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# ANCSA Section 7(i) Settlement Agreement: Impediments to Mineral Development

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Alaska Native Bar Section Meeting

December 12, 2007

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# Overview

- Description of the Issue
- Review of ANCSA 7(i)
- History of 7(i) & Settlement Agreement
- Potential Solutions

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# Description of the Issues

- ANCSA Section 7(i) and the 1982 Settlement Agreement among the ANCSA regional corporations create a disincentive to maximize mineral exploration under specific circumstances affecting a number of regions currently.
  - The structure of the ANCSA 7(i) Settlement Agreement makes certain otherwise viable business arrangements impractical when considering structuring mineral exploration on ANCSA lands

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# Description of the Issues: con't

- ❑ The Settlement Agreement also disincentivizes landowning Regions, under certain circumstances, from self-financing exploration.
  - ANCSA regions without current and significant resource development (7(i) payors); and
  - ANCSA regions with specific identified mineral or oil and gas potential, but without a proven economic resource
  - The Settlement Agreement creates a disincentive to a regional corporation investing in exploration on its own lands under these circumstances because:
    - ❑ All other regions share in any upside of an economically viable resource;
    - ❑ No region shares the risk of investment in a likely outcome of non-success.

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# Description of the Issues: con't

- Why isn't industry exploration on ANCSA lands sufficient?
  - In many cases, it has been. Oil and gas major producers spent millions exploring ANCSA lands in the 1970s through 1990s. Mineral major producers continue to intermittently explore/develop on ANCSA lands.
  - Alaska is one small market to worldwide companies that prioritize on a global, rather than local scale.

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# ANCSA Section 7(i)

- The Alaska Native Claims Settlement Act (“ANCSA”) Section 7(i), 43 U.S.C. §1606(i), provides for the sharing among Regional Corporations of revenue derived from timber or subsurface resources on ANCSA lands:
  - (i) Certain natural resource revenues; distribution among twelve Regional Corporations; computation of amount; subsection inapplicable to thirteenth Regional Corporation
    - (1)(A) Except as provided by subparagraph (B), 70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

# ANCSA Section 7(i)

## ■ Sharing Formula:

	<u>1971 pop.</u>	<u>7i gross %</u>	<u>7i share %</u>
Ahtna	1100	1.47%	1.03%
Aleut	3249	4.34%	3.03%
ASRC	3738	4.99%	3.49%
BBNC	5200	6.94%	4.86%
BSNC	6200	8.27%	5.79%
Calista	13306	17.75%	12.43%
Chugach	2109	2.81%	1.97%
CIRI	6553	8.74%	6.12%
Doyon	9061	12.09%	8.46%
Koniag	3731	4.98%	3.48%
NANA	5000	6.67%	4.67%
Sealaska	15700	20.95%	14.66%
<b>sum</b>	<b>74947</b>	<b>100.00%</b>	<b>70.00%</b>

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## ANCSA Section 7(i): con't

- Section 7(i) “was intended to achieve a rough equality in assets among all the Natives. . . . (The section) insures that all of the Natives will benefit in roughly equal proportions from these assets. . . . Congress required that 70 percent of all revenues from the development of timber and subsurface resources be distributed among the Regional Corporations.” *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (9<sup>th</sup> Cir. 1978).



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# ANCSA 7(i) History

- Section 7(i) did not contain adequate definitions of its basic terms which resulted in protracted litigation between the regions over many issues. See, e.g. *Aleut Corp. v. Arctic Slope Regional Corp.*, 410 F.Supp. 1196 (D. Alaska 1976); *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F. Supp. 900 (D. Alaska 1976) reversed in part *sub nom Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491 (9<sup>th</sup> Cir. 1978); *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F.Supp. 862 (D. Alaska 1976) *aff'd* in part, *rev'd* in part *sub nom Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (9<sup>th</sup> Cir. 1978); *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F.Supp. 482 (D. Alaska 1980).
- Eventually, the regions agreed to a 121 page “Section 7(i) Settlement Agreement,” entered into June 29, 1982 between the twelve regions.

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# Settlement Agreement

- The Settlement Agreement:
  - “represent[ed] an effort by the twelve Regional Corporations to resolve the cycle of litigation and to bring certainty to the application of § 7(i). In essence, the “Section 7(i) Settlement Agreement” represents an effort by the Regional Corporations to correct the deficiencies of ANCSA by a detailed agreement in order to render possible commercially viable resource development without litigation; it exhaustively defined terms and concepts, established detailed accounting procedures, and established a consensus among the Regions on policies for development of resources.” James D. Linxwiler, *The Alaska Native Claims Settlement Act: the First Twenty Years*, Paper 2, 38th Annual Rocky Mountain Law Institute at 28 (1992).

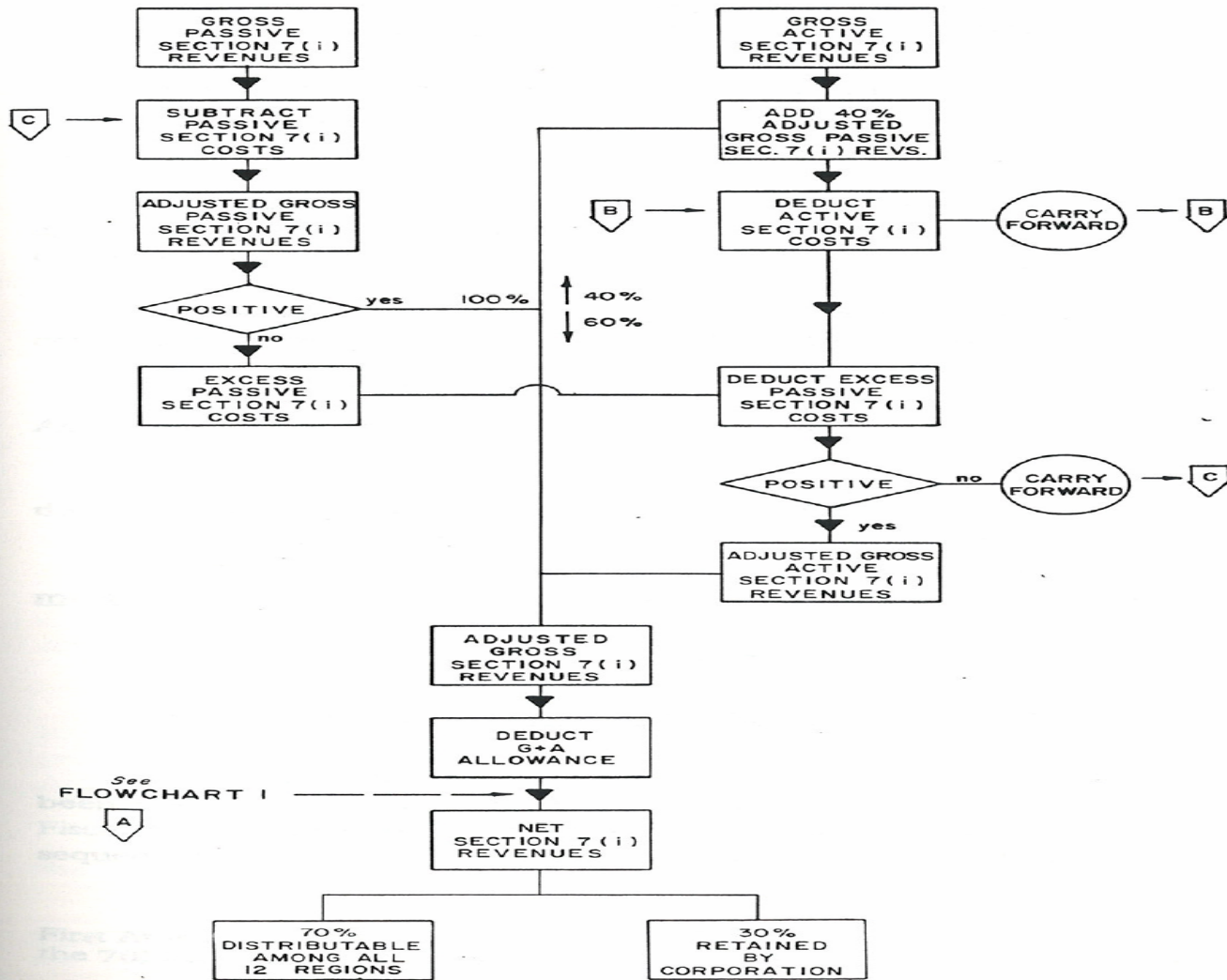
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# Settlement Agreement: con't

- Structure of the Settlement Agreement:
  - Very generally, the Settlement Agreement is structured to require a resource producing Region to share 70% of its Net Section 7(i) revenue, which is roughly its gross receipts related to the 7(i) resource less certain allowable costs (which is a rough measure of profit realized by the Region from the resource)
  - The Agreement is very complex. As an example of the detail:
    - A resource owning Region is required share 70% of “Net Section 7(i) revenue” each corporate fiscal year. Agreement, art. V, § 1.
    - The derivation of this Net Section 7(i) revenue is shown in flow-chart form on the next page:

# Settlement Agreement: con't

7(i) SETTLEMENT AGREEMENT  
 ARTICLE IV  
 FLOWCHART 2



ANY EXCESS PLUS INTEREST AT PRIME + 1% SHALL BE CARRIED FORWARD AND INCLUDED IN THE ACTIVE SECTION 7(i) COSTS IN THE SUCCEEDING FISCAL YEAR.

ANY EXCESS IS CARRIED FORWARD AND ADDED TO NEXT YEARS PASSIVE SECTION 7(i) COSTS WITH INTEREST.

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# Specific Impediments Created by the Agreement

- Impracticality of certain business structures involving the landowning Region
  - Landowning region holding substantial equity stake in venture
    - “Related Party” transactions, involving 20% or more equity interest by the Region, or other control exercised by the region, result in all associated 7(i) Revenue being subject to the Agreement (and not a pro rata share associated with the landowning Region’s interest in the venture).
    - There are similar restrictions on Intra-Company transfers and Controlled Entity Transfers.
  - In the substantial equity case, a Region’s prospective partner or co-owner of a venture is not likely to assume the obligations of 7(i) sharing; alternatively, there is not likely to be an economic case for the Region to assume all of the obligations of 7(i) within the venture structure.

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## Specific Impediments Created by the Agreement: con't

- Disincentive to direct landowning Region investment in exploration on its own lands (assuming conditions outlined above):
  - Structure of Agreement allows deduction of certain expenses against resource revenues, including carry-forward of expenses.
  - However, the sharing structure of 7(i) assumes a success case.

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## Specific Impediments Created by the Agreement: con't

- E.g. assume \$10M exploration cost, with 25% chance of success, with assumed present value of success of \$100M
  - In a non-7(i) context, a rational landowner would make the investment ( $25\% * \$100M - \$10M = \$15M$  NPV)
  - In 7(i) context ( $25\% * ((\$100M - \$10M) * 38\%) - \$10M = -\$1.45M$  NPV)

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# Settlement Agreement Solutions

- Solutions to specific issues:
  - Amendment to Settlement Agreement
  - Congressional amendment to 7(i)
  - Contract around Settlement Agreement by two or more regions



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# Settlement Agreement Solutions: con't

- Amendment to Settlement Agreement
  - Article X – Amendments:
    - This Agreement may not be amended without the unanimous agreement of all Corporations, provided, however, that no amendment shall be effective on arbitration proceedings then in progress without the approval of the parties to such arbitration.
  - Amendment not likely to happen

# Settlement Agreement Solutions: con't

- Congressional amendment to ANCSA Section 7(i)
  - Section 7(i) is clearly ambiguous on its face
  - Congress has the power to pass legislation clarifying or interpreting past legislation despite burdening private parties who have relied upon a different interpretation. *See Mattingly v. District of Columbia*, 97 U.S. 687 (1878). The Courts grant substantial weight to Congressional clarifications to earlier statutes when the Courts are asked to interpret those statutes. *See 73 Am.Jur.2d Statutes § 94 at p. 304 (2d ed. 2001).*
    - Congress can also retroactively clarify in many circumstances its intent in a statute without offending the Constitution or effecting a taking. *See Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937).
  - Regardless of the ability of Congress to take this action, the politics surrounding Section 7(i) issues, makes this an unlikely solution.

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# Settlement Agreement Solutions: con't

- Contract around Settlement Agreement by two or more regions
  - Contract rights and obligations, as among two or more parties, can be assigned or modified without affecting the rights of the remaining parties to the Settlement Agreement;
  - Both of the disincentives, discussed above, can be greatly minimized by a side agreement among regions;
  - There are many risks in this strategy as well, including arbitration or litigation by other Regions or village corporations

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# Questions

- More 7(i) related materials:
  - May 9, 2006 Alaska Native Law Section meeting (Aaron Schutt presentation on ANWR-Kaktovik lands issues related to 7(i)) [available at Alaska Bar website]
  - Landye, Bennett & Blumstein, LLP “ANCSA Resource Center” [available at: <http://www.lbblawyers.com/anca.htm>]
  - James Linxwiler Articles:
    - *The Alaska Native Claims Settlement Act: the First Twenty Years*; Paper 2, 38th Annual Rocky Mountain Law Institute, 1992 , by James D. Linxwiler
    - *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*; Paper 12, 53rd Annual Rocky Mountain Mineral Law Institute, 2007, by James D. Linxwiler