

# Public Land and Resources Law Review

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Volume 20

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### Recommended Citation

20 Pub. Land & Resources L. Rev. 169 (1999)

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# Tribal Land Quarrels in Alaska: *Leisnoi v. Stratman*

Britt Lindsay\*

## I. INTRODUCTION

Alaska is a region of abundant natural resources and vast lands. Unfortunately, modern legal disputes continue to originate from historic rival claims to this bounty. Alaskan Natives have long struggled to maintain some semblance of control over their ancient lands in the midst of settlement by competing alien cultures. After Alaskan statehood, interest in the region resulted in Congress adopting the Alaska Native Claims Settlement Act (ANCSA). However, in adopting ANCSA Congress simply added fuel to the fire causing additional problems in the wake of questionable solutions to the Native land claims.

ANCSA instituted an unfamiliar corporate system on the Alaskan Natives. The creation of village and regional corporations imposed artificial property divisions and adversarial relationships among Native groups. Thus, the opportunity arose for non-natives to exploit tensions between opposing tribal entities. Furthermore, ANCSA fabricated disruption where it did not exist before, namely among competing Native organizations. ANCSA was born out of convenience, paving the way for the American development of Alaska without concern for the subsequent Native struggle to adapt. In *Leisnoi v. Stratman*, the Ninth Circuit Court of Appeals examined the legal structure of ANCSA and some of the inherent difficulties that have unfortunately persisted.<sup>1</sup>

The foremost objective of this note is an analysis of *Leisnoi v. Stratman* as a “real world” application of the complexities of ANCSA. *Leisnoi v. Stratman* exemplifies the difficulties inherent in ANCSA which have led to extensive litigation, despite the contrary intentions of Congress. In a narrower scope, *Leisnoi* looks at the hardships associated with the double land ownership regime instituted under ANCSA. The case concerns common disputes between regional and village corporations in regard to the twenty-two million acres of land that are “dually owned” under ANCSA.<sup>2</sup> *Leisnoi*, a village corporation, contested the regional corporation’s authority to permit the extraction of sand and gravel by a local rancher, Omar Stratman.<sup>3</sup> According to the Ninth Circuit in *Leisnoi*

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1. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062 (9th Cir. 1998).

2. *Id.* at 1065.

3. *Id.*

*v. Stratman*, the case is yet another example "that pits surface-estate owner against subsurface-estate owner."<sup>4</sup>

Section II introduces the development of ANCSA. Section III explores the almost unbelievable vendetta between Omar Stratman and the Native Village of Leisnoi. Section IV sets the legal stage by illustrating the case law relative to the narrow legal issue of sand and gravel extraction under ANCSA. Section V fully analyzes the Ninth Circuit opinion from *Leisnoi v. Stratman* and the court's evaluation of Leisnoi's arguments. Finally, Section VI concludes by relating the narrow example of *Leisnoi v. Stratman* back to the larger issue of the failure of ANCSA to provide a satisfactory solution to Alaskan land disputes.

## II. BACKGROUND: ALASKA NATIVE CLAIMS SETTLEMENT ACT

By enacting ANCSA in December 1971,<sup>5</sup> Congress responded to the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska."<sup>6</sup> Alaska's unique history as part of the United States began when then Secretary of State William Seward negotiated a land purchase from Russia in 1867. Subsequent gold discoveries induced Congress to recognize the region as a territory but further assimilation had to wait. Finally, statehood was precipitated by World War II, which demanded a greater military presence in the Pacific. Alaska was accepted into the Union on January 3, 1959.<sup>7</sup> Claims to Alaska's lands had been a growing problem even before statehood. With the addition of federal claims to Alaska's lands and natural resources, a resolution with the Alaskan Natives was unavoidable. However, the discovery of oil reserves in Prudhoe Bay pushed Congress toward a hasty solution.<sup>8</sup> ANCSA was created to resolve land disputes between the federal government, the state of Alaska, Alaska Natives and non-Native settlers.<sup>9</sup> Congress deemed that a legislative act, rather than a judicial settlement, was the "only practical course to follow."<sup>10</sup>

Despite Congress's intention to reduce litigation, ANCSA proved to be problematic.<sup>11</sup> Outstanding land claims threatened the development of

4. *Id.*

5. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(e) (1994)).

6. 43 U.S.C. § 1601(a) (1994).

7. 1 NEW ENCYCLOPEDIA BRITANNICA 202 (15th ed. 1994).

8. MARY CLAY BERRY, *THE ALASKAN PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 246-48 (1975).

9. *City of Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381, 1383 (9th Cir. 1996).

10. H.R. Rep. No. 92-523, at 3 (1971), reprinted in 1971 U.S.C.C.A.N. 2192, 2194.

11. Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1332 (1992).

oil and compelled Congress to provide a quick and final solution. Under ANCSA, in an unusual congressional compensatory action, Alaskan Natives received over forty million acres of land and nearly one billion dollars in exchange for the abolishment of aboriginal land claims.<sup>12</sup> ANCSA then divided Alaska into twelve geographic regions based on cultural differences, forming corresponding corporations owned by the local Natives.<sup>13</sup> On a secondary level, ANCSA then similarly required that villages within each of the regions to incorporate in order to facilitate organized settlement.<sup>14</sup> Both regional and village corporations were to choose their own lands, but curiously, on lands where the village corporations owned the surface estate, the regional corporations would retain control over the subsurface estate.<sup>15</sup> Many of the corporations selected land, mainly tundra, for subsistence living purposes only, without considering possible commercial opportunities.<sup>16</sup>

Congress designed the unique corporate structure to govern the Alaskan Native lands in order to improve Native life,<sup>17</sup> but the results have been disappointing. Many of the corporations have hovered near insolvency, partly due to the vast amount of litigation concerning unclear provisions of ANCSA.<sup>18</sup> Other problems have also plagued ANCSA and the Native corporations. The money to be apportioned to the Native corporations was distributed within eleven years, so the fund of nearly one billion dollars has long been depleted.<sup>19</sup> Furthermore, the conveyance of Native land has been very slow, and some corporations have faced losing the land that they received in order to avoid bankruptcy.<sup>20</sup> Also, despite an initial twenty-year prohibition against selling Native corporate stock, Native control over their corporations has been threatened.<sup>21</sup>

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12. 15 NEW ENCYCLOPEDIA BRITANNICA 23, 24 (15th ed. 1994).

13. *Id.* Seven of the regional corporations are Eskimo, one is Aleut, and the rest are Indian. A thirteenth corporation includes Alaskan Natives outside of the state. *Id.*

14. 43 U.S.C. §§ 1606-07 (1994).

15. 43 U.S.C. § 1611(a) (1994).

16. Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* 33-35 (1985).

17. Hirschfield, *supra* note 11, at 1338. ANCSA was to be instituted in a manner consistent "with the real economic and social needs" of the Alaskan Natives. 43 U.S.C. § 1601(b) (1994).

18. Hirschfield, *supra* note 11, at 1339.

19. *Id.* at 1332 & n.15.

20. *Id.* at 1332. Fifteen years after ANCSA, the Native corporations had obtained patents for less than 8% of their land. *Id.* at n.14.

21. *Id.* at 1332.

## III. BACKGROUND: A KODIAK FEUD

The Department of the Interior certified Leisnoi as a village corporation for the village of Woody Island in 1974.<sup>22</sup> As a benefit of incorporation, ANCSA permitted Leisnoi to choose over 115,000 acres of public land to manage with the condition that the subsurface would remain in the control of the applicable regional corporation.<sup>23</sup> ANCSA allowed village corporations to select the townships where their particular villages were located as a portion of their allotted acres.<sup>24</sup> Leisnoi stated in its application for land that its Native village was located in two townships on the western side of Woody Island. For its remaining acres, Leisnoi selected additional land on Woody Island as well as on Kodiak and Long Islands.<sup>25</sup> Woody Island, locally known as Leisnoi Island, is located in Chiniak Bay, almost three miles east of Kodiak. Russians may have used the island as early as 1792 as an agricultural colony, but it is now abandoned with most of the Natives living in Kodiak and Anchorage.<sup>26</sup>

Omar Stratman is an enigmatic figure. As a cattle rancher on Kodiak Island, he held over 45,000 acres of grazing leases. Initially federal leases, the Alaska Statehood Act transferred those leases to the state from the federal government. Those leases were then transferred to Leisnoi through part of its land entitlement under ANCSA.<sup>27</sup> Stratman owned several hundred head of cattle and operated a tourist lodge on his ranch east of Kodiak. He has been characterized as a "homesteader with a reputation for being ornery," and even he admitted that he is a "pretty stubborn individual."<sup>28</sup> However, such descriptions do not adequately portray the Omar Stratman who has waged a long and costly war with Leisnoi.

Incredibly, Omar Stratman's struggle with Leisnoi began over twenty years ago. In 1976, he and other ranchers filed suit in federal district court to prevent Leisnoi and other village corporations from receiving certain land transfers under ANCSA.<sup>29</sup> Even though Leisnoi's eligibility as a village corporation was not directly challenged, the suit was recognized as "decertification" litigation.<sup>30</sup> In 1978, the district court dismissed the case

22. *Id.*

23. 43 U.S.C. §§ 1611, 1613 (1994).

24. *Id.*

25. *Leisnoi*, 154 F.3d at 1065.

26. *Woody Island Alaska--I Love Alaska* (visited March 27, 1999) <<http://www.ilovealaska.com/alaska/WoodyIsland/#history>>.

27. *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1203-04 (Alaska 1992).

28. Tom Kizzia, *Kodiak Land Tiff Still Burns After Almost Two Decades, Congress May Step In Between Rancher, Native Corporation*, ANCHORAGE DAILY NEWS, Sept. 4, 1995, at A1.

29. *Leisnoi*, 835 P.2d at 1204 (providing a detailed time line of the legal history between the litigants prior to 1992).

30. *Id.*

for failure to exhaust administrative remedies.<sup>31</sup> However, the Ninth Circuit disagreed and the case was reinstated in 1981.<sup>32</sup> Meanwhile, Leisnoi and several other village corporations formed the regional corporation, Koniag.<sup>33</sup> Thus, Koniag began to negotiate with Stratman, but, in December 2, 1981, a former Leisnoi shareholder filed a derivative suit to set aside the alliance with Koniag, an action which actually succeeded.<sup>34</sup> In 1982, Koniag and Stratman reached a settlement that became known as the "Stratman Agreement," where Stratman set aside the "decertification" action in return for certain land interests.<sup>35</sup> By 1983, Leisnoi had separated itself from Koniag and subsequently refused to honor the "Stratman Agreement."<sup>36</sup> Leisnoi and Omar Stratman again found themselves on opposing sides of litigation, and the Alaska Supreme Court ruled in 1992 that the "Stratman Agreement" was unenforceable against Leisnoi.<sup>37</sup>

Stratman's case gained new life in December 1994, when the Ninth Circuit ruled that he could reinstate his "decertification" action because of the failure of the "Stratman Agreement."<sup>38</sup> The renewed litigation sparked a response in Congress that seemed to doom Stratman's "long, lonely struggle against his Native landlord."<sup>39</sup> The U.S. Senate sought to avoid Stratman's argument that Leisnoi was fraudulently constructed around a Native village that had ceased to exist long before ANCSA. Senator Frank Murkowski from Alaska proposed to simply eliminate the controversy with a legislative act legitimizing Leisnoi's position as a village corporation in order to stop the financial drain of the ongoing litigation.<sup>40</sup> However, as the measure was presented, Leisnoi made "one of the great public-relations blunders in the annals of the land claims act."<sup>41</sup> The corporation imposed substantial fees on the use of its land for all of Kodiak's residents.<sup>42</sup> The public outcry was immediate and immense. The Kodiak Island Borough Assembly passed a resolution against Leisnoi, and Stratman found himself with overwhelming support.<sup>43</sup> With an angry mob suddenly backing Stratman, Murkowski's measure ultimately fizzled into nothing.<sup>44</sup>

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31. *Id.*

32. *Stratman v. Watt*, 656 F.2d 1321 (9th Cir. 1981).

33. *Leisnoi*, 835 P.2d at 1204.

34. *Id.* at 1205.

35. *Id.*

36. *Id.* at 1206.

37. *Id.* at 1211.

38. *Stratman v. Babbitt*, 42 F.3d 1402 (9th Cir. 1994).

39. Kizzia, *supra* note 28, at A1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. David Whitney, *Long Fight Over Kodiak Land May End Without Clear Winner*, ANCHOR-

In other areas, difficulties familiar to many ANCSA corporations have become a dominant part of Leisnoi's history. The village corporation represents Woody Island, a Native village just outside of Kodiak. However, by 1970 the village had nearly vanished, and, according to Stratman, its existence is ambiguous even prior to ANCSA.<sup>45</sup> Furthermore, in 1995 half of Leisnoi's shareholders lived outside of Alaska, with only 21 percent living on Kodiak Island.<sup>46</sup> In addition, the corporation has spent over one million dollars on litigation, which includes legal fees associated with internal fights.<sup>47</sup> A new board of directors in 1994 even requested that the Alaska State Troopers investigate the possibility of a misuse of funds.<sup>48</sup> Still, Omar Stratman has ranked the highest on Leisnoi's list of tribulations.

The preoccupation that Stratman and Leisnoi have had in regard to each other seems to have developed into a permanent endeavor for revenge. Once, when a clerical error included Stratman's homestead on Leisnoi's land, the corporation actually nailed an eviction notice to his door.<sup>49</sup> In addition to the unanswered questions concerning the "decertification" action, the feuding parties have continued their battle in further litigation.<sup>50</sup>

Over recent years Leisnoi has been on the attack. Last year, before the Alaskan Supreme Court, the corporation attempted to stop Stratman from mining sand and gravel on land leased from the village.<sup>51</sup> Leisnoi argued that a permanent injunction instituted in 1996, which prohibited Stratman from entering the leased land for his guided horseback and horse rental operations, should apply to the mining operations.<sup>52</sup> However, the Alaskan Supreme Court found that the injunction concerning the grazing leases was inapplicable to mining.<sup>53</sup> Recently, Leisnoi has renewed its

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AGE DAILY NEWS, Sept. 30, 1995, at B1.

45. Kizzia, *supra* note 28, at A1.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* Stratman v. Leisnoi, Inc., 969 P.2d 1139 (Alaska 1998). Leisnoi wanted to sell a piece of land known as Termination Point to the Exxon Valdez Oil Spill Trustees. Stratman recorded a lis pendens against Leisnoi's lands and disrupted the conveyance. Leisnoi brought a quiet title action against Stratman and the superior court granted summary judgment in favor of the corporation. However, the Alaskan Supreme Court vacated the decision and ordered a stay until the outcome of the pending "decertification" litigation in front of the Interior Board of Land Appeals. *See also* Leisnoi, Inc. v. United States, No. 97-36006, 1999 WL 147368 (9th Cir. Mar. 19, 1999). Leisnoi also brought a quiet title action against the United States, but the federal district court ruled that it lacked jurisdiction since no dispute existed with the federal government. The Ninth Circuit affirmed. *Id.*

51. Leisnoi, Inc. v. Stratman, 956 P.2d 452 (Alaska 1998).

52. *Id.* at 453.

53. *Id.* at 455.

efforts and has brought a forcible entry and detainer action, alleging that Stratman broke several provisions of the grazing leases.<sup>54</sup> Furthermore, the litigation surrounding Stratman's mining operations has continued in the present case, following this long history of fighting that has made Leisnoi and Stratman "avowed enemies."<sup>55</sup>

One month after the 1996 injunction against his horse operations became effective, Omar Stratman began the disputed extraction of sand and gravel from Leisnoi's land.<sup>56</sup> Koniag, the regional corporation of Kodiak Island, retained the subsurface rights to the land selected by Leisnoi.<sup>57</sup> Stratman received from Koniag, through a quitclaim deed, the sand and gravel rights for a portion of land located approximately twelve miles from Woody Island and began his mining activity there in July 1996. Concerned about damage to the surface estate and the possible destruction of buried artifacts, Leisnoi insisted that Stratman needed its permission to proceed and filed for injunctive relief in federal district court.<sup>58</sup> Leisnoi's legal arguments contested the regional corporation's authority to permit the extraction of sand and gravel.<sup>59</sup> Therefore, Stratman had symbolically "stepped into Koniag's shoes" for this dual ownership conflict.<sup>60</sup> Upon a Rule 12(b)(6) motion by Stratman, the federal district court dismissed the case.<sup>61</sup> Leisnoi then appealed the decision to the Ninth Circuit.<sup>62</sup>

#### IV. OTHER "DUAL OWNERSHIP" CASE LAW

With a mocking tone, the Ninth Circuit Court of Appeals in *Leisnoi v. Stratman* commented that the concept of dual ownership in ANCSA created a continuous issue for litigation.<sup>63</sup> Bifurcating the surface estate from the subsurface seems to be a simple enough notion, but hidden ambiguities generate ample controversy for both state and federal courts. The Ninth Circuit has had the opportunity to address dual ownership litigation prior to *Leisnoi v. Stratman*. As the following cases illustrate, whether sand and gravel are surface or subsurface estates has been a prevalent

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54. *Leisnoi, Inc. v. Stratman*, 906 P.2d 14 (Alaska 1998).

55. *Leisnoi*, 154 F.3d at 1065.

56. *Leisnoi*, 956 P.2d at 453.

57. *Leisnoi*, 154 F.3d at 1065.

58. *Id.*

59. *Id.* at 1066-70. Leisnoi also sued under the Archaeological Resources Protection Act and the National Environmental Policy Act. These claims were similarly dismissed by the federal district court, but were not appealed. *Id.* at n.5.

60. *Id.* at 1065.

61. *Leisnoi, Inc. v. Stratman*, No. A96-0361-CV (D. Alaska Jul. 3, 1997).

62. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062 (9th Cir. 1998).

63. *Id.* The court characterizes this case as "yet another chapter" in an "ongoing saga." *Id.*

issue.

As early as 1976, in *Aleut Corporation v. Arctic Slope*, the federal district court of Alaska reviewed whether sand and gravel are considered surface or subsurface resources under ANCSA.<sup>64</sup> *Aleut* arose out of a dispute between various regional corporations regarding sharing subsurface resources.<sup>65</sup> ANCSA requires each regional corporation to distribute seventy percent of the revenue received from its granted subsurface and timber resources among all of the regional corporations.<sup>66</sup> The pertinent question for regional corporations became whether sand and gravel are categorized as surface or subsurface resources under ANCSA.

In examining the issue, the district court realized that any classification would affect the relationship between regional and village corporations.<sup>67</sup> The extraction of sand and gravel requires open pit mining which destroys the surface estate. Without a specific provision in ANCSA, the court found that it was "implausible" that Congress intended sand and gravel to be part of the subsurface where village corporations were involved.<sup>68</sup> Based on "this policy consideration," the court refused to classify sand and gravel as part of the subsurface estate in dually owned lands.<sup>69</sup> However, the court recognized that approximately half of the Native surface land distributed under ANCSA was conveyed solely to the regional corporations, and considerations of dual ownership are irrelevant in such circumstances.<sup>70</sup> Thus, the court reasoned that sand and gravel should be classified as a subsurface resource where there is not a separate surface interest but as a surface resource when village corporations are involved.<sup>71</sup>

The Ninth Circuit first opportunity to interpret sand and gravel disputes between regional and village corporations came in *Chugach Natives v. Doyson*.<sup>72</sup> *Chugach Natives* was a consolidated appeal of several district court opinions addressing the classification of sand and gravel based on dual ownership, including *Aleut*. The district court in *Aleut* had interpreted ANCSA in a "somewhat anomalous" decision by finding two different meanings for the term "subsurface."<sup>73</sup> On appeal, the Ninth Circuit

64. *Aleut Corp. v. Arctic Slope Reg'l Corp.*, 421 F. Supp. 862 (Alaska 1976).

65. *Id.* at 864. The dispute began initially with five regional corporations suing another seven regional corporations in regard to the requirements of sharing revenue. *See Aleut Corp. v. Arctic Slope Reg'l Corp.*, 410 F. Supp. 1196 (Alaska 1976).

66. 43 U.S.C. § 1606(i) (1994).

67. *Aleut Corp.*, 421 F. Supp. at 864.

68. *Id.* at 866.

69. *Id.*

70. *Id.* at 867.

71. *Id.*

72. *Chugach Natives, Inc. v. Doyson, Ltd.*, 588 F.2d 723 (9th Cir. 1979).

73. *Id.* at 725 (quoting *Aleut*, 421 F. Supp. at 867). The district court admitted that its decision

struggled with the lower court's definition. In their opinion in *Chugach Natives*, the court thoroughly examined the relevant legislative history of ANCSA. Koniag, the regional corporation later associated with Leisnoi and Omar Stratman, firmly argued that sand and gravel should be recognized as a subsurface resource in every situation. Koniag based its position on the development of federal public land law in regard to minerals.<sup>74</sup> The Ninth Circuit ultimately remained unconvinced that classifying sand and gravel solely as part of the subsurface estate would harm village corporations.<sup>75</sup> In making this determination, the court rested its decision on the relevant value of sand and gravel.<sup>76</sup> ANCSA requires regional corporations to share the revenues obtained from subsurface mining with other regional corporations in order to lessen the effect of uneven resource distribution. Sand and gravel are only valuable when located near developing areas, and classifying such resources as part of the surface would only enrich corporations located near population centers.<sup>77</sup> The court in *Chugach Natives* admitted that there was "no readily ascertainable answer" to the problem of classifying sand and gravel, but failed to find any persuasive argument to provide a surface exception where village corporations were involved.<sup>78</sup>

In 1988, the Ninth Circuit again had the opportunity to reexamine surface rights associated with sand and gravel in *Tyonek v. Cook Inlet*.<sup>79</sup> In *Tyonek*, a village corporation brought a declaratory judgment action against a regional corporation in order to define the relationship of sand and gravel to the surface estate. Tyonek asserted that sand and gravel are naturally attached to the surface estate.<sup>80</sup> *Chugach Natives* seemed to be controlling precedent, but Tyonek argued that *Chugach Natives* only applied to lands completely owned by regional corporations and not to dually owned lands.<sup>81</sup> However, the Ninth Circuit refused to distinguish

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seemed to be unusual. *Id.*

74. *Id.* at 727-28. After determining that the "subsurface estate" included the "mineral estate," Koniag referred to the 1955 amendment to federal mining law at 30 U.S.C. §§ 601-15 (1976). Sand and gravel were specifically excluded from the definition of valuable minerals. However, according to Koniag, they still remained minerals in general. In support, the Sealaska Regional Corporation cited a Department of Interior decision which recognized both "common" and "uncommon" varieties of minerals under federal law. *Id.* at 728 & nn.14-15 (citing *United States v. United States Minerals Dev. Corp.*, 75 Interior Dec. 127 (1968) (*expressly approved by McClarty v. Secretary of Interior*, 408 F.2d 907 (9th Cir. 1968))).

75. *Id.* at 731-32.

76. *Id.*

77. *Id.*

78. *Id.* at 732.

79. *Tyonek Native Corp. v. Cook Inlet Reg'l, Inc.*, 853 F.2d 727 (9th Cir. 1988).

80. *Id.* at 728-29.

81. *Id.* at 729. <sup>1</sup>

*Chugach Natives*, and instead affirmed that the case governed all sand and gravel classification disputes.<sup>82</sup> In a further effort, Tyonek argued for a favorable application of an amendment to ANCSA, which Congress had adopted after *Chugach Natives*.<sup>83</sup> Specifically, ANCSA as amended states that village corporations can retain revenue from certain surface resources "extracted" from village lands.<sup>84</sup> Tyonek argued that "extracted" referred to sand and gravel. In disagreement, the court examined the relevant legislative history and found that the amendment to ANCSA did not affect the holding in *Chugach Natives*.<sup>85</sup>

However, sand and gravel disputes between regional and village corporations continued to generate litigation before the Ninth Circuit. Following *Chugach Natives* and *Tyonek*, the court decided two additional sand and gravel cases: *Shee Atika v. Sealaska*<sup>86</sup> and *Koniag v. Koncor*.<sup>87</sup> In *Shee Atika*, the regional corporation, Sealaska, sought to enjoin unauthorized use of sand and gravel from its subsurface estate. As an urban corporation,<sup>88</sup> Shee Atika owned several acres of surface estate and brought an action for declaratory judgment allowing it to use sand and gravel from the subsurface free of charge. The Ninth Circuit simply referred to its "contemporaneous decision" in *Koniag* and ruled that the subsurface estate is burdened by the ability of surface owners to reasonably use the sand and gravel for development.<sup>89</sup>

In *Koniag*, the Ninth Circuit examined the issue posed in *Shee Atika* in greater detail. In *Koniag*, the regional corporation appeared once again entangled in a sand and gravel dispute. Koniag brought the action to obtain an injunction to stop a partnership of village corporations from using subsurface rock. The court promptly related its conclusions from *Tyonek*, but claimed that the issue of subsurface use by a village corporation had been "left open."<sup>90</sup>

According to the Ninth Circuit, Congress created the corporate structure of ANCSA to facilitate the land and money grants to the Natives of Alaska.<sup>91</sup> Nearly 22 million acres were patented to village corporations.<sup>92</sup> Koncor existed to harvest timber on the lands of the participating

82. *Id.*

83. *Id.* at 729-30.

84. 43 U.S.C. § 1613(c) (1994).

85. *Tyonek*, 853 F.2d at 729-30.

86. *Shee Atika v. Sealaska Corp.*, 39 F.3d 247 (9th Cir. 1994).

87. *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994).

88. ANCSA established urban corporations, akin to village corporations, that own surface lands as opposed to the subsurface. 43 U.S.C. § 1613(h) (1994).

89. *Shee Atika*, 39 F.3d at 248-49.

90. *Koniag*, 39 F.3d at 995.

91. *Id.*

92. *Id.*

village corporations and had used rock from the subsurface estate for road building in order to conduct its logging operations.<sup>93</sup> Koncor claimed that in order to access its timber resources, rock and gravel were needed to build roads, and the local subsurface, owned by Koniag, was the only practical source.<sup>94</sup> Therefore, Koncor argued that when the regional corporation received the subsurface estate, Congress implied that village corporations would have the right to use materials necessary to build roads.<sup>95</sup> By looking at various factors, including congressional intent and the necessity of road construction, the Ninth Circuit agreed that the subsurface estates were burdened by an implied servitude.<sup>96</sup>

However, the Ninth Circuit qualified its decision that Koniag could not unreasonably deny Koncor the necessary rock. According to the court, such reasonable access to subsurface resources must be accompanied by reasonable payment.<sup>97</sup> The court reasoned that since regional corporations are required to redistribute part of the income received from subsurface resources, to allow village corporations free access would undermine the policy of ANCSA.<sup>98</sup>

After *Koniag*, certain resources under ANCSA, like rock, sand, and gravel, had achieved a unique status. Regional corporations clearly owned the resources as part of the subsurface estate. Village corporations, however, could use the resources when it was necessary, as long as the regional corporations received adequate compensation.

#### V. ANALYSIS OF *LEISNOI V. STRATMAN*

*Leisnoi v. Stratman* represents another step in the evolution of sand and gravel on dually owned lands in Alaska. The case illustrates that ANCSA contains vague provisions that allow interpretation based on the situation and, unfortunately, also allow endless litigation. Specifically, ANCSA restricts regional corporations by empowering village corporations with the right to refuse mineral exploration and mining within "the boundaries" of a village.<sup>99</sup>

Leisnoi objected to Stratman's extraction of gravel, which was specifically authorized by Koniag, by alleging that the mining activity was with-

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93. *Id.*

94. *Id.* at 996.

95. *Id.*

96. *Id.* at 996-98.

97. *Id.* at 998-99.

98. *Id.*

99. 43 U.S.C. § 1613(f) (1994). ANCSA states that the right "to explore, develop, or remove minerals from the subsurface estate in the land within the boundaries of any Native village shall be subject to the consent of the Village Corporation." *Id.*

in the boundaries of the Native village, Woody Island. Leisnoi asserted that the land within the boundaries of a village includes all land that the relevant village corporation received under ANCSA, or as an alternative, all land that the village historically used. Such interpretations would effectively include the land containing Stratman's mining efforts. Stratman, in response, contended that the boundaries of a village should be delineated by actual physical structures.<sup>100</sup> Stratman's reasoning would favor the gravel operation since the village of Woody Island seems to have ceased to exist in any permanent form.<sup>101</sup>

#### A. Village Boundaries as Enclosing Corporate Land

The Ninth Circuit first examined Leisnoi's contention that the boundaries of a Native village match the boundaries of all of the land granted to the relevant village corporation under ANCSA. The court began by probing the substance of ANCSA around the critical phrase allowing a village corporation to deny mining operations on "lands within the boundaries of any Native village."<sup>102</sup> After examining the statute, the court noted that Congress used divergent phrases when explaining corporate lands and lands within the boundaries of a Native village. From such evidence, the court hypothesized that Congress did not intend for corporate lands to be included within the boundaries of a Native village.<sup>103</sup> Other sections of ANCSA support the possibility by drawing further distinctions, and the court finally concluded that "the text of ANCSA draws a clear distinction between the lands patented to the Village Corporation and the boundaries of the Native village."<sup>104</sup>

#### B. Village Boundaries as Denoted by Historical Use

The Ninth Circuit continued its analysis by examining Leisnoi's alternative assertion that the boundaries of a Native village should enclose areas historically used by the relevant village.<sup>105</sup> The court addressed this contention by turning to an interpretive regulation promulgated by the Secretary of the Interior.<sup>106</sup> In order for a village corporation to receive

100. *Leisnoi*, 154 F.3d at 1066.

101. *See Woody Island Alaska-I Love Alaska*, *supra* note 26; *see also Kizzia*, *supra* note 28, at A1 (explaining the uncertain existence of Woody Island even before ANCSA).

102. *Leisnoi*, 154 F.3d at 1066 (referring to the statute codified at 43 U.S.C. § 1613(f) (1994)).

103. *Id.* at 1067.

104. *Id.* at 1068. The court expressly examined the section of ANCSA which allows village corporations to select the land of their choice. The section administers land where the relevant village is located *plus* additional acreage. *Id.* (referring to the statute codified at 43 U.S.C. § 1611 (1994)).

105. *Id.*

106. *Id.* (referring to the regulation codified at 43 C.F.R. § 2651.2(b)(2) (1998)). The Secretary of the Interior examines signs of "occupancy consistent with the Natives' own cultural patterns and

land under ANCSA, it must meet certain criteria. The regulation states that one of the requirements is that the relevant village must have "an identifiable physical location."<sup>107</sup> The court concluded that, because the Secretary identifies the location of Native villages by signs of occupancy, the boundaries of such a village must be in reference to physical evidence of habitation.<sup>108</sup> The court also acknowledged deference to the Secretary of the Interior because of his responsibility to administer ANCSA and refused to ignore his interpretation unless unreasonable or inconsistent with the intent of Congress.<sup>109</sup>

Leisnoi specifically asserted that the Secretary's interpretation of a Native village as evidenced by occupancy was inconsistent with congressional intent.<sup>110</sup> ANCSA uses the word "community" to refer to a Native village. Leisnoi contended, therefore, historic hunting and fishing grounds should be included.<sup>111</sup> However, the court used a different definition of community meaning a "people with common interests living in a particular area."<sup>112</sup> Having disposed with the congressional intent issue, the court moved on in evaluating the reasonableness of the Secretary's interpretation.

Leisnoi challenged the reasonableness of the interpretation on several grounds. To begin with, Leisnoi does not even control the portion of the land where the actual village structures of Woody Island are located, since they lie within the vicinity of the City of Kodiak.<sup>113</sup> Leisnoi argued that, therefore, it would not have the power to withhold consent anywhere. The court quickly dismissed this claim, however, by stating that "perfection is not to be expected from a statutory scheme like ANCSA."<sup>114</sup> Leisnoi next examined the legislative history to challenge the reasonableness of the Secretary's interpretation of a Native village. The relevant House Report states that mining within the boundaries of a Native village is dependent on the consent of the village corporation in order to preserve the use of the land "in accordance with traditional local life-styles and subsistence economy."<sup>115</sup> The court readily dismissed this argument too by claiming

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life style." *Id.*

107. *Id.* Stratman contended that Woody Island ceased to physically exist long before the creation of ANCSA. Kizzia, *supra* note 28, at A1.

108. *Leisnoi*, 154 F.3d at 1068.

109. *Id.* (applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 843 (1984)).

110. *Id.*

111. *Id.* at 1069 (referring to the statute codified at 43 U.S.C. § 1602(c) (1994)).

112. *Id.* (quoting Webster's Ninth New Collegiate Dictionary 267 (1986)).

113. *Id.* at 1070. A village corporation cannot control land within two miles of the boundary of any "home rule" city. 43 C.F.R. § 2650.6(a) (1998).

114. *Leisnoi*, 154 F.3d at 1070.

115. H.R. No. 94-729, at 26 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2376, 2393.

that the report was ambiguous, and, in any event, legislative history "as a tool for statutory interpretation suffers from a host of infirmities."<sup>116</sup> In its last effort, Leisnoi contended that the Secretary's position violates a policy of economic improvement.<sup>117</sup> Leisnoi drew a picture of the foundations of homes collapsing due to subsurface exploration, curtailing housing growth beyond the current occupancy of the village. The court refused to delve into property law, though, and simply noted the possibility for contracts between surface and subsurface owners.

In the end, the Ninth Circuit disregarded all of Leisnoi's arguments and firmly defined village boundaries by occupancy.<sup>118</sup> Based on this conclusion, the court examined whether the village of Woody Island was located on Kodiak Island where Stratman extracted sand and gravel. It found that the village was not located there pursuant to the information included in Leisnoi's original application for land to the Secretary of the Interior. Further, nobody suggested that the village had somehow expanded. Therefore, since Stratman received permission from Koniag, he did not need further authority from Leisnoi to proceed with his mining because the activity was located outside of the boundaries of Woody Island as defined by the occupancy of its residents.<sup>119</sup>

## VI. CONCLUSION

Leisnoi made a strong attempt to expand the boundaries of Woody Island and thwart its nemesis, Omar Stratman. The Ninth Circuit quickly dismissed all of Leisnoi's arguments in finding for Stratman, and the dismissals were not always accompanied with satisfactory explanations. Specifically, the court haphazardly ignored the legislative history even though it seemed to support Leisnoi's stance. However, the utilization of common sense rejects Leisnoi's arguments even faster. Realistically, the boundaries of a village cannot encompass thousands of acres belonging to a corporation. The real dilemma lies in the provisions of ANCSA that do not adequately take into consideration the essence of Native life.

Most criticisms of ANCSA center on the fact that Congress produced a complex corporate structure without taking into account Alaskan lifestyle. In fact, information available to Congress depicted Alaskan Natives as people in poverty surviving mainly on subsistence activities,<sup>120</sup> which accounts for Leisnoi's argument that the boundaries of a Native village

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116. *Leisnoi*, 154 F.3d at 1070.

117. *Id.* at 1071.

118. *Id.* at 1071.

119. *Id.* at 1072.

120. Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 450 (1997).

should include historic hunting grounds. Also, Congress realized that most Natives were completely unexposed to corporate and business concepts.<sup>121</sup> ANCSA required such uninitiated people to organize multiple corporations, meet important deadlines, and deal with land issues.<sup>122</sup> Obviously, Alaskan Natives have had difficulty adjusting.

Besides the awkward imposition of a foreign corporate system on the people of Alaska, the dual land ownership regime has contributed to the troubles of ANCSA. In particular, disputes over sand and gravel use alone have generated much litigation over the last twenty years. *Leisnoi v. Stratman* confirmed the authority of regional corporations, like Koniag, to effectively control sand and gravel mining in Alaska. Further disputes in this area may be possible, though, considering the intricacies of ANCSA. However, it is the perpetual saga between Leisnoi and Omar Stratman that epitomizes all of the struggles inherent within ANCSA. Yet, despite these multitudes of problems, Congress may have developed a scheme as workable as any other possibility to achieve its goals. Economic and industrial development of Alaska called for clear land titles. With ANCSA, Congress simply wanted to impose the modern world on Alaska in an instantaneous fashion. Such an immediate clash between contemporary law and society with a remote and primeval land like Alaska inevitably leads to disruption.

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121. *Id.*

122. *Id.* at 470 n.44.

