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ANCSA SURFACE/SUBSURFACE ESTATE PROBLEMS

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When Congress legislated the settlement of the land claims of Alaska Natives with the enactment of the Alaska Native Claims Settlement Act (P.L. 92-203) ("ANCSA") in 1971, it required the creation of twelve geographically based Regional Corporations and a number of Village Corporations that were to receive substantial acreage from the millions of acres of land to be conveyed under the settlement. Formation of a for profit or non-profit corporation was a prerequisite to the receipt by a village of settlement land under ANCSA. However, Congress, in its wisdom, decided that Village Corporations should receive only the surface estate to their entitlement and that the Regional Corporation covering the village area should receive the subsurface estate. Regional Corporations also received both the surface and subsurface estate of other lands. The division of interests in land into a mineral estate and a surface estate has been recognized for many years. However, the concept of a surface estate in juxtaposition with a subsurface estate in Alaska appears to be a creation of ANCSA (although other federal statutes have referred to subsurface rights). The question that immediately arises is whether Congress intended that the ANCSA subsurface estate be the same as a mineral estate, or whether it included such things as soil, sand, gravel and rock, and the right to control the use and occupancy of the subsurface. Also, which, if either, is the superior estate? It is not the purpose of this paper to predict the answers to the unanswered questions, but rather to explore the questions and the impact these questions may have on some private and public activities such as platting, land acquisition, land development and public improvement projects. Many of the problems can be overcome by dealing with them at the platting or land acquisition stage.

When a Village Corporation submits its surface estate for subdivision, there are certain problems that may not be obvious during the platting process, but that may come back to haunt either the municipality or persons who purchase the subdivided land. Further, many municipalities are entitled to receive substantial acreage from Village Corporations under ANCSA section 14(c)(3) or may later acquire Village Corporation lands for public projects. As to lands acquired from Village Corporations, private parties and municipalities will face all the same problems as to the scope of their interest and rights in the land as the Village Corporations now face.

The 9th Circuit Court of Appeals has ruled that sand and gravel is a part of the subsurface estate. Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (CA9 1978) (but see Norken Corp. v. McGahan, 823 P.2d 622 (AK 1991) for a discussion of the scope of a reservation of gravel rights with respect to the surface estate in a non ANCSA context). That is, the subsurface estate includes much more than what we think of as mineral rights. If you want to split hairs, this may mean that when you plant grass on ANCSA Village Corporation land, the roots of the grass are actually invading the subsurface estate that is owned by someone else (usually the Regional Corporation). This raises serious questions when the Village Corporation alone submits a plat: How effective or extensive is the dedication of streets and utility rights-of-way? In order for streets to be constructed, the builder will often invade the subsurface estate. Can the person who is building the streets (whether the municipality or the subdivider) remove subsurface materials as part of the grading process without paying the Regional Corporation for them? Can they move gravel from a cut to a fill within the same subdivision without paying for the materials and without obtaining the Regional Corporation's permission? If cut volume exceeds fill volume, may the road builder spoil the materials outside the subdivision or sell them to someone else, or use them on a different project without paying for them? If fill materials are hauled in and placed in the street right-of-way, does the location of the surface estate rise? If so, who owns the fill material?

Can the municipality place its sewer, water or other utility lines within the street right-of-way or within a separately dedicated utility right-of-way without either obtaining the permission of or paying the Regional Corporation for this invasion of their subsurface estate? And, most alarming of all, can the Regional Corporation remove its subsurface estate thereby causing the subsidence of the surface or damage to utilities located within the right-of-way? Or to structures on the subdivided land? Can the purchaser of a lot invade the subsurface to construct a foundation, basement or a septic disposal system? May the surface estate holder discharge its septic system effluent into the subsurface?

An approach to a partial solution to these problems is to ensure that platting authorities identify all ANCSA property and ensure that the Regional Corporation (or other person who may have received the subsurface estate from the Regional Corporation) is on the plat as an owner making appropriate dedications of their interest. This may take care of the municipality's interest in invading the subsurface estate to place roads and utilities, but may not fully address its right to remove subsurface estate for such purposes and to spoil

or dispose of materials off site. Often, some of the material that is removed for the construction of roadbeds or for laying water or sewer lines is unsuitable for backfill and must be disposed of off site. A mere dedication of the road by a Regional Corporation might not be seen by all Regional Corporations as authorizing the removal and disposal without compensation for materials removed. The subsurface assets are viewed as a substantial part of the value of the assets held by many Regional Corporations and they jealously guard and actively market these assets.

In September of 1993, the federal district court in Anchorage handed down a decision in Koniag, Inc. v. Koncor Forest Resource Management Co., et al., (Case No. A-88-249 Civil) in which it addressed the "cut and fill" question in relation to the construction of logging roads and logging camps on ANCSA land. This case is currently on appeal to the 9th Circuit Court of Appeals and no decision on the appeal has yet been issued. In this case, two Village Corporations had assigned to subsidiaries their interest in timber and timber harvesting rights on their ANCSA lands and included in that assignment the right to use sand, gravel, rock, stone, pumice, pumicite, cinders and other common materials in conjunction with timber harvesting and related activities. The judgment referred to these as "mineral materials," the same description applied to common varieties of sand, rock, pumice, etc. in 30 U.S.C. § 601 relied upon by the Chugach court in holding that sand and gravel were part of the minerals Congress intended to include in the subsurface estate. The subsidiaries ultimately assigned these rights to Koncor, a timber harvesting company. Koncor had constructed a logging camp, a log sort yard and a log transfer facility on Village Corporation lands. Additionally, Koncor had repaired and maintained a storage yard and log transfer facility by removing and hauling away mud and replacing it with rock that had been ripped from a hill adjacent to the log transfer facility. Koncor had constructed logging roads. In doing so, it obtained rock from cutting high areas and pushing the material into low areas and by excavating from pits near the road.

The question the court addressed was a determination of the rights of the surface estate owners (the Village Corporations) to use rock in order to harvest their timber. The court found that the Village Corporations could not develop their surface estates for timber operations without the use of rock, sand and gravel, and that the only practical source of such material was on Afognak Island where the Village Corporation lands and the timber operations were located.

The court concluded that both the surface and the subsurface estate owners had the right to develop their respective estates for the benefit of their respective shareholders, and that Congress, in splitting the estates in land, had intended that there be a cooperative relationship between the Village and Regional Corporations so that each might enjoy the benefits of their respective estates. The court ruled that where the Regional Corporation did not have a competing use for the materials, the Village Corporation had a right to use the subsurface materials in the development of their surface estate, but that the Regional Corporation was entitled to compensation for non-incidental use of "mineral materials." That is, the surface owner may make incidental use of subsurface materials

without incurring an obligation to compensate the Regional Corporation. The court went on to define incidental use to include "cut and fill" which it defined to be:

> . . . the excavation by ripping or digging of mineral materials from within the earthwork design limits of a project and their embankment within the same limits of the same project. For the purposes of this definition, the "same project" refers to such things as campsites, log sort yards, or log transfer sites, each considered separately (i.e., the material excavated from within the parameters of one campsite may be used for preparation of that particular campsite without compensation to [the Regional Corporation]). Mineral materials from a road bed may be considered cut and fill if pushed for a distance equal to or less than 500 feet, for use in the same road bed. Any mineral materials blasted, hauled by truck, put through a crusher or obtained from a borrow pit or quarry shall not be considered cut and fill.

(Page 14, Findings of Fact and Conclusions of Law, 9-16-93, Koniag, supra). Additional issues not addressed in the Conclusions of Law were addressed in the permanent injunction issued on the same date. In the injunction, the court provided that the Village Corporation had the right

> to explore, excavate, remove, extract and/or use (collectively referred to as "use") mineral materials which are part of [the Regional Corporation's] subsurface estates to lands . . . now or hereafter conveyed to [the Village Corporation] pursuant to ANCSA for development of the surface estate, upon compliance with the terms and conditions of this Permanent Injunction so long as [the Regional Corporation] does not have a competing use for such mineral materials. . . . Title to the mineral materials, excluding cut and fill, shall pass upon use of the mineral materials. . . . The rights granted hereunder shall run with the surface estate.

(pp. 2, 3, Permanent Injunction, 9-16-93, Koniag, supra). The injunction went on to require that the Village Corporation notify the Regional Corporation at least annually, and at least thirty days prior to any removal or use of mineral materials. It also required the Village Corporation to use mineral materials in such a manner as to preserve and protect (to the extent reasonably possible) the Regional Corporation's subsurface estate not used by the Village Corporation. The Village Corporation is required to pay to the Regional Corporation annually the amount owing for materials used on other than an incidental basis at prices set out in the injunction. The court also excluded from payment mineral materials that are excavated solely for the purpose of placement of utility lines and then replaced over the utility lines. It also excluded mineral materials that were excavated solely to build a foundation and then backfilled around the foundation.

The court required that the Village Corporations provide a one million dollar comprehensive general liability insurance policy naming the Regional Corporation as an

additional insured and making this policy primary to any policy carried by the Regional Corporation. The injunction was complete with indemnity, breach, force majeure, attorney's fees, individual and joint liability, waiver, notice and delivery, subsequent contract, and term clauses. The court retained jurisdiction of the case. Both parties have appealed the case to the 9th Circuit, so the long-term effect of the case is in some doubt. However, it is the first relatively comprehensive statement from a court addressing the conflicts between the rights of ANCSA surface and subsurface owners.

If we apply the Koniag principles and rules to the subdivision process, we may be able to state the following with respect to the platting and development of ANCSA subdivisions.

For roads, no payment for cuts is required if the material is pushed (not hauled) 500 feet or less to its fill location in the same roadbed. It is not clear whether payment would have to be made if cut materials from one street are pushed around the corner and used to fill an intersecting street; is this same roadbed?

Cut and fill materials must be excavated by ripping or digging. Blasted materials must be paid for, even if used on the same site or within 500 feet on the same roadbed. Materials that are processed (crushed, screened or washed) must be paid for as must materials that are moved any distance by truck or come from a quarry or borrow pit.

The use of the materials for on-site surface development is superior to the Regional Corporation's rights unless the Regional Corporation has a competing use for the materials. Title to purchased materials passes upon excavation. Title to cut and fill (incidental use) materials apparently remains with the Regional Corporation. Does this mean that if the Regional Corporation has a buyer it can remove its subsurface materials used by a City or Village Corporation in a cut and fill operation to build a road, or does such development of the surface impose a duty of support on the subsurface estate?

In the non-ANCSA context, the Alaska Supreme Court in Norken, supra suggests that a duty of support might exist, but this question is still open as to ANCSA land. In the Koniag decision, the court concluded that the Village Corporation has the right to develop and use the surface estate. Taken alone this might lead one to the conclusion that the owner of the subsurface estate could not interfere with the right to develop and use the surface estate. This is bolstered to some extent by the language in the injunction which provides that the Village Corporations have the right to excavate, remove and use the minerals in the subsurface estate for the development of the surface estate. This conclusion, however, is undercut by the court's conclusion that the Regional Corporation has the right to develop and use the subsurface estate for its benefit and that the right of the surface estate owner to use the subsurface estate is limited to those instances where the subsurface estate owner does not have a competing use for the materials. It would be easy to argue under the Koniag decision that when the Regional Corporation sells materials from its subsurface estate to a third party, it has a competing use for the materials which is superior

to any use being made of the materials by the surface estate holder, including use for subjacent support.

One way to deal with this problem would be with a recordable waiver or relinquishment of the Regional Corporation's right to excavate its subsurface in such a manner as to cause subsidence of the surface, another approach, not requiring the concurrence or cooperation of the Regional Corporation, might be considered. Under Section 14(f) of ANCSA, Village Corporations are given what amounts to a right to veto subsurface extractions. It provides, with respect to the subsurface estate conveyed to the Regional Corporations:

> That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.

There are two things to note with this language. First, the land over which the Village Corporation is given this authority is only the land within the Native village. Thus, for land Village Corporations have been permitted to select outside what is considered to be the Native village boundaries, this veto right could not be exercised. However, it appears likely that much of the land that would be submitted for subdivision or would be conveyed to a municipality under Section 14(c)(3) would be within the boundaries of the Native village. The location of the boundaries of a Native village is also something that is not always certain. The other thing that should be noted is that this veto power extends to the right to explore, develop or remove minerals. However, in light of the rationale used in the Chugach decision, it appears that minerals might include "mineral materials" as used in the Koniag decision and in 30 U.S.C. § 601. A municipality may be able to make use of this section by requesting as to land being platted or conveyed to the municipality that the plat or conveyance document contain language clearly denying to the Regional Corporation the right to explore, develop or remove minerals under the lands subject to the conveyance without the consent of both the holder of the surface estate and the Village Corporation.

Finally, under Koniag, supra, materials excavated for utility lines and replaced on these lines and materials excavated for foundations and backfilled against the foundation are not subject to payment. Such excavated materials that are not replaced are subject to payment. This leaves the surface estate owner in a peculiar situation. If the city is to lay a sewer line in a street in an ANCSA land subdivision and the material in the street is not satisfactory as backfill, the city will have to pay the Regional Corporation for all the unsatisfactory materials removed and will have to pay for all the material it hauls in. Municipalities may want to make it a condition of the plat that the Village Corporation (or other person platting ANCSA land) be liable for compensating the Regional Corporation (or other holder of the subsurface estate) for all materials that must be paid for as a result of their being excavated or removed in connection with any public project in a platted way unless the Regional Corporation is a signatory to the plat and waives any rights it may have to such payments. This seems a fair resolution of this problem as the owners on non-

ANCSA land who plat their property generally have no right to receive compensation for the removal of materials in connection with public projects in platted ways.

Platting authorities may also want to consider attempting to alleviate future conflicts between the Regional Corporation and the persons who buy the subdivision lots. In spite of the Koniag case (assuming it is affirmed on appeal), a Regional Corporation could still insist that the lot owners have no right to excavate for foundations or basements because the excavated material is not being used for backfill, etc. It could even insist that lot owners do not have a right to drill wells or install on-site underground sewage disposal systems, or install underground gas, TV cable, telephone, water, sewer, or electric lines. A plat note resolving these problems may avoid a great deal of heartache and grief for future property owners, but only if the Regional Corporation signs the plat. Such a plat note would probably create many problems if the plat is not signed by the Regional Corporation. If the Regional Corporation does not sign the plat, it may be wise to include a plat note pointing out that only the surface estate was subdivided and that the subsurface estate (which includes sand, gravel and rock) is still held by a third party.

The problems just described that arise out of the split of the surface and subsurface estate could arise whether the land is submitted for subdivision by a Village Corporation or by a successor in interest to the Village Corporation. For example, the Village Corporation could very well sell acreage to a private developer. The private developer still has only the surface estate rights and when he or she submits a plat of this land for subdivision, all of the above problems arising out of the split estate still exist. Thus, if the platting authority wants to deal with any of these problems, whether it be the dedication problems, subsurface invasion problems, or the material removal problems, whether on-site or off-site, it will be necessary to determine whether the property was originally patented by the federal government pursuant to ANCSA.

Many municipalities require the subdivider to submit a certificate to plat from a title company that sets out all the persons who have an interest in the property and a notation of recorded restrictions that apply. This gives the platting authority some assurance that all those who have an interest in the property are signatories to the plat. If a municipality uses these, it might be worthwhile to obtain from the title companies that issue such certificates assurances that the certificates they submit will show the separate ownership of the subsurface estate of present and former ANCSA land where the surface and subsurface estates are held by different persons. However, if the municipality does not require submission of the certificate to plat until submission of the final plat this will not be an effective means of timely identifying ANCSA property. A certificate to plat at the preliminary stage with an update at the final plat would work as would a limited certificate at the preliminary plat stage addressing only the ANCSA history of the land. If a municipality does not currently use certificates to plat then it should investigate implementing this practice. When a certificate to plat is received, it should be examined carefully to determine whether the surface and subsurface estates have been split so the platting authority can apply whatever special language it has determined may be needed to

deal with the split estate problems. This early identification also permits the platting authority to draw the subsurface estate holder into the platting process to resolve the problems before the platting process has proceeded too far. Platting authorities may also want to consider changing and adding to the standard language on plats regarding dedications when ANCSA land is involved.

To date, many of these problems have not arisen in many of the municipalities because not a great deal (if any) of the ANCSA land has been submitted for subdivision. However, more and more of this land will be submitted by ANCSA corporations as they begin to develop their assets. It is better for platting authorities to think these problems through now and establish procedures and standards before they come face to face with the problem and have to scramble to solve the problem within the 60 days that some platting authorities have to approve or reject a plat. A presubmission conference between the Village Corporation and the platting staff at which the special problems can be discussed would probably facilitate the preliminary plat approval when the plat is actually submitted. This would give staff and the corporation an opportunity to explore and resolve the problems.

Although there may be little a municipality can do when acquiring ANCSA land under sections 14(c)(3) or through purchase, it must keep the factors discussed above in mind when it uses such land for any development.

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SEC. 14. CONVEYANCE OF LANDS

(f) When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b), he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in subsection 12(a)(1): *Provided*, That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.