIONS, Appendix C (2015) (listing the Ahtna, Inc. merger with eight of its nine village corporations in 1980 and the NANA merger in 1976).

89. Lazarus Memo, *supra* note 43, at 2.

90. Special Master Report, *supra* note 21, at 25.

Master's report added that the "Agreement introduces three principal standards for determining the deductibility of an item of cost: reasonableness, allocability and substantiation."[91]

The allowance for deductions became a controversial issue among the regional corporations. Doyon's outside counsel noted, "[a]mong the most controversial issues in the litigation thus was whether general and administrative costs (G&A) were allowable deductions and, if so, to what extent. Indeed, Doyon's own position on this question changed twice."[92] The courts also struggled with this topic, in part because Congress provided no guidance in the language or legislative history of ANCSA.[93] In the first court case between regional corporations regarding Section 7(i), the court proposed "a strictly limited net concept allowing only deductions which are directly related to the production of [Section 7(i)] revenues" and expressly disallowed "land selection expenses, salaries of regular corporate employees, or overhead or administrative expenses."[94]

The Settlement Agreement again broke from court precedent and charted a different path on G&A costs that relies on a formula rather than an allocation of actual overhead. The Agreement set a standard deduction, "not subject to audit or change," at $300,000 per fiscal year.[95] In addition, in a single fiscal year, a corporation is permitted to deduct a percentage of its adjusted Gross Section 7(i) Revenues based on a sliding scale: 20% on up to $3 million, 6% on up to $100 million, and 4% on amounts greater than $100 million.[96]

The Settlement Agreement also specifies costs that could be included as itemized deductions. The Agreement categorizes a number of costs as allowable: "Passive Section 7(i) Costs," including land selection costs regional corporations incurred in selecting ANCSA lands for resource potential; pre-conveyance geological and geophysical costs; costs incurred in negotiating contracts related to Section 7(i) Resources; contract administration costs; litigation costs related to Section 7(i) Resources; resource management costs; Section 7(i) Resource taxes; and costs of acquiring an interest in ANCSA lands, and borrowing costs.[97]

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91. *Id.* at 29.

92. Lazarus Memo, *supra* note 43, at 4.

93. *See Aleut III*, 421 F. Supp. 862, 868 (D. Alaska 1976) (noting that while House bill "spoke only in terms of 'revenues'," the Senate bill also referred to "net revenues.").

94. *Doyon v. NANA*, No. 1531-74, at 11 (D.D.C. 1974) (unreported mem. op.) (on file with authors).

95. Settlement Agreement, *supra* note 2, at 38.

96. *See id.* at 60–61. Unlike tax brackets for federal income taxes, the scale is not progressive, but brackets the floor and ceiling based on the fiscal year revenue for each category. *See id.*

97. *See id.* at 39–42.

Additionally, section 5 of Article III requires the corporations to keep detailed records of allowable Section 7(i) costs.[98] For example, in the ASRC arbitration, the panel rejected ASRC's cost allocations because "ASRC made no attempt to keep . . . [t]he requisite contemporaneous records and detail so as to be able to allocate in accordance with Article III, Section 5 . . . ."[99] Section 5 details the types of allowable costs per category and the methods of recordkeeping for labor, in-house costs like travel, outside vendor costs, and dedicated facilities and equipment.[100] Subsection (b) provides an allocation methodology for labor and equipment used for Section 7(i) activities and non-Section 7(i) activities.[101]

Article IV – Calculation of Distributable Revenues

Article IV is a short but complicated article addressing the "calculation of distributable revenues."[102] This distributable revenues concept addresses situations where a regional corporation has both active and passive 7(i) activities and revenues by allowing a balance of recovering certain active development costs by off-setting them against passive revenues within the same period. But it caps that active-to-passive transition such that the regional corporation cannot eliminate sharing of its passive revenues alogether. Section 1 begins by requiring each regional corporation, for each fiscal year, to first calculate its Adjusted Gross Passive Section 7(i) Revenues.[103] Then,

> [i]f that calculation yields a positive number, sixty percent (60%) of the Corporation's Adjusted Gross Passive Section 7(i) revenues shall be segregated and shall be added to the Corporation's Adjusted Gross Active Section 7(i) Revenues, if any, in computing the Corporation's Adjusted Gross Section 7(i) Revenues for the year; the other forty percent (40%) shall be added to the Corporation's Gross Active Section 7(i) Revenues for that year.[104]

The Special Master's Report to the *Aleut* court recites the history of the sixty-forty split. The split was a solution to the debate among the regional corporations over whether Section 7(i) "established a collective 70% interest in the revenues from individual transactions or parcels of property" or "realized net revenues, if any, from [a regional

98. *Id.* at 55.
99. ASRC Arbitration Prelim. Op., *supra* note 79, at 18–19.
100. *See* Settlement Agreement, *supra* note 2, at 56–57.
101. *Id.* at 57–58.
102. *Id.* at 62–64.
103. *Id.* at 62.
104. *Id.*

corporation's] timber and subsurface estate taken as a whole."[105] The Special Master noted that the sixty-forty split "allow[ed] developer Regional Corporations the opportunity to recover its reasonable costs from its other [Section 7(i)] Revenues and thus spend with some confidence the capital needed to earn revenues, while to some extent protecting other Regional Corporations from the undue diversion of annual distributions."[106]

Article V – Compliance Mechanism

Section 1 requires each regional corporation to distribute to the other eleven corporations "their Distributive shares of the Corporation's Net Section 7(i) Revenues" for the prior fiscal year within ninety days of the close of the fiscal year.[107] This was an important inclusion in the Settlement Agreement as Section 7(i) itself is silent as to the timeframe for required sharing of Section 7(i) revenues.[108] This is another example of the Settlement Agreement negotiators deciding to make explicit prior court holdings, particularly the ninety-day timeframe established by the earliest court decision on Section 7(i) in *Doyon, Ltd. v. NANA Regional Corp.*[109]

If a corporation fails to make appropriate and timely distribution of the required sums, the Agreement provides for the payment of interest "at the Prime Rate plus five percent (5%) per year on all amounts not distributed or escrowed."[110] In 2002, Sealaska exercised this provision when it "deferred the Company's own fiscal year 2001 Section 7(i) and 7(j) distributions, due March 30, 2002, until the summer of 2002."[111]

Additionally, section 3 sets out the reporting requirements. It requires that the corporation issue a Section 7(i) annual report to the other corporations within 180 days of the close of the company's fiscal year.[112]

Moreover, subsection 3(d) requires the Section 7(i) annual report to provide an "itemization of the Corporation's Section 7(i) Costs by category of allowable costs as maintained by the Corporation in its books and records."[113] The Sealaska arbitration panel noted: "[W]e believe that

105. Special Master Report, *supra* note 21, at 17–18.
106. *Id.* at 19.
107. *See* Settlement Agreement, *supra* note 2, at 65.
108. *See* ANCSA § 7(i).
109. *Doyon v. NANA*, No. 1531-74, at 14 (D.D.C. 1974) (unreported mem. op.) (on file with authors).
110. *See* Settlement Agreement, *supra* note 2, at 65.
111. SEALASKA CORP., *2001 Annual Report to Shareholders*, 19 (on file with authors).
112. *See* Settlement Agreement, *supra* note 2, at 65.
113. *Id.* at 69.

the drafters of the agreement intended to make substantial compliance with the record-keeping requirements a condition precedent to the allowance of a deduction for costs which are to be described in the records."[114]

Furthermore, section 8 provides that any regional corporation may "commence an audit or other examination" of the financial and contractual records of a reporting corporation within twelve months of the transmittal of a Section 7(i) annual report.[115] In the event that a corporation institutes an audit, it must give a sixty-day notice to every other corporation, including the corporation to be audited.[116] Each regional corporation has the right to join the audit and to expand the list of audited items.[117] Thereafter, to prevent the disruption of business and duplication of efforts, no other corporation is permitted to audit or examine the same report.[118] If the results of the audit show that the reporting regional corporation understated Net Section 7(i) Revenues by 5% or more, but not less than $100,000, then the audited regional corporation must pay the costs of the audit.[119] Otherwise, the audit costs are the responsibility of the regional corporation or corporations that requested the audit.[120]

Section 9 addresses the consequences of a corporation's failure to transmit its Section 7(i) annual report. In such circumstances, any other corporation may give sixty days written notice and then commence an "audit or other examination of the pertinent financial and contractual records of the non-reporting Corporation."[121] In essence, a regional corporation can perform the financial reporting and issue a Section 7(i) annual report for a non-reporting region, and this audit becomes binding on the non-reporting region unless challenged in arbitration within 120 days of issuance of the report.[122] While this provision has never been exercised, it highlights the importance of the Section 7(i) annual report to the other regional corporations as stakeholders in Section 7(i) Resources outside their own regions.

Additionally, section 10 provides that a regional corporation may escrow revenues if it is "uncertain how to treat revenues received or expenses incurred . . . and avoid the interest and penalty provisions of

114. Sealaska Arbitration Prelim. Op., *supra* note 47, at 37.
115. Settlement Agreement, *supra* note 2, at 72.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 73.
120. *Id.*
121. *Id.*
122. *Id.* at 73–74.

Section 2" of Article V while it initiates an arbitration to seek resolution of the issues.[123] This provision may provide an option for corporations as they wrestle with matters unforeseen at the time of the Settlement Agreement like carbon credits, conservation easements, and other matters not clearly addressed by the Agreement.[124]

Article VI – Arbitration

Article VI makes arbitration the exclusive method for Settlement Agreement dispute resolution, with exceptions for disputes involving "Federal or State income tax consequences of revenues, deductions, distributions, or any other income tax issues."[125] The Special Master explained: "The Agreement does not purport to resolve the Federal or state income tax consequences of [Section 7(i)] revenues, deductions, distributions or other issues. Indeed, the Agreement . . . expressly excludes such issues from arbitration."[126]

The topic of depletion was a significant hang-up among the regional corporations when negotiating the Settlement Agreement. In a letter to the Special Master, ten regional corporations recounted: "[A] clear majority of the corporations were in agreement that the Section 7(i) Agreement was not intended to resolve the issues of depletion. It was recognized that it was impossible to get agreement on this issue and some corporations expressed the view that it was a tax matter and not a matter for [the Agreement]."[127]

In reviewing the final draft of the Settlement Agreement, Doyon's outside counsel noted the purpose of the arbitration provisions:

> The object of the Agreement is to avoid further litigation over Section 7(i) issues, and all of Article V is devoted to procedures for implementing the settlement . . . . Article VI of the Agreement further provides that . . . all issues arising under Section 7(i) or the Agreement shall be subject exclusively to arbitration.[128]

An earlier draft of the Settlement Agreement did not include binding arbitration provisions and required three corporations to join the request for arbitration, which caused Doyon's legal counsel to remark:

123. *Id.* at 74.
124. *See* Schutt, *supra* note 5, at 268–70.
125. *See* Settlement Agreement, *supra* note 2, at 77–83.
126. Special Master Report, *supra* note 21, at 26.
127. Letter from Chugach Natives, Inc. and Bristol Bay Native Corp. to Ralph Wienshienk, Special Master (Nov. 12, 1982) (on file with authors).
128. Lazarus Memo, *supra* note 43, at 5.

> Doyon may as well get an outside law firm and put it permanently on retainer to do nothing but handle appeals from Section 7(i) arbitrations, because it is virtually guaranteed that we will have an even higher level of litigation, and more attorneys' fees, than we have at the present time.[129]

In the 1980s, several regions filed arbitration cases that resulted in final decisions regarding the applicability of Section 7(i) to land exchanged between ASRC and the federal government and to Sealaska timber.[130] Following the arbitration, Sealaska filed suit in federal district court attempting to overturn the arbitrators' decision.[131] In rejecting Sealaska's challenge, the court noted: "The corporations intended the Agreement to be a definitive declaration of their revenue sharing obligations under section 7(i), and to provide an alternative mechanism for resolving any controversies that might arise in the future regarding those obligations."[132] The court rejected Sealaska's arguments for escaping the binding nature of the arbitration clause in the Agreement, stating: "When parties agree to commit a particular question to binding arbitration before a specialized tribunal, a federal district court may not disturb their decision, absent special circumstances . . . ."[133]

In the ASRC arbitration proceeding regarding the Kaktovik Land Exchange, ASRC made a legal argument that "the Claimants have waived their rights to arbitrate the issues raised in these proceedings by reason of the fact that they have participated in the formulation of pending legislation before the Congress of the United States."[134] The arbitrators ruled against ASRC on this point.[135]

The Settlement Agreement adopts the 'loser-pays' rule otherwise applicable in civil litigation in Alaska's state courts under Rule 82 of Alaska's Rules of Civil Procedure.[136] The Agreement defines the "prevailing party" as the defendant regional corporation "if the outcome

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129. Memorandum from Elizabeth Ingraham, *supra* note 17.

130. *See, e.g.*, Aleut Corp. v. Arctic Slope Reg'l Corp., AAA No. 75113030986 (Aug. 14, 1989) [hereinafter ASRC Arbitration Decision] (Morris, Arb.) (on file with authors); Sealaska Arbitration Decision, *supra* note 29; *see also* Schutt, *supra* note 5, at 242–46 (discussing arbitration cases).

131. *See* Aleut Corp. v. Arctic Slope Reg'l Corp. (*Aleut VI*), Civ. No. A88-515 (Jan. 24, 1989) (on file with authors). The court merged the case with the original *Aleut v. Arctic Slope Reg'l Corp.* case, Civ. No. A75-053.

132. *Id.* at 5.

133. *Id.* at 9–10; *see also id.* at 17 ("Sealaska's decision to sign the Agreement and save itself the costs of perpetual litigation was an informed and intelligent waiver of its right to argue in this forum . . . .").

134. ASRC Arbitration Prelim. Op., *supra* note 79, at 19.

135. *See id.*

136. *See* Settlement Agreement, *supra* note 2, at 82.

of the arbitration and any appeal does not increase its Net Section 7(i) Revenues before any carry-forward of deductions by five percent (5%) or more, but not less than one hundred thousand dollars ($100,000)."[137]

In the Sealaska arbitration, the arbitrators awarded the claimant regional corporations $1.0 million in attorneys' fees.[138] In the ASRC arbitration, the arbitrators found ASRC to be the prevailing party and awarded it 75% of its actual fees, or $1.2 million, as a "reasonable and appropriate sum . . . in a very complex case."[139]

Per section 15, post-arbitration proceedings are governed by chapter 09.43 of the Alaska Statutes.[140] However, the Superior Court for the Third Judicial District in Anchorage is the exclusive venue for such proceedings.[141] Sealaska challenged the applicability of this section as a part of the *Aleut Corp. v. Arctic Slope Regional Corp.* (*Aleut VI*)[142] case, arguing that did not prevent it from removing the post-arbitration proceeding from state court to federal court.[143] The federal district court held that the "forum selection clause at issue is exclusive and mandatory," before remanding the arbitration enforcement action to state court.[144]

Article VII – Settlement Provisions Relating to Past Transactions

Although lacking relevance to current Section 7(i) controversies, Article VII was critically important at the time of negotiations due to the long time period covered by the Settlement Agreement (1972 to 1982), the multiple court cases involved, and the interaction with prior settlement agreements among less than the full twelve regions.[145] Article VII begins by setting March 31, 1982, as the cut-off date. That is, the Settlement Agreement governs all determinations of revenues and costs on and after April 1, 1982.[146]

Sections 2 and 3 set out the agreed upon past Section 7(i) revenues earned and costs expensed by each regional corporation, with the exception of ASRC. In Doyon's case, the negotiated amounts were significant:

137. *Id.* at 90.
138. Sealaska Arbitration Decision, *supra* note 29, at 10.
139. ASRC Arbitration Decision, *supra* note 130, at 6.
140. *See* Settlement Agreement, *supra* note 2, at 83.
141. *Id.*
142. *Aleut VI*, Civ. No. A88-515 (on file with authors).
143. *Id.* at 18–19.
144. *Id.* at 19, 21.
145. *See* Settlement Agreement, *supra* note 2, at 91–100.
146. *See id.* at 91.

> Doyon was able to increase the amount of its claimed past deductions from about $2.5 million to $5,922,911—primarily by applying to direct Section 7(i) expenses an allocation of G&A costs which had not been used before. More importantly, the Doyon representatives were able to convince a majority of the other Regional Corporations that, because of its substantial earlier investments, Doyon's active development revenues (through its subsidiary, Tanana Asbestos Corp.) from the Doyon asbestos project should be excluded from shareable Section 7(i) revenues and that only Doyon's income under the primary lease (passive development) need be shared under ANCSA.[147]

Section 4 summarizes what each regional corporation owed based upon the difference between the amounts in sections 2 and 3, less prior distributions made. Sections 5 and 6 set out the deduction carry-forwards and prior excess distributions for each regional corporation.

Section 7 structures the payment of Section 7(i) revenues from the settlement period (1972 to 1981) for ASRC in recognition of the magnitude of certain revenues in question at the time of settlement.[148] ASRC agreed to pay $7,250,000 in installments, with $1,500,000 payable within thirty days of the dismissal of the *Aleut* case, and the balance in not more than ten annual payments.[149]

Section 11 requires each party to dismiss all claims from Aleut with prejudice, and blocks the Settlement Agreement from going into effect until they had done so.[150] The district court issued an order dismissing the case with prejudice on June 3, 1983.[151]

Article VIII – Miscellaneous

Article VIII includes miscellaneous provisions. [152] Section 1 recognizes that the Agreement was a compromise of "current disputes and disagreements over the interpretation and application of Section 7(i) of ANCSA" and specifically the *Aleut* case.[153] Just as importantly, the provision recognizes that the Agreement governs the "future relationship of the parties towards one another in complying with Section 7(i)" and acknowledged that the parties had "foregone legitimate [legal] positions"

147. Lazarus Memo, *supra* note 43, at 6–7.
148. Settlement Agreement, *supra* note 2, at 87–90.
149. *See id.* at 87–88.
150. *Id.* at 91.
151. *See* Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53, at 6 (D. Alaska June 3, 1983) (order dismissing case following settlement) (on file with authors).
152. *See* Settlement Agreement, *supra* note 2, at 93–100.
153. *Id.* at 100.

in order to reach agreement.[154] In his report to the *Aleut* court, the Special Master summarized the history and importance of the provision: "As with any achievable compromise, few of the Agreement's provisions satisfied all parties. However, the consensual nature of a unanimous Agreement reached after extensive arm's length bargaining demonstrates the fairness and feasibility of the whole."[155] The arbitrators in the ASRC case noted one example:

> ASRC initially deducted the cost of lobbying for passage of ANILCA against Section 7(i) revenues. These deductions were challenged in the Section 7(i) federal court litigation and were ultimately compromised in Article VIII, Section 1 of the Settlement Agreement.[156]

Section 2 provides that the Agreement was an integrated agreement that "express[es] the entire agreement and understanding of the parties."[157] In this case, the clause was particularly important, as ASRC had finalized several settlement agreements with other individual regional corporations that were superseded by the Agreement.[158]

Section 3 is a severability provision. It provides that Articles II, III and IV "are the essence of th[e] Agreement," excepting sections 7 (sand and gravel) and 8 (mergers of corporations) of Article II.[159] It further recognizes the grand compromises inherent in the settlement agreement and the fact that many of the provisions are interdependent.[160] Section 3 provides that if a court materially changes the financial aspects of the Agreement by determining that any of the referenced provisions are "incompatible with ANCSA," then "the entire Agreement shall be rendered prospectively void and unenforceable and that they will promptly attempt in good faith to negotiate a new Agreement."[161]

Section 7 is an extensive provision regarding indemnification.[162] This section creates indemnity between regional corporations in the event of a successful suit brought by a village corporation, or at-large shareholder,

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154. *Id.*
155. Special Master Report, *supra* note 21, at 13.
156. ASRC Arbitration Prelim. Op., *supra* note 79, at 9.
157. Settlement Agreement, *supra* note 2, at 93.
158. *See id.* at 98 ("Arctic Slope has previously entered into settlement agreements with Ahtna, Inc., Bering Straits Native Corporation, Calista Corporation, NANA Regional Corporation, Inc., Chugach Natives, Inc., and Bristol Bay Native Corporation."); *see also* Briefing of Doyon Bd. of Dirs., *supra* note 9.
159. Settlement Agreement, *supra* note 2, at 94.
160. *See id.*
161. *Id.* at 101–02.
162. *See id.* at 103–07.

against either a recipient corporation or a distributing corporation.[163] This provision reflects the regional corporations' understanding of the risk attending to the village corporations' non-party status and the then legally untested interactions between Sections 7(i), 7(j), and the Settlement Agreement.[164]

Subsection (g) concludes by providing that the Settlement Agreement does not create a cause of action for village corporations or regional corporation shareholders.[165] Several lawsuits by village corporations and at-large shareholders in the 1990s challenged this legal conclusion, but the regional corporations ultimately prevailed in the litigation.[166]

Article IX – Ratification of Agreement

Article IX requires that at least ten of the twelve regional corporations ratify the Agreement for it to become effective and binding on all corporations that had ratified it.[167] It also provides for the method of ratification, the effective date, and the deadline for ratification of October 1, 1982.[168] An arbitration panel "interpret[ed] the effective date . . . as the date on which a resolution of notification of the tenth corporation was served, or 1982, even though court approval was not given until June of 1983."[169] Each of the twelve regional corporations ratified the Agreement by the October 1, 1982 deadline.[170]

Section 1 requires that each corporation cooperate in the defense of the Agreement in "any legal action by anyone not a party to this Agreement."[171] The parties included this provision because village corporations were not parties to the Settlement Agreement and the regional corporations knew there was some risk of a Section 7(j)

163. *Id.* at 103–06.

164. *See* Schutt, *supra* note 5, at 258–59 (describing legal challenges to the Settlement Agreement brought by village corporations); Lazarus Memo, *supra* note 43, at 8–9 (anticipating risk of village corporations "challenging the Agreement or any distributions made pursuant thereto").

165. Settlement Agreement, *supra* note 2, at 107.

166. *See* Oliver v. Sealaska Corp., 192 F.3d 1220 (9th Cir. 1999); Bay View, Inc. *ex rel.* AK Native Village Corps. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997); Dagg v. Arctic Slope Reg'l Corp., Civ. No. A94-044, slip op. at 1–2 (D. Alaska May 2, 1994) (on file with authors). This article discusses each of these cases in more detail, *see infra* Part III.

167. Settlement Agreement, *supra* note 2, at 98.

168. *See id.* at 101.

169. Sealaska Arbitration Prelim. Op., *supra* note 47, at 38.

170. *See* Resolution of Doyon Bd., No. 82-53 (Sept. 24, 1982) (on file with authors); Aleut Corp. v. Arctic Slope Reg'l Corp., Civ. No. A75-53, at 5 (D. Alaska June 3, 1983) (order dismissing case following settlement) (on file with authors).

171. Settlement Agreement, *supra* note 2, at 100.

"attack"on the Agreement, challenging whether they should have been parties and signatories because of their inherent economic interest in 7(i) sharing among the regional corporations.[172]

Article X – Amendments

The regional corporations intentionally made the amendment process for the Settlement Agreement very difficult. Article X requires consensus among all twelve regional corporations for the enactment of an amendment.[173] Despite the difficulty of obtaining unanimous agreement among the regional corporations, there have been two amendments: (1) a major revision in 1990 changing the methodology for calculating revenue under Section 7(i) for timber resources,[174] and (2) an amendment addressing scholarships for shareholders from resource revenue.[175]

Article XI – Review

Article XI provides that the corporations shall meet approximately every two years "for the purpose of reviewing how the Agreement is operating and whether any modifications seem desirable."[176] Despite the presence of this Article, the regional corporations have not met in many years to discuss the Agreement or modification of it.

Appendix A

Appendix A provides accounting procedures for operating equipment and facilities.[177] It "provides guidance for compliance with the cost allocation provisions of Article III Section 5."[178] The appendix has four parts: Scope and Applicability, Definitions and General Principles, Basic Considerations, and Special Considerations.[179]

172. *See* Lazarus Memo, *supra* note 43, at 9 (explaining the legal cooperation provision to Doyon Board of Directors).
173. *See* Settlement Agreement, *supra* note 2, at 102.
174. *See supra* notes 32–39 and accompanying text.
175. *See supra* notes 40–42 and accompanying text.
176. *See* Settlement Agreement, *supra* note 2, at 103–04.
177. *Id.* at 104.
178. *Id.*
179. *Id.* at 104–11.

Appendix B

Appendix B addresses two region-specific issues.[180] First, it addresses a resource-specific issue in the Doyon region involving an asbestos deposit.[181] The appendix provided that Doyon:

> Shall be deemed to receive Gross Passive Section 7(i) Revenues and incur Passive Section 7(i) Costs as Lessor under its lease for asbestos development in the area of Eagle, Alaska, with GCO Minerals Co., Tanana Asbestos Corp., and Boreal Exploration Co., Lessees, and shall not be deemed to receive Gross Active Section 7(i) Revenues or incur Active Section 7(i) Costs through the operations of Tanana Asbestos Corp., its wholly-owned subsidiary, as Lessee under such lease.[182]

The agreement to treat revenues and expenses as passive, in this particular case, is the opposite of the treatment that those revenues and expenses would otherwise receive under the Agreement given Doyon's 100% ownership of Tanana Asbestos Corp.[183]

Second, the Agreement addresses a settlement payment between Chugach Natives, Inc. and the United States that concluded in summer 1982.[184] According to the settlement, Chugach had the "choice of accepting $12 million or exercising certain timber cutting rights within a National Forest."[185] Chugach chose the $12 million, but that raised the question of whether part, or all, of the $12 million was shareable.[186] Under the Agreement, a compromise was reached providing that the first $2,460,014 "was used to eliminate Chugach's carry-forward of past deductions [under Article VII, section 5]," but the remaining $9,539,986 was non-shareable.[187]

180. *Id.* at 112.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *See* Lazarus Memo, *supra* note 43, at 5–6 (explaining the rationale behind Appendix B of Agreement to Doyon Board of Directors).
186. *Id.*
187. *See id.* at 6 (further explaining details of Appendix B); Settlement Agreement, *supra* note 2, at 86, 112.

III. LEGAL CHALLENGES TO THE SETTLEMENT AGREEMENT

Since the finalization of the Settlement Agreement in the early 1980s, all three relevant constituencies—village corporations, individual at-large shareholders, and regional corporations—have challenged the Agreement in court.

Concurrent with the finalization and court-approval of the Settlement Agreement in 1982 to 1983, several village corporations sought to intervene in the litigation to protect their interests in the *Aleut* case.[188] This happened in May 1982, just one month prior to the culmination of the multi-year effort to finalize the Settlement Agreement.[189] In February 1983, the district court denied the motion, ruling that it was untimely.[190] In affirming the district court decision, the Ninth Circuit stated:

> We reach this conclusion on the assumption that the regions did not represent the villages in the section 7(i) litigation. . . . Our assumption that the villages were not represented by the regions would, were it to be determined to be correct, enable the villages to challenge the applicability of *Chugach* to dually owned land as well as the settlement agreement to the extent it affected their interests.[191]

In 1989, following several years of arbitration interpreting the provisions of the Settlement Agreement regarding timber harvest, Sealaska filed suit in federal district court.[192] Sealaska asked the court to issue a preliminary injunction while simultaneously asking the court to reopen the earlier *Aleut* cases and set aside the arbitration decisions.[193] Meanwhile, the prevailing regional corporations filed a case in Alaska state court to enforce the arbitration award.[194] Sealaska removed the state court case to federal district court and all of the issues were decided together.[195] The federal district court upheld the binding nature of the arbitration provisions of the Settlement Agreement and rejected Sealaska's other arguments, which attempted to re-litigate issues addressed in the arbitration.[196] The court noted that the "corporations

188. Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527, 528 (9th Cir. 1984).
189. *Id.* at 528–29.
190. *Id.* at 529.
191. *Id.* at 530 (referencing Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1979)). It should be noted that the court made no holding with respect to whether the villages were represented by the regions. *Id.*
192. *Aleut VI*, Civ. No. A88-515, at 7–8 (Jan. 24, 1989) (on file with authors); *see also* Schutt, *supra* note 5, at 261–62 (summarizing timber harvest litigation).
193. *See Aleut VI*, Civ. No. A88-515, at 7–8.
194. *Id.*
195. *Id.* at 8–9.
196. *Id.* at 9–20.

intended the Agreement to be a definitive declaration of their revenue sharing obligations under Section 7(i)" and that "signators included . . . a binding arbitration clause which provides only for limited judicial review."[197] The court concluded that Sealaska's decision "was an informed and intelligent waiver of its right to argue in this forum that a particular method for determining fair market value violates ANCSA."[198]

Furthermore, in 1994, in *Bay View, Inc. ex rel. AK Native Village Corps. v. Ahtna, Inc.* (*Bay View I*), a village corporation in the Bristol Bay region and Lewis Olsen, an individual at-large shareholder of Bristol Bay Native Corporation, brought suit claiming that ANCSA Sections 7(i) and 7(j) required ten regional corporations to share proceeds from the sale of net operating losses (NOLs)—a tax benefit largely derived from the unique structure of a regional corporation's options for setting the tax basis for its resource properties.[199] The NOL tie to 7(i) resources was the genesis of the *Bay View I* challenge as well as other similar litigation. An *Anchorage Times* story in 1989 explained NOLs and their history with Alaska Native corporations:

> In 1984, Sen. Ted Stevens, R-Alaska, persuaded Congress to help the native corporations by inserting a special tax break into that year's tax reform act. . . . [T]he break has allowed the corporations to earn more than $500 million by selling past operating and paper losses to high-profit Lower 48 corporations looking for ways to reduce their tax bills.
>
> Those corporations were allowed to apply the losses against their profits; they then passed up to 80 percent of the resultant tax savings on to their native corporate partners.[200]

NOL sales were a major boost to the profits of a number of regional corporations in the late 1980s—a time when many were struggling financially.[201]

197. *Id.* at 5–6.
198. *Id.* at 17.
199. Bay View, Inc. *ex rel.* AK Native Village Corps. v. Ahtna, Inc. (*Bay View I*), Civ. No. A94-0551, at 4 (D. Alaska July 6, 1995) (unreported mem. op.) (on file with authors).
200. Bob Ortega, *Calista Wants Cut of Tax Sales*, ANCHORAGE TIMES, Mar. 5, 1989, at A-1, A-10.
201. *See, e.g.*, Hal Bernton, *Profits Soar for Native Corporations*, ANCHORAGE DAILY NEWS, Mar. 10, 1989, at C-1, C-2 (on file with authors).

Both plaintiffs in the *Bay View I* case sought to represent classes, the village corporations and the at-large shareholders, respectively.[202] The plaintiffs claimed that the NOLs that the ten regional corporations sold derived from losses attributable to natural resources and were therefore subject to Section 7(i).[203]

The issue of NOLs and the applicability of Section 7(i) had been brewing for several years during the pendency of the NOL transactions of the late 1980s.[204] In late 1990, CIRI's President, Roy Huhndorf, wrote a letter to each of the other regional corporations' CEOs urging that they reach a consensus position on the NOL issue.[205] Mr. Huhndorf noted "[i]f you did an NOL deal and didn't share the proceeds under 7(i) (which is true of everyone but NANA), you have already made the decision that NOL's are not shareable."[206]

In the *Bay View I* litigation, the regional corporation defendants challenged the standing of the plaintiffs, specifically raising the question of whether either plaintiff could bring a direct private right of action against regional corporations outside the Bristol Bay region.[207]

The court noted that Section 7(i) is "qualified by subsections 7(ℓ) and 7(m). These subsections allow a regional corporation to use some or all of its subsection 7(j) funds for joint ventures between the village corporations in that region and the regional corporation, or for use by the regional corporation for projects that will benefit the region generally."[208]

"Inasmuch as subsection 7(i) entitles all 12 regional corporations to a share in resource revenues, and since regional corporations are entitled to retain a significant percentage of those revenues . . . it follows that each regional corporation has a very significant, direct financial interest in assuring the receipt of what is due it under subsection 7(i)."[209]

The court found that with respect to at-large shareholder plaintiff Olsen, there was no direct cause of action.[210] The court found that the "most obvious indication of this conclusion is the language of ANCSA itself," which provides for no such right, despite expressly providing for

202. *See Bay View I*, Civ. No. A94-0551, at 7.
203. *See id.* at 4–5.
204. *See* Bay View, Inc. *ex rel.* AK Native Village Corps., 105 F.3d at 1283–84 (describing NOL background and history); Schutt, *supra* note 5, at 259–60 (describing history of NOL litigation).
205. Letter from Roy M. Huhndorf, President, CIRI, to Reg'l Corp. CEOs (Oct. 24, 1990) (on file with authors).
206. *Id.* at 2.
207. *See Bay View I*, Civ. No. A94-0551, at 7.
208. *Id.* at 8 (citing 43 U.S.C. § 1606(i), (ℓ), (m)).
209. *Id.* at 13.
210. *See id.* at 11–12.

other litigation rights within the Act.[211] Instead, the court noted that "it is the Bristol Bay Native Corporation which is entitled to receive subsection 7(i) proceeds and that corporate entity is answerable to Mr. Olsen for his rights as an at large shareholder."[212]

Similarly, the court found that Congress did not create a direct cause of action for a village corporation against regional corporations outside of its region.[213] In reaching its conclusion, the court repeatedly noted Congress's directive that ANCSA "be effected 'without litigation.'"[214] While it ultimately dismissed the action, the court did "assume[] without deciding that there is at least the possibility of a state law cause of action by villages *against their regional corporation* for failure to enforce rights under ANCSA as to which the villages have a direct, beneficial interest."[215]

On appeal, the litigation focus changed dramatically as Congress had amended ANCSA Section 7(i) to clarify that NOL sales were not subject to Section 7(i) sharing.[216]

A few years later in *Oliver v. Sealaska Corp.*,[217] an at-large shareholder of Sealaska and CIRI sued each of the regional corporations.[218] The plaintiff "challenge[d] the legality of Article IV and Article II, Subsection 6(g) of the Settlement Agreement."[219] He sought a court ruling that "it was an ultra vires action of the corporations to agree to these terms because the terms wrongly limit the village corporations' and at-large shareholders' rights to shareable revenues under ANCSA subsection 7(i)."[220] In short, Oliver attempted a direct attack on the Settlement

211. *Id.* at 11.
212. *Id.* at 12.
213. *Id.* at 11.
214. *Id.* at 11–13.
215. *Id.* at 14 (emphasis added).
216. Bay View, Inc. *ex rel.* AK Native Village Corps. v. Ahtna, Inc., 105 F.3d 1281, 1284 (9th Cir. 1997) (noting "Congress made the 1995 Amendment fully retroactive" and the court therefore "need not decide whether village corporations or at-large shareholders have an implied right of action to enforce section 7(i) in federal court."); *see also* Bay View, Inc. v. United States, 46 Fed. Cl. 494, 497 (Ct. Fed. Cl. 2000) ("The court concludes, on the basis of section 1606(i)'s plain language, that NOL revenues were not shareable revenues under section 1606(i) as enacted. . . . Accordingly, . . . Congress took nothing when it enacted the 1995 amendment clarifying that NOL revenues were not shareable revenues.").
217. Oliver v. Sealaska Corp., Civ. No. A96-0343, slip op. (D. Alaska Sept. 24, 1997) (on file with authors).
218. *Id.* at 1–2 (on file with authors).
219. *Id.* at 11. Article IV is titled "Calculation of Distributable Revenues." Article II, subsection 6(g) is the language addressing land exchanges of surface estate for surface estate, subsurface estate, or both, and excluding it from revenue sharing.
220. *Id.* at 11–12.

Agreement and the legality of the regional corporations entering into the Agreement without direct representation of village corporations and at-large shareholders in the negotiations.

The district court dismissed the complaint, concluding "that plaintiff may not bring a direct cause of action under [Alaska Statute] 10.06.015."[221] The court went on to explain "a second reason" for the dismissal that:

> [R]elates to the very fact that there has been over twenty years of litigation on the reach of ANCSA subsection 7(i). . . . Subsection 7(i) is, very simply put, a problem; it is a problem that affects regional corporations, village corporations, and at-large shareholders in a variety of ways. It is inappropriate for a problem that affects everybody to be brought in a private, direct action by a single shareholder with no claim against anyone but his own two regional corporations.[222]

The district court also awarded attorneys' fees to the defendant regional corporations under Alaska Rule of Civil Procedure 82.[223] The court concluded that an award of fees under Alaska law was appropriate despite the fact that "the case [wa]s before th[e] court on removal because of federal question jurisdiction."[224] The court noted that "Oliver's complaint was founded upon the doctrine of ultra vires corporate conduct and was brought on the basis of [Alaska Statute] 10.06.015," and held that where Alaska substantive law was the basis of the dispute, the availability of attorneys' fees under Alaska substantive law was appropriate.[225] This was an important ruling for regional corporations because Alaska Rule 82 helps prevent unfounded or repetitive litigation by assessing a portion of the winning party's attorneys' fees to the loser.

The Ninth Circuit affirmed the district court decision holding that "nothing in the text of the revenue-sharing provision creates an express private right of action to enforce the section's mandates" and finding that the factors test regarding whether a private right of action may be implied by the statutory text did not in fact support any such right of action.[226]

Similarly, in *Dagg v. Arctic Slope Regional Corp.*,[227] an at-large shareholder of Cook Inlet Region, Inc. sought to institute a class action "against ASRC to recover funds which he contend[ed] were not shared with the other regional corporations as required by [Section 7(i)]" and to

221. *Id.* at 14.
222. *Id.* at 17.
223. Oliver v. Sealaska Corp., Civ. No. A96-0343, slip op. at 20–21 (D. Alaska Feb. 9, 1998) (on file with authors).
224. *Id.* at 6.
225. *Id.*
226. Oliver v. Sealaska Corp., 192 F.3d 1220, 1223–25 (9th Cir. 1999).
227. Civ. No. A94-044 (May 2, 1994) (on file with authors).

set aside the Section 7(i) Settlement Agreement.[228] The court dismissed the action holding "[t]his is not a derivative suit and Congress did not give individual shareholders a private right of action to enforce corporate opportunities."[229]

IV. TIME FOR AMENDMENT?

The parties to the Settlement Agreement have only amended the complex document twice in thirty-five years.[230] In the intervening time, statutory amendments enacted by Congress to Section 7(i), as well as court decisions, as discussed herein, have changed the landscape upon which the Settlement Agreement was concluded. This section, therefore, proposes several potential subjects that might be worthy of review and amendment.

A main reason to amend the Agreement is to modernize it. For example, the current notice provision of the Agreement requires: "All notices . . . shall be in writing and shall be communicated to the Corporations by certified mail, return receipt requested."[231] The Settlement Agreement does not include a provision allowing for electronic communication of required notice.

Another area ripe for modernization is the constant dollar provision of section 5 in Article VIII. That provision provides for inflationary adjustment of dollar figures in various provisions of the Agreement like the standard deduction of $300,000 per year for general and administrative costs in Article III, section 1(c).[232] While, the five-year inflationary adjustment has provided for increasing the dollar amounts, the corporations themselves have also grown significantly in the more than three decades since the Settlement Agreement was executed. As such, merely adjusting for inflation from time-to-time has not matched the economic realities of the regional corporations' growth, which has far outpaced inflation. That growth, and changing conditions generally, may warrant adjustments of some of the provisions providing specific dollar amounts.

Another obvious choice for modernization of the Agreement would be incorporating amendments to ANCSA that affect Section 7(i) into the Agreement itself. For example, despite an amendment to ANCSA Section

228. *Id.* at 1.
229. *Id.* at 1–2.
230. *See supra* notes 32–42 and accompanying text.
231. Settlement Agreement, *supra* note 2, at 95–96.
232. *Id.* at 38.

7(i) in 1995 specifically addressing tax benefits,[233] and a Ninth Circuit case involving the issue,[234] the regional corporations have not amended the Agreement to address tax benefits arising from natural resource development, including net operating losses, depletion allowances, and various forms of tax credits.[235]

Similarly, although a congressional amendment to ANCSA has rendered sand, gravel, and rock non-shareable, the Agreement still includes a provision addressing the sharing of revenue from sand, gravel and rock.[236] The Agreement's provision even anticipated the 1998 congressional amendment to ANCSA that made sand, gravel, and rock non-shareable.[237]

There have also been new developments that apply to ANCSA land, which the parties to the Agreement could not have possibly contemplated in 1982. One example is the expansion of various types of legal entities recognized by state and federal laws in the time since 1982. The Agreement recognizes corporations, partnerships, and trusts, but it did not anticipate limited liability companies, limited partnerships, or other corporate forms legally recognized more recently than 1982.[238] As a related matter, the complexity of ordinary business transactions regarding capital-intensive developments has blossomed in recent years. The relatively simplistic approach of the Agreement may not be adequate should a dispute arise regarding the treatment of previously uncommon (or non-existent) uses of financial mechanisms, such as preferred equity

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

234. *See* Bay View, Inc. *ex rel.* AK Native Village Corps. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997) (affirming district court dismissal of suit challenging 1995 amendment as unconstitutional taking).

235. Doyon and other regions identified the benefit of the resource-owning region keeping full depletion allowances under the Internal Revenue Code within a few years of ANCSA. In a 1976 memorandum to the Doyon Board, John Sackett stated Doyon's position on the issue: "[O]ther regions do not have a sufficient economic interest in the resources in place to warrant the depletion pass through." Memorandum from John Sackett, President, Doyon, Ltd., to Doyon Bd. of Dirs., at 2 (May 16, 1976) (on file with authors).

236. Settlement Agreement, *supra* note 2, at 35.

237. *See id.* (anticipating congressional action); *see also* ANCSA Land Bank Protection Act of 1998, Pub. L. No. 105-333, § 8, 112 Stat. 3129, 3134 (codifed at ANCSA § 7(i), 43 U.S.C. § 1606(i)). The Agreement references sand, gravel, and rock one other time in Article III, § 3(c)(i)(C). Settlement Agreement, *supra* note 2, at 44, Article III, § 3(c)(i)(C).

238. Settlement Agreement, *supra* note 2, at 8.

or back leverage, in determining whether a regional corporation's participation should be treated under the Agreement's active or passive rules.

The Agreement also did not anticipate the sale of conservation easements.[239] Conservation easements are transactions where a landowner will retain ownership of a parcel of land but permanently restrict development of that land.[240] Often, though not always, the landowner will receive a tax benefit in exchange for the conservation easement.[241] Conservation easements have not been tested in the context of Section 7(i), although there have been several recent transactions involving ANCSA lands.[242] Because of the 1995 amendments to ANCSA, specifically amending Section 7(i) to address tax benefits, it is clear that Section 7(i) does not require sharing in a conservation easement transaction where the only benefit received by the regional corporation landowner is a tax benefit.[243] Regional corporations should consider amending the Agreement to reflect this result. In addition, the Agreement could address the situation where a regional corporation receives cash or some other benefit in exchange for part or all of a conservation easement.

Finally, the regional corporations should address carbon credit transactions in any amendment. "A forest carbon offset, is a metric ton of carbon dioxide equivalent (CO2e)—the emission of which is avoided or newly stored—that is purchased by greenhouse gas emitters to compensate for emissions occurring elsewhere."[244] In 2015, the California Air Resources Board extended the geographic area of forested lands

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239. *See* Schutt, *supra* note 5, at 269 (explaining that "conservation easements have not been tested in the context of Section 7(i)").

240. *See* Internal Revenue Service, Conservation Easement Audit Techniques Guide (revised Jan. 3, 2012) (defining "conservation easement") (on file with authors).

241. *See id.*

242. *See Pedro Bay Corporation Conservation Easement Project Description*, PEDRO BAY CORP., http://www.pedrobaycorp.com/index.php/latest-news/310-pedro-bay-corporation-conservation-easement-project-description (last visited Sept. 14, 2017) (describing Pedro Bay Corporation's efforts to establish conservation easements on parts of its land); *Agulowak Conservation Easement*, BRISTOL BAY HERITAGE LAND TRUST, http://www.bristolbaylandtrust.org/agulowak-conservation-easement (last visited June 17, 2017) (describing a conservation easement established on Native land by Aleknagik Native LTD).

243. ANCSA § 7(i)(2) ("For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation."); *see also* Bay View, Inc. v. U.S., 278 F.3d 1259, 1264 (Fed. Cir. 2001).

244. Christine Yankel, *FAQ Forest Carbon Projects*, THE CLIMATE TRUST (Aug. 1, 2014), http://www.climatetrust.org/forest-carbon-projects-faq/ (internal quotations omitted); *see also* Schutt *supra* note 5, at 268–69 (describing forest carbon offsets and their potential treatment under ANCSA's revenue sharing provision).

eligible to participate in its program to include the southeast and southern coastal areas in Alaska that are not in National Forests.[245] Several regional corporations are pursuing transactions involving the forest carbon projects on ANCSA lands.[246] While this issue is likely to be contentious, a negotiated set of rules would make future transactions much more predictable and less risky to regions considering those or similar transactions.

CONCLUSION

The ANCSA Section 7(i) Settlement Agreement has withstood the test of time. Thirty-five years after it ended a persistent cycle of litigation, and twenty-five years after several arbitration cases tested its provisions, the ANCSA regional corporation parties to the Agreement have benefited from a long period of certainty around resource development on ANCSA lands.

The parties clearly anticipated that the Settlement Agreement would be a living document that could be amended to address unanticipated issues as they arose. Yet, in the thirty-five years since the effective date of the Agreement, the regional corporations have only agreed to amend the Agreement twice. Given the many changes in the intervening decades, it is time that the regional corporations closely study amending the Agreement to reflect modern transactions and changes. That effort could provide another long period of certainty under the grand compromise which was the Settlement Agreement.

245. Cal. Air. Res. Bd., *Compliance Offset Protocol U.S. Forest Offset Projects* (last updated Dec. 2, 2015), https://www.arb.ca.gov/cc/capandtrade/protocols/usforest/usforestprojects_2015.htm.

246. *See Ahtna Kanas*, AHTNA, INC., at 5 (Winter 2016), http://ahtna-inc.com/wp-content/uploads/2017/01/AHA020-4th-Quarter-2016_web.pdf (describing Ahtna's ongoing efforts to sell carbon stocks).