Chapter 7
A PRIMER ON ALASKA LANDS

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Synopsis

§ 7.01 Introduction*[1]

Alaska's lands have captured the imagination of the United States for 150 years. Alaska is huge—it consists of 375 million acres, about one-fifth the size of the rest of the United States.

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[1]This chapter summarizes in part other more detailed materials that the authors have written on Alaska lands and natural resources, including the following: 3 *Am. L. of Mining* tit. VI (2d ed. 2015) ("Alaska Lands and Mineral Interests"); 2 *Law of Fed. Oil & Gas Leases* ch. 27 (2015) ("Federal Oil and Gas Leasing in Alaska"); Joseph J. Perkins, Jr., "The Great Land Divided But Not Conquered," 34 *Rocky Mt. Min. L. Inst.* 6-1 (1988); James D. Linxwiler, "The Alaska Native Claims Settlement Act: The First 20 Years," 38 *Rocky Mt. Min. L. Inst.* 2-1 (1992) (First 20 Years of ANCSA); James D. Linxwiler, "The Alaska Native Claims Settlement Act at 35: Delivering on the Promise," 53 *Rocky Mt. Min. L. Inst.* 12-1 (2007).

Alaska's lands offer unprecedented riches: vast oil and gas resources that fuel Alaska's economy, some of the largest mines in the world, rich wildlife resources that support a billion-dollar fishing industry and allow Alaska's Native communities to maintain a way of life based on subsistence hunting and fishing, and of course, unparalleled natural beauty.

But Alaska's lands are different for another reason too. For unique historical reasons, Alaska has generated its own extensive body of federal and state public land law, oil and gas law, mining law, and Native law. Each of these primary areas of natural resources law is significantly different in Alaska from what lower 48 practitioners are familiar with. The purpose of this chapter is to provide an introductory user's guide to this body of public land law and the resulting mosaic of federal, state, and Native lands.

In the most simplified terms, Alaska's current land ownership is the result of three unique but interrelated federal public land laws that reflect the strong demands of three different constituencies upon Alaska's 375 million acres of land. The first constituency was the advocates for statehood, primarily non-Native settlers in Alaska who wanted Alaska admitted to the Union so that Alaskans would have a greater role in determining Alaska's future than they had as residents of a territory. The Alaska Statehood Act (Statehood Act)[2] was enacted in 1958, and Alaska was admitted to the Union on January 3, 1959.[3] Because Alaska had no economic base to fund state government, the Statehood Act deviated from the historic pattern of granting particular sections in each township to each new state and instead made an unprecedented grant to the State of Alaska of 104 million acres of federal lands.

The second constituency was Alaska Natives. Land selections under the Statehood Act challenged Alaska Natives' historic occupancy rights to lands on which they had lived for millennia. Beginning in the 1960s, Alaska Native groups began to file with the U.S. Department of the Interior (DOI) claims asserting aboriginal title to Alaska. The eventual result was the enactment, in 1971, of the Alaska Native Claims Settlement Act (ANCSA),[4] which extinguished the aboriginal land rights of Alaska Natives and in compensation granted 44 million acres of lands and $962.5 million in federal and state funds. To administer these lands and money,

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[2] Pub. L. No. 85-508, 72 Stat. 339 (1958).

[3] *See* Statehood Act § 8(c); Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 6, 1959); *see generally* 3 *Am. L. of Mining* § 71.03[2][b] (2d ed. 2015).

[4] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h); *see generally* 3 *Am. L. of Mining* § 71.04[2][a]–[b] (2d ed. 2015).

ANCSA provided for the creation of 12 land-owning regional corporations and more than 200 village corporations.

The third constituency was the conservation community. Section 17(d) of ANCSA[5] recognized the importance of expanding existing and creating new national parks, refuges, and forests in Alaska, and after years of study, debate, and contentious executive and administrative actions, Congress in 1980 enacted the Alaska National Interest Lands Conservation Act (ANILCA).[6] As a result of ANILCA, more than 150 million acres of federal lands in Alaska (over 40% of the state) are now set aside in various national parks, wildlife refuges, national forests, and other conservation withdrawals.

This chapter discusses the major features of these statutes (and related federal and state statutes) that together constitute Alaska's unique body of federal and state public land law.[7]

§ 7.02 Alaska Statehood Act, and State Lands and Minerals Generally

[1] Introduction

The Statehood Act provided for Alaska's admission to the Union on an equal footing[8] with the other states, on terms designed to ensure Alaska's success as a state[9] and to reserve for later resolution the aboriginal claims of the Native peoples of Alaska.[10]

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[5] 43 U.S.C. § 1616(d).

[6] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 and 43 U.S.C.).

[7] While these statutes also address other issues, this chapter concentrates only on their public land law content.

[8] *E.g.*, Statehood Act § 6(m) (making the Submerged Lands Act, 43 U.S.C. §§ 1301–1315, applicable to Alaska); *see generally* 3 *Am. L. of Mining* § 71.06 (2d ed. 2015).

[9] *See* Statehood Act § 6 (land grants to the new state); *see also id.* §§ 2, 5, 20, 28; Alaska Omnibus Act, Pub. L. No. 86-70, §§ 21, 35, 73 Stat. 141 (1959) (pursuant to the Alaska Omnibus Act, Congress authorized and directed the transfer to the state of certain public highways, roads, airports, and related properties); ANILCA § 906, 43 U.S.C. § 1635 (concerning state selections and conveyances).

[10] *See* Statehood Act § 4; *see also* Alaska Const. art. XII, § 12. For a detailed discussion of aboriginal title in Alaska, see David S. Case & David A. Voluck, *Alaska Natives and American Laws* ch. 2 (3d ed. 2012). The aboriginal *land* claims of Alaska's Natives were extinguished by enactment of ANCSA.

Under section 6 of the Statehood Act, Alaska was granted the right to acquire more than 104 million acres of land.[11] These land grants are unique among the western states because of the large amount of land involved,[12]

[11] The specific grants made to the state by section 6, and the prior grants to the territory transferred to the state by section 6, excluding certain expressly described and conveyed small parcels, are as follows:

- § 6(b): 102,550,000 acres of vacant, unappropriated, and unreserved public lands, of which ~97,450,000 acres have been conveyed to the state;
- § 6(a): 400,000 acres of vacant, unappropriated, and unreserved public lands, of which ~195,500 acres have been conveyed to the state;
- § 6(a): 400,000 acres of vacant and unappropriated lands within national forests, of which ~370,000 acres have been conveyed to the state;
- § 6(k): 105,000 acres of vacant, unappropriated, and unreserved public lands in all sections 16 and 36 surveyed before statehood, for the support of public schools, and all sections 33 in the Tanana Valley surveyed before statehood, for support of the University of Alaska, all of which have been conveyed to the state (see § 7.02[4][d], below);
- § 6(k): 100,000 acres of vacant, unappropriated, and unreserved public lands, for support of the University of Alaska, of which ~99,000 have been conveyed to the state (see § 7.02[4][d], below);
- § 6(k): 1,000,000 acres of vacant, unappropriated, and unreserved public lands, for support of mental health services in Alaska, almost all of which have been conveyed to the state (see § 7.02[4][d], below);
- § 6(k): 70,000 acres later recognized in ANILCA § 906(b) as an "indemnity" entitlement, all of which have been conveyed to the state;
- § 6(m): ~15,000,000 acres of lands underlying inland navigable waters, tidelands, and coastal submerged lands;
- Total: >119,000,000 acres.

Emails from Ginger Gallus, Selections Manager, Div. of Mining, Land & Water, Alaska Dep't of Natural Res. (DNR) (Mar. 26–27, 2015) (on file with author). For a more thorough discussion of the issues arising in connection with state selections under the Statehood Act, see 3 *Am. L. of Mining* § 71.03[2][b], [3], [5] (2d ed. 2015).

The state owns other lands, of course, including those acquired under laws enacted by the territory for failure to pay certain taxes or fees, improved lands or rights-of-way acquired pursuant to the Alaska Omnibus Act, lands acquired by escheat, and lands acquired by eminent domain, land exchange, or purchase.

[12] The upland grants made or confirmed by section 6 total more than 104,500,000 acres (an area roughly equal to the size of the State of California, or more than 1.5 times the size of the State of Colorado).

because the state generally chooses the lands it wants,[13] and because the grants include mineral rights.[14]

Though the selection and conveyance process was slow and interrupted, the State of Alaska has now received most of the lands to which it is entitled. Obtaining the last few million acres will present many of the same issues that have confronted the state previously, however, so this chapter includes a review of the processes the state has followed to select its lands and the issues that arise in adjudicating and conveying those selections.

[2] Selections and Conveyances Under the Statehood Act

After statehood, the State of Alaska began to make its land selections under section 6(b) and (a) of the Statehood Act.[15] Originally the state confined its selections to those areas that already were well settled or were connected to those areas via the ferry system,[16] the state's limited highway system, or the Alaska Railroad. Beginning in 1964, however, the state began selecting lands for their natural resources potential. Conflicts soon developed between oil and gas exploration and development on lands approved for conveyance to the state and the still unresolved aboriginal claims of Alaska Natives.[17]

These conflicts eventually resulted in all state selections being halted until the enactment of ANCSA, and then, with limited exceptions, stymied[18]

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[13] Statehood Act § 6(a)–(b), (g). No restrictions exist on the purposes for which lands could be selected in fulfillment of the 102,550,000-acre grant made by section 6(b). Selections in fulfillment of the two 400,000-acre grants under section 6(a) could be made only for the limited purpose of community expansion or recreation. *See generally* 3 *Am. L. of Mining* § 71.03[3][b] (2d ed. 2015); *see also* Statehood Act § 6(p) (added Dec. 10, 2004, by section 101(b) of the Alaska Land Transfer Acceleration Act, Pub. L. No. 108-452, 118 Stat. 3575 (2004)).

[14] Statehood Act § 6(i) (confirming that all grants made or confirmed under the Statehood Act include minerals). But section 6(i) also prohibits the state from issuing patents that convey in perpetuity the minerals in and under lands granted to state under Statehood Act § 6(a)–(b). As discussed in § 7.02[4][c], below, minerals in and under lands granted to the state under Statehood Act § 6(a)–(b) may be located or be leased as the state legislature may direct.

[15] *See generally* 3 *Am. L. of Mining* § 71.03[2][b], [3][a]–[b] (2d ed. 2015).

[16] Most communities geographically within Tongass and Chugach National Forests are situated within "elimination" surveys outside the forests where the regular public land laws applied and continue to apply.

[17] *See* § 7.03, *infra*; *see generally* 3 *Am. L. of Mining* § 71.02[2][b] (2d ed. 2015).

[18] *See* § 7.03[4][c][i], [viii], [ix], *infra*.

until the enactment in 1980 of section 906 of ANILCA.[19] Section 906 resolved legislatively most of the land status and other outstanding issues affecting the state's land entitlement, selections, and conveyances.

- Under § 906(j), most of the withdrawals made by or pursuant to ANCSA no longer prevent selection by or conveyance to the State of Alaska of the withdrawn lands, except in situations where a prior Native corporation selection takes priority;
- § 906(a) amended the Statehood Act § 6(a) and (b) to extend the time for making selections thereunder from 25 years after statehood to 35 years after statehood (the selection period thus expired on January 3, 1994);
- § 906(e) allowed selections to be made of lands not currently available for selection (top-filing), thereby eliminating the need for the state to file regular amendments and reassertions;[20]
- § 906(f) codified the right to overselect, i.e., to file selection applications covering more lands than the state is entitled to acquire;[21]
- § 906(k) expressly provides for interim management of lands selected but not yet conveyed, and establishes escrow procedures for revenues;
- § 906(l) addresses valid existing rights and associated issues;
- § 906(b) settles the state's claims to indemnity school lands;
- § 906(c) resolves uncertainty regarding nature of title conveyed by tentative approvals[22] by expressly confirming, as to both prior tentative approvals and those to be issued after ANILCA, that "all right, title, and interest of the United States in and to [tentatively approved] lands is deemed to have vested in the State of Alaska as of the date of tentative approval" subject only to valid existing rights and Native selection rights under ANCSA;

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[19] 43 U.S.C. § 1635. ANILCA is discussed in § 7.04, below, but section 906 is considered here because it is integral to a discussion of the Statehood Act.

[20] Unlike a valid state selection, a top-filed state selection that has not ripened into a valid state selection has no segregative effect, even if such selection is noted on the Bureau of Land Management (BLM) plats. State of Alaska, 108 IBLA 181, GFS(MISC) 37(1989).

[21] Regarding overselections and prioritization of state selections, see § 7.03[4][c][iv], below, discussing the Alaska Land Transfer Acceleration Act, Pub. L. No. 108-452, 118 Stat. 3575 (2004).

[22] *See* Statehood Act § 6(g) (providing for "tentative approval" of selected lands so that the state could make conditional sales or leases in advance of survey and receipt of patent).

- § 906(d), (g), and (h) effectively conveyed many pending selections to the state, subject to final adjudication and the issuance of tentative approvals;
- § 906(p) confirmed prior conveyances (plus those made by section 906(d) and 906(g)) north and west of the PYK line described in Statehood Act § 10 but maintained the requirement for presidential approval of future selections in this area.

Tentative approvals and patents issued by the United States to the State of Alaska historically have not been subject to many reservations, exceptions, or limitations except for statutorily required reservations[23] of floating rights-of-way for ditches and canals, certain railroads, telephone, and telegraph lines, and certain roads; fissionable materials; certain hydropower rights; and a 2% royalty for the benefit of Alaska Natives and payment into the Alaska Native Fund.[24] Also, limitations or restrictions on uses, beneficiaries, or transfers (e.g., school lands,[25] university lands,[26] and mental health lands[27])—whether found in the patents or in the law—continue to apply to the affected lands. Tentative approvals and patents also will be subject generally to valid existing rights[28] in the conveyed land, though lands included in competing interests possibly leading to the acquisition of title from the United States should be excluded from the conveyance.[29] Also, when federal land or a severed federal mineral estate constituting less than all of the lands subject to a federal oil and gas lease has been conveyed to the state, the oil and gas in such conveyed land or severed estate is reserved to the United States until the lease expires or is relinquished, whereupon the withheld oil and gas will vest in the state automatically. But when federal land or a severed federal mineral estate constituting *all* of the federal lands or minerals subject to a federal oil and gas lease has been proposed for conveyance to the state, the land or estate will be conveyed subject to the lease.[30]

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[23] Citations to the applicable statutes are omitted here because they will be included in the affected patents.

[24] *See* § 7.03[4][a], *infra*.

[25] *See* § 7.02[4][d], *infra*.

[26] *See id.*

[27] *See id.*

[28] ANILCA § 906(c), (*l*), 43 U.S.C. § 1635(c), (*l*).

[29] *See generally* 3 *Am. L. of Mining* § 71.03[2][b], [3][a]–[b], [5] (2d ed. 2015).

[30] Statehood Act § 6(h).

[3] Alaska Land Transfer Acceleration Act of 2004; Endgame Issues

As this Act affects both state selections and Native selections, and since most Native selections must be adjudicated before any conflicting state selection is adjudicated, this Act is discussed below.[31]

[4] Exploration and Development of Particular State Lands

[a] Introduction

The discussion immediately below pertains primarily to state general grant lands (i.e., the more than 100 million acres to be received under section 6(b) of the Statehood Act)[32] and to state-owned lands underlying meanderable waters,[33] navigable waters, tidelands, and coastal submerged lands.

[b] Alaska Constitution art. VIII

[i] Provisions of General Applicability

Article VIII of the Alaska Constitution establishes that the policy of the state is "to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest"[34] and charges the state legislature with enacting laws to "provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people."[35] Alaska's own Alaska Land Act,[36] which

[31] *See* § 7.03[4][c][iv], *infra*.

[32] Management of mental health trust lands, university lands, and school lands is discussed at § 7.02[4][c], below.

[33] Meanderable waters are waterbodies 50 acres or larger and those watercourses 3 chains (198 feet) wide or wider. BLM, *Manual of Surveying Instructions* § 3-181 (2009); BLM, *Manual of Surveying Instructions* §§ 3-120, -121 (1973).

[34] Alaska Const. art. VIII, § 1.

[35] Alaska Const. art. VIII, § 2. Article VIII of the Alaska Constitution also provides that all "[l]ands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain," and charges the legislature with providing for its administration. *Id.* art. VIII, § 6. The legislature may provide for sales or grants of state lands or interests therein, subject to "such reservations . . . of all resources as may be required by Congress or the State." *Id.* art. VIII, § 9. The legislature also may provide for the issuance of leases or permits, "subject to reasonable concurrent uses." *Id.* art. VIII, § 8. But "[n]o disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." *Id.* art. VIII, § 10. The Alaska Constitution became effective when Alaska was admitted to the Union on January 3, 1959. *Id.* art. XV, § 25.

[36] Alaska Stat. §§ 38.05.005–.990.

provides most of the statutory authority governing private acquisition of rights in state lands, is the direct result of this directive.

[ii] Provisions Relating to Mineral Disposals and Water Rights

Article VIII of the Alaska Constitution distinguishes between locatable minerals and leasable minerals, in anticipation that the Statehood Act would allow the new state to adopt a system of mineral laws similar to the federal system then in effect.[37] With the exception of the prohibition in section 6(i) of the Statehood Act on the issuance of patents conveying minerals,[38] this essentially occurred.[39] Beginning with the first legislative session in 1959, the legislature has provided both a location system for locatable minerals and a leasing system for oil and gas, coal, and other leasable minerals.[40]

As is the case with other disposals generally, no mineral lease may be issued "without prior public notice and other safeguards of the public interest as may be prescribed by law."[41] The establishment of a valid mining location on available state lands does not require more public notice than that afforded by the state statutes authorizing the same on state public domain lands generally open for location. But disposals of other interests in state land in support of mineral development may not be made "without

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[37] *Compare* Alaska Const. art. VIII, § 12 (requiring legislature to provide for mineral leases for "coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law"), *with id.* art. VIII, § 11 (providing that "[d]iscovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws" and that "[p]rior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction").

[38] *See* § 7.02[2], *supra*; *see also* Alaska Stat. § 38.05.125 (required mineral reservation).

[39] Until the legislature required rents and royalties to be paid on state mining locations and mining leases, however, the state's location system was flawed, at least in those circumstances where rents or royalties were found to be required under section 6(i) of the Statehood Act. *See* Trustees for Alaska v. Alaska, 736 P.2d 324 (Alaska 1987). After that decision, the legislature amended the state mining laws to require *all claimants* to pay rents and royalties. 1989 Alaska Sess. Laws ch. 101 (codified in part at Alaska Stat. §§ 38.05.210–.212, .265).

[40] *See generally* Alaska Stat. §§ 38.05.135–.184 (leasing system); *id.* §§ 38.05.185–.275 (location system).

[41] Alaska Const. art. VIII, § 10. The Alaska legislature and the Supreme Court of Alaska have been engaged in a battle over what safeguards are required by the Alaska Constitution. *See* Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL), 311 P.3d 625 (Alaska 2013); Nunamta Aulukestai v. State Dep't of Natural Res., 351 P.3d 1041 (Alaska 2015).

prior public notice and other safeguards of the public interest as may be prescribed by law."[42]

Article VIII of the Alaska Constitution also provides that surface and subsurface waters in Alaska are subject to prior appropriation.[43] The Alaska Water Use Act[44] establishes a modified appropriation system.

[iii] Provisions Providing for Private Ways of Necessity

The Alaska Constitution expressly provides that "private ways of necessity" may be taken "to permit essential access for extraction or utilization of resources."[45] Even though this provision is self-executing,[46] the authors are aware of no instance where this provision has been utilized by a private person on a stand-alone basis.

[iv] Conflict Between "Common Use" Clause and Management of Federal Lands for Subsistence Purposes and Preference for Rural Residents

Article VIII of the Alaska Constitution expressly provides that Alaska's "fish, wildlife, and waters are reserved to the people for common use"[47] and that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."[48] But on *federal public lands*, ANILCA accords priority to "nonwasteful subsistence uses" of fish and wildlife and establishes a rural preference "[w]henever it is necessary to restrict the taking of populations of fish and wildlife on such lands for

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[42] Alaska Const. art. VIII, § 10; *see, e.g.*, N. Alaska Envtl. Ctr. v. State Dep't of Natural Res., 2 P.3d 629 (Alaska 2000) ("functionally irrevocable" authorizations are disposals requiring a statutory "best interests" determination).

[43] Alaska Const. art. VIII, § 13.

[44] Alaska Stat. §§ 46.15.010–.270.

[45] Alaska Const. art. VIII, § 18.

[46] *See id.* art. XII, § 9 ("The provisions of this constitution shall be construed to be self-executing whenever possible.").

[47] *Id.* art. VIII, § 3.

[48] *Id.* art. VIII, § 15; *see generally* McDowell v. State, 785 P.2d 1 (Alaska 1989) (concerning subsistence in Alaska); Kenaitze Indian Tribe v. Alaska, 860 F.2d 312 (9th Cir. 1988) (same); Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168 (Alaska 1985) (same).

subsistence uses in order to protect the continued viability of such populations, or to continue such uses . . . ."[49] The result is bifurcated management of fish and game resources in Alaska.[50]

[c] Alaska Land Act

[i] Introduction

The State of Alaska's public land and mineral laws are structured similarly to federal public land and mineral laws, especially with regard to locatable and leasable mineral disposal. The state's system provides for (1) location of mining claims on state lands for minerals that were locatable under federal law on January 3, 1959;[51] (2) issuance of leases on state lands for oil and gas, coal, and all other minerals, except sand, gravel, stone, and similar materials;[52] and (3) the sale of sand, gravel, stone, and similar materials.[53]

There are some key differences, however:

(1) mineral patents have never been available;

(2) salable materials are conveyed—not reserved—when the state conveys lands subject to the broad mineral reservation required under Alaska Stat. § 38.05.125;

(3) the state location system does not provide for separate lode and placer locations and does not recognize extralateral rights; and

(4) the state location system provides for the granting of millsite leases for mining support purposes rather than the location of mill sites.

A full discussion of the state's mineral disposal system is beyond the scope of this chapter. Set forth below, however, are abbreviated discussions of the state's location system and its leasing system for oil, gas, and associated substances.

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[49] ANILCA § 804, 16 U.S.C. § 3114.

[50] *See, e.g.*, John v. United States, 720 F.3d 1214 (9th Cir. 2013). For further discussion of the impact of subsistence on natural resources decision-making in Alaska, see § 7.04[6], below.

[51] *See generally* Alaska Stat. §§ 38.05.185–.275 (location system).

[52] *See generally id.* §§ 38.05.135–.184 (leasing system).

[53] *See generally id.* §§ 38.05.550–.565 (materials sales); *id.* § 38.05.965(11) (defining "materials").

[ii] Locatable Minerals—Uplands, Lands Underlying Inland Navigable or Meanderable Waters, Tidelands, and Submerged Lands

Most state lands are open to location.[54] Except in unusual circumstances state mining claims must be located in the cardinal directions.

Historically, the maximum size of a state claim was 40 acres, and both the corners and the boundaries needed to be marked on the ground. But now, if a locator locates his claims on the basis of a surveyed or protracted quarter section (160 acres) or quarter-quarter section (40 acres) (these locations are referred to as MTRSC locations, where MTRSC stands for meridian, township, range, section, and claim[55]), a claimant need only mark the corners of his location.[56] As a result, most new state mining locations initiated in Alaska today are located with the assistance of helicopters using GPS and cover full quarter sections.

Persons entitled to locate and hold state mining claims are expressly identified in Alaska Stat. § 38.05.190.

The discovery test in Alaska is the prudent person test.[57] Exclusive exploration rights in advance of discovery can be acquired by locating 160-acre prospecting sites, but since it became possible to locate 160-acre claims, few claimants locate prospecting sites.[58]

As is the case under federal law, each state mining claim must be supported by a discovery, and the state is always able to investigate whether a claimant has made a discovery within the boundaries of each claim.[59] In practice, however, the state typically does not require proof of discovery except in unique circumstances where a claimant has not acted in good

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[54] *See id.* § 38.05.185(a) (limitations on closing lands or restricting lands). Even many mineral estates reserved by the state under section 38.05.125 are open to location of "leasehold locations." *See* Alaska Admin. Code tit. 11, § 86.135(b). Leasehold locations are initiated and maintained in the same way as regular state mining claims, but an upland mining lease must be obtained before production may commence from lands available only for leasehold locations. *See* Alaska Stat. § 38.05.205(a) ("Minerals may not be mined and marketed or used until a lease is issued, except for limited amounts necessary for sampling or testing.").

[55] *See* Fact Sheet, DNR, "MTRSC Mining Claim Locations" (June 2015); *see also* Alaska Stat. § 38.05.195(b)(1).

[56] *See* Alaska Stat. § 38.05.195.

[57] Alaska Admin. Code tit. 11, § 86.105.

[58] *See* Alaska Stat. §§ 38.05.245, .195.

[59] *Id.* § 38.05.195.

faith and damage to or interference with significant surface resources or uses is occurring.

Assessment work in the amount of $100 per 40-acre claim or $400 per 160-acre claim must be performed annually on or for the benefit of each claim.[60] "Group" assessment work may be performed on or for the benefit of contiguous claims, and up to four years' worth of excess assessment work may be carried forward at any one time (but it can only be applied to claims in existence when the work was performed).[61] The assessment work year runs from noon on September 1 to noon on the following September 1, and affidavits of assessment work must be recorded for state claims within 90 days following the end of each assessment work year, in the same way as for federal claims historically.[62] Rent likewise is due on each state mining claim, on a sliding scale that increases in year 6 and again in year 11 of a claim's life, and the entire scale is adjusted for inflation every decade.[63]

A production royalty also is payable by each owner of an interest in a state claim, based on the net income realized by that owner.[64]

Failure to perform assessment work, record an affidavit of assessment work, pay rent, or pay royalty can result in the forfeiture of the affected claims.[65]

Contiguous claims owned in common may be converted into an upland mining lease. The cost to maintain an upland mining lease is essentially the same as the cost of maintaining the converted claims.

[iii] Leasable Minerals—Oil and Gas

Oil and gas have been and remain Alaska's most important natural resources. The state's economy is largely driven by oil and gas exploration, development, and production, and the budget for state government depends heavily on tax revenues and royalties from oil and gas production.

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[60] *Id.* § 38.05.210.

[61] *Id.*; Alaska Admin. Code tit. 11, § 86.220.

[62] *See* Alaska Stat. § 38.05.185(c) (providing that "[u]nless otherwise provided, the usages and interpretations applicable to the mining laws of the United States as supplemented by state law apply to [Alaska Stat. §§ 38.05.185–.275]"). This directive should be equally applicable to all aspects of the state mining law, from discovery to qualifications to location maintenance procedures.

[63] *Id.* § 38.05.211.

[64] *Id.* § 38.05.212.

[65] *See generally id.* § 38.05.265. The ability to cure otherwise fatal flaws, in the absence of intervening rights, is a relatively new feature of this statute.

State oil and gas resources are leased competitively.[66] The state has experimented with a variety of bid variables, but most leases have been and now are sold to the bidder offering the highest cash bonus. Initial lease tracts typically cover from four to nine sections (2,560 to 5,760 acres), if available, and are issued for primary terms of 5, 7, or 10 years, depending on the level of prior exploration and development in the area.[67] Annual rental must be paid in advance in accordance with the schedule set out in each lease.[68] Rents are sometimes adjusted upon unitization, or under a separate new process for extending primary terms for 3–5 more years.[69] Initial royalties typically are 1/8 or 1/6, although higher initial royalties have been reserved in special circumstances. Lower royalties are authorized in rare instances, and formal royalty reductions also are permitted in several circumstances.[70]

The primary means of extending groups of state leases beyond their primary terms is by unitization. Unitization of state leases occurs under regulations of the Alaska Department of Natural Resources (DNR).[71] Pure "exploration units" are virtually non-existent, but units have been formed based on a combination of limited well data plus extensive seismic information. When acting in its role as proprietor of state lands and lessor under state oil and gas leases, the DNR exercises considerable discretion in approving units, plans of exploration and development thereunder,[72] and any resulting participating areas.[73]

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[66] *Id.* § 38.05.180(f); Alaska Admin. Code tit. 11, § 83.100.

[67] Alaska Stat. § 38.05.180(m).

[68] *Id.* § 38.05.180(n); Alaska Admin. Code tit. 11, § 83.110.

[69] Alaska Stat. § 38.05.180(m)–(n).

[70] Alaska Stat. § 38.05.180(f), (j).

[71] *See* Alaska Admin. Code tit. 11, §§ 83.300–.395.

[72] *Id.* When approving unit plans of exploration or development, the DNR has in some instances required deferred bonus payments, imposed work commitments, and required performance bonds in connection with such work commitments.

[73] Where lands other than state lands (e.g., federal lands on the Outer Continental Shelf or in the National Petroleum Reserve in Alaska (NPR-A), or subsurface estate owned by a regional corporation) are proposed to be included in a unit with state lands, the DNR remains involved (sometimes primarily involved depending on the amount of state acreage affected) in negotiation, approval, and oversight of the unit agreement, plans of development, participating areas, etc.

The authority of the Alaska Oil and Gas Conservation Commission (AOGCC) extends to all land in the state lawfully subject to its police powers.[74] In practice, however, the role of the AOGCC varies depending on the circumstances. A permit to drill must be obtained from the AOGCC for any well drilled in the state.[75] The AOGCC also enforces spacing and setback requirements[76] and establishes pool rules covering rates of production, pressure maintenance, and all other aspects of primary, secondary, and tertiary recovery.[77] When Native or other private lands cover a significant part of a pool, the AOGCC also may become involved in formal pooling or unitization proceedings.

Given the importance of oil and gas revenues to the state, both the DNR (with respect to royalties) and the Alaska Department of Revenue (with respect to taxes) regularly audit returns filed by the producers and aggressively seek to maximize state revenues. Older fields typically now operate under royalty settlement agreements that reduce the number of issues, but substantial opportunity remains for disputes over both old and new production, especially over value.

[d] Various State Trust Lands

Between 1912 (when Alaska officially became a territory) and statehood in 1959, the Territory of Alaska was the beneficiary or recipient of several reservations or grants of federal lands to be held in trust for particular purposes. The first of these, made by section 1 of the Act of March 4, 1915,[78] reserved the non-mineral public lands in sections 16 and 36 of each township in Alaska for the support of common schools in Alaska and section 33 in each township in the Tanana Valley in interior Alaska for the support of the University of Alaska,[79] *effective upon completion of the field survey of such lands*. Due to the lack of extensive surveys, this reservation ultimately

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[74] Alaska Admin. Code tit. 20, § 25.515; *see generally* Alaska Stat. §§ 31.05.005–.170; Alaska Admin. Code tit. 20, §§ 25.005–25.990.

[75] *Id.* § 25.005; *see also* AOGCC, Form 10-401, "Permit to Drill" (Oct. 2012).

[76] Alaska Admin. Code tit. 20, § 25.055.

[77] *Id.* § 25.520.

[78] Ch. 181, 38 Stat. 1214 (previously codified at 48 U.S.C. § 353 (repealed 1958)).

[79] *Id.* By section 2 of the Act of March 4, 1915, ch. 181, 38 Stat. 1214, the United States also granted to the Territory of Alaska four specific sections of land near Fairbanks for the site of the University of Alaska. *See* 43 U.S.C. § 852 note.

attached to very few lands before being repealed by section 6(k) of the Statehood Act.[80]

Second, by the Act of January 21, 1929,[81] the Territory of Alaska was granted the right to select and receive conveyance of 100,000 acres of vacant, unreserved, and surveyed non-mineral public lands in Alaska, to be used for the exclusive use and benefit of the University of Alaska. This grant was confirmed and transferred to the State of Alaska by section 6(k) of the Statehood Act, and has been virtually fulfilled.[82]

Third, by section 202 of the Alaska Mental Health Enabling Act,[83] the Territory of Alaska was granted the right, subject to valid existing rights, to select within 10 years and receive conveyance of one million acres of vacant, unappropriated, and unreserved public lands in Alaska to be administered as a public trust to meet the necessary expenses of the mental health program in Alaska. As with the university land grants, the mental health land grant was confirmed and transferred to the state by section 6(k) of the Statehood Act. All of the mental health land selections have been made, but some of these selections have not yet been adjudicated.[84]

Pursuant to section 6(i) of the Statehood Act, all three of these grants include minerals. In addition, each of these grants created a trust.[85]

Notwithstanding the clear creation of a trust relationship, the state did not preserve the trust status of these lands in the first two decades of statehood.[86] The cited litigation spawned significant settlement agreements, payments, new conveyances of other state lands into trust, and the formation of two entities—the Alaska Mental Health Trust Land Office (within

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[80] Prior to its repeal, the reservation had attached to approximately 105,000 acres and had given rise to an indemnity entitlement of approximately another 70,000 acres. *See* Thomas E. Meacham, "The State of Alaska as Landowner," *Inst. on Alaska Mineral Development* 3-1 (Rocky Mt. Min. L. Fdn. 1978). This indemnity entitlement has been satisfied by selections and conveyances made pursuant to ANILCA § 906(b), 43 U.S.C. § 1635(b). *See* 3 *Am. L. of Mining* § 71.03[2][f] (2d ed. 2015).

[81] Ch. 92, 45 Stat. 1091, *as amended by* Act of July 12, 1960, Pub. L. No. 86-620, 74 Stat. 408; *see* 43 U.S.C. § 852 note.

[82] *See supra* note 10; 3 *Am. L. of Mining* § 71.03[3][d] (2d ed. 2015).

[83] Ch. 772, 70 Stat. 709, 711 (1956).

[84] *See supra* note 10; 3 *Am. L. of Mining* § 71.03[3][e] (2d ed. 2015).

[85] Wessells v. State, Dep't of Hwys., 562 P.2d 1042, 1051 n.34 (Alaska 1977).

[86] *See generally* State v. Univ. of Alaska, 624 P.2d 807 (Alaska 1981) (university lands); State v. Weiss, 706 P.2d 681 (Alaska 1985) (mental health trust lands); Consent Decree and Settlement Agreement, Kasayulie v. State, No. 3AN-97-3782 CI (Alaska Super. Ct. July 5, 2012) (regarding school lands, with the court retaining jurisdiction until July 1, 2015); 3 *Am. L. of Mining* § 71.03[3][c]–[e] (2d ed. 2015).

but separate from the DNR) and the University of Alaska's Office of Land Management—to manage mental health and university lands respectively. Because these lands generally include minerals and are held in trust to make money for the designated beneficiaries, they often present good opportunities for exploration and development.

§ 7.03 Alaska Native Claims Settlement Act (ANCSA)

Of all the unique provisions of Alaskan public land law, perhaps none is more so than ANCSA's resolution of Alaska Native aboriginal rights. In ANCSA, Congress did not choose to employ the system of reservations, Indian country, and federal supervision applicable in the lower 48 as the primary vehicle of settlement. Instead, ANCSA extinguished aboriginal land rights in Alaska, and in compensation, granted 40 million acres of lands[87] and $962.5 million to Alaska Natives.[88] To administer these lands and money, Congress required the creation of 12 for-profit land-owning regional corporations[89] and about 225 for-profit village corporations, the shareholders of which were Alaska Natives, thus leaving Alaska Natives in direct control of their assets,[90] which Congress intended to be used and developed for their financial benefit.

The 44 million acres of Native-owned fee lands offer an unusual opportunity to the oil and gas and mining industries seeking to do business in Alaska, because these lands are privately owned.

[1] Assertion of Native Claims

Unique among all the states except Hawaii,[91] the aboriginal rights of Alaska Natives to the lands of Alaska were preserved from the time of historic occupancy through statehood and non-Native settlement, until the enactment of ANCSA in 1971.[92] That single fact led to a unique recognition and resolution of aboriginal rights in Alaska.

Facing increasing pressure upon their aboriginal rights from land and resource developments, beginning in 1963 the Alaska Native community

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[87] ANCSA also revoked all Indian reservations located in Alaska (except Annette Island), and conveyed an additional four million acres to village corporations located on the reservations that chose not to accept the benefits of ANCSA, under ANCSA § 19, 43 U.S.C. § 1618.

[88] ANCSA § 6, 43 U.S.C. § 1605.

[89] ANCSA § 7, 43 U.S.C. § 1606. Congress also created a 13th regional corporation for Natives not resident in Alaska, which did not receive land conveyances.

[90] ANCSA § 8, 43 U.S.C. § 1607.

[91] *See* Felix S. Cohen, "Original Indian Title," 32 *Minn. L. Rev.* 28, 34, 36 n.19 (1947).

[92] *See generally* First 20 Years of ANCSA, *supra* note 1.

filed claims with the DOI, eventually asserting their ownership of all Alaska lands.[93] In response, in an informal process beginning in 1966, Secretary Udall suspended conveyance of all federal lands in Alaska (the "land freeze"),[94] and in 1969, he issued Public Land Order 4582,[95] which formally withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws (except location for metalliferous minerals) pending enactment of ANCSA. Public Land Order 4582 created concern over land titles throughout the state, and led directly to the enactment of ANCSA.

[2] Congressional Policy in Enacting ANCSA

The policy of ANCSA as stated in section 2(b) and (c)[96] was to extinguish aboriginal title and to settle all Native claims quickly, and in conformity with the real social and economic needs of Alaska Natives, without creating tribes or a trust relationship that did not already exist, and without diminishing any existing right or privilege of Natives.

The U.S. Court of Appeals for the Ninth Circuit has held that ANCSA's land grant was intended to promote economic development, village expansion, and subsistence, and that "[o]f these potential uses, Congress clearly expected economic development would be the most significant."[97]

[3] Native Corporations as Primary Structure for Settlement

Congress organized ANCSA around for-profit business corporations, created under Alaska corporate law and owned and controlled by Alaska Natives. Section 5[98] provided for the enrollment of Alaska Natives by the Secretary of the Interior; section 7[99] required the incorporation of 12 land-owning "for profit" regional corporations and one non-land-owning regional corporation for non-residents, and the issuance of stock in these

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[93] Fed. Field Comm. for Dev. Planning in Alaska, *Alaska Natives and the Land* (1968); Robert D. Arnold et al., *Alaska Native Land Claims* 131 (2d ed. 1978).

[94] The state unsuccessfully challenged the land freeze in *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969). *See generally* 3 *Am. L. of Mining* § 71.02[2][b] (2d ed. 2015).

[95] 34 Fed. Reg. 1025 (Jan. 17, 1969). Public Land Order 4582 was extended several times and then revoked by ANCSA § 17(d)(l), 43 U.S.C. § 1616(d)(l).

[96] 43 U.S.C. § 1601(b), (c).

[97] Koniag, Inc. v. Koncor Forest Res., 39 F.3d 991, 996 (9th Cir. 1994); *see also* Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 731 (9th Cir. 1978); City of Angoon v. Marsh, 749 F.2d 1413, 1418 (9th Cir. 1984).

[98] 43 U.S.C. § 1604.

[99] *Id.* § 1606.

corporations to enrolled Natives; section 8[100] similarly requires the incorporation of about 225 village corporations within the regional corporation geographic areas, either as for-profit or non-profit corporations,[101] and the issuance of separate stock to those Natives enrolled to a village. A Native thus may be a shareholder of both a regional and a village corporation.

One hundred shares of stock in these regional and village corporations were issued to each enrolled Native, with restrictions on alienation, thus preserving the ownership of Native corporations in Native hands, unless a corporation opts to allow stock sale.[102] The corporations may also opt to issue stock to descendants of Natives born after enactment of ANCSA.[103]

[4] Land Provisions

[a] Extinguishment of Aboriginal Rights

A fundamental purpose of ANCSA was to reach a final settlement of land claims in Alaska. Thus, ANCSA § 4[104] is broadly drafted to extinguish all aboriginal title to lands in Alaska and all claims based on such title, and to establish that all prior federal conveyances of lands in Alaska constituted extinguishment of aboriginal title. A number of court decisions (including cases alleging the non-extinguishment of prior claims for damages for trespass by oil companies on the North Slope, and claims of aboriginal rights and title to the offshore, and to the Arctic sea ice) have addressed whether ANCSA completely extinguished such rights in Alaska.[105]

Among the other Native aboriginal rights claims ANCSA resolved, section 4(a) of ANCSA resolved legal claims against the State of Alaska that it had received lands (including the North Slope oilfields), and money derived from those lands (nearly $1 billion at just one oil and gas lease

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[100] *Id.* § 1607.

[101] The authors are not aware of any village corporation that incorporated on a non-profit basis.

[102] *See* ANCSA §§ 7(h)(1), 36–38, 43 U.S.C. §§ 1606(h)(1), 1629b–1629d.

[103] ANCSA § 7(g)(1)(B)(i)(I), 43 U.S.C. § 1606(g)(1)(B)(i)(I).

[104] 43 U.S.C. § 1603.

[105] *See, e.g.*, Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973); United States v. Atl. Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980); Vill. of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984); Inupiat Cmty. v. United States, 746 F.2d 570 (9th Cir. 1984) (issued the same day as *Village of Gambell*); *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987), *remanded to* Vill. of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989); Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998). However, due to the complex history of *Village of Gambell*, the question regarding sovereign rights and aboriginal title to the areas offshore Alaska probably is not finally resolved.

sale in 1969), to which it was not entitled. In return, ANCSA required the State of Alaska to contribute to its cost. Thus ANCSA required the State of Alaska to surrender some of its lands to Native corporations,[106] and to pay $500 million[107] into the Alaska Native Fund.[108]

ANCSA § 10(a) provided a one-year statute of limitations upon any challenge to the legality or constitutionality of ANCSA, so that its validity would be promptly determined.[109] That one year passed without litigation being initiated.

In this manner, in ANCSA, Congress settled Native land claims, and in doing so achieved an intricate balance of Native, state, and other interests.

[b] Revocation of Existing Reservations

ANCSA § 19[110] revoked all but one of the Indian reservations located in Alaska. Under section 19, the village corporations formed for villages within existing Indian reservations could opt either to receive the surface and subsurface of their reservation lands in fee and receive nothing further under ANCSA, or to receive the surface estate and money benefits[111] provided by ANCSA to village corporations. The village corporations formed for Arctic Village, Elim, Gambell, Savoonga, Tetlin, and Venetie opted to obtain surface and subsurface title to their former reserves, and approximately four million acres were conveyed to them.

[c] Withdrawal, Selection, and Conveyance of Lands

ANCSA provided a system for the withdrawal, selection, and conveyance of lands to Native corporations. Village corporations would receive title to the surface estate within and surrounding their villages. Regional

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[106] The state surrendered up to three townships of state selected or tentatively approved lands in each village withdrawal. *See* § 7.03[4][c][i], [ii], *infra* (discussing ANCSA § 11(a)(2), 43 U.S.C. § 1610(a)(2), and ANCSA § 12(a), 43 U.S.C. § 1611(a)).

[107] This payment was derived from a 2% royalty on the State of Alaska's own oil and gas leases and lease sale revenues, and also from its revenue share from federal oil and gas leases. ANCSA §§ 6(a)(3), 9, 43 U.S.C. §§ 1605(a)(3), 1608.

[108] ANCSA § 6, 43 U.S.C. § 1605, provided for the establishment of the Alaska Native Fund and the payment over the following 10 years of $962.5 million to the Native corporations. Annual releases to Native corporations from the Alaska Native Fund were made for a period of 10 years.

[109] 43 U.S.C. § 1609(a).

[110] 43 U.S.C. § 1618.

[111] Such benefits would include possible additional land interests under ANCSA, and the payment of funds under ANCSA §§ 6 (Alaska Native Fund), and 7(j) (village share of 7(i) distributions, discussed below).

corporations would receive two basic types of interests in lands: title to the subsurface estate in and under the surface estate conveyed to village corporations, under ANCSA § 14(f), and title to the surface and subsurface estates in other lands, pursuant to sections 12(c) and 14(h)(1) and (h)(8). This process is fundamental to the functioning of ANCSA, and so it is outlined here.[112]

[i] Land Withdrawals for Purposes of Native Land Selection

Section 11(a) of ANCSA[113] withdrew lands for selection by Native corporations. There were three types of section 11(a) withdrawals.

First, section 11(a)(1) withdrew the 25 townships of federal public lands surrounding a village for village selection. Second, section 11(a)(2) withdrew state lands located within the section 11(a)(1) withdrawals that were previously selected or tentatively approved (but not yet patented) to the State of Alaska under the Alaska Statehood Act. The withdrawals under section 11(a)(1) and (2) of 25 townships of lands for about 225 village corporations totaled about 130 million acres. Third, if there were insufficient lands to allow a village corporation to select its entire entitlement from lands in the section 11(a)(1) and (2) withdrawal, then section 11(a)(3) directed the Secretary to make "deficiency" withdrawals of "three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. . . . of a character similar to those on which the village is located . . . ."[114] These section 11(a) withdrawals also segregated lands for regional corporation selection.

The effect of these withdrawals was to confine nearly all Native land holdings to the 25 townships around each village, or in its deficiency withdrawal area (where applicable). That limitation generally prevented significant Native acquisition of lands lying outside these areas, such as the major North Slope oil fields.

While ANCSA § 22(h)(1)[115] provided that these section 11 withdrawals would expire in 1975, it also provided that Native land selection of these lands had the effect of continuing the withdrawals until the lands were

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[112] For further discussion of split estates under ANCSA, see Stephen F. Sorensen, "Split Estates Under the Alaska Native Claims Settlement Act," *Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations* 6A-1 (Rocky Mt. Min. L. Fdn. 2005).

[113] 43 U.S.C. § 1610(a).

[114] *Id.* § 1610(a)(3)(A). Deficiency withdrawals also were made for regional corporations.

[115] 43 U.S.C. § 1621(h)(1).

conveyed pursuant to ANCSA. Because the conveyance process has been slow, some of the section 11(a) withdrawals have continued in effect.[116]

[ii] Land Selections

Section 12(a) of ANCSA[117] authorized the village corporations to select lands within their withdrawals until December 18, 1974. Under section 12(a), no more than three townships could be selected from tentatively approved lands withdrawn under section 11(a)(2), and no more than three townships could be selected within a pre-ANCSA national wildlife refuge or within a national forest. Under section 12(a), regional corporations could not select lands within pre-ANCSA wildlife refuges or the "Naval Petroleum Reserve Numbered 4"[118] and were instead allowed to select in lieu subsurface estate elsewhere.

Regional corporation selection requirements are not directly addressed in ANCSA. The regulations governing regional corporation selections[119] establish the requirements and procedures for the various regional corporation selection obligations.

[iii] Conveyances of Lands to Native Corporations

Village corporations are entitled to conveyance of interests in lands under two different provisions. The amounts of land entitlement for village corporations are contained in section 14(a) of ANCSA,[120] which authorized the conveyance of between three and seven townships of land to each village corporation, depending upon its population. Although these conveyances were to occur "[i]mmediately after selection,"[121] in fact the process was glacially slow, and some of these conveyances still have not occurred.

Additional surface acreage within the withdrawals could be allocated by regions to their village corporations pursuant to section 12(b) of ANCSA.[122] Many of these 12(b) land allocations are made on the basis

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[116] See discussion of Alaska Land Transfer Acceleration Act at § 7.03[4][c][iv], *infra*.

[117] 43 U.S.C. § 1611(a).

[118] Now known as the National Petroleum Reserve-Alaska (NPRA). *See* § 7.04[10][b], *infra*.

[119] *See* 43 C.F.R. §§ 2652.0-3 to .4.

[120] 43 U.S.C. § 1613(a).

[121] *Id.*

[122] *Id.* § 1611(b). While this allocation was required to occur prior to 2005, village over-selections remain in part unresolved, and thus these 12(b) land allocations in part are not finalized.

of their potential for certain special uses, such as subsistence or cultural activities, or because they may contain mineral or oil and gas deposits (for this reason, 12(b) lands have been strategically important in some resource transactions).

The regional corporations are entitled to conveyance of interests in lands under four different ANCSA provisions.

First, under section 14(f) of ANCSA,[123] the regional corporation receives title to the subsurface estate when the surface estate is conveyed to a village corporation, thus creating "split estate" land ownership.[124]

Under section 14(f), exploration, development or removal of minerals from these split estate lands by a regional corporation "within the boundaries of any Native village [is] subject to the consent of the Village Corporation."[125] The boundaries of Native villages (and thus the area subject to such consent) have been limited by the courts to the areas subject to occupancy.[126] The need to obtain this consent is critical to parties engaged in transactions to develop such Native lands.

In addition to the "split estate" subsurface in and under village lands, 11 land-owning regional corporations (excluding Sealaska) were granted fee estate (surface and subsurface) in 16 million acres of lands pursuant to the "land loss" formula of section 12(c) of ANCSA.[127] Section 12(c) allocated land grants to regional corporations based upon their relative sizes—thus in part allocating compensation for the loss of aboriginal title through land grants, in rough proportion to the amount of land claims the Natives of the various regions surrendered in ANCSA.

Finally, the regional corporations were also conveyed surface and subsurface title in up to two million acres of additional lands pursuant to section 14(h)(1) and (8).[128] Section 14(h)(1) conveyances are for preserving

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[123] *Id.* § 1613(f).

[124] While the phrase "subsurface estate" was not defined in ANCSA, a Ninth Circuit decision held that it means mineral estate. Tyonek Native Corp. v. Cook Inlet Region, Inc., 853 F.2d 727 (9th Cir. 1988).

[125] 43 U.S.C. § 1613(f).

[126] *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062 (9th Cir. 1998), held that section 14(f)'s limit on the exercise of the village consent to lands within the boundaries of any Native village granted a village a right of consent only in "an identifiable physical location *evidenced by occupancy* consistent with the Natives' own cultural patterns and life style." *Id.* at 1068 (quoting 43 C.F.R. § 2651.2(b)(2)).

[127] 43 U.S.C. § 1611(c).

[128] *Id.* § 1613(h)(1), (8). Implementation of section 14(h)(8) has required many separate agreements and implementing legislation.

existing cemetery and historical sites, and these lands may not be utilized for mineral development purposes,[129] while section 14(h)(8) lands are conveyed to regional corporations for any use whatsoever.

One of the critical concerns during the enactment of ANCSA was protection of valid existing rights. All ANCSA withdrawals and conveyances are made subject to valid existing rights under sections 11(a)(1)[130] and 14(g).[131] Section 14(g) expressly protects, inter alia, previously issued leases, contracts, permits, and rights-of-way, including those issued under section 6(g) of the Statehood Act. Thus, section 14(g) protects, among other previously granted interests, North Slope oil and gas leases and the Trans-Alaska Pipeline right-of-way.

Unpatented federal mining claims located on ANCSA lands that were in effect at the time of ANCSA's enactment are not expressly made subject to the protections of section 14(g), but are specifically subject to protection under section 22(c),[132] which provides that administration of such claims lying entirely within regional corporation lands is transferred to the regional corporation at the time the surrounding lands are conveyed.

Native lands lying within national wildlife refuges in existence at the time of enactment of ANCSA "remain subject to the laws and regulations governing use and development of such Refuge," under section 22(g).[133]

Section 14(c) of ANCSA[134] provided for the re-conveyance of lands by village corporations to individual occupants of their primary place of residence or business, to municipalities for community expansion, and for airports, among other purposes. Most of the section 14(c) process has been completed.

Pursuant to ANCSA § 17(b),[135] the BLM reserves from ANCSA conveyances of public easements for certain access rights across Native lands, but not for purposes of use of Native lands. Easements for new rights-of-way are reserved only for purposes of access from public lands to public lands or major waterways, and are reserved only if there is no alternative route.

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[129] *See* 43 C.F.R. § 2653.5(a).

[130] 43 U.S.C. § 1610(a)(1).

[131] *Id.* § 1613(g).

[132] *Id.* § 1621(c).

[133] *Id.* § 1621(g). Compare to ANILCA § 103(c), 16 U.S.C. § 3103(c) (discussed at § 7.04[5], *infra*).

[134] 43 U.S.C. § 1613(c).

[135] *Id.* § 1616(b); *see also* ANILCA § 903, 43 U.S.C. § 1633. Extensive ANCSA easement regulations are located at 43 C.F.R. § 2650.4-7.

Easements are reserved for transportation routes, and for site easements providing for temporary uses of ANCSA lands. These easements may be vacated for nonuse.

Secretarial decisions pursuant to ANCSA are subject to a two-year statute of limitations.[136] ANCSA conveyances to Native corporations are exempted from National Environmental Policy Act of 1969 (NEPA)[137] review by ANILCA § 910.[138]

[iv] Finalizing ANCSA and Statehood Act Conveyances Under the Alaska Land Transfer Acceleration Act

Notwithstanding that section 14 of ANCSA[139] provides for the conveyance of lands "[i]mmediately after selection," not all ANCSA land has been fully conveyed almost 45 years later. Similar delays have occurred under the Statehood Act and the Native Allotment Act.[140]

The Alaska Land Transfer Acceleration Act (ALTAA)[141] was enacted in order to finalize and resolve pending Alaska land status issues under ANCSA, the Statehood Act, and the Native Allotment Act, by requiring final prioritization of Native and state land selections to resolve overselections, providing for agreements finally settling entitlements, and imposing deadlines on this process. While ALTAA's ambitious goal of completing all these conveyances by 2009 has not entirely been met, the Act has significantly reduced the backlog and moved these conveyances nearer to completion. Under ALTAA the Secretary is authorized to enter into voluntary, negotiated settlements of final entitlements.[142] ALTAA also required each Native corporation that had not received its full entitlement or entered into a settlement agreement to file its final priorities for all remaining entitlements under each applicable section of ANCSA by a date certain.[143] ALTAA further limited the number of acres that could be prioritized to the greater of 125% of the remaining entitlement or 640 acres in excess of the remaining entitlement. The filing of these final priorities effected

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[136] 43 U.S.C. § 1632(a).

[137] 42 U.S.C. §§ 4321–4347.

[138] 43 U.S.C. § 1638.

[139] *Id.* § 1613.

[140] Ch. 2469, 34 Stat. 197 (1906); *see* § 7.04[9], *infra*.

[141] Pub. L. No. 108-452, 118 Stat. 3575 (2004).

[142] ALTAA §§ 106, 203, 209, 43 U.S.C. §§ 1611 note, 1613(d)(3)(A), 1635 note.

[143] ALTAA § 404, 43 U.S.C. § 1635 note.

a relinquishment of all other selections and terminated all outstanding withdrawals under sections 11 and 16 of ANCSA except insofar as lands remain selected.[144]

[v] Land Exchange Authority

The ANCSA land withdrawal, selection, and conveyance scheme does not always function seamlessly, and conveyance of other lands is occasionally sought. Land exchanges can provide a valuable tool to consolidate Alaska's complex land ownership patterns and to facilitate mineral and other land development. Land exchange authority is provided by ANCSA § 22(f)[145] and by ANILCA § 1302(h).[146] Each of these provisions authorizes the Secretary to exchange lands with Native corporations, and requires the exchange to be for equal value, unless the parties agree to the contrary.[147]

There have been several large and successful ANCSA land exchanges, including (1) the Cook Inlet Land Exchange (a 2.5-million-acre land exchange between Cook Inlet Region, Inc., the State of Alaska, and the United States, granting, inter alia, oil and gas rights in the Kenai National Wildlife Refuge);[148] (2) the NANA Regional Corp.'s Red Dog Mine exchange (granting rights to the road and the port serving the world's largest zinc mine);[149] and (3) the Arctic Slope Regional Corp. exchanges into the Arctic National Wildlife Refuge (ANWR) and the National Petroleum Reserve-Alaska/Colville River Delta.[150] Each of these large exchanges was accompanied by special ratifying legislation. While ANCSA § 22(f) and ANILCA § 1302(h) provide express legislative authority, land exchanges may be difficult to complete without additional legislation. While only one

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[144] ALTAA § 403(d), 43 U.S.C. § 1611 note.

[145] 43 U.S.C. § 1621(f).

[146] 16 U.S.C. § 3192(h).

[147] Section 1302(h) of ANILCA differs substantively from 22(f) of ANCSA only by beginning with the phrase "[n]otwithstanding any other provision of law." In theory, this language avoids the requirement of section 204(j) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(j), that the Secretary may not modify or revoke congressional withdrawals of lands.

[148] The Cook Inlet Land Exchange was approved by state and federal legislation, and was affirmed in an appeal to the Alaska Supreme Court. *See* Act of October 4, 1976, Pub. L. No. 94-456, §§ 4, 5, 90 Stat. 1934 (current version at 43 U.S.C. § 1611 note); State v. Lewis, 559 P.2d 630 (Alaska 1977), *cert. denied* 432 U.S. 901 (1977).

[149] *See* 43 U.S.C. § 1629; *see also id.* § 1629a.

[150] *See* ANILCA § 1431.

land exchange was blocked in litigation,[151] other exchanges have been terminated prior to completion.[152]

[vi] Automatic Land Bank Protections

One significant subsequent amendment to ANCSA protected ANCSA lands from loss due to debts, bankruptcy, and similar causes, until the lands are subject to economic development.

Under the automatic land bank provisions, Native corporation title to ANCSA lands and resources is protected, until such lands are "developed or leased or sold," from loss of title due to adverse possession, real property taxes, bankruptcy and other creditor actions, judgments, and the involuntary dissolution of a Native corporation.[153]

Neither land exchanges nor mineral exploration renders lands "developed" pursuant to the automatic land bank provisions,[154] and lands exchanged with another Native corporation in the same region remain ANCSA lands subject to this provision.[155] Resource transactions with regional and village corporations will almost certainly require a structure to preserve the protections of the automatic land bank for as long as possible, and to restore those protections as soon as possible.

[vii] Revenue Sharing Provisions

While the economic provisions of ANCSA are generally not discussed in this chapter, the revenue sharing provisions of section 7(i) and (j) are addressed here because they are closely tied to the lands provisions of ANCSA, and they will certainly arise during negotiation of any mineral development agreement.[156] Section 7(i) requires regional corporations developing their resources to share 70% of the revenues derived from those resources with the 12 land-owning regions (including the region conducting the development), proportional to the number of their shareholders.[157]

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[151] *See* Nat'l Audubon Soc'y v. Hodel, 606 F. Supp. 825 (D. Alaska 1984).

[152] *See, e.g.*, U.S. Fish & Wildlife Serv., "Yukon Flats National Wildlife Refuge: Comprehensive Conservation Plan, Environmental Impact Statement, and Wilderness Review" (Oct. 1987) (concerning adopting the "no action alternative" with regard to the proposed Yukon Flats National Wildlife Refuge Land Exchange). One of the authors, James Linxwiler, represented Doyon, Limited (a regional corporation) in this proposed land exchange.

[153] 43 U.S.C. § 1636(d).

[154] *Id.* § 1636(d)(2)(A)(i), (B)(iv).

[155] *Id.* § 1613a.

[156] *Id.* § 1606(i), (j).

[157] *Id.* § 1606(i).

Section 7(i) thus tends to equalize the allocation of resources and benefits received by the Native corporations from the subsurface or timber interests in lands received pursuant to ANCSA.[158] Well over $1 billion has been distributed under section 7(i), thus making it an important element of compensation to Alaska Natives under ANCSA.

Because it requires the distribution of 70% of its mineral revenues, section 7(i) dominates regional corporations' decision making in relation to developing their mineral and timber resources.

Revenue sharing obligations under section 7(i) are guided by a 121-page settlement agreement entered into in 1982 among all 12 resource-holding ANCSA regional corporations in settlement of litigation over the meaning and application of section 7(i).[159] The settlement agreement provides exhaustively detailed accounting procedures for resource revenues derived from ANCSA lands.

The settlement agreement will affect many of the basic features of any resource transaction with a regional corporation. Most basically, the settlement agreement is structured to discourage the "active" development of their own resources by regional corporations, who would thus be at financial risk, in favor of "passive" developments, with the regional corporation passively collecting royalties, and similar payments, with respect to its own lands.

ANCSA § 7(j) ensured that 50% of the section 7(i) distributions would be further distributed by the receiving regional corporations to village corporations and to individual "at large" shareholders.[160] In many remote

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[158] The intent of section 7(i) has been stated by one court as follows: "Section 1606(i) thereby achieves a rough equality by allowing for the fact that some regions are resource-poor, while others possess a wealth of natural resources." Ukpeagvik Inupiat Corp. v. Arctic Slope Reg'l Corp., 517 F. Supp. 1255, 1257 (D. Alaska 1981). The revenue sharing requirements of section 7(i) have been broadly construed by the courts as intending "to achieve a rough equality of assets among all the Natives." Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 732 (9th Cir. 1978) (quoting Aleut Corp. v. Arctic Slope Reg'l Corp., 421 F. Supp. 862, 867 (D. Alaska 1976)).

[159] *Section 7(i) Settlement Agreement* (rev. ed. 1990). Before its settlement, this case resulted in numerous reported decisions in the district court and the Ninth Circuit on section 7(i) issues. *See, e.g.*, *Chugach Natives*, 588 F.2d 723; *Aleut Corp.*, 421 F. Supp. 862.

[160] Section 7(j) provides as follows:

> During the five years following December 18, 1971, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 1605 of this title (Alaska Native Fund), and under subsection (i) . . . , and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village

areas of Alaska, village corporations are heavily dependent upon section 7(j) revenue to ensure their continued viability.

[viii] ANCSA § 17(d)(1) Land Withdrawals

Section 17(d)(1) of ANCSA provided that for a period of 90 days after passage of ANCSA, "all unreserved public lands in Alaska are hereby withdrawn from all forms of appropriation under the public land laws" for study purposes.[161] Thereafter, section 17(d)(1) directed the Secretary of the Interior to withdraw such public lands in Alaska "to insure that the public interest in these lands is properly protected." Acting under this authority, the Secretary exercised his authority to withdraw all unreserved public lands in Alaska.[162] The section 17(d)(1) withdrawals thus affected vast tracts of Alaska.

While many section 17(d)(1) withdrawals have been released, some have persisted for more than 40 years. Section 207 of ALTAA required the Secretary to report to Congress within 18 months of the date of enactment of ALTAA concerning whether the section 17(d)(1) withdrawals made pursuant to ANCSA remained necessary.

[ix] ANCSA § 17(d)(2) Land Withdrawals

ANCSA § 17(d)(2) directed the Secretary to make withdrawals of an additional 80 million acres of unreserved public land for possible additions to the national park, national forest, wildlife refuges, and wild and scenic river systems. These were the most controversial of all the ANCSA withdrawals, because they laid the foundation for the establishment of new, major conservation areas in Alaska.

These section 17(d)(2) withdrawals were made promptly after ANCSA was enacted,[163] and they expired seven years after enactment of ANCSA, in December 1978. However, as discussed at § 7.04[1], below, the section 17(d)(2) withdrawals were in effect extended by the Secretary and President Jimmy Carter until ANILCA was enacted.

Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsection to it.

43 U.S.C. § 1606(j) (footnote omitted); *see Ukpeagvik Inupiat Corp.*, 517 F. Supp. 1255 (addressing the application of section 7(j) of ANCSA); *see also Chugach Natives*, 588 F.2d at 732; *Aleut Corp.*, 725 F.2d at 529.

[161] 43 U.S.C. § 1616(d)(1).

[162] *See* Pub. Land Order No. 5180, 37 Fed. Reg. 5583 (Mar. 16, 1972), *amended by* Pub. Land Order No. 5418, 39 Fed. Reg. 11,547 (Mar. 29, 1974).

[163] *See, e.g.*, Pub. Land Order Nos. 5169–5188, 37 Fed. Reg. 5572–5591 (Mar. 16, 1972).

[5] The Movement Towards Tribal Sovereignty and Indian Country

While this subject is generally beyond the scope of this chapter, Alaska Native tribal governments continue to expand in importance and they will continue to have impacts upon Alaska's body of public land law. ANCSA § 2(c) preserved Native rights and privileges, including those related to tribal governments, which exist separate from ANCSA. There are 230 federally recognized tribal governments in Alaska,[164] which often serve as the sole unit of local government in villages in remote portions of Alaska. Native tribal governments in Alaska have been recognized by Alaska courts as capable of exercising certain sovereign powers.[165] But the U.S. Supreme Court has held that ANCSA lands re-conveyed to tribal governments are not Indian country in which tribal government powers can be more broadly exercised.[166] This lack of Indian country has limited the growth and use of tribal governments in Alaska.

Recently the DOI has taken steps to strengthen tribal governments in Alaska by allowing ANCSA lands to be taken into trust so as to create Indian country. In settlement of litigation,[167] the DOI has published a final rule amending 25 C.F.R. § 151.1,[168] to allow the federal government to take lands owned by recognized tribes in Alaska into trust pursuant to section 5 of the Indian Reorganization Act.[169] The litigation continues on appeal.[170]

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[164] *See* Nat'l Conference of State Legislatures, "Federal and State Recognized Tribes" (Feb. 2015), http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#ak; Notice, Indian Entities Recognized and Eligible to Receive Services from the BIA, 78 Fed. Reg. 26,384 (May 6, 2013).

[165] *See, e.g.*, John v. Baker, 982 P.2d 738 (Alaska 1999).

[166] Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).

[167] Akiachak Native Cmty. v. Jewell, 995 F. Supp. 2d 1 (D.D.C. 2013), *appeal docketed sub nom.* Akiachak Native Cmty. v. DOI, No. 13-5360 (D.C. Cir. Dec. 3, 2013).

[168] *See* Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014) (codified at 25 C.F.R. § 151.1).

[169] 25 U.S.C. § 465. The decision in *Akiachak* held that the exclusion of Alaska in the prior version of 25 C.F.R. § 151.1 was improperly discriminatory, and the new version of the regulation removed this exclusion.

[170] Akiachak Native Cmty. v. DOI, No. 13-5360 (D.C. Cir. filed Dec. 3, 2013) (appellant's opening brief was filed on August 24, 2015).

§ 7.04 Alaska National Interest Lands Conservation Act (ANILCA)

[1] Origins of ANILCA

Once ANCSA was enacted, the resulting state and ANCSA land selections increased pressure to preserve federal lands for conservation, wildlife, and scenic purposes, helping lead to the enactment of ANILCA.

But the enactment of ANILCA most directly resulted from a series of related withdrawals of Alaska lands for parks, refuges, and wilderness purposes. The first of these withdrawals occurred on a temporary basis under ANCSA § 17(d)(2).[171] In November 1978, one month prior to the expiration of the section 17(d)(2) withdrawals, the Secretary of the Interior withdrew many of these lands anew under section 204 of the Federal Land Policy and Management Act of 1976 (FLPMA),[172] thus continuing the withdrawals in effect. Thereafter, on December 1, 1978, President Carter withdrew 56 million acres of these lands as national monuments[173] under authority of the Antiquities Act.[174] Because Congress could not agree on the terms of legislation, these executive withdrawals created bitter political controversy and litigation.[175]

[2] Significant Compromise Between Conservation and Other Interests

It would be a significant misstatement to describe ANILCA solely as a statute creating national parks, refuges, wilderness areas, and the like, without recognizing that perhaps 75% of its contents served its other purposes.

ANILCA embodies significant congressional compromise. ANILCA's massive conservation withdrawals could not be enacted without an accommodation of Native and state needs. For these reasons, ANILCA consists of a carefully crafted political balance between the creation of new or enlarged

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[171] 43 U.S.C. § 1616(d)(2).

[172] *Id.* § 1714; *see, e.g.*, Pub. Land Order No. 5654, 43 Fed. Reg. 59,756 (Dec. 21, 1978).

[173] *See* Proclamation Nos. 4612–4627, 43 Fed. Reg. 57,013–19 (Dec. 5, 1978).

[174] 34 Stat. 225 (codified as amended at 54 U.S.C. §§ 320301–320303).

[175] Decades later, President Carter stated: "This was a very unpopular thing that we did. As a matter of fact, I was burned in effigy in Fairbanks." Nat'l Wildlife Refuge Sys., "We Just Sat There for an Hour While Thousands of Caribou Went By" (Apr. 12, 2011), http://www.fws.gov/refuges/refugeupdate/marchapril_2011/caribouwentby.html. The Carter withdrawal was unsuccessfully challenged in *State v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978), and *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980).

conservation system units (CSU)[176] and the protection of Native, state, and other land uses on these and other lands.

Thus, only about 45 pages (titles II to VII) of ANILCA's 180 pages relate to the creation of new or enlarged CSUs. The remaining 135 pages (titles VIII to XV) of ANILCA contain provisions addressing a wide variety of other issues, including (1) the "no more" clause, a congressional attempt to end the highly controversial "war of executive withdrawals" that had been waged over Alaska lands since 1968;[177] (2) section 103(c), meshing ANILCA's new and expanded CSUs with existing state and ANCSA lands; (3) title VIII, preserving subsistence activities and land uses by rural Alaskans; (4) title IX, containing key amendments to the Statehood Act, ANCSA, and the Native Allotment Act; (5) title X, addressing oil and gas leasing on federal lands; (6) title XI, preserving and establishing public access rights across CSUs; (7) titles XII and XIII, establishing joint land management advisory bodies, and containing administrative provisions; and (8) title XIV, containing technical amendments to ANCSA and enacting extensive additional amendments to ANCSA lands provisions (including ratifying many land exchanges).

[3] Reservation of 105 Million Acres of Conservation System Units (CSU)

The first order of business of ANILCA, set out in titles II–VII, was the reservation of about 105 million acres of new units or additions to units in national parks, wildlife refuges, national recreation and conservation areas, national forests, wild and scenic rivers, and national wilderness.[178]

The impact of these provisions was significant. ANILCA doubled the size of the country's national park and refuge system and tripled the amount of land designated as wilderness[179]:

> The Alaska National Interest Lands Conservation Act of 1980 provided for 43,585,000 acres of new national parklands in Alaska; the addition of 53,720,000

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[176] *See* ANILCA § 102(4), 16 U.S.C. § 3102(4).

[177] While the "war" may largely be over for the moment, there are still many ANCSA § 17(d)(1) withdrawals in place affecting many acres. *See* § 7.03[4][c][viii], *supra*.

[178] While the total acreage subject to ANILCA withdrawals is greater due to overlapping withdrawals (i.e., Wilderness Areas within parks and refuges), the generally accepted figure is that ANILCA withdrew about 105 million acres. *See, e.g.*, John v. United States, 720 F.3d 1214, 1237 (9th Cir. 2013) (citing Se. Alaska Conservation Council, Inc. v. Watson, 697 F.2d 1305, 1307 (9th Cir. 1983)). Together with the lands in CSUs prior to ANILCA, the total acreage embraced in CSUs in Alaska is more than 150 million acres, or more than 40% of Alaska.

[179] Nat'l Parks Conservation Ass'n, Fact Sheet, "Alaska National Interest Lands Conservation Act" (Oct. 27, 2011), http://www.npca.org/news/media-center/fact-sheets/anilca.html.

> acres to the National Wildlife Refuge System; twenty-five wild and scenic rivers, with twelve more to be studied for that designation; establishment of Misty Fjords and Admiralty Island national monuments in Southeast Alaska; establishment of Steese National Conservation Area and White Mountain National Recreation Area to be managed by the Bureau of Land Management; the addition of 56,400,000 acres to the Wilderness Preservation System, and the addition of 3,350,000 acres to Tongass and Chugach national forests. It was, many believe, the most significant single piece of legislation in the history of conservation in the United States.[180]

Although these withdrawals were extensive, they often contained unique requirements to suit Alaska needs, such as continuing subsistence hunting and fishing and allowing the operation of snow machines in national parks and other CSUs, and avoiding the disruption of traditional access routes across CSUs.[181]

These sorts of unique "Alaska-only" provisions continue throughout the CSU withdrawals of titles II–VII, and similar provisions are also found throughout the generally applicable provisions of titles I and VIII–XV of ANILCA.

[4] "No More Clause"

In light of the political controversy accompanying enactment of ANILCA, Congress included in it a number of important limitations. One of these is the "no more clause."

The ANCSA § 17(d)(2), FLPMA § 204, and Antiquities Act withdrawals preceding enactment of ANILCA were intensely controversial, and Congress thus included in ANILCA the "no more clause," to ensure similar withdrawals would not be repeated without congressional concurrence. ANILCA § 1326[182] provides that an executive branch withdrawal of more than 5,000 acres would expire within one year, unless Congress approved it, and also prohibited further wilderness and similar studies without authorization by Congress.

Section 1326 is related to another provision in ANILCA, section 101(d),[183] which states that ANILCA's legislative withdrawals satisfied public needs and properly balanced conservation uses with other uses of the public lands, and thus future CSUs are unnecessary.

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[180] George Frank Williss, *"Do Things Right the First Time": The National Park Service and the Alaska National Interest Lands Conservation Act of 1980* 61 (1985).

[181] *See, e.g.*, ANILCA § 201(2), 16 U.S.C. § 410hh(2) (relating to the Bering Land Bridge National Preserve, allowing traditional Alaska land uses, including reindeer herding, subsistence hunting and fishing, outdoor recreation, and access for snow machines).

[182] 16 U.S.C. § 3213.

[183] *Id.* § 3101(d).

[5] Meshing New CSUs with Existing Native and State Land Rights

Another critical issue for Congress was to determine the legal effect of superimposing more than 100 million acres of CSUs over prior grants or selections of ANCSA and state lands that would now be located within the external boundaries of CSUs. Each of these land programs had its own specific congressional purposes—what priorities are to be given to these now overlapping and possibly conflicting land uses?

In ANILCA § 103(c), Congress provided that neither Native, state, nor private lands located within CSUs would be included in the CSUs, nor would these lands become subject to statutes and regulations applicable "solely to public lands within such units."[184]

Section 103(c) provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after [December 2, 1980], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary [of the Interior] may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.[185]

Section 103(c) was broadly interpreted by the Ninth Circuit in *City of Angoon v. Marsh*[186] in a manner that suggested that state, Native, and private lands were excepted from all CSU laws and regulations. However, the Ninth Circuit recently enunciated a narrower interpretation of section 103(c) in *Sturgeon v. Masica*,[187] holding:

> The plain text of § 103(c) only exempts nonfederal land from "regulations applicable *solely* to public lands within [CSUs]." The regulation at issue, banning hovercraft use in the Yukon-Charley, is not so limited.
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> . . . .
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> . . . . Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national

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[184] *Id.* § 3103(c); *see also id.* § 3102(3) (defines "public lands" as lands that, after enactment of ANILCA, are federal lands, and have not been selected by or conveyed to the state, or Native corporations). Thus, lands that were selected by, or conveyed to, the state or a Native corporation before the enactment of ANILCA are not federal land or public lands.

[185] *Id.* § 3103(c).

[186] 749 F.2d 1413 (9th Cir. 1984).

[187] 768 F.3d 1066 (9th Cir. 2014), *cert. granted*, No. 14-1209 (U.S. Oct. 1, 2015).

> parks. . . . Because of its general applicability, the regulation may be enforced on both public and nonpublic lands alike within CSUs.[188]

The U.S. Supreme Court has now granted certiorari to the plaintiffs-appellants in *Sturgeon*.[189]

[6] Protecting Subsistence Activities

A significant portion of Alaska's rural residents rely upon subsistence hunting, fishing, and gathering activities for sustenance. However, unlike in the lower 48, there are no treaties guaranteeing Alaska Natives' rights to hunt or fish, and the large CSU withdrawals of ANILCA for conservation purposes threatened this traditional activity. Thus, one primary concern in the enactment of ANILCA was to protect traditional subsistence activities from disruption by the creation of CSUs, and from the effects of other federal land decisions.

Title VIII of ANILCA generally addresses and protects subsistence uses by rural residents,[190] and broadly states policies, preferences, procedures, and administrative measures favoring subsistence activities.[191] In addition, section 811 provides for access across CSUs for subsistence activities.[192]

However, title VIII also contains a unique provision directly inserting protection of subsistence activities into federal public lands decision-making. Section 810 of ANILCA[193] imposes both procedural and substantive requirements on federal public land use decisions to protect subsistence uses from any unnecessary restriction, and to require mitigation. Section

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[188] *Id.* at 1077–78 (alteration in original) (citation omitted) (quoting 16 U.S.C. § 3103(c)).

[189] James Linxwiler, one of the authors of this chapter, represents Alaska Native corporations appearing in this matter as amici curiae before the Supreme Court.

[190] 16 U.S.C. §§ 3111–3126. ANILCA § 803, 16 U.S.C. § 3113, defines "subsistence uses" in part as follows:

> As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

[191] ANILCA §§ 801, 802, 16 U.S.C. §§ 3111, 3112, contain congressional findings and a declaration of policy favoring subsistence activities; section 804, 16 U.S.C. § 3114, states a preference for taking fish and game on public lands for subsistence purposes over other uses; sections 805 to 809, 16 U.S.C. §§ 3115–3119, establish regional committees and federal enforcement vehicles for subsistence activities; and sections 811 to 816, 16 U.S.C. §§ 3121–3126, provide other administrative measures to protect subsistence activities.

[192] 16 U.S.C. § 3121; *see* § 7.04[8], *infra*.

[193] 16 U.S.C. § 3120.

810 requires federal agencies to study the effect of proposed federal land use decisions upon subsistence activities, and to make specific findings concerning whether such decisions may significantly restrict subsistence uses. If so, then the agency must hold hearings and make specific findings that the agency has taken reasonable steps to minimize adverse impacts upon subsistence.[194]

Thus, section 810 provides unique procedural and substantive protection for the subsistence activities of rural Alaskans. This constraint upon agency discretion should not be overlooked by anyone concerned with mineral exploration or development in Alaska.

[7] Acquiring Title to Meanderable Waters

Often, half or more of the "uplands" in Alaska is water, in the form of ponds, lakes, and watercourses. The means of acquiring title to lands beneath waters is critically important in relation to state and ANCSA lands, both to ensure title is actually acquired and to ensure limited acreage entitlements are not expended acquiring lakebeds and streambeds.

As in all other states, at the time of statehood the State of Alaska received title to lands underlying navigable waters not otherwise reserved, pursuant to the Equal Footing Doctrine[195] and the Submerged Lands Act.[196] However, title to both

(1) lands under navigable waters that were not conveyed by operation of law at Statehood and that are both (a) meanderable[197] and (b) surrounded or abutted by state or Native lands; and

(2) lands under non-navigable but meanderable waters that are surrounded or abutted by state or Native lands,

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[194] The courts have applied section 810 to a variety of federal lands decisions. *See, e.g.*, Kunaknana v. Clark, 742 F.2d 1145 (9th Cir. 1984); Tribal Vill. of Akutan v. Hodel, 792 F.2d 1376 (9th Cir. 1986), *cert. granted, judgment vacated*, 480 U.S. 943 (1987), *cert. granted, judgment vacated sub nom.*, Amoco Prod. Co. v. Tribal Vill. of Akutan, 480 U.S. 943 (1987) (oil and gas leasing); Sierra Club v. Penfold, 664 F. Supp. 1299 (D. Alaska 1987), *aff'd*, 857 F.2d 1307 (9th Cir. 1988) (federal lands mining); Hanlon v. Barton, 740 F. Supp. 1446 (D. Alaska 1988) (timber).

[195] Under the Equal Footing Doctrine, "the Federal Government holds [title to the beds of navigable waterways] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." Montana v. United States, 450 U.S. 544, 551 (1981) (citing Pollard v. Hagan, 44 U.S. 212, 222–23, 229 (1845)).

[196] 43 U.S.C. §§ 1301–1315; *see* Statehood Act § 6(m), 48 U.S.C. note prec. § 21.

[197] Meanderable waters are waterbodies 50 acres or larger and those watercourses three chains (198 feet) wide or wider. BLM, *Manual of Surveying Instructions* § 3-181 (2009) (referring to 1973 edition for purposes of implementing section 901); BLM, *Manual of Surveying Instructions* §§ 3-120, -121 (1973).

is conveyed pursuant to section 901 of ANILCA, as amended,[198] if such lands were not already conveyed directly by conveyances made to prior August 16, 1988.

In effect, ANILCA § 901 provides as follows: (1) upon conveyance of the adjacent uplands, title to the lands under waterbodies smaller than 50 acres, and watercourses under 3 chains in width, shall transfer to the owners of the adjacent uplands and the acreage entitlement of the adjacent owner is charged for such lands; but (2) if such waterbodies and watercourses are at least 50 acres in size, or three chains in width, then upon conveyance of the adjacent uplands, title to any remaining federal interest in lands under such meanderable waterbodies and watercourses shall transfer to the owners of the adjacent uplands but the acreage entitlement of the adjacent owners is not charged for such lands.

This seemingly technical and insignificant provision has had the effect of settling land titles to very large areas of lands lying beneath non-navigable waters and waters for which navigability had not been adjudicated, and significantly increasing the amount of lands received by the state and Native corporations by conveying lands beneath large non-navigable waters without charge against ANCSA and Statehood Act land entitlements.

Although these issues are outside the scope of this chapter, ANILCA § 901 leaves unresolved a number of serious technical title issues that arise as a result of section 901 being superimposed on a land conveyancing system that, prior to August 16, 1988, conveyed to the boundaries of particular sections but, after that date, formally conveyed only to the water's edge and then let section 901 operate to convey to the midpoint.[199]

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[198] 43 U.S.C. § 1631, as amended by § 101 of the Act of August 16, 1988, Pub. L. No. 100-395, 102 Stat. 979. As so amended, section 901 of ANILCA not only (1) effects the automatic transfer of any remaining federal interest in lands under a meanderable waterbody to certain owners of the lands abutting the waterbody, but also (2) requires that the acres so conveyed not be counted against the state's or any Native corporation's entitlement.

[199] There are many such serious technical issues. Here are only three examples:

(1) Lands underlying meanderable waterbodies or watercourses that also were navigable in fact on January 3, 1959, and not expressly retained would have passed to the state on January 3, 1959, under section 6(m) of the Statehood Act and the Submerged Lands Act, and thus there would be no remaining federal interest in or under such lands.

(2) Many conveyances made to the state and to Native corporations prior to August 16, 1988, conveyed all lands within particular sections, regardless of the presence of meanderable waterbodies. *See, e.g.*, Memorandum from Guy Martin, Assistant Secretary, Land & Water Res., to Cecil Andrus, Secretary of the Interior (Mar. 3, 1978) (approved by the Secretary on March 3, 1978, adopting departmental

[8] Access Rights

The creation of large CSUs threatened to frustrate or block access to state and ANCSA lands. Thus, Congress specifically responded to this concern by enacting title XI of ANILCA,[200] which addressed access in a number of provisions.

Title XI contains a complex process for the authorization of "transportation or utility systems,"[201] which has largely not been utilized. However, two more specific provisions, sections 1110 and 1111,[202] have been important in ensuring the rights of access into and across CSUs.

First, Congress generally protected the use of traditional Alaska transportation modes across CSUs in section 1110(a), including "the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities . . . and for travel to and from villages and homesites."[203]

Another critical concern was ensuring that state, Native, and private landowners within CSUs would be able to access their lands. Under section 1110(b)[204] landowners within CSUs are given rights to "assure adequate

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recommendation on ANCSA Issue 8). Thus in some instances there might not have been any remaining federal interest in the lands under a particular meanderable waterbody or watercourse within a particular section on August 16, 1988, to be conveyed *by operation of law* on that date.

(3) Conveyances made on or after August 16, 1988, may result in portions of waterbodies in particular sections being owned by owners of uplands in adjacent sections, to the surprise of all concerned.

[200] 16 U.S.C. §§ 3161–3173

[201] *Id.* § 3162(4).

[202] *Id.* §§ 3170, 3171.

[203] *Id.* § 3170(a). As discussed above, Congress also included similar such provisions in ANILCA's provisions withdrawing individual CSUs. *See* § 7.04[3], *supra*.

[204] 16 U.S.C. § 3170(b).

and feasible access for economic and other purposes"[205] to their lands within CSUs.[206]

Section 1111 uses similarly broad and mandatory language to provide temporary access to "the State or a private landowner to or across any [CSU], . . . in order to permit the State or private landowner access to its land for purposes of survey, geophysical, exploratory, or other temporary uses thereof . . . ."[207]

In addition to other similar provisions, ANILCA § 811 specifically grants rural residents engaged in subsistence activities "reasonable access to subsistence resources on the public lands," including "appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation."[208]

ANILCA §§ 1110(a) and (b), 1111(a), and 811(b) each begin with the words "Notwithstanding any other provision of this Act or other law" and then require the Secretary to take specific actions to preserve public access across CSUs.[209] While this language could be argued to constitute a categorical exclusion from applicable laws or regulations for access rights

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[205] The term "adequate and feasible" used to be defined in the National Park Service regulations as: "A reasonable method and route of pedestrian or vehicular transportation which is economically practicable for achieving the use or development desired by the applicant on his/her non-Federal land or occupancy interest but does not necessarily mean the least costly alternative." 36 C.F.R. § 13.1(a) (2008). It is currently defined as a part of the DOI multi-agency regulations as "a route and method of access that is shown to be reasonably necessary and economically practicable but not necessarily the least costly alternative for achieving the use and development by the applicant on the applicant's nonfederal land or occupancy interest." 43 C.F.R. § 36.10(a)(1); *see* 73 Fed. Reg. 3181, 3182 (Jan. 17, 2008). 43 C.F.R. § 36.10 generally implements ANILCA § 1110(b). *See also* 50 C.F.R. § 35.13 (generally providing for access to lands within wilderness units).

[206] The Senate Committee report accompanying ANILCA states that section 1110 is intended to grant a legally separate and unique right to the inholder: "*This provision is intended to be an independent grant supplementary to all other rights of access*, and shall not be construed to limit or be limited by any other right of access granted by the common law, other statutory provisions, or the Constitution." S. Rep. No. 96-413, at 249 (1979) (emphasis added).

[207] 16 U.S.C. § 3171(a).

[208] *Id.* § 3121.

[209] *Id.* §§ 3121(b), 3170(a), (b), 3171(a).

falling within these provisions of ANILCA, the courts have held to the contrary in a number of cases.[210]

[9] Native Allotments

ANILCA significantly affected rights under the former Native Allotment Act.[211] The Native Allotment Act provided Alaska Natives the right to acquire up to 160 acres of lands in Alaska after five years of use and occupancy.[212] Native allotments represented one of the first efforts to provide Alaska Natives with land. Unlike lower 48 allotment acts that were generally limited to lands on reservations, such allotments in Alaska were limited to vacant, unappropriated, and unreserved lands. In addition, such allotments were limited to non-mineral lands, or (subject to a reservation of the minerals) to lands "that may be valuable for coal, oil, or gas deposits."[213] Alaska Native allotments tend to be concentrated along streams and lakes, roads, and other similar locations convenient to transportation or subsistence activities.

The Native Allotment Act was repealed by ANCSA § 18(a).[214] However, at the time of repeal there were 10,207 pending applications, covering 16,024 separate parcels, and encompassing approximately 1.4 million acres of land.[215] In the nine years between enactment of ANCSA and ANILCA, very few of these applications were acted upon.

Thus, ANILCA § 905[216] generally approved such pending Native allotments, subject to valid existing rights, and subject to a right of protest for 180 days after enactment of ANILCA.

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[210] *See, e.g.*, United States v. Vogler, 859 F.2d 638 (9th Cir. 1988) (where a miner claimed the right to access his claims using a bulldozer off trail in the Yukon-Charley Rivers National Preserve). The Ninth Circuit noted that "[t]his case demonstrates all too clearly that compliance with the Park Service's permit regulations is essential to ensuring the protection of the Preserve's natural beauty and value." *Id.* at 641. See also *Hale v. Norton*, 476 F.3d 694 (9th Cir. 2007), another ANILCA § 1110(b) case raising issues of a miner's use of a bulldozer for access purposes in a CSU, in which the court held that ANILCA § 1110(b) did not provide an exemption from review under NEPA for access within CSUs. This NEPA exemption issue had first been raised, but not resolved, in *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986).

[211] Ch. 2469, 34 Stat. 197 (1906), *as amended by* Act of Aug. 2, 1956, ch. 891, 70 Stat. 954.

[212] *Id.* § 3.

[213] *Id.* § 1(c).

[214] 43 U.S.C. § 1617(a).

[215] David S. Case & David A. Voluck, *Alaska Natives and American Laws* 121 & n.53 (3d ed. 2012).

[216] 43 U.S.C. § 1634.

Subsequent case law arising under the Native Allotment Act had the effect of granting Native allotments a priority date as of the earliest date for Native use of the allotment, as stated in the allotment application.[217]

The decision in *Alaska Department of Transportation & Public Facilities*[218] explains the effect of *Golden Valley Electric Ass'n*:

> In [*Golden Valley Electric Ass'n*], we found that a Native allotment applicant is accorded a statutory preference right to an allotment of land commencing with the first use and occupancy of the land in a qualifying manner. Although that inchoate preference right does not vest until completion of the required 5 years use and occupancy coupled with the filing of a timely application, once the preference right becomes vested, it relates back to the initiation of the use and occupancy and preempts conflicting applications filed after that time.[219]

The rights of adjoining or conflicting landowners and holders of rights-of-way thus may be substantially affected by the preemptive effect of allotments measured from the time of first use and occupancy by the allottee.[220]

[10] Federal Onshore Oil and Gas Programs in Alaska[221]

There are three unique federal onshore[222] oil and gas regimes applicable to Alaska.

[a] Arctic National Wildlife Refuge Closed to Exploration and Production

In 1960, Secretary of the Interior Fred Seaton withdrew approximately 8.9 million acres of land in the extreme northeast corner of Alaska to create the Arctic National Wildlife Range (Arctic Range) in order to preserve its unique wildlife, wilderness, and recreational values.[223] ANILCA § 303(2)[224]

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[217] *See* Alaska v. Babbitt, 182 F.3d 672, 674 (9th Cir. 1999); *see also* Golden Valley Elec. Ass'n (On Reconsideration), 98 IBLA 203, GFS(MISC) 60(1987).

[218] 124 IBLA 386, GFS(MISC) 61(1992).

[219] *Id.* at 391 (citations omitted).

[220] As one response to the title uncertainties created by Native allotments, ANCSA § 18 was amended by title III of ALTAA to provide for the correction of Native corporation and State of Alaska conveyances erroneously containing lands subject to Native allotments, and for other related purposes.

[221] This section very briefly summarizes material addressed in much more detail in 2 *Law of Fed. Oil & Gas Leases* § 27.01 (2015).

[222] Although there is extensive federal offshore leasing in Alaska under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356b, that enactment is not addressed here, because it does not contain significant statutory provisions uniquely applicable to Alaska.

[223] Pub. Land Order No. 2214, 25 Fed. Reg. 12,598 (Dec. 9, 1960).

[224] *See* 16 U.S.C. § 668dd note.

created the Arctic National Wildlife Refuge (ANWR), adding 9.16 million acres to the Arctic Range. ANILCA § 702(3)[225] also designated 8 million acres of ANWR as wilderness.

In enacting ANILCA, however, Congress was unable to resolve the political conflict over ANWR's significant wildlife and conservation values, and its oil and gas resource values, and the impasse has persisted ever since. In addition to its esthetic and wilderness values, the Coastal Plain of ANWR "contains the largest onshore, unexplored, potentially productive geologic basins in the United States."[226] In 1998, the U.S. Geological Survey issued an updated report stating that "[t]he total quantity of technically recoverable oil within the entire assessment area is estimated to be between 5.7 and 16.0 billion barrels (95-percent and 5-percent probability range), with a mean value of 10.4 billion barrels."[227]

Under section 1003 of ANILCA "[p]roduction of oil and gas from [ANWR] is prohibited and no leasing or other development leading to production of oil and gas from the range shall be undertaken until authorized by an Act of Congress."[228]

"No exploratory drilling has been accomplished in the area except for one well commenced in the winter of 1984-85 on Kaktovik Inupiat Corporation and Arctic Slope Regional Corporation lands southeast of Kaktovik just outside the ANWR Coastal Plain."[229]

[b] Federal Oil and Gas Leasing in the National Petroleum Reserve-Alaska

Oil and gas leasing and production in the National Petroleum Reserve-Alaska (NPR-A) occurs under legislation separate from, but related to, ANILCA.

"Established in 1923, the NPR-A on Alaska's North Slope is 'the largest single unit of public land in the United States and covers 23.6 million acres.

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[225] *See id.* § 1132 note.

[226] U.S. Energy Info. Admin. (EIA), "Potential Oil Production from the Coastal Plain of the Arctic National Wildlife Refuge: Updated Assessment," at 1 (May 2000).

[227] U.S. Geological Survey, "Arctic National Wildlife Refuge, 1002 Area, Petroleum Assessment, 1998, Including Economic Analysis," at 4 (Apr. 2001). ANILCA § 1002, 16 U.S.C. § 3142, mandated a federal study of the 1.5-million-acre "Coastal Plain" in ANWR to determine the impact of possible future petroleum leasing and development on ANWR's wildlife resources. This report was issued as a result of that study. The EIA published a slightly different figure of 10.3 billion barrels. *See* EIA, *supra* note 226, at 9.

[228] 16 U.S.C. § 3143.

[229] Norman Chance, "Oil and Gas Exploration Since 1944" *in The Arctic National Wildlife Refuge: A Special Report*, http://arcticcircle.uconn.edu/ANWR/anwroilhistory.html.

It is also an important habitat for vegetation, fish, and wildlife.' "[230] The NPR-A was originally created to secure a future supply of fuel for the U.S. Navy.[231]

In 1980, Congress opened the NPR-A to competitive oil and gas leasing.[232] Since that time, from 1.8 million to 5.8 million acres have been offered in oil and gas lease sales per year, in many but not all years, and exploration, development, and production activities have occurred. Leasing occurs pursuant to the Naval Petroleum Reserves Production Act of 1976,[233] which also transferred jurisdiction from the Navy to the Secretary of the Interior.[234]

NPR-A oil and gas lease sales and development decisions have been repeatedly challenged in litigation.[235] Currently, oil production activity in the NPR-A is primarily concentrated in the northeastern NPR-A area, near the Colville River and the Village of Nuiqsut.

[c] "Non-North Slope" Federal Oil and Gas Leasing Program

Congress also provided for a "non-North Slope" leasing program in sections 1008 and 1009 of ANILCA.[236] Under section 1008, the Secretary is directed to establish an oil and gas leasing program, after conducting extensive studies of the environment and the oil and gas potential of an area.[237] This program is the federal onshore oil and gas program under the Mineral Leasing Act of 1920[238] and its regulations,[239] modified to apply in Alaska with certain additional environmental and administrative provisions due to Alaska's unique requirements and history.

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[230] Kunaknana v. U.S. Army Corps of Eng'rs, 23 F. Supp. 3d 1063, 1071 (D. Alaska 2014) (quoting N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 973 (9th Cir. 2006)).

[231] Exec. Order No. 3797-A (Feb. 27, 1923).

[232] *See* 42 U.S.C. § 6506a.

[233] *Id.* §§ 6501–6507

[234] *Id.* § 6502.

[235] *See, e.g.*, *N. Alaska Envtl. Ctr.*, 457 F.3d 969; Wilderness Soc'y v. Salazar, 603 F. Supp. 2d 52 (D.D.C. 2009); *Kunaknana*, 23 F. Supp. 3d 1063.

[236] 16 U.S.C. §§ 3148, 3149.

[237] *Id.* § 3148(a), (b).

[238] 30 U.S.C. §§ 181–263.

[239] 43 C.F.R. pts. 3000–3180.

Leases issued under the program may be suspended or cancelled for environmental reasons.[240] Lease operations, including exploration and development, surface and subsurface activities alike, may be conducted by a lessee only pursuant to an exploration or development plan and/or permit.[241] Leases in Alaska may be issued for not more than 5,760 acres.[242]

[11] Extensive Amendments to Specific Native Corporation Land Provisions

Title XIV of ANILCA contains many generally applicable technical amendments to ANCSA, including provisions relating to withdrawal and conveyance of subsurface estates, the grant of shareholder home sites to individuals, the tax basis in lands conveyed under ANCSA, fire protection of Native lands, and the effect of interim conveyances to Native corporations.

Title XIV also contains amendments to ANCSA applying to specific Native corporations that: (1) make additional or alternate lands available to such corporations, including Chugach Alaska Corp., NANA Regional Corp., Cook Inlet Region, Inc., Doyon, Limited, Koniag, Inc., and Arctic Slope Regional Corp., and several village corporations; and (2) approve several extensive land exchanges, including land exchanges involving the Arctic Slope Regional Corp. on the North Slope in section 1431, and Doyon, Limited in section 1419.

§ 7.05 Conclusion

Because Alaska is so vast and its natural resources so substantial, because the aboriginal title of Alaska Natives to lands in Alaska was protected and preserved until well into the modern settlement era, and because Alaska includes significant wilderness, natural habitats, and scenery, Alaska has generated a body of federal and state public land laws that in many respects is unlike such laws relating to the rest of the United States.

Born of this rich and complex tapestry, the federal and state public land laws applicable to Alaska strive to provide for the development of Alaska's oil and gas and mining resources; sustainable commercial, sport, and subsistence fishing; sustainable sport and subsistence hunting; and sustainable use of Alaska's other renewable resources (whether for tourism, recreation, or subsistence), while simultaneously advancing and accommodating the sometimes conflicting goals, needs, and desires of federal, state, and local governments, Native corporations and tribes, and urban and rural

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[240] 16 U.S.C. § 3148(i).

[241] *Id.* § 3148(f), (g), (h).

[242] 30 U.S.C. § 226(b)(1)(A).

communities in Alaska or beyond. Finding the right balance is often difficult, but the results to date are impressive: development of some of North America's largest oil and gas and mining projects; the resolution of Native land claims in a manner that allows significant economic development while preserving significant historic cultural and subsistence activities; and the protection and conservation of some of Alaska's most valuable natural areas in national parks, wildlife refuges, forests, wilderness areas, and wild and scenic rivers.

Future decisions regarding Alaska's lands and resources will be based in large part on the laws as they exist today. We hope this chapter helps readers to understand both the origins of this complex legal terrain and some of the pathways into and through it.