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# The Alaska Native Claims Settlement Act at 50



*Cosponsored by the Indian Law Section*

Wednesday, June 22, 2022  
Noon–1 p.m.

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# THE ALASKA NATIVE CLAIMS SETTLEMENT ACT AT 50

## SECTION PLANNERS

**Cari Baermann**, *Hobbs Straus Dean & Walker LLP, Portland*  
**Kate Gargan**, *Dorsay & Easton LLP, Portland*  
**Martha Klein Izenson**, *Native American Program Legal Aid Services of Oregon, Portland*  
**Caroline Lobdell**, *Western Resources Legal Center, Portland*  
**Suzanne Trujillo**, *Office of Legislative Counsel, Salem*  
**Dawn Winalski**, *Winalski Law LLC, Portland*

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OREGON STATE BAR  
16037 SW Upper Boones Ferry Road  
P.O. Box 231935  
Tigard, OR 97281-1935

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## SCHEDULE

### 12:00 The Alaska Native Claims Settlement Act (ANCSA) at 50

- ◆ Overview of ANCSA and Alaska Native Corporations
- ◆ *Chehalis* decision

Christopher Slottee, *Schwabe Williamson & Wyatt PC, Anchorage, Alaska*

### 1:00 Adjourn

## FACULTY

**Christopher Slottee**, *Schwabe Williamson & Wyatt PC, Anchorage, Alaska*. Mr. Slottee handles complex commercial, corporate, and litigation matters, specifically working with Alaska native corporations, Alaska native corporation settlement trusts, and tribal governments. He provides guidance related to the Small Business Administration's (SBA) small business programs, including SBA's Section 8(a) and HUBZone Business Development Programs. He has advised clients regarding 8(a) and small business joint ventures, regulatory compliance with the Federal Acquisition Regulations, and requests for equitable adjustment and claims and has provided strategic advice regarding utilization of the SBA's small business programs. In addition, he advises Alaska native corporations and tribal entities regarding federal funding opportunities and grant compliance, including CARES Act and American Rescue Plan Act compliance issues. Mr. Slottee also has extensive experience providing advice regarding creating, managing, and leveraging the unique characteristics of Alaska native corporation settlement trusts.

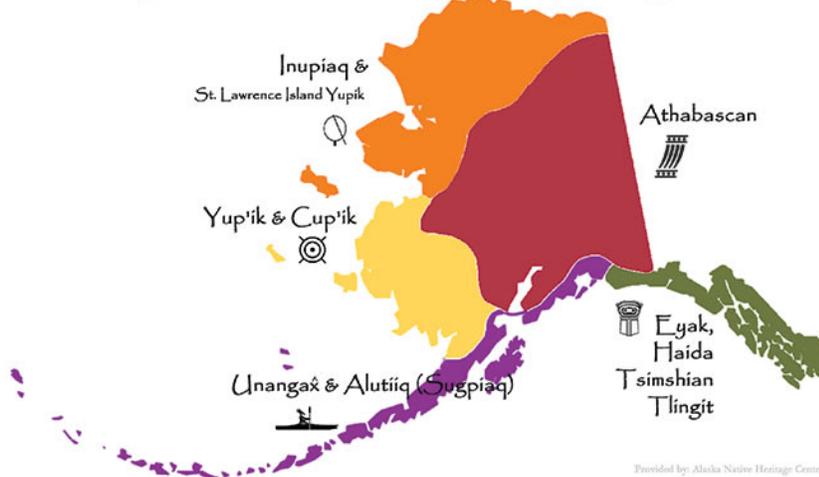


# ALASKA NATIVE CORPORATIONS AND THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Christopher Slottee  
06.22.22

## Alaska Natives

### Traditional territories of Alaska Native Cultures



# Alaska Native Villages



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## Purchase of Alaska

Treaty of 1867 (sale of Alaska to the United States) was a quit claim of whatever interest Russia had in Alaska to the United States and preserved the property rights held by individual property holders



“The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, **except merely private individual property holders**, and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.”

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## Aboriginal Title

The Treaty of 1867 subjected the “uncivilized tribes” of Alaska to federal Indian Law, defined as those Native people who have not abandoned their tribal relations. Federal Indian Law included an obligation to protect aboriginal title.



“The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. **The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regards to aboriginal tribes of that country.**”

## Aboriginal Title

1884 Organic Act arguably preserved the aboriginal title Alaska Natives had at the time of the 1867 Treaty of Cession with Russian

“[t]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved to future legislation by Congress.”

## Alaska admitted as a state in 1959



- Section 4 of the Statehood Act required the State to “forever disclaim all right and title...to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts.”
- Section 6 of the Statehood Act authorized the State to select a little over 103 million acres from the “vacant, unappropriated, and unreserved” public lands of the United States.
- Ninth Circuit ruled in 1959 that the Tlinglet and Haida Indians held most of Southeast Alaska by claims of aboriginal title.

## Aboriginal Title

During the 1960s and 1970s, there was a legal question as to whether Alaska Natives retained aboriginal title to Alaska

- If Alaska Natives retained aboriginal title under the 1867 Treaty, they continued to have a claim to aboriginal title and the State could not claim their land under the Statehood Act.
- Alaska Natives could plausibly claim aboriginal title to 365 million acres of land in Alaska.
- Litigation continued and the dispute was not resolved.

## Oil and the Impetus for ANCSA

- Oil is discovered in the North Slope of Alaska in 1960s.
- Construction of a pipeline was necessary to transport the oil.
- Construction could not be done without litigation and the potential trespass damages for crossing land to which Alaska Natives claimed aboriginal title equaled the profits to be derived from the oil.

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## Alaska Native Claims Settlement Act (ANCSA)

Passed December  
18, 1971

- Driven by need to resolve aboriginal claims to land that were impeding construction of Trans-Alaska Oil Pipeline.
- Settlement agreement between the Federal Government, the state of Alaska, and the Alaska Natives.



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## ANCSA Settlement Agreement Terms

- Federal government received:
  - Alaska Native claims to aboriginal title extinguished
- Alaska Natives received:
  - 45.7 million acres of land
  - \$962.5 million in cash
- State of Alaska received:
  - Ability to make its selection of 103 million acres

688 PUBLIC LAW 92-203—DEC. 18, 1971 [85 STAT.]

Public Law 92-203

December 18, 1971 (H. R. 10267) AN ACT  
To provide for the settlement of certain land claims of Alaska Natives, and for other purposes.

Alaska Native Claims Settlement Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Alaska Native Claims Settlement Act".*

DECLARATION OF POLICY

SEC. 2. Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

## ANCSA as a Social Experiment

ANCSA converted the communal, aboriginal claims of the Alaska Natives into individual private property, represented by shares of stock in Alaska Native Village and Regional Corporations.

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

## ANCSA as a Social Experiment

*"a movement toward business as usual, a movement toward providing a sameness for the Native population in terms of the legal recognition and treatment that it had that is being like everybody else..."*

The mechanisms that we chose, of how the land was allotted and the money provided was really rooted, themselves, in what I think we were trying to accomplish in a social engineering way....So there's a lot of things, devices, that were crafted in that act that I *think...could fairly be described as pointed toward social individual and attitudinal changes. Now, I'm thinking [that] the private corporation matter and the financial experiences matter have to do with attitudinal changes that we were hoping to accomplish, maybe even some cultural ones.*"

Alaska Natives and American Laws, Third Edition, p. 189, quoting Douglas Jones, a Member of Alaska's United States Senate Staff during consideration and passage of ANCSA

"ANCs are *sui generis* entities created by federal statute and granted an enormous amount of special federal benefits as part of a legislative experiment tailored to the unique circumstances of Alaska and recreated nowhere else."

*Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2443 (2021).

## ANCSA Structure

### Alaska Native Corporations

- For-profit corporations organized under Alaska state law
- Alaska Natives alive on December 18, 1971 were issued 100 shares for their village corporation and 100 shares for their regional corporation
- Native Corporations have boards of directors, bylaws, and articles of incorporation
- Annual meetings and dividends



## ANCSA Structure Alaska Native Tribes

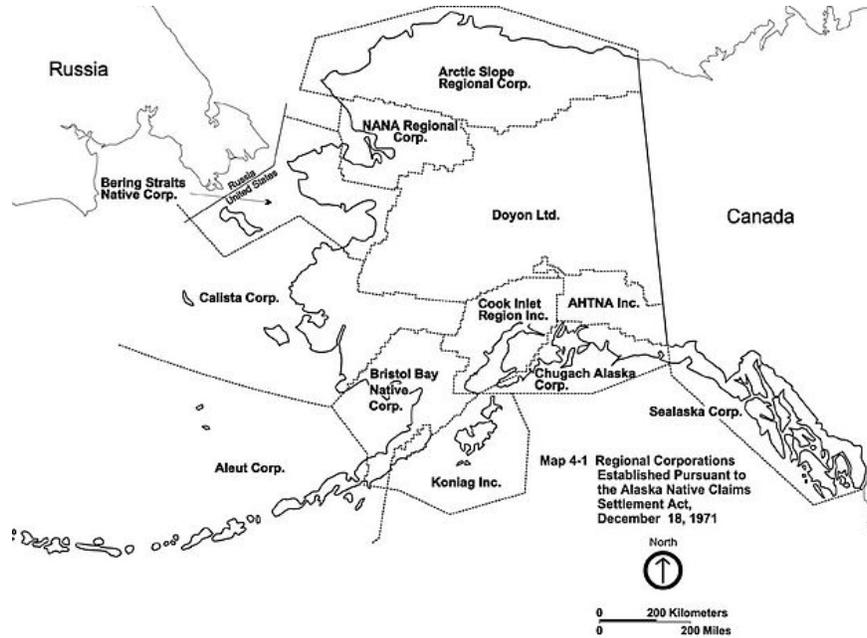
- Alaska Native Tribes:
  - Remained, but sidelined
  - Did not receive anything under ANCSA
  - No reservations (except for one pre-dating ANCSA)
- Native Corporations, as for-profit entities organized under Alaska and without tribal sovereignty or any governmental status, were now the primary organizing entity of Alaska Natives.

## Regional Corporations

- Twelve Regional Corporations
  - Arctic Slope Regional Corp.
  - NANA Regional Corp.
  - Bering Straits Native Corp.
  - Calista Corp.
  - Doyon, LTD
  - Bristol Bay Native Corp.
  - Koniag, Inc.
  - Aleut Corp.
  - Cook Inlet Region, Inc.
  - Ahtna, Inc.
  - Chugach Alaska Corp.
  - Sealaska Corp.



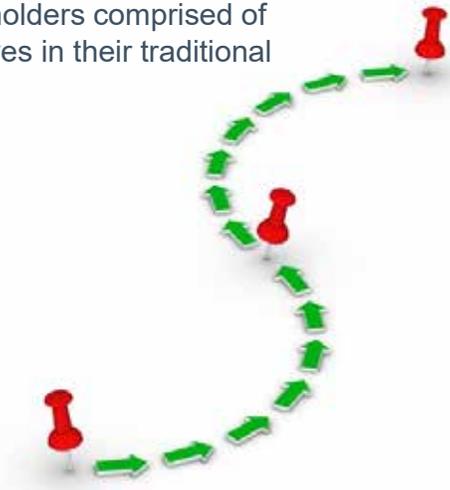
## Regional Corporations



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## Regional Corporations

- Larger corporations
- More employees and assets
- Have larger Boards of Directors
- More shareholders comprised of Alaska Natives in their traditional region.

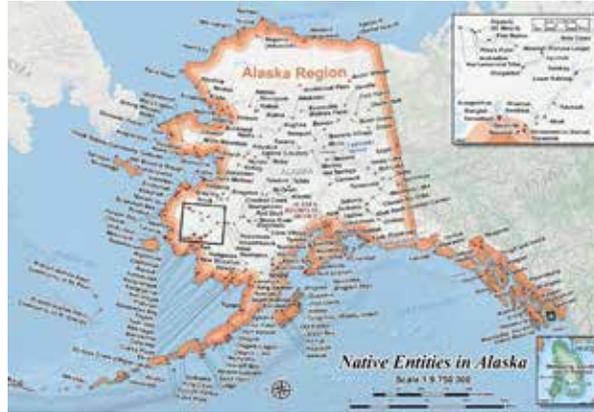


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## Village Corporations

- Over 200 Alaska Native Village Corporations
- Based on traditional villages
- Varying size, some defunct



## Regional and Village Corporations

- No formal relationship
  - Separate entities
  - Not subsidiaries
- Politically and culturally aligned in most cases



## Land Ownership

- 45.7 million acres of land transferred to Alaska Native Corporations.
- Village and Regional Corporations entitled to select land throughout the state.
- Village Corporations received **surface** estate.
- Regional Corporations received **subsurface** estate.
- Some obligation by ANCs to transfer land to local cities and municipalities and prior users



## Financial Settlement

- \$962.5 million into the Alaska Native Fund:
  - 50% went to Regional Corporations
  - 50% went to Village Corporations
- Intended to serve as start-up capital for the Alaska Native Corporations
- Varying success on the use of the funds



## Alaska Native Corporations: Share Restrictions

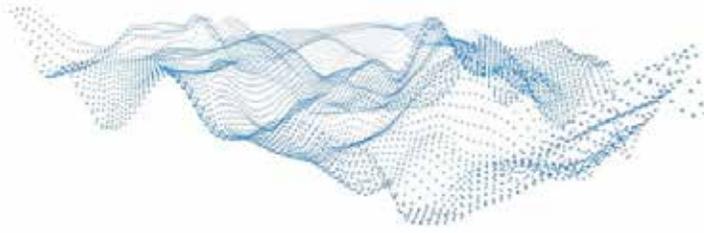
- Restricted shares:
  - Only Alaska Natives living on December 18, 1971 received shares.
  - No new shares unless authorized by a majority of the shareholders.
  - Shares cannot be sold.
  - Shares can only be gifted to children, grandchild, nieces, and nephews.
  - Shares can be willed to or inherited by anyone, including non-Natives.
  - Shares held by non-Natives or people who are not descendants of Natives are non-voting shares.
  - Shares cannot be seized by creditors.

## Alaska Native Corporations: Corporate Governance

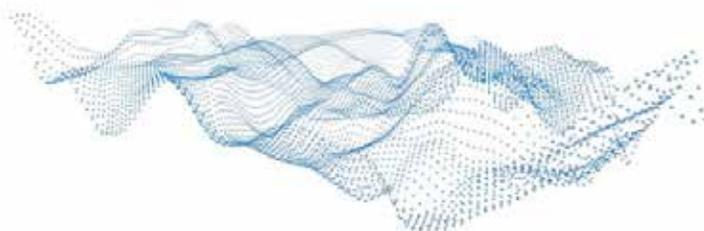
- Board of Directors
  - Only shareholders can serve as members of the board of directors.
  - Directors generally serve staggered terms, elected at annual meeting.
  - Most directors elected pursuant to proxy solicitations and electronic voting prior to the annual meeting
- ANCs are exempt from federal securities laws
  - BUT Alaska has statutes and regulations barring false and misleading proxy solicitations in ANC elections.
  - Native Corporations over a certain size must file annual reports and proxy solicitations with the State and those are public records.

## Alaska Native Corporations: Unique Characteristics

- ANCSA land held by Native Corporations is protected from adverse possession, property taxes, and seizure by credits until and unless it is developed.
- Native Corporations are exempt from some aspects of Title VII of the Civil Rights Act of 1964 – shareholder hiring preferences are permitted.



## Alaska Native Corporations: Unique Characteristics

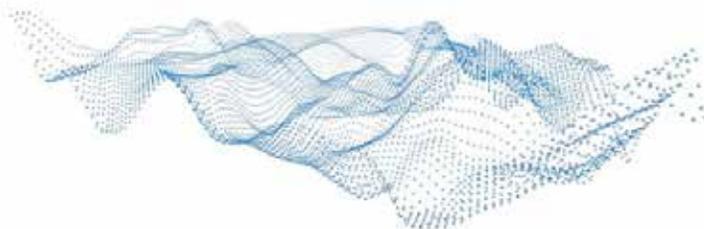


## Alaska Native Corporations: Unique Characteristics

- ANCs are authorized to provide a broad array of benefits to their shareholders, and the family members of shareholders, to “to promote the[ir] health, education, or welfare...” on an other than share basis.
- Social/Cultural Mission in addition to profit sharing.
- Elders benefits, scholarships, etc.
- Dividends to shareholders are a primary focus:
  - Shareholders rely on dividends as a regular source of income.
  - Significant percentage of Alaska Natives are at or below the poverty line.

## Alaska Native Corporations: Unique Characteristics

- **43 U.S.C. 1626(c)**
  - Value of ANC shares (or interest in Settlement Trusts) are not considered when determining shareholder’s eligibility for federal benefits
  - The first \$2,000 received from Native Corporation does not count when determining eligibility for federal benefits



## Alaska Native Corporations: Unique Characteristics

- **43 U.S.C. 1626(d)**
  - “Notwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans.”
- **26 U.S.C. 139E**
  - a taxpayer’s gross income does not include the value of any “Indian general welfare grant” that is provided by an “Indian tribal government,” if the general welfare grant:
    - is administered under specified guidelines and does not discriminate in favor of members of the governing body of the tribe, and
    - the benefits provided under such program—
      - are available to any tribal member who meets such guidelines,
      - are for the promotion of general welfare,
      - are not lavish or extravagant, and
      - are not compensation for services.
  - “Indian tribal government” includes “any Alaska Native regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).”

## Alaska Native Corporations: Unique Characteristics

- Native Corporation shareholders can leave their shares to anyone (or any entity) with a will
  - Non- Alaska Natives or non-descendants of an Alaska Native cannot vote inherited shares
- If there is no will, ANC shares do not go through probate in that an order from the probate court is not necessary to pass the shares by intestate succession.
- ANC “probate” the shares and determine by affidavit or statement who the proper heir is, based on Alaska’s law on intestate succession, and convey shares to the heir
- Alaska law on intestate succession provides that if a shareholder leaves behind a spouse and children, the spouse receives 50% of the shares and the remainder goes to the children
- Some ANCs have approved descendant enrollment and issued shares to Alaska Natives and Descendants born after December 18, 1971 (“afterborns”) but have generally given only a life estate interest in those those shares

## Alaska Native Corporations: Similarity to Other Corporations

- No sovereign immunity
- C Corporations and taxed as such
- Governed by Alaska's Corporations Code



## OUTSIZED ALASKA NATIVE CORPORATIONS

- In 2017, Alaska Regional Corporations generated:
  - More than \$8.5 billion in revenue
  - More than \$211 million in net income
- Does not include 200+ Alaska Village Corporations

## Alaska Native Corporations:

Operations and Size

- 26 of the 2019 “Top 49ers”, a list of the Top 49 businesses in Alaska measured by gross revenue, were Alaska Native Corporations, and Native Corporations comprised the top 13 entities:
  - ASRC: \$3.396 billion in revenue (2018)
  - BBNC: \$1.6 billion in revenue (2019)
  - Koniag: \$323 million in revenue (2019)
  - Aleut: \$258 million in revenue (2019)
  - Sitnasauk: \$133 million in revenue (2018)

## Alaska Native Corporations:

How Did They Get There?

- Royalty sharing – 7(i)
- Government contracting



## Section 7(I) OF ANCSA

ANCSA requires Regional Corporations to share revenue from natural resources extraction (oil, timber, gravel, etc.) with other Native Corporations

- 70% of the net profit from natural resources on ANCSA land must be shared with the other Regional Corporations – Section 7(i) of ANCSA.
- Regional Corporations must then give 50% of their share of 7(i) money to the Village Corporations in their region – Section 7(j) of ANCSA. The Village Corporation's share is based on number of shareholders.
- **NANA's 7(i) payment to the other Regional Corporations was \$217 million in 2018 – Red Dog Mine.**
- Regular source of funds to Village Corporations: varies per year, but can be between \$100,000 and several million dollars based on number of shareholders in the Village Corporation.

## Small Business Administration Programs

- The 8(a) Program permits government agencies to award sole source awards to small businesses in the 8(a) program.
- Must show that you are economically and socially disadvantaged.
- Must be managed by the economically and socially disadvantaged individual.
- Normally, a person can only have one 8(a) company in their lifetime, and it can only be in the 8(a) program for 8 years.
- Sole source awards are normally limited to \$4 million for services and \$7 million for manufacturing.

## Native Corporation 8(a) Special Rules

- ANCSA provides that ANCs are deemed socially and economically disadvantaged for Small Business Administration Programs
  - Tribes are deemed socially disadvantaged but must show economic disadvantage.
- Permits ANCs easy access to the SBA's 8(a) Government Contracting Program.
- ANCs can have multiple 8(a) companies
- ANCs can receive sole source awards up to \$100 million easily, and there is no limit on the size of the sole source award if justification is provided by the contracting officer (i.e. \$100 million+ sole source awards are possible)
- ANCs can have non-socially and non-economically disadvantaged individuals run and operate the 8(a) programs
- ANC subsidiaries not deemed affiliated with sister subsidiaries because of common ownership, management, or shared services.

## Alaska Native Corporation Settlement Trusts

- Authorized in 1988 and tax bill in 2017 significantly changed utility.
- Trusts are established by ANC under state law.
- Shareholders of ANC are the beneficiaries of the Trust.
- ANCs can deduct contributions of cash or non-cash assets to the Trust.
- Trust pays 10% tax on the contribution and distributions by the Trust are non-taxable to the beneficiaries.
- Board of directors of ANC appoints the Trustees of the Trust.
- Shareholders can decline benefits
- \$2000 exclusion from eligibility in practice but some question of it
- Ownership of trust interests follows share ownership of ANC

## ***Chehalis v. Mnuchin – CARES Act***

- CARES Act passed 2020 set aside \$8 billion for “Tribal Governments” to respond to COVID-19
- “Tribal Government” was defined in the CARES Act as “the recognized governing body of an Indian Tribe as defined in the ISDA [Indian Self-Determination Act].”
- ISDA defines an “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”
- Treasury allocated ~\$450 million of CARES Act funds to Alaska Native Corporations

## ***Chehalis v. Mnuchin – Litigation***

- A few Lower 48 Tribes challenged Treasury’s determination in the *Chehalis* litigation
- District Court ruled in favor of ANCs based on 40 year history of interpreting ISDA’s definition of Indian Tribes as including ANCs
- D.C. Circuit Court of Appeals interpreted ISDA definition of Indian Tribes as only including ANCs if the ANC was a federally recognized tribe – none are or have been

## Chehalis v. Mnuchin – Supreme Court



- United States Supreme Court reversed, finding that “[u]nder the plain meaning of ISDA, ANCs are Indian tribes, regardless of whether they are also federally recognized tribes.”
  - *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2443 (2021)
- The United States Supreme Court recognized that “[a]llowing ANCs to distribute federal Indian benefits more broadly is entirely consistent with the approach Congress charted in ANCSA,” and “[h]ad Congress wished to limit CARES Act funding to federally recognized tribes, it could simply have cross-referenced the List Act instead, as it had in numerous statutes before. Instead, Congress invoked a definition that expressly includes ANCs (and has been understood for decades to include them).”
  - *Chehalis*, 141 S. at 2443, 2451-52.

## Chehalis v. Mnuchin – Impact

- ANCs received ~\$450,000,000 in August of 2021
- CARES Act required expenditure of all funds by December 31, 2021 or unused funds are returned to Treasury
- Treasury’s initial direction was that all funds had been expended (i.e. money paid/check sent) by December 31, 2021
- Treasury issued revised guidance on December 17, 2021 that ANCs could just sign contracts to spend CARES Act funds by December 31, 2021
- Primary use of CARES Act funds was provision of financial assistance to shareholders who submitted application showing/representing negative impact from COVID-19 (\$300 to \$2000 per shareholder)
- Treasury confirmed in early 2022 that CARES Act assistance payments to shareholders were not taxable

# Christopher Slottee

Shareholder



[Christopher Slottee](#)

907-339-7130

[cslottee@schwabe.com](mailto:cslottee@schwabe.com)

Christopher Slottee has over 15 years of experience handling complex commercial, corporate, and litigation matters, specifically working with Alaska native corporations, Alaska native corporation settlement trusts, and tribal governments. Christopher's previous experience as vice president and general counsel for an Alaska native corporation gives him an invaluable understanding of the inner workings of Alaska native corporations and the unique challenges they face. He is well versed in issues of corporate governance, legal and risk management, government contracting, bid protests, corporate transactions, and mergers and acquisitions.

Christopher provides guidance related to the Small Business Administration's (SBA) small business programs, including SBA's Section 8(a) and HUBZone Business Development Programs. Christopher has advised clients regarding 8(a) and small business joint ventures, regulatory compliance with the Federal Acquisition Regulations, requests for equitable adjustment and claims, and provided strategic advice regarding utilization of the SBA's small business programs. He also advises Alaska native corporations and tribal entities regarding federal funding opportunities and grant compliance, including CARES Act and American Rescue Plan Act compliance issues.

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