

# BUSINESS ORGANIZATIONS AND TRIBAL SELF-DETERMINATION: A CRITICAL REEXAMINATION OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

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## ABSTRACT

*In 1971, Congress enacted the Alaska Native Claims Settlement Act. This Act required that Native American groups in Alaska form corporations to receive property and money to settle their claims to the land and resources of the state. The Act represents an unprecedented experiment in Native American law. Because the Act required that Alaska Natives organize corporations, it has been the subject of great debate among Native Americans, scholars, and politicians. This Article explores the benefits and harms of the Settlement Act and provides substantive suggestions if the Act is ever amended or if similar legislation is ever proposed.*

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## I. INTRODUCTION

In 1971, Congress enacted the Alaska Native Claims Settlement Act (“Settlement Act,” “Act,” or “ANCSA”) to provide certainty as to the ownership of land and natural resources in Alaska.<sup>1</sup> As reported in the Act, Congress expressly found that “there [was] an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal [status].”<sup>2</sup> This “immediate need” for settlement was fueled by Alaska becoming a state in 1959<sup>3</sup> and the discovery of large oilfields in the state during the 1960s.<sup>4</sup> The Settlement Act resulted from

1. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–29h (2000).

2. 43 U.S.C. § 1601 (presenting congressional findings regarding the need for the Settlement Act).

3. See Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers’ Subsistence*, 7 FORDHAM ENVTL. L.J. 211, 229–31 (1996) (explaining that Alaska statehood created pressure to settle aboriginal land claims and to provide certainty as to who owned the land within the state); Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 261–62 (1995) (reporting that statehood created a “crisis” over ownership of the land comprising Alaska).

4. See Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA)—Whose Settlement Was It? An Overview of Salient Issues*, 25 J. LAND RESOURCES & ENVTL. L. 131, 133 (2005) (stating that the discovery of oil at Prudhoe Bay in Alaska created the need for settlement because concerns about litigation were delaying the construction of a pipeline); Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 36 (“[I]n the later 1960s, when significant amounts of oil were discovered on the Alaskan North Slope, the

lengthy negotiations among Congress, Alaska Native leaders, state officials, and oil lobbyists.<sup>5</sup>

The size and means for achieving this settlement are unprecedented in the United States. Congress required that Alaska Native communities create corporations to obtain the benefits of the Settlement Act.<sup>6</sup> In exchange for relinquishing any claim to over 360 million acres of land,<sup>7</sup> the indigenous people of Alaska received clear title to approximately 45.5 million acres of land<sup>8</sup> and payments totaling \$962.5 million.<sup>9</sup> All reservations, except for one, were revoked,<sup>10</sup> and regional Native corporations were created to manage the payments and the land.<sup>11</sup> Stock in these corporations was issued to each member of the indigenous population of Alaska.<sup>12</sup> Then, Alaska Native villages were required to

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interested parties realized that little development could proceed until the inchoate but as-yet-intact Alaska native occupancy rights were extinguished.”).

5. See Naiman, *supra* note 3, at 231 (explaining that Alaska Native groups, oil lobbyists, and the State of Alaska came together to petition the federal government to settle Alaska Native land claims); see also John R. Boyce & Mats A.N. Nilsson, *Interest Group Competition and the Alaska Native Claims Settlement Act*, 39 NAT. RESOURCES J. 755, 757 (1999) (suggesting that the Settlement Act resulted from the convergence of the concerns of three groups: “the Natives, the development interests (oil companies and the State of Alaska) and conservation interests (environmentalists and the [United States Department of the Interior])”).

6. 43 U.S.C. §§ 1606–07 (2000) (requiring the creation of Alaska Native regional corporations and village corporations to oversee the distribution of money and land received in the settlement of Alaska Native claims).

7. 43 U.S.C. § 1603 (2000) (providing for the settlement and extinguishment of all previously disputed aboriginal claims to the territory comprising Alaska); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 4.07[3][b][ii][B] (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN’S HANDBOOK] (stating that under the Settlement Act, Alaska Natives relinquished claims to over 360 million acres of land).

8. 43 U.S.C. §§ 1611, 1613, 1618 (2000) (detailing the selection and conveyance of land given for the settlement of aboriginal claims to the state of Alaska); see also COHEN’S HANDBOOK, *supra* note 7, § 4.07[3][b][ii][B] (explaining the land selection provisions under the Settlement Act that allowed Alaska Native communities to obtain 45.5 million acres of land).

9. 43 U.S.C. § 1605(a) (2000) (providing for the creation of a fund for the settlement of Alaska Native claims that would receive \$462.5 million in payments from the United States Treasury and \$500 million in payments by the State of Alaska and the federal government from revenues created by ceded Native mineral rights).

10. 43 U.S.C. § 1618(a) (2000) (providing for the revocation of all Alaska Native reservations with the exception of the Annette Island Reserve).

11. 43 U.S.C. § 1606 (establishing and describing the Native regional corporations that were created to oversee payments and land received in the settlement of Alaska Native claims).

12. 43 U.S.C. § 1606(g)(1)(A).

create corporations to share in the benefits of the Act.<sup>13</sup> Once villages incorporated, the Act authorized the federal government and regional corporations to transfer land, funds, and other resources to the village corporations.<sup>14</sup>

This Article examines the cultural and political implications of recasting Alaska Native communities in the corporate form and gives substantive suggestions to be considered in the event that the Settlement Act is ever amended or in case similar legislation is ever proposed. This Article has been authored with two main purposes. First, the Article provides a balanced discussion of the Settlement Act. With limited exception, the articles, comments, and notes on the Act focus on its negative aspects without providing adequate discussion of its benefits.<sup>15</sup> Although the Act does have significant shortcomings,<sup>16</sup> Alaska Native leaders played a major role in negotiating the Act<sup>17</sup> and were able to gain major concessions from the United States government.<sup>18</sup> This Article provides a balanced discussion of the Act by presenting both its benefits and harms, allowing readers to determine for themselves whether the Settlement Act was a victory or defeat for Alaska Natives.

Second, beyond just offering a balanced discussion of the Act, this Article goes further than previous scholarship and provides a list of substantive suggestions to be considered in case the Settlement Act is ever amended or if similar legislation is ever proposed.<sup>19</sup> These suggestions are

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13. 43 U.S.C. § 1607(a) (2000).

14. *Id.*

15. See, e.g., Marilyn J. Ward Ford & Robert Rude, *ANCSA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 *TOURO L. REV.* 479, 489 (1999) (“ANCSA did not provide wealth, land, or improvement in the lifestyles of Alaska Natives. Instead it divided Alaska Natives [and] placed their lands and culture in jeopardy . . . .”); Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 *UCLA L. REV.* 943, 946 (2002) (“Allotment, termination, and ANCSA have been among the most severely criticized federal Indian policies ever adopted.”).

16. See *infra* Part IV (discussing the harms and shortcomings of the Settlement Act).

17. See James E. Torgerson, *Indians Against Immigrants—Old Rivals, New Rules: A Brief Review and Comparison of Indian Law in the Contiguous United States, Alaska, and Canada*, 14 *AM. INDIAN L. REV.* 57, 72 (1989) (“Alaska[] [N]atives were deeply involved in the development and passage of ANCSA. Their role was very different from that of the frequently illiterate Indians with whom treaties were made 150 years ago.”); see also Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 *NAT. RESOURCES J.* 85, 92 (1998) (“Most framers of the Act, both non-Native and Native, saw the corporation model as the key instrument to help—and perhaps induce—Native groups to make the transition to a modern economic society.”).

18. See *infra* Part III (analyzing the benefits of the Settlement Act).

19. See *infra* Part V (discussing the drafting of any future legislation similar to the Settlement Act).

important because the federal government has recently shown a willingness to negotiate and settle the claims of Native Americans elsewhere in the United States.<sup>20</sup> In fact, settlements similar to the Act have been suggested as a means to deal with the land claims of Native Hawaiians and other tribes of Native Americans.<sup>21</sup> The analysis and

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20. See Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 971 (1996) (“Beginning with the Alaska Native Claims Settlement Act and continuing until the present, Congress has used the negotiated settlement . . . as the means of dealing with complex Indian problems.”); see Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. §§ 941–41n (2000) (settling the land claims of the Catawba Indian Tribe in the State of South Carolina); Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–16 (2000) (settling the land claims of the Narragansett Tribe in the State of Rhode Island); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721–35 (2000) (settling the land claims of the Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe in the State of Maine); Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741–49 (2000) (settling the land claims of the Miccosukee Indian Tribe in the State of Florida); Miccosukee Settlement Act of 1997, 25 U.S.C. §§ 1750–50e (2000) (settling the land claims of the Miccosukee Indian Tribe in the State of Florida); Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. §§ 1751–60 (2000) (settling the land claims of the Mashantucket Pequot Tribe in the State of Connecticut); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, 25 U.S.C. §§ 1771–71i (2000) (settling the land claims of the Gay Head Indians in the State of Massachusetts); Seminole Indian Land Claims Settlement Act of 1987, 25 U.S.C. §§ 1772–72g (2000) (settling the land claims of the Seminole Tribe in the State of Florida); Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. §§ 1773–73j (2000) (settling the land claims of the Puyallup Tribe in the State of Washington); Seneca Nation Settlement Act of 1990, 25 U.S.C. §§ 1774–74h (2000) (settling the land claims of the Seneca Nation in the State of New York); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 25 U.S.C. §§ 1775–75h (2000) (settling the land claims of the Mohegan Nation in the State of Connecticut); Crow Boundary Settlement Act of 1994, 25 U.S.C. §§ 1776–76k (2000) (settling the land claims of the Crow Tribe in regard to the boundary of the Crow Indian Reservation); Santo Domingo Pueblo Claims Settlement Act of 2000, 25 U.S.C. §§ 1777–77e (2000) (settling the land claims of the Pueblo of Santo Domingo in the State of New Mexico); Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, 25 U.S.C. §§ 1778–78h (2000) (settling the land claims of the Torres-Martinez Desert Cahuilla Indians in the State of California); Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act, 25 U.S.C. §§ 1779–79g (2000 & Supp. III 2002) (settling the land claims of the Cherokee, Choctaw, and Chickasaw Nations in the State of Oklahoma); Pueblo de San Ildefonso Claims Settlement Act of 2005, 25 U.S.C.A. §§ 1780–80p (West 2001 & Supp. 2007) (settling the land claims of the Pueblo de San Ildefonso).

21. See, e.g., Robert B. Porter, *Building a New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 938 (1998) (suggesting that the Haudenosaunee might be able to act collectively by organizing as a corporation similar to the corporations created by the Settlement Act); Mark A. Inciong, Note, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, 8 ARIZ. J. INT’L & COMP. L. 171, 189 (1991) (suggesting that the

suggestions contained within this Article will be useful in formulating any future resolution of land claims, especially one that is similar to the Settlement Act.

The Article is structured as follows. Part II provides information regarding the history of Alaska and offers further background on the Settlement Act. Part III and Part IV respectively discuss the benefits and the harms of the Act. Part V offers substantive suggestions to be considered in the event that the Settlement Act is ever amended or in case similar legislation is ever proposed, and Part VI provides brief concluding remarks.

## II. BACKGROUND

The Settlement Act offered a unique solution to the issues created by aboriginal land claims. To appreciate its significance, one must understand both the history of Alaska and the basic provisions of the Act. This section provides background information regarding the Act with the goal of offering a fully developed picture of the Act for purposes of the subsequent discussion in this Article.

### A. A History of Alaska and Its Native Peoples

The federal government has treated Alaska Natives differently than other Native Americans. This disparate treatment occurred because of Alaska's geographic isolation and its late acquisition by the United States.<sup>22</sup> This unique history resulted in a distinct method of settling aboriginal land claims.

Alaska was first settled between 11,000 and 30,000 years ago when nomadic bands traveled across a land bridge that existed between Russia and Western Alaska during that period.<sup>23</sup> Ultimately, these nomadic bands

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Settlement Act should be used as a model from which to create a legislative settlement to Hawaiian Native claims).

22. Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72, 85 (1997) ("The indigenous people living within the State of Alaska have had a different history than the Indian nations located within the lower 48 United States."); see also Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 401 (1998) (explaining that the relationship between Alaska Natives and the federal government is unique because of Alaska's remoteness and history).

23. See WALTER R. BORNEMAN, *ALASKA: SAGA OF A BOLD LAND* 18-19 (2003) (explaining that nomadic bands began spreading throughout Alaska between 15,000 and 30,000 years ago, and the first evidence of Alaska settlements dates from approximately 11,000 years ago).

developed into three distinct groups of Alaska Natives: Aleuts in the Alaskan Peninsula and Aleutian Islands, Eskimos in the North, and several tribes in the southeast and interior of the state.<sup>24</sup> The Eskimos in Northern Alaska are divided into two sub-groupings, the Yupik and Inupiat,<sup>25</sup> and the tribes in the southeastern and interior of the state include the Tlingit, Haida, and Athabascans.<sup>26</sup> The governmental structures and cultural practices of the Aleuts, Eskimos, and other Alaska Native tribes varied substantially prior to colonization.<sup>27</sup>

The Aleuts, Eskimos, and other Alaska Native tribes occupied the land that currently comprises Alaska without foreign interference until the mid-1700s. Then, in 1741, Vitus Bering led the first Russian expedition to the Alaska mainland.<sup>28</sup> News of the expedition fueled Russian interest in the northwest region of North America, and the first permanent Russian settlement was founded in Alaska in 1784.<sup>29</sup> Settlements, however, were small and scattered, and Russia never succeeded in fully colonizing Alaska.<sup>30</sup>

In the mid-1800s, the Russian government decided to sell the land that currently comprises Alaska.<sup>31</sup> Upon the advice of United States Secretary of

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24. See WILLIAM R. HUNT, *ALASKA: A BICENTENNIAL HISTORY* 11 (1976) (stating that the descendants of the nomadic bands that arrived in Alaska from Russia “include the three broad general groups of Native Alaskans: Aleuts, Eskimos, and Indians”).

25. See DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 906 (4th ed. 1998) (reporting on the various aboriginal groups residing in Alaska).

26. *Id.*

27. See HUNT, *supra* note 24, at 11–21 (discussing the varied cultural practices of the Aleuts, Eskimos, and other Alaska Native tribes).

28. See CLARENCE C. HULLEY, *ALASKA: PAST AND PRESENT* 40–55 (rev. 1958) (reporting on Bering’s voyages and the discovery of Alaska); HUNT, *supra* note 24, at 21–24 (describing the Bering expedition to explore the mainland of Alaska).

29. See HULLEY, *supra* note 28, at 70–81 (describing the establishment of the first permanent Russian colony in Alaska on Kodiak Island in 1784); HUNT, *supra* note 24, at 24–25 (describing the establishment by fur traders in 1784 of the first permanent Russian settlement).

30. See GETCHES ET AL., *supra* note 25, at 906 (“The average Russian population of Alaska was only about 550 persons and the only substantial permanent settlements were Kodiak and Sitka.”); ERNEST GRUENING, *THE STATE OF ALASKA* 17 (rev. ed. 1968) (arguing that the legacy of Russia’s occupation of the land comprising Alaska is “negligible”); see also JAMES R. GIBSON, *IMPERIAL RUSSIA IN FRONTIER AMERICA* 29 (1976) (suggesting Russia stopped trying to colonize Alaska because “Russia was overextended in America, and her destiny seemed to lie in Asia”).

31. See also ARCHIE W. SHIELS, *THE PURCHASE OF ALASKA* 1–5 (1967) (analyzing the reasons why Russia opted to sell Alaska and the reasons why the United States

State William Seward, the Senate authorized the purchase of 586,400 square miles of land by the United States from Russia for \$7.2 million.<sup>32</sup> In 1867, Russia and the United States memorialized this purchase in the Treaty of Cession.<sup>33</sup> The parties to the treaty, Russia and the United States, agreed to deal with Alaska's native inhabitants by stating that the "uncivilized tribes" were to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country."<sup>34</sup> Initially, the purchase of Alaska was unpopular with the United States public and was commonly referred to as "Seward's Folly" or "Seward's Icebox."<sup>35</sup> This public scorn quickly eroded, however, when large quantities of gold were discovered in Alaska during the 1890s.<sup>36</sup>

Although Alaska Natives were subject to a variety of laws, relations between the federal government and Alaska Natives were relatively good because of the large amount of land and natural resources in the region coupled with the low number of settlers.<sup>37</sup> Tensions between Alaska Natives and the federal government were also relatively low because Alaska was viewed as a poor candidate for statehood well into the twentieth century.<sup>38</sup> Under these conditions, the federal government made few efforts to "quiet" title and settle the issue of who owned the land comprising Alaska.<sup>39</sup>

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decided to purchase it). *See generally* GRUENING, *supra* note 30, at 23–29 (describing the United States' purchase of Alaska from Russia).

32. *See generally* SHIELDS, *supra* note 31 (providing an in-depth study of the sale of Alaska to the United States by Russia).

33. *See id.* at 128–32 (providing the text of the Treaty of Cession, which memorialized the sale of the territory that is today Alaska to the United States by Russia).

34. *See* DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 45–46 (2d ed. 2002) (examining the provision of the Treaty of Cession addressing the status of Alaska Natives).

35. *See* GRUENING, *supra* note 30, at 27 (discussing the public criticism of the purchase of Alaska by the United States).

36. *See* HUNT, *supra* note 24, at 59–67 (discussing the discovery of major gold deposits in Alaska and its impact upon the state).

37. *See* STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 299–300 (3d ed. 2002) (stating that Alaska Natives were "left largely undisturbed" for decades after the United States purchased Alaska from Russia); *see also* GETCHES ET AL., *supra* note 25, at 906 (noting the lack of pressure to settle Alaska after it was purchased from Russia because of its "harsh climate and remote location").

38. *See generally* BORNEMAN, *supra* note 23, at 395–403 (reporting on Alaska's path to statehood during the first half of the twentieth century).

39. Torgerson notes that:

Two important distinctions . . . differentiated the [N]atives of Alaska from the Indians in the contiguous forty-eight states. First, they had, with minor



Alaska, however, ultimately did achieve statehood and was admitted to the Union on January 3, 1959.<sup>40</sup> The push for statehood was fueled by Alaska's growing population,<sup>41</sup> the state's increasing strategic importance due to rising tensions with the Soviet Union,<sup>42</sup> and the discovery of oil at Swanson River on the Kenai Peninsula on July 23, 1957.<sup>43</sup> Statehood created new pressures to determine the validity and settle the claims of Alaska Natives to the land and resources of the region.<sup>44</sup> Upon the declaration of statehood, Congress gave Alaska the right to select 102.5 million acres of federal land for the state to control and develop.<sup>45</sup> Alaska Natives felt threatened by the state's land selections and began filing formal protests in 1961.<sup>46</sup> Ultimately, on January 12, 1967, the United States Secretary of the Interior, Stewart Udall, imposed a "land freeze" to prevent the transfer of title of any more federal land to the State of Alaska until the aboriginal claims had been resolved.<sup>47</sup>

During the land selection controversy, crude oil deposits had continued to be discovered throughout the 1960s, and the discovery of the Prudhoe Bay oilfields on the North Slope of Alaska in 1968 provided the

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exceptions, no agreements with the federal government that 'quieted' their aboriginal title to their traditional lands in Alaska. Second, with minor exceptions, Alaska [N]atives did not live on or have any reservations.

Torgerson, *supra* note 17, at 63.

40. See GRUENING, *supra* note 30, at 504 ("And so Alaska became the forty-ninth state. The final act was the signing of the statehood proclamation by President Eisenhower at the White House on January 3, 1959.").

41. See *id.* at 318 (informing of the desire for statehood that accompanied the population boom in Alaska during the 1950s).

42. See BORNEMAN, *supra* note 23, at 387-94 (discussing the strategic importance of Alaska in the Cold War standoff between the United States and the Soviet Union).

43. See *id.* at 407-09 (reporting on the discovery of oil on the Swanson River in the Kenai Peninsula of Alaska).

44. See Boyce & Nilsson, *supra* note 5, at 756 (noting the escalation of tensions between the state government and Alaska Natives when statehood was declared).

45. See Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority*, 14 ALASKA L. REV. 443, 445-47 (1997) (providing historical background regarding the push to settle aboriginal claims after the passage of the Alaska Statehood Act of 1958).

46. Naiman, *supra* note 3, at 230 (analyzing why Alaska statehood created pressure to resolve aboriginal claims and to pass the Settlement Act).

47. See Ford & Rude, *supra* note 15, at 483 (discussing the events that led up to the passage of the Settlement Act). See *generally* CASE & VOLUCK, *supra* note 34, at 83-195 (2d ed. 2002) (analyzing the issues created by Alaska statehood and explaining the "land freeze" that occurred prior to aboriginal land claims being settled).

final impetus for the enactment of the Settlement Act.<sup>48</sup> Oil companies needed to be certain of ownership of the oilfields and other land prior to developing the infrastructure necessary for oil production.<sup>49</sup> The federal government, oil lobbyists, state officials, and Alaska Native leaders worked together to create the Alaska Native Claims Settlement Act to resolve the issue of who owned and controlled the region's land and resources.<sup>50</sup> As a result, Congress enacted the Act in 1971.

## B. The Alaska Native Claims Settlement Act

The Settlement Act embodies a unique solution to the issues created by the convergence of Alaska Native, federal, state, and business interests. The re-imagining of Alaska Native communities as corporations in exchange for 45.5 million acres of land and payments totaling \$962.5 million was an undertaking of unprecedented magnitude.<sup>51</sup> In this section, the stated policies behind the Act, the requirements of Alaska Native incorporation, and the scope of the settlement will be explored.

In 43 U.S.C. § 1601, Congress outlined its findings and the declaration of policy underlying the Settlement Act. Beyond stating that there was “an immediate need for fair and just settlement of all claims” by Alaska Natives, Congress expressly stated how it intended the settlement was to be achieved.<sup>52</sup> Congress declared that the settlement needed to be

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48. See Berardi, *supra* note 4, at 133 (“The key incentive to resolve the land claims issue was the discovery of oil at Prudhoe Bay on Alaska’s North Slope in 1967.”).

49. See generally MARY CLAY BERRY, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* (1975) (examining the intersection of oil interests in Alaska and the settlement of aboriginal land claims).

50. See *supra* note 5 and accompanying text (discussing the multiple interests at play in the negotiation and settlement of Alaska Native claims).

51. See Stephen Colt, *Alaska Natives and the “New Harpoon”: Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND RESOURCES & ENVTL. L. 155, 155 (2005) (“The Alaska Native Claims Settlement Act of 1971 (ANCSA) is an unparalleled natural experiment in resource-based economic development.”). Congress, however, also employed a corporate model in settling the land claims of the Narragansett Tribe in Rhode Island. See Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–16 (2000). The Rhode Island Indian Claims Settlement Act required the formation of a state chartered corporation to “acquire, perpetually manage, and hold settlement lands.” See 25 U.S.C. § 1706(a)(1). Rhode Island passed specific legislation creating the Narragansett Indian Land Management Corporation. See R.I. GEN. LAWS §§ 37-18-1 to 18-18 (1997). Unlike the corporations created by the Alaska Native Claims Settlement Act, however, the Narragansett Indian Land Management Corporation has the limited purpose of managing and holding the settlement land, rather than engaging in general business activities. See R.I. GEN. LAWS § 37-18-4.

52. 43 U.S.C. § 1601 (2000).

completed “rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, [and] with maximum participation by Natives in decisions affecting their rights and property.”<sup>53</sup> Congress also provided that the settlement would occur “without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship.”<sup>54</sup> In short, the policies underlying the Settlement Act were and are dramatically different than the policies Congress had used to deal with Native Americans in the lower United States.<sup>55</sup>

Although the Act echoes many of the policies employed by the federal government in the lower United States, the Act remains distinct because it forced Alaska Native communities to create corporations both at the regional and local levels to share in the benefits of the settlement. Section 1606(a) of the Act mandated the incorporation of twelve Native regional corporations based on geography and heritage,<sup>56</sup> and section 1606(c) allowed for the establishment of a thirteenth regional corporation to represent the interests of Alaska Natives who did not currently reside in the state.<sup>57</sup> The Act requires that the regional corporations be for profit entities under the laws of Alaska.<sup>58</sup> Each Alaska Native who was alive on December 18, 1971 was entitled to 100 shares of the regional corporation representing the area where that Alaska Native lived.<sup>59</sup>

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53. *Id.*

54. *Id.*

55. See COHEN’S HANDBOOK, *supra* note 7, § 4.07[3][a], at 337 (“Departing from previous Indian land claims settlement acts, the Act did not vest the assets provided in the settlement in tribal governments, but in state-chartered native corporations pursuant to an elaborate corporate scheme.”); Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 358 (1997) (stating that the policies that Congress adopted in its dealings with Alaska Natives were “dramatically different” from the policies used in dealings with other Native American communities).

56. See 43 U.S.C. § 1606(a) (2000) (providing the geographic area covered and population represented by each Alaska Native regional corporation).

57. 43 U.S.C. § 1606(c).

58. 43 U.S.C. § 1606(d) (“Five incorporators within each region . . . shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit . . .”).

59. 43 U.S.C. § 1606(g)(1)(A) (“The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock . . . as may be needed to issue one hundred shares of stock to each Native.”); see 43 U.S.C. § 1604 (2000) (outlining the requirements for enrollment and participation by Alaska Natives in the settlement from the Act); see also 43 U.S.C. § 1602(b) (2000) (defining “Native” as “a citizen of the United States who is a person of one-fourth degree or more Alaska Indian . . . , Eskimo, or Aleut blood, or combination thereof”).

On the local level, the Act also mandated that Alaska Native villages incorporate to enjoy the benefits of the settlement.<sup>60</sup> The Act granted the federal government and regional corporations the power to transfer funds, land, and other resources to the village corporations after they had incorporated.<sup>61</sup> The Act then required village corporations to make conveyances to various Native and non-Native occupants of settlement land and to municipal corporations that had been formed to govern Alaska Native village municipalities.<sup>62</sup> The village corporations retained all land that they did not convey.<sup>63</sup>

For the most part, Alaska Native corporations operate similarly to traditional corporations.<sup>64</sup> For example, the Act contains provisions

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60. 43 U.S.C. § 1607(a) (2000) (“The Native residents of each Native village entitled to receive lands and benefits under this [Act] shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits . . .”).

61. *Id.* (stating that Alaska Native villages must be incorporated prior to receiving any benefit of the Settlement Act).

62. 43 U.S.C. § 1613(c) (2000) (providing the requirements placed upon village corporations to convey land received under the Settlement Act).

63. *See id.*

64. A large amount of information is available online regarding the corporations created as a result of the Settlement Act. All of the regional corporations maintain websites. *See* Ahtna, Inc., <http://www.ahtna-inc.com> (last visited Mar. 3, 2008); The Aleut Corporation, <http://www.aleutcorp.com> (last visited Mar. 3, 2008); Arctic Slope Regional Corporation, <http://www.asrc.com> (last visited Mar. 3, 2008); Bering Straits Native Corporation, <http://www.beringstraits.com> (last visited Mar. 3, 2008); Bristol Bay Native Corporation, <http://www.bbnc.net> (last visited Mar. 3, 2008); Calista Corporation, <http://www.calistacorp.com> (last visited Mar. 3, 2008); Chugach Alaska Corporation, <http://www.chugach-ak.com> (last visited Mar. 3, 2008); Cook Inlet Region, Inc., <http://www.ciri.com> (last visited Mar. 3, 2008); Doyon, Ltd., <http://www.doyon.com> (last visited Mar. 3, 2008); Koniag, Inc., <http://www.koniag.com> (last visited Mar. 3, 2008); NANA Regional Corp., <http://www.nana.com> (last visited Mar. 3, 2008); Sealaska Corporation, <http://www.sealaska.com> (last visited Mar. 3, 2008); The 13th Regional Corporation, <http://www.the13thregion.com> (last visited Mar. 3, 2008). Many of the village corporations created as a result of the Act also have websites. *See, e.g.*, Afognak Native Corporation, <http://www.afognak.com> (last visited Mar. 3, 2008); Bethel Native Corporation, <http://www.bnc-alaska.com> (last visited Mar. 3, 2008); Deloycheet, Inc., <http://www.deloycheet.com> (last visited Mar. 3, 2008); Goldbelt, Incorporated, <http://www.goldbelt.com> (last visited Mar. 3, 2008); Haida Corporation, <http://www.haidacorp.com> (last visited Mar. 3, 2008); Huna Totem Corporation, <http://www.hunatotem.com> (last visited Mar. 3, 2008); Kivilco Incorporated, <http://www.kivilco.com> (last visited Mar. 3, 2008); Klukwan, Inc., <http://www.klukwan.com> (last visited Mar. 3, 2008); The Kuskokwim Corporation, <http://www.kuskokwim.com> (last visited Mar. 3, 2008); Natives of Kodiak, Inc. <http://www.nativesofkodiak.com> (last visited Mar. 3, 2008); Ounalashka Corporation, <http://www.ounalashka.com> (last visited Mar. 3, 2008); Ouzinkie Native Corporation, <http://www.ouzinkienativecorporation.com> (last visited Mar. 3, 2008); Shee Atiká, Incorporated, <http://www.sheeatika.com> (last

allowing Alaska Native corporations to undertake such activities as enacting resolutions to engage in corporate activity and passing amendments to their articles of incorporation and bylaws.<sup>65</sup> The Act also has a provision allowing mergers between Alaska Native corporations.<sup>66</sup>

The Settlement Act, however, does modify traditional corporate law in three major ways. First, the Act allows for restrictions on the alienability of Alaska Native corporate stock.<sup>67</sup> The Act initially required that Alaska Native corporate stock could not be sold until December 18, 1991, but as this date approached, the Act was modified so that corporations could maintain the alienability restrictions.<sup>68</sup> Under the Act as currently written, corporations can choose to restrict the sale of their stock indefinitely.<sup>69</sup> To date, no Alaska Native corporation has terminated the alienability restrictions.<sup>70</sup> Second, Alaska Native corporations are different than traditional corporations because Alaska Native corporations are exempted from the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940.<sup>71</sup> These exemptions continue until (1) stock is issued to someone other than an Alaska Native or Alaska Native entity, (2) alienability restrictions on stock are terminated, or (3) the Alaska Native corporation files a registration statement with the United States Securities and Exchange Commission.<sup>72</sup> Third, the Settlement Act requires that seventy percent of all revenues received by each regional corporation from timber resources and subsurface estates annually be

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visited Mar. 3, 2008); Ukpeaġvik Iñupiat Corporation, <http://www.ukpik.com> (last visited Mar. 3, 2008).

65. 43 U.S.C. § 1629b (2000) (outlining the procedures in Alaska Native corporations for passing corporate resolutions and considering amendments to articles of incorporation and bylaws).

66. 43 U.S.C. § 1627 (2000) (allowing for and providing the procedures for mergers and consolidations of Alaska Native corporations).

67. 43 U.S.C. § 1629c (2000) (providing the duration of alienability restrictions on Alaska Native corporate stock and outlining the process of maintaining or terminating those alienability restrictions).

68. *See id.*

69. *Id.*

70. *See* E. Budd Simpson, *Doing Business with Alaska Native Corporations*, BUSINESS LAW TODAY, July–Aug. 2007, at 38 (discussing the current status of the alienability restrictions placed upon the stock of Alaska Native corporations).

71. 43 U.S.C. § 1625 (2000).

72. *Id.*

divided among the twelve land-owning regional corporations,<sup>73</sup> which allows wealth to be more evenly distributed among the corporations.<sup>74</sup>

The imposition of the corporate form on Alaska Native communities created uncertainty regarding the role of Native governments existing at the time that the Act was passed. The Act did not require the dissolution of existing governments nor did it require the distribution of these governments' assets.<sup>75</sup> Instead, Alaska Native corporations were designed only to hold property and develop infrastructure, not to exercise governmental powers.<sup>76</sup> As such, tribal governments continue to coexist with regional and village corporations.<sup>77</sup> These governments remain the only entities with the inherent powers of self-government.<sup>78</sup>

However, because Alaska Native corporations control a large amount of land and resources, they often frustrate and interfere with the role of Native governments. As will be discussed later in this Article, the objectives of regional and village corporations can conflict with the objectives of Alaska Native communities.<sup>79</sup> Yet, the boards of the corporations can make independent choices about the use of corporate land and resources.<sup>80</sup> For example, if one wanted to mine silver on Alaska Native corporate land, one would approach the corporation owning the land, rather than the Native government. Thus, the Settlement Act ultimately undercuts the role of Native governments in determining the

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73. 43 U.S.C. § 1606(i)(1)(A) (2000).

74. 43 U.S.C. § 1606(i)(1)(A) (“[Seventy] 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 . . .”).

75. See COHEN’S HANDBOOK, *supra* note 7, § 4.07[3][d][i], at 361 (analyzing the role of Alaska Native corporations in relation to Native governments existing at the time of the Act).

76. See *id.* (arguing that “[t]he [N]ative regional and village corporations are chartered under state law to perform proprietary, not governmental, functions.”).

77. See *id.* at 360–61 (discussing the relationship between Alaska Native corporations and Native governments existing at the time that the Act was passed by Congress).

78. See *id.* at 361 (“Tribal governments, as opposed to regional and village corporations, are the only native entities that possess inherent powers of self-government and that can develop autonomous membership rules.”); Geoffrey D. Strommer & Stephen D. Osborne, “*Indian Country*” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 10–18 (2005) (discussing the sovereign powers of Alaska Native governments after the Settlement Act); *but see* Part IV.B (arguing that the Settlement Act diminished the sovereignty of Alaska Native communities).

79. See *infra* Part IV.A (arguing that the Settlement Act is harmful because of the differences between traditional Alaska Native cultures and corporate culture).

80. *But see supra* notes 75–78 and accompanying text (discussing the uncertainty as to the role of traditional Alaska Native governments after the passage of the Settlement Act).

use of land and resources because it vests power to make certain determinations in the boards of the corporations created as a result of the Act.

Congress's purpose in creating Alaska Native corporations at both a regional and local level was to help administrate a settlement of unprecedented size and scope.<sup>81</sup> Within the Act, Congress declared that "[a]ll claims against the United States, the State, and all other persons . . . based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska . . . [were] hereby extinguished."<sup>82</sup> All reservations in Alaska were revoked with the exception of the Annette Island Reserve, which is occupied by the Metlakatla Indian Community.<sup>83</sup>

In consideration for release of these claims to the rest of Alaska, Congress established the Alaska Native Fund and set up terms for payments into the fund that totaled \$962.5 million.<sup>84</sup> As provided in the Act, \$462.5 million was to come from a series of payments to the fund from the United States Treasury,<sup>85</sup> and the remaining \$500 million was to come from a revenue sharing plan from natural resource and mineral rights ceded to the state and federal government under the Act.<sup>86</sup> Congress mandated that attorney and consultant fees be paid from the fund for services rendered to Alaska Natives in connection with the preparation of any legislation to settle aboriginal claims or in connection with any pending cause of action based on an aboriginal claim that was dismissed by the Settlement Act.<sup>87</sup>

In addition to the creation of the Alaska Native Fund, Alaska Native entities also received approximately 45.5 million acres of land.<sup>88</sup> Under the

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81. See Torgerson, *supra* note 17, at 82 ("Through ANCSA, Alaska [N]atives gained fee simple title to roughly the same amount of land as is held in trust for all other American Indians, and they gained monetary compensation nearly four times the amount awarded by the Indian Claims Commission during its entire 25-year existence.").

82. 43 U.S.C. § 1603 (2000) (providing the declaration of settlement under the Act).

83. 43 U.S.C. § 1618(a) (2000).

84. 43 U.S.C. § 1605(a) (2000).

85. 43 U.S.C. § 1605(a)(1) (establishing a schedule for payments to be made from the United States Treasury into the Alaska Native Fund).

86. 43 U.S.C. § 1605(a)(3); *see also* 43 U.S.C. § 1608 (2000) (outlining a revenue sharing plan from natural resource and mineral rights ceded by Alaska Natives under the Settlement Act).

87. 43 U.S.C. § 1619 (2000).

88. 43 U.S.C. § 1611 (2000) (providing for the selection of settlement land by Alaska Natives); 43 U.S.C. § 1613 (2000) (providing for conveyance of settlement land to Alaska Natives); 43 U.S.C. § 1618 (2000) (allowing village corporations to

land selection provisions of the Act, village corporations were entitled to select and collectively receive the surface estates of approximately twenty-two million acres of land.<sup>89</sup> Regional corporations received any of the twenty-two million acres of land that were not selected by the village corporations and the subsurface estates of any land selected by a village corporation.<sup>90</sup> The land selection provisions also entitled the regional corporations to collectively receive an additional sixteen million acres of land.<sup>91</sup> Finally, under the land selection provisions, two million more acres were set aside for cemetery sites and other historical places that should be under Alaska Native control and for grants to Alaska Natives and Native groups who otherwise did not qualify to receive land under the Act.<sup>92</sup>

Village corporations could opt out of the land selection provisions and receive surface and subsurface title to any reservation that had been previously set aside for their benefit.<sup>93</sup> To receive title to existing reservation land, however, the enrolled residents of the village corporation were required to give up their right to receive any Alaska Native regional corporation stock and to forfeit eligibility to receive other benefits under the Act.<sup>94</sup> The village corporations from four large Alaska Native reservations opted to retain their existing land, rather than go through the land selection process under the Act.<sup>95</sup> In total, the Settlement Act allowed Alaska Native entities to obtain clear title to approximately 45.5 million acres of land.<sup>96</sup>

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opt out of other land selection rights and to acquire title to the reservations where the villages were located); *see also* COHEN'S HANDBOOK, *supra* note 7, § 4.07[3][b][ii][B] (explaining the land selection provisions under the Settlement Act that allowed Alaska Natives to receive 45.5 million acres of land).

89. 43 U.S.C. § 1611(a); *see also* COHEN'S HANDBOOK, *supra* note 7, § 4.07[3][b][ii][B] ("The village corporations were entitled to select approximately 22 million acres, and received patents, primarily from available land in the vicinity of their villages.").

90. 43 U.S.C. § 1611(b) (stating that regional corporations would receive the difference between twenty-two million acres and the land selected by the village corporations); 43 U.S.C. § 1613(f) (2000) (providing that the subsurface estate of land received by a village corporation would be conveyed to the regional corporation representing the area where the land is located).

91. 43 U.S.C. § 1611(c).

92. 43 U.S.C. § 1613(h) (2000).

93. 43 U.S.C. § 1618(b) (2000).

94. *Id.* (requiring residents of a village acquiring reservation lands under §1618(b) to forfeit eligibility to receive other benefits of the Act).

95. *See* COHEN'S HANDBOOK, *supra* note 7, § 4.07[3][b][i][B], at 342 (discussing the land received by village corporations who opted out of the other land selection provisions of the Settlement Act).

96. *Id.*



### III. BENEFITS OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Although the Settlement Act has substantial shortcomings, the purpose of this Article is not to make a final determination as to whether the Act should be considered a success or a failure. The focus, however, is to provide a balanced examination of the benefits and harms of the Act and to provide substantive suggestions to be considered if similar legislation is ever proposed.<sup>97</sup> The benefits of the Act discussed in this Part and the harms discussed in Part IV should help readers draw their own conclusions about the Act. Both Part III and Part IV should be read prior to drawing any conclusions. In terms of the benefits, the Settlement Act can be viewed as increasing sovereignty for Alaska Natives, creating long-term cultural institutions, and providing Alaska Natives with defined rights.

#### A. Increased Sovereignty for Alaska Natives

The Settlement Act re-imagined the relationship between Alaska Natives and the federal government. Through the Act, Congress unmoored Alaska Natives from constraints placed on Native Americans in the lower forty-eight states.<sup>98</sup> Congress debatably increased Alaska Native sovereignty by granting clear title to settlement land, establishing a vehicle for self-sufficient economic success, and providing Alaska Natives with the power of self-determination.<sup>99</sup>

One can argue that Congress increased Alaska Native sovereignty by granting clear title to settlement land because the Act confirmed that Alaska Natives were the owners of the land that they occupied. To one not familiar with Native American law, the fact that the Settlement Act gave Alaska Natives clear title to settlement land might seem intuitive and insignificant. As established by the Supreme Court of the United States in *Johnson v. M'Intosh*,<sup>100</sup> however, the federal government owns title to most

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97. See *infra* Part V (offering substantive suggestions to be considered if similar legislation is ever proposed).

98. See *supra* note 55 and accompanying text (reporting that the Settlement Act is a departure from federal Indian policy in the lower United States).

99. *But see infra* Part IV.B (arguing that the Act also diminished sovereignty by ending the powers of Indian Country, denying the ability to choose Native governmental structures, and forcing conformance with Alaska corporate law).

100. 21 U.S. (8 Wheat.) 543 (1823).

other Native American land and holds it in trust for the Native Americans who reside upon it.<sup>101</sup>

In *Johnson*, the Court first held that Native American title to land had been invalidated at the time of “discovery” by Europeans and that the federal government holds title to all Native American territory.<sup>102</sup> In that case, Thomas Johnson was one of a group of investors who purchased land from the Piankeshaw Indian tribe on October 18, 1775.<sup>103</sup> On July 20, 1818, the federal government sold William M’Intosh property that overlapped the land Thomas Johnson received from the Piankeshaw.<sup>104</sup> Thomas Johnson died on October 1, 1819 and left the land at issue in the case to his son, Joshua Johnson, and grandson, Thomas Graham.<sup>105</sup> Joshua Johnson and Graham brought an action for ejectment of M’Intosh from the disputed property.<sup>106</sup> The United States District Court of Illinois denied Johnson and Graham relief, and they appealed to the Supreme Court of the United States.<sup>107</sup>

The Court affirmed the district court’s opinion and held that M’Intosh owned title to the land after receiving it from the federal government.<sup>108</sup> The Court reached this conclusion by reasoning that Native Americans had lost their title to the land when European explorers had discovered and claimed it.<sup>109</sup> Writing for a unanimous Court, Chief Justice Marshall described the state of Native American title upon European conquest:

[Native Americans] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>110</sup>

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101. See generally Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of “Universal Recognition” of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481 (2006) (providing an in-depth analysis of the history and significance of *Johnson v. M’Intosh*).

102. *Johnson*, 21 U.S. (8 Wheat.) at 574.

103. *Id.* at 555–58.

104. *Id.* at 560.

105. *Id.* at 560–61.

106. *Id.* at 543.

107. *Id.* at 562.

108. *Id.* at 604–05.

109. *Id.* at 574.

110. *Id.*

Moreover, the Court expressly held that the federal government had “exclusive power to extinguish” the right of Native Americans to occupy the land.<sup>111</sup> The Court held that the United States owned Native American land by obtaining title through conquest, and Native American tribes became legally dependent on the federal government for their continued existence.<sup>112</sup>

The Settlement Act undid the results of *Johnson v. M’Intosh* by giving Alaska Native corporations title to large amounts of land. The federal government no longer holds the land in trust, and Alaska Native corporations can either use or dispose of the land freely.<sup>113</sup> Of course, creating the opportunity for the land to be sold does generate significant dangers because all of the settlement lands could eventually be divested, leaving groups of Alaska Natives without property.<sup>114</sup> At the same time, land ownership and other financial assets are essential to thriving and surviving in a capitalist society such as the United States.<sup>115</sup>

Beyond giving Alaska Natives the financial assets to survive in a capitalist society, the Settlement Act arguably established a vehicle for their self-sufficient, economic success. The Act can be viewed as increasing sovereignty for Alaska Natives by reducing their dependence on the federal government for their long-term financial well-being. Through the creation of Native corporations, Alaska Native communities are better equipped to develop natural resources, provide employment

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111. *Id.* at 584.

112. *See id.* at 574; *see also* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that Native American tribes are “domestic dependent nations” and stating that “[t]heir relation to the United States resembles that of a ward to his guardian”).

113. *See* 43 U.S.C. § 1601(b) (2000) (providing that settlement of Alaska Native claims was to be accomplished “without creating a reservation system or lengthy wardship or trusteeship” of Alaska Native land); *see also* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 549–50 (2001) (reporting that Congress rendered land given to Alaska Native corporations under the Settlement Act fully alienable).

114. *See* Thomas Morehouse, *Native Claims and Political Development*, 24 J. LAND RESOURCES & ENVTL. L. 413, 420 (2004) (“ANCSA placed Native lands in jeopardy by exposing them to alienation, corporate failure, and taxation . . .”); *see also* Linda O. Smiddy, *Responding to Professor Janda—The U.S. Experience: The Alaska Native Claims Settlement Act (ANCSA) Regional Corporations as a Form of Social Enterprise*, 30 VT. L. REV. 823, 836 (2006) (noting that the alienation of shares of a Native corporation could separate Alaska Natives from the land and describing Alaska Natives’ relationship to the land as “at best once removed”).

115. *See* Smiddy, *supra* note 114, at 831 (discussing the relationship between land ownership and mainstream capitalism in the United States).

opportunities, and build needed infrastructure in remote areas of Alaska.<sup>116</sup> The corporations created by the Settlement Act are designed to give Alaska Natives the economic and organizational resources necessary to survive and prosper.<sup>117</sup>

The Act also arguably increases sovereignty by giving Alaska Natives the power of self-determination because they can decide how to use the resources of their own communities.<sup>118</sup> Part of Congress's stated purpose in enacting the Settlement Act was to allow for "maximum participation by Natives in decisions affecting their rights and property."<sup>119</sup> Under the Act, shareholders of Alaska Native corporations can determine their own goals for their particular region or village and vote to adopt resolutions, amend articles of incorporation and bylaws, and elect directors and officers based on these goals.<sup>120</sup> For example, if acquiring and maintaining title to land is important to a group of Alaska Natives, they can vote their shares of a corporation to cause that entity to purchase and hold real estate.<sup>121</sup> In the alternative, if jobs and employment opportunities are important to the Alaska Natives of a particular region, they can vote their shares in favor of management and resolutions that will support the development of

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116. See Berardi, *supra* note 4, at 135 ("Economic benefits anticipated from ANCSA included development of natural resources, capital improvements such as housing, transportation, services, employment opportunities, and establishment of small business enterprises. Broader social benefits included improved educational levels and greater Native political influence."); see also Porter, *supra* note 21, at 938 (stating that the reason for creating Native corporations is to "promote economic development for tribal purposes and thereby seek to redress other tribal problems").

117. See Berardi, *supra* note 4, at 135 ("The intent of the corporate structure was to assist Alaska Natives in social and economic arenas by giving them control (as corporate shareholders) over their land and other natural resources, while avoiding the paternalism of the reservation system in the contiguous forty-eight states.").

118. See Julie Cassidy, *Sovereignty of Aboriginal Peoples*, 9 IND. INT'L & COMP. L. REV. 65, 100 n.215 (1998) (stating that the Settlement Act supports Alaska Native sovereignty by promoting self-determination).

119. 43 U.S.C. § 1601(b) (2000) (providing the congressional findings and declarations of policy underlying the Settlement Act).

120. 43 U.S.C. § 1606(h)(1)(A)(i) (2000) (stating that common stock in Alaska Native regional corporations provides the "right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders"); 43 U.S.C. § 1629b (2000) (outlining the procedures in Alaska Native corporations for passing corporate resolutions and considering amendments to articles of incorporation and bylaws).

121. See Colt, *supra* note 51, at 158 (stating that land ownership and use is "valued highly" among many Alaska Native corporate shareholders); Ford & Rude, *supra* note 15, at 484 (reporting that land and rights are more important to many Alaska Natives than money).

employment opportunities.<sup>122</sup> Unlike most other Native American groups in the United States, Alaska Natives can operate their corporations and make decisions for their communities without worry of paternalistic interference from the federal government because shareholders are able to shape and determine the objectives of the corporations.<sup>123</sup>

## B. Created Community Institutions

Another benefit of the Settlement Act is that it creates long-term, communal institutions that can help maintain and nurture Alaska Native communities. The Act provides for defined cultural and political institutions, allows for communal ownership and use of the land, and creates a communal mode of doing battle for Alaska Native rights.

Although the corporate form is arguably incompatible with many aspects of Alaska Native life,<sup>124</sup> this form does provide a defined cultural and political institution for Alaska Natives. As previously discussed, the Act mandates the organization of both regional and village corporations that are required to be formed under the state law of Alaska.<sup>125</sup> The Alaska Corporations Code provides a defined structure for these entities and gives them potentially unlimited life.<sup>126</sup> As long as the business does not fail or the stock does not become alienable,<sup>127</sup> these corporations will operate indefinitely as Alaska Native institutions.<sup>128</sup>

The institutional aspects of these corporations debatably help to nurture and strengthen social and political ties within Alaska Native

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122. See Berardi, *supra* note 17, at 102 (stating that “job creation is a primary goal of many [Alaska Native] corporations”); Colt, *supra* note 51, at 161 (explaining that many Alaska Natives want employment opportunities more than they want dividends from Native corporations).

123. See Torgerson, *supra* note 17, at 82 (“Alaska [N]atives have enjoyed a unique opportunity in the past dozen years to manage their resources free from the interference of a distant paternalistic bureaucracy.”).

124. See *infra* Part IV.A (discussing the harms associated with forcing Alaska Natives to live under a system of corporate law).

125. 43 U.S.C. § 1606(d) (outlining the requirements for incorporation of Alaska Native regional corporations); 43 U.S.C. § 1607(a) (2000) (providing the requirements for incorporation of Alaska Native village corporations).

126. ALASKA STAT. §§ 10.06.005–.995 (2006).

127. See 43 U.S.C. § 1629c (2000) (providing the duration of alienability restrictions on Alaska Native corporate stock and outlining the procedures for maintaining or terminating those alienability restrictions).

128. See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 109 (9th ed. 2004) (informing that corporations generally have infinite life, unless their articles of incorporation contain a specified term or they are dissolved by shareholder action or judicial decree).

communities. In addition to the cultural incentives that Alaska Natives have to support these corporations, they also have an economic incentive because they own an equity stake in these businesses through stock ownership.<sup>129</sup> Although the Settlement Act generates concerns that the federal government is trying to assimilate Alaska Natives into the mainstream capitalist culture of the United States,<sup>130</sup> the corporations created by the Act bind Alaska Natives together through their shared interest in the success of these entities.

The Settlement Act can also be viewed as binding Alaska Natives together by allowing for communal ownership and use of the land. As previously discussed, the Act gave Alaska Natives both money and land in consideration for extinguishing their claims to the rest of the state.<sup>131</sup> For many Alaska Natives, the receipt of title to approximately 45.5 million acres of land was more important than the \$962.5 million received under the Act.<sup>132</sup> This is because many Alaska Native communities traditionally lived a subsistence lifestyle in which they followed migratory animals and moved when needed to survive.<sup>133</sup> Individual ownership of property did not make sense because of this subsistence lifestyle in which land was used and occupied by the community.<sup>134</sup>

The Settlement Act is arguably beneficial because it mimics traditional concepts of possession and use of the land. Through ownership and control of Native corporations, Alaska Natives communally own the land that they occupy and can make determinations about how to use it. Of course, corporate ownership does not perfectly mirror how Alaska Natives traditionally used the land and does not give them control of the entire State of Alaska. Even so, corporate ownership creates another communal tie for Alaska Natives.

Corporate ownership also allows for communal decision-making about how to use the land. The Act may mimic traditional concepts about

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129. See 43 U.S.C. § 1606(g)(1)(A) (providing for the distribution of stock in the regional corporations to Alaska Natives).

130. See *infra* Part IV.A (providing the reasons why the Act might be viewed as a form of assimilation and colonialization).

131. See *supra* Part II.B (describing Congress's purposes in passing the Act and the Act's effect).

132. See Ben Summit, *The Alaska Native Claims Settlement Act (ANCSA): Friend or Foe in the Struggle to Recover Alaska Native Heritage*, 14 T.M. COOLEY L. REV. 607, 608 (1997) ("It is not land ownership that is important to Alaska Natives, but instead the process of gathering sustenance from the land and maintaining intimacy with their environment.").

133. See *id.* at 621 (stating that traditional Alaska Native life "centered around seasons, animals and migratory patterns").

134. See Smiddy, *supra* note 114, at 832 (discussing the relationship between traditional Alaska Native communities and the land).

possession of land, but it also allows Alaska Native communities to determine how to use their territory in the future. Native corporations own the territory that they occupy in fee simple and can make determinations about whether to maintain, develop, or sell the land.<sup>135</sup> Alaska Natives have a voice in this process by adopting corporate resolutions and supporting management who share their views.<sup>136</sup> The Act creates community because it causes decisions regarding land use to be made by Alaska Native communities through the corporations representing them.

Another way that the Settlement Act creates community is by providing a communal mode of doing battle for defending and furthering Alaska Native rights. The Settlement Act gives Alaska Native communities a vehicle to bring lawsuits, hold property, and execute contracts.<sup>137</sup> Native corporations have been able to seek protection and redress for Alaska Natives under a variety of circumstances, including in such high profile matters as the Exxon-Valdez oil spill.<sup>138</sup> The Settlement Act not only creates community, but the Act also gives a vehicle for defending it.

### C. Provides Alaska Natives with Defined Rights

As will be discussed in the next section, the corporate form often does not correspond to the traditional practices of Alaska Native communities.<sup>139</sup> Even with that being the case, the corporate form does afford at least one valuable benefit: Native corporations provide Alaska Natives with defined legal rights.

In the lower United States, the rights and obligations of Native American communities have shifted at the will of the federal

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135. See *id.* at 836 (noting that the Settlement Act allows for collective ownership of land by shareholders of Alaska Native corporations).

136. See generally ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 5.05, at 106–20 (2d ed. 2004) (explaining shareholders' rights within a corporation, including the right to change management and change policy).

137. See David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, 12 STAN. L. & POL'Y REV. 223, 229 (2001) (discussing the additional powers granted to Native American communities by being recast in the corporate form).

138. See *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769 (Alaska 1999) (holding that Alaska Native corporations had standing to sue for damage to land that had not yet been conveyed); see also Keith E. Sealing, *Civil Procedure in Substantive Context: The Exxon-Valdez Cases*, 47 ST. LOUIS U. L.J. 63, 70 (2003) (describing the suits brought by Native corporations to seek redress for the Exxon-Valdez oil spill in Alaska).

139. See *infra* Part IV.A (discussing the problems created by recasting Alaska Native communities in the corporate form).

government.<sup>140</sup> As previously discussed, the Supreme Court of the United States held in *Johnson v. M'Intosh* that the federal government owns title to Native American lands in the lower United States and holds them in trust for the Native Americans who reside upon them.<sup>141</sup> In *Johnson*, the Court also held that the federal government had "exclusive power to extinguish" the rights of Native Americans to occupy the land.<sup>142</sup> The federal government has often abused its superintendence over Native American lands and has often failed to respect Native American communities.

The federal government has used its power in insidious ways to recurrently redefine Native American land occupancy rights. For example, on May 28, 1830, Congress passed the Indian Removal Act, which mandated that Native American tribes in the eastern states move to the western territories.<sup>143</sup> The Indian Removal Act resulted in the infamous "Trail of Tears" that occurred when the Cherokee were forcibly removed from Georgia to Oklahoma.<sup>144</sup> Later, after the frontier closed and removal was no longer possible, the federal government adopted a policy of allotment and assimilation.<sup>145</sup> In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, which allowed the President to break up any reservation into small tracts of land and allot those tracts to Native Americans in hopes of indoctrinating them into the mainstream,

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140. See Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans?*, 12 J. ENVTL. L. & LITIG. 305, 310 (1997). Ford states that:

According to many observers, instead of fulfilling its duty to protect their interest and property, the federal government breached its trust obligation to Native Americans in the lower forty-eight states by engaging in both direct and indirect action that significantly contributed to the "taking" of Native American land, and thus, led to the destruction of their heritage and culture, and to their near extinction.

*Id.*

141. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 604–05 (1823).

142. *Id.* at 585.

143. See generally TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL* (2002) (discussing the federal government's policy of removal and relocation of Native American tribes that lasted from the 1820s to 1887).

144. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 6–8 (1983) (reporting on the "Trail of Tears" and the federal policies that caused it to occur).

145. See LAURENCE ARMAND FRENCH, *NATIVE AMERICAN JUSTICE* 24 (2003) ("Allotment represented the imposition of the Western Protestant ethnic model of economic competition and individual responsibility, which was the diametrical opposite of the aboriginal communal, collective responsibility model.").



capitalist culture.<sup>146</sup> In sum, the federal government has shown no hesitation in redefining Native American land occupancy rights to serve its own goals.

By requiring Alaska Native communities to form corporations, the Settlement Act created defined legal rights for these communities that are substantially less likely to be altered by the federal government. The Settlement Act requires that Alaska Native corporations organize under state law.<sup>147</sup> The Alaska Corporations Code provides a defined body of law that outlines the rights and obligations of Alaska Native corporations.<sup>148</sup> The Alaska Corporations Code is unlikely to be abusively redefined by the federal or state government because this would affect a substantial number of business entities and such a change would impact both Alaska Native and non-Native corporations. As will be discussed in Part IV, the Settlement Act is still somewhat unrefined because the Act represents a unique approach to dealing with aboriginal land claims.<sup>149</sup> Even taking this into account, however, Alaska Native communities are still far less likely to have their rights altered by the federal or state government than other Native American communities because corporations have clearly defined rights within mainstream society.<sup>150</sup>

#### IV. HARMS OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Even though the Settlement Act arguably has many benefits, its potential harms may be equally if not more compelling. Once again, the purpose of this Article is not to determine whether the Act is a success or failure, but the intent is to provide a thorough analysis of the Act that will aid in structuring and evaluating similar future settlements. Still, one can fairly say that the Settlement Act has been widely criticized.<sup>151</sup> This Part will explore some of those criticisms, including the arguments that the Act

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146. See DELORIA & LYTTLE, *supra* note 144, at 9–10 (discussing the General Allotment Act, also known as the Dawes Act, as part of a national policy to assimilate Native American tribes).

147. 43 U.S.C. § 1606(d) (2000); 43 U.S.C. § 1607(a) (2000).

148. ALASKA STAT. §§ 10.06.005–.995 (2006).

149. See *infra* Part IV.A (criticizing the Settlement Act for forcing Alaska Natives to operate within an unrefined system of law).

150. *But see id.* (explaining that some view the Settlement Act as a means of assimilation and colonialization of the Native peoples of Alaska).

151. See *supra* note 15 and accompanying text (discussing the widespread criticism of the Settlement Act).

encases Alaska Natives within the law, diminishes sovereignty, and destroys Alaska Native community.

### A. Encased Alaska Natives within the Law

The Settlement Act can be viewed as a means of assimilation and colonialization<sup>152</sup> of Alaska Natives. The Act forces Alaska Native communities to operate corporations and adopt the practices of mainstream, capitalist society. The corporate form, however, is difficult to reconcile with traditional Alaska Native culture. Alaska Natives are encased within the law because of the tension between corporate culture and Alaska Native culture, the legal burdens created by the Act, and the stresses generated by operating in an unrefined corporate system.

The Settlement Act creates tensions because the traditional cultures of Alaska Natives differ substantially from the culture found in corporate America.<sup>153</sup> Through the Act, Congress imposed a new system of governance and values upon Alaska Native communities.<sup>154</sup> Traditional governance practices of Alaska Natives often do not correspond to the governance structures found in corporations.<sup>155</sup> For example, management of an Alaska Native corporation may attempt to implement traditional practices within its operations, but these traditions are often in opposition to methods of operation viewed as “best practices” in the business world.<sup>156</sup> Many Alaska Natives fear that fully embracing the corporate model imposed by the Settlement Act will lead to a loss of their cultural values and traditions.<sup>157</sup>

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152. While “colonization” refers to the physical act of settlers moving into and inhabiting a region, “colonialization” is used within the text to describe the process by which settlers establish dominance over the natives of a colonized region.

153. See Smiddy, *supra* note 114, at 832–35 (contrasting common law property rights with traditional Native relationships to land).

154. See Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL’Y 97, 100–01 (1999) (discussing the tensions created when the Settlement Act imposed a “colonial superstructure” on Alaska Natives by forcing them to reorganize as corporations).

155. See Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT’L L. 183, 190 (2002) (discussing the tensions created when aboriginal groups adopt or are forced to reorganize as corporations).

156. *Id.*

157. Michael M. Pacheco, *Toward a Truer Sense of Sovereignty: Fiduciary Duties in Indian Corporations*, 39 S.D. L. REV. 49, 78 n.199 (1994) (reporting that many Alaska Natives fear loss of cultural identity if they embrace the corporations created by the Settlement Act).

One major problem with forcing Alaska Native communities to adopt the corporate form is that corporations measure success by financial performance, rather than by success in land stewardship.<sup>158</sup> Congress mandated in the Settlement Act that the regional Alaska Native corporations operate as for profit entities.<sup>159</sup> A for profit corporation must act for the financial benefit of its shareholders, rather than work for the public good.<sup>160</sup> Although the village corporations are permitted to operate as either nonprofit or for profit corporations,<sup>161</sup> all of the village corporations created under the Settlement Act chose to operate as for profit entities because otherwise they would not have been permitted to issue dividends to their shareholders.<sup>162</sup> Therefore, village corporations must also focus on profit, rather than goals specific to the community.

By focusing on financial performance, Alaska Native corporations act in direct opposition to the goals of many of the people that they are supposed to represent. Traditionally, most Alaska Natives have been more concerned with conservation and use of the land, rather than money.<sup>163</sup> For thousands of years prior to the passage of the Settlement Act, the Alaska Natives lived a subsistence lifestyle based on surviving off the bounty of the land.<sup>164</sup> The Settlement Act, however, does not protect this subsistence

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158. See Berardi, *supra* note 17, at 101 (“ANCSA abruptly moved Alaska Natives into the mainstream of American capitalism as corporate owners focused on financial performance rather than land stewardship, with little regard to existing organizational structures or behaviors and lifestyles foreign to capital accumulation, and with little success.”); Sacks, *supra* note 3, at 263 (noting that the Settlement Act impairs the ability of Alaska Natives to pursue their traditional way of life because corporations focus on the development and exploitation of the land).

159. 43 U.S.C. § 1606(d) (2000).

160. See Smiddy, *supra* note 114, at 837 (noting that business activities are required to be of primary importance to Alaska Native corporations even if their articles of incorporation list other purposes); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 433–34 (1995) (stating that the Settlement Act is flawed because the “corporations exist solely to make a profit and not to meet the political and social needs of the [N]ative people”); *but see* Smiddy, *supra* note 114, at 838 (discussing instances in which Alaska Native corporations have included social and cultural priorities in their stated business purposes).

161. 43 U.S.C. § 1607(a) (2000) (providing the requirements for incorporation of Alaska Native village corporations).

162. See Summit, *supra* note 132, at 616 (discussing the village corporations created under the Settlement Act).

163. See *supra* notes 121 & 132 (discussing the importance of land use and ownership to many Alaska Natives).

164. See Ford, *supra* note 45, at 445; *see also* Porter, *supra* note 22, at 86–87 (discussing the problems created by superimposing the corporate form upon the subsistence lifestyle of many Alaska Natives).

way of life.<sup>165</sup> For example, section 1603 of the Act expressly extinguished Alaska Native hunting and fishing rights in exchange for money and definite tracts of land.<sup>166</sup> Definite tracts of land, however, do not appeal to Alaska Natives leading a subsistence lifestyle because migratory animals do not choose their path based on land ownership.<sup>167</sup> The Settlement Act, therefore, encases Alaska Natives within a system of governance and ownership that is in direct opposition to many of their traditional practices.

Alaska Natives are also burdened with numerous legal requirements created by operating corporations. Section 1625 of the Settlement Act initially exempts Alaska Native corporations from complying with a variety of federal securities laws,<sup>168</sup> but the corporations are still required to conform to the laws of the state of Alaska and a variety of other legal provisions.<sup>169</sup> Directors and officers are burdened with corporate fiduciary duties to achieve financial success while trying to represent traditional interests, such as conservation of the land and preservation of subsistence rights.<sup>170</sup>

Beyond the burden of complying with the legal requirements of the Settlement Act, Alaska Natives must shoulder the burden of paying for this compliance. Lawyers and corporate consultants have been major beneficiaries of an Act that was supposed to help Alaska Natives.<sup>171</sup> Under section 1619 of the Act, money received in the settlement was required to be used to pay for services received by Alaska Natives in connection with preparing settlement legislation and for services received in connection

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165. See Sophie Theriault, Ghislain Otis, Gerard Duhaime & Christopher Furgal, *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35, 41 (2005) (reporting that the Settlement Act left the subsistence lifestyle of many Alaska Natives “virtually unprotected”); Naiman, *supra* note 3, at 235 (“Although Congress recognized the importance of subsistence to Alaska Natives, ANCSA contained no express protection for subsistence in its final form.”); Sacks, *supra* note 3, at 262–63 (reporting that the Settlement Act did not establish or protect Alaska Native subsistence rights).

166. 43 U.S.C. § 1603 (2000) (providing the declaration of settlement under the Settlement Act).

167. See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 86–87 n.55 (1985) (discussing why definite property is undesirable to many groups of Native Americans).

168. 43 U.S.C. § 1625 (2000).

169. 43 U.S.C. § 1606(d) (2000) (requiring that the regional corporations be organized under the state laws of Alaska); 43 U.S.C. § 1607(a) (requiring that the village corporations be organized under the state laws of Alaska).

170. See *generally* Pacheco, *supra* note 157 (discussing the fiduciary duties that are owed within Native American corporations).

171. See Ford & Rude, *supra* note 15, at 489 (stating that the Settlement Act “only brought worthwhile wealth and benefit to corporate consultants, lawyers, managers, employees, and directors”).

with any suit dismissed by the Settlement Act.<sup>172</sup> The legal and consulting fees did not by any means end there, and Alaska Native corporations have paid nearly half a billion dollars to maintain and defend the corporations established by the Act.<sup>173</sup>

The costs associated with operating an Alaska Native corporation are greater than the costs of operating other business entities because the Settlement Act created a novel and relatively unrefined system of law.<sup>174</sup> The legal implications of imposing the corporate form on existing Alaska Native communities are still being determined.<sup>175</sup> Some of the major issues include the extent of Alaska Native self-government and sovereignty<sup>176</sup> and conflicts over the existence of Alaska Native subsistence rights.<sup>177</sup> Moreover, Alaska Native corporations face unique challenges any time new legislation impacting corporations is passed because they must determine how the new provisions operate in relation to the Settlement Act.<sup>178</sup> Congress created uncertainty and numerous legal issues by using a novel approach of settling aboriginal land claims when it adopted the Act,

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172. 43 U.S.C. § 1619 (2000).

173. See GETCHES ET AL., *supra* note 25, at 911 (reporting that Alaska Native corporations have “probably spent more than . . . \$465 million . . . in legal and accounting fees and other office overhead expenses since the Act’s inception”).

174. See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 108 (1993) (discussing the legal uncertainty created by the corporate system of law adopted in the Settlement Act).

175. See Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132, 138 (1976) (“A new statute—especially one as complicated and unique as the Claims Act—is under the best of circumstances bound to produce problems of interpretation, but in the case of ANCSA this problem has been complicated by the frequent ambiguity of its language and the relative dearth of revealing legislative history.”).

176. See Morehouse, *supra* note 114, at 431 (discussing the uncertain state of Alaska Native self-government after the Settlement Act); Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 139 (1995) (noting that the Settlement Act “now confuses the efforts of the Alaska [N]atives and the Alaska tribes to organize their own system of adjudication”). See generally Heather Kendall-Miller, *ANCSA and Sovereignty Litigation*, 24 J. LAND RESOURCES & ENVTL. L. 465 (2004) (analyzing the extent of sovereignty of Alaska Native communities); see also Susanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?*, 10 ALASKA L. REV. 335 (1993) (examining and questioning the jurisdiction of Native courts to adjudicate disputes in Alaska).

177. See Berardi, *supra* note 17, at 103.

178. See S. Mike Murphy, Note, *Sarbanes-Oxley and Alaska Native Corporations: Do the Regulations Apply?*, 23 ALASKA L. REV. 265, 288 (2006) (arguing that Sarbanes-Oxley does not apply to Alaska Native corporations but that the corporations should adopt the requirements anyway).

and one would have difficulty arguing that the Act settled anything until many of these issues are resolved.<sup>179</sup>

## B. Diminished Sovereignty of Alaska Natives

The Settlement Act also arguably diminished the sovereignty of Alaska Native communities.<sup>180</sup> Sovereignty is important to Alaska Natives because it gives them the ability to choose how their land and resources are used and the opportunity to define and determine the future of their communities.<sup>181</sup> The Act debatably diminished sovereignty by ending the protections and powers of Indian Country, denying Alaska Natives the ability to choose their own governance structures, and providing limited opportunities for self-determination.

The Settlement Act ended the protection and powers of Indian Country in Alaska on most, if not all, land conveyed to Alaska Native corporations.<sup>182</sup> Under federal law, “Indian Country” is defined as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished.”<sup>183</sup> In some regards,

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179. See COHEN’S HANDBOOK, *supra* note 7, § 4.07[3][a], at 337 (noting that Alaska Native communities have often had to petition Congress and the courts for clarification and refinement of the Settlement Act); see also Jennifer E. Spreng *The Icebox Cometh: A Former Clerk’s View of the Proposed Ninth Circuit Split*, 83 WASH. L. REV. 875, 934 (1998) (suggesting that many of the judges on the United States Court of Appeals for the Ninth Circuit have limited knowledge of the Settlement Act and its legislative history because it pertains only to Alaska).

180. This Part provides a rebuttal to the arguments presented in Part III.A, namely that the Settlement Act actually increased the sovereignty of Alaska Native groups.

181. See Ford & Rude, *supra* note 15, at 490 (arguing that sovereignty improves the lives of Native Americans because it allows them to pursue entrepreneurial activities, levy taxes, and improve their standards of living); Berardi, *supra* note 17, at 105–06 (suggesting that increased Alaska Native sovereignty would remedy the ills created by the “social engineering” of the Settlement Act); Ford, *supra* note 45, at 469 (arguing that the sovereignty afforded to other Native American groups has allowed them to make substantial improvements in their communities).

182. See 43 U.S.C. § 1618(a) (2000) (maintaining the Annette Island Reserve while revoking all other reservations set aside by the federal government in Alaska); 43 U.S.C. § 1601(b) (2000) (stating that the settlement of Alaska Native claims was to be accomplished “without creating a reservation system or lengthy wardship or trusteeship”). *But see* COHEN’S HANDBOOK, *supra* note 7, § 4.07[3][d][ii], at 363–64 (suggesting that some Indian Country may still exist in Alaska even after the enactment of the Settlement Act).

183. 18 U.S.C. § 1151 (2000). Although this definition is found in Title 18 of the United States Code, which governs crimes and criminal procedures, the definition is also commonly used in civil matters. See *DeCoteau v. Dist. County Court for*

the term “Indian Country” is negative because much of the land that it designates is held in perpetual trust by the federal government so that Native Americans do not fully own the land that they occupy.<sup>184</sup> However, Indian Country does afford some sovereign powers to governments of Native American communities who reside upon it. The sovereign powers associated with Indian Country include the power to impose taxes, jurisdiction to adjudicate certain disputes, authority over non-members on tribal land, the power to regulate domestic relations, the right to determine rules of inheritance, and the power to permit and regulate gambling activities.<sup>185</sup> Without Indian Country, these sovereign powers do not exist.

In *Alaska v. Native Village of Venetie Tribal Government*,<sup>186</sup> the Supreme Court of the United States held that most, if not all, land conveyed to Alaska Native corporations is no longer Indian Country because of the Settlement Act.<sup>187</sup> In that case, the Alaska Native tribe that occupied the former Venetie reservation tried to impose a tax upon a private contractor who was hired to build a school on Native corporate land.<sup>188</sup> The State of Alaska was potentially liable for the tax because the construction of the school was a joint venture between the State and the private contractor.<sup>189</sup> The State filed for and received both declaratory judgment and injunctive relief from the United States District Court for the District of Alaska on the

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Tenth Judicial Dist., 420 U.S. 425, 427 n.2 (1975) (holding that 18 U.S.C. § 1151 “generally applies as well to questions of civil jurisdiction” involving Indian Country).

184. See *supra* Part III.A (discussing the trust relationship that exists between the federal government and some groups of Native Americans).

185. See Strommer & Osborne, *supra* note 78, at 15–18 (2005) (reporting on the sovereign powers that do not exist absent Indian Country); Ford, *supra* note 45, at 451 (discussing the sovereign powers that Indian Country affords to the Native American groups that occupy it); David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211, 212 (1996) (stating that Indian Country is “essential for any meaningful exercise of tribal sovereign powers”); A. Gregory Gibbs, Note, *Anchorage: Gaming Capital of the Pacific Rim*, 17 ALASKA L. REV. 343, 353–54 (2000) (suggesting that Alaska Native lands are subject to whatever regulations the state promulgates, unlike other Native American groups who can permit gambling on their lands even if the state objects). See also Dean B. Suagee, *Cruel Irony in the Quest of an Alaska Native Tribe for Self-Determination*, 13 NAT. RESOURCES & ENV’T 495, 503 (1999) (reporting that the existence of Indian Country has become increasingly more important to the exercise of sovereign powers by Native American communities); *but see* Strommer & Osborne, *supra* note 78, at 10–16 (discussing sovereign powers likely afforded to Native American groups even in the absence of Indian Country).

186. 522 U.S. 520 (1998).

187. *Id.* at 532–34.

188. *Id.* at 525.

189. *Id.*

ground that the Settlement Act terminated the tribe's sovereign power to tax by extinguishing Indian Country on settlement land.<sup>190</sup> The United States Court of Appeals for the Ninth Circuit reversed.<sup>191</sup>

The Supreme Court of the United States reversed the Ninth Circuit and held that the Settlement Act terminated the sovereign powers of Alaska Native communities to tax because the land held by Native corporations no longer constitutes Indian Country.<sup>192</sup> The Court defined "Indian Country" as land comprised of reservations, dependent Indian communities, or Indian allotments.<sup>193</sup> The Court focused on the definition of "dependent Indian communities" because the Settlement Act revoked the Venetie reservation and allotments were not at issue in the case.<sup>194</sup> The Court held that Alaska Native corporate lands do not constitute dependent Indian communities because the Settlement Act did not set aside the land solely for Alaska Native use nor did the Act make the land subject to federal superintendence.<sup>195</sup> Thus, the Settlement Act terminated Alaska Native communities' power to tax and the other sovereign powers associated with Indian Country, i.e., corporations may own the land but existing Alaska Native governments cannot exercise sovereign powers over it.<sup>196</sup>

The Settlement Act also diminishes sovereignty because it denies Alaska Natives the ability to choose governance structures for use of their land and resources and forces them to conform to Alaska corporate law.<sup>197</sup> The Settlement Act superimposed a corporate structure upon Alaska Natives cultures.<sup>198</sup> Although the Act did not require the dissolution of any

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190. *State ex rel. Yukon Flats Sch. Dist. v. Venetie Tribal Gov't*, No. F87-0051CV(HRH), 1995 WL 462232 (D. Alaska Aug. 2, 1995), *rev'd*, 101 F.3d 1286 (9th Cir. 1996), *rev'd*, 522 U.S. 520 (1998).

191. *State ex rel. Yukon Flats Sch. Dist. v. Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996), *rev'd*, 522 U.S. 520 (1998).

192. *Venetie Tribal Gov't*, 522 U.S. at 532-34.

193. *Id.* at 526-27 (employing the definition of Indian Country found in 18 U.S.C. § 1151).

194. *Id.* at 527.

195. *Id.* at 532-34.

196. *Id.*; see also Goldberg, *supra* note 15, at 947 ("Without Indian country, Alaskan tribes and Native villages cannot exercise meaningful and desired governmental powers."); Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 427 (2000) (noting that the extent of a Native American community's sovereignty is dependent upon the existence of Indian Country).

197. See *supra* Part II.B (explaining that Congress mandated that Alaska Native communities form corporations to receive and oversee funds, land, and resources received under the Settlement Act).

198. See Porter, *supra* note 154, at 100-01 (noting that the Settlement Act imposed the corporate form upon existing Alaska Native cultures and systems of governance); but see *supra* notes 75-78 and accompanying text (explaining that the



Alaska Native governments, section 1606 mandated that regional corporations be formed to oversee money and land given from the settlement,<sup>199</sup> and section 1607 required that each Alaska Native village incorporate to receive any share of the settlement.<sup>200</sup> Alaska Native communities receive an economic benefit from the Act, but they are forced to operate corporations to receive it. Forcing Alaska Native communities to operate corporations and conform to Alaska corporate law limits their sovereignty and autonomy because they can no longer choose how their land and natural resources are governed. Alaska Natives may receive increased economic freedom, but it comes at the cost of their ability to associate and to govern their land and resources as they please.

Sovereignty is also limited under the Settlement Act because it affords little opportunity for self-determination. As just discussed, Alaska Native communities are forced to operate corporations.<sup>201</sup> However, even after they have made the concession to incorporate, the ability to direct and develop their community is contingent upon the Alaska Native corporation's economic success.<sup>202</sup> If the corporation is successful, then the Alaska Native community may be able to undertake the activities and projects that their community wants to achieve. If the corporation suffers economic difficulties, however, then the community will be left fighting for its economic life, rather than allowing its members and community to develop. Since Alaska Native corporations have enjoyed mixed success, the

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Settlement Act did not require the dissolution of governments existing at the time of its passage, nor the distribution of these governments' assets).

199. 43 U.S.C. § 1606(d) (2000) ("Five incorporators within each region . . . shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter.").

200. The statute reads as follows:

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

43 U.S.C. § 1607(a) (2000).

201. See *supra* notes 197–200 and accompanying text.

202. See *infra* notes 224–31 and accompanying text (discussing the mixed financial performance of many Alaska Native corporations and the implications for the communities associated with those corporations).

ability of Alaska Native groups to chart and determine the courses for their communities has been correspondingly uneven.<sup>203</sup>

### C. Destroys Alaska Native Community

Another argument that can be made against the Settlement Act is that it destroys Alaska Native community. Section 1601(b) of the Act specifically states that the settlement was designed to be accomplished “without establishing any permanent racially defined institutions,” which suggests that the framers of the Act were not interested in maintaining traditional, Native cultures.<sup>204</sup> Moreover, the Act arguably causes the breakdown of Alaska Native community by pitting corporations against each other, allowing for the eventual divestment of heritage, and creating dependence on the success of the Alaska Native corporations.

The Settlement Act promotes the breakdown of Alaska Native community by forcing Native corporations to compete for resources and economic opportunities. The thirteen regional corporations authorized under the Settlement Act are required to operate as for profit entities,<sup>205</sup> and the over two hundred village corporations must operate as either for profit or nonprofit institutions,<sup>206</sup> although all have chosen to operate with for profit status.<sup>207</sup> In all cases, the management of these corporations must be concerned with the financial well-being of their businesses.<sup>208</sup> In many instances, these corporations will be in direct competition to take advantage of resources and economic opportunities.<sup>209</sup>

The Act does require that the twelve land-owning regional corporations share revenues generated from timber resources and subsurface estates.<sup>210</sup> However, regional corporations owning or generating

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203. See *infra* Part IV.C (arguing that the Settlement Act potentially destroys Alaska Native communities by creating dependence on the success of Native corporations).

204. 43 U.S.C. § 1601 (2000).

205. 43 U.S.C. § 1606 (2000).

206. 43 U.S.C. § 1607 (2000).

207. See *supra* note 162 and accompanying text (noting that all of the village corporations decided to operate as for profit entities so that they can issue dividends to their shareholders).

208. See Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 398 (2006) (suggesting that the purpose of Alaska Native regional and village corporations is “to make money for their Native shareholders”).

209. See Summit, *supra* note 132, at 617 (stating that after the Settlement Act, “[m]any villages and regions that had once lived and shared in unity, were now pitted against one another in the scramble for money and power”).

210. 43 U.S.C. § 1606(i)(1)(A) (2000) (“[Seventy] percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate

profit from a resource receive larger shares.<sup>211</sup> Disputes between Alaska Native corporations regarding the revenue sharing provision of the Settlement Act have created a large amount of litigation.<sup>212</sup> These disputes and competition among the Native corporations cause divisions between Alaska Native communities that would not exist in the absence of the Settlement Act.

The Settlement Act also threatens Alaska Native community because it allows for the eventual divestment of heritage by permitting land and stock to be sold to non-Natives.<sup>213</sup> The Settlement Act conveyed land to Alaska Native corporations in fee simple without any restrictions on its alienability.<sup>214</sup> Although being freely able to sell land gives Alaska Native corporations economic power, it also creates concerns about what happens if all or a substantial portion of the land is eventually sold.<sup>215</sup> Traditionally, Alaska Natives have engaged in subsistence living by depending on the land to give them what they need to survive.<sup>216</sup> If all or a substantial portion of the land owned by Alaska Native corporations is sold, many traditional Alaska Native practices cannot continue.

The Settlement Act also allows for the possible divestment of Alaska Native heritage because the shares of stock in the Alaska Native corporations can be sold to non-Natives. As previously mentioned, section 1601(b) of the Act provides that the settlement of Alaska Native claims was to occur “without establishing any permanent racially defined institutions.”<sup>217</sup> Despite Congress initially prohibiting the sale of Alaska Native corporate stock to non-Natives, to accomplish the above stated goal,

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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 . . .”).

211. *Id.*

212. See COHEN’S HANDBOOK, *supra* note 7, § 4.07[3][b][iii][B], at 342.

213. See *supra* note 114 and accompanying text (explaining that the Act created the danger that Alaska Native communities would be divested of land received in the settlement because Native corporations were granted title in fee simple without any restrictions on alienability).

214. 43 U.S.C. § 1613 (2000) (providing for the conveyance of settlement land to Alaska Native communities).

215. See *supra* note 114 and accompanying text (noting that the Act created the danger that Alaska Native communities would eventually be divested of all of the land that they received in the settlement).

216. See Smiddy, *supra* note 114, at 832 (“Throughout Alaska, traditional Native economies were substantially based on subsistence hunting, fishing, and gathering.”); Summit, *supra* note 132, at 608–09 (discussing the importance of subsistence living in the traditional cultures of Alaska Native communities).

217. 43 U.S.C. § 1601(b) (2000).

Congress chose to allow the stock to become fully alienable on December 18, 1991.<sup>218</sup> As that date approached, however, the Act was modified so that corporations could maintain or terminate the alienability restrictions.<sup>219</sup> To date, all Alaska Native corporations have opted to maintain, rather than terminate, alienability restrictions.<sup>220</sup> The current provisions of the Act, however, still allow shares of Alaska Native corporations potentially to be sold to non-Natives.

The Act as currently written also allows for takeovers of Alaska Native corporations by non-Natives. Shareholders of a corporation would simply need to amend the articles of incorporation to lift the alienability restrictions on their stock.<sup>221</sup> Upon the sale of stock, Alaska Natives would be left with no interest in institutions that were supposed to be created for their long-term benefit.<sup>222</sup> The corporation would cease to be a communal institution and would take on the qualities of any other corporation.

The Settlement Act also threatens Alaska Native communities because it creates dependence upon the success of the corporations. The Settlement Act was drafted in part to give Alaska Native communities the financial tools to allow for economic and cultural self-determination.<sup>223</sup> The ability of Alaska Native communities to determine the future paths of their communities is dependent upon the success of the Native corporations. If a corporation is not financially successful, it is left fighting to survive, rather than fighting to preserve traditional practices and uplift the Alaska Native community.

The corporations formed under the Settlement Act have had mixed financial performances. Many corporations have struggled,<sup>224</sup> and a few

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218. See COHEN'S HANDBOOK, *supra* note 7, § 4.07[3][b][ii][C], at 344–42 (discussing the initial alienability restrictions on the stock of Alaska Native corporations and the subsequent amendment of these restrictions).

219. 43 U.S.C. § 1629c (2000) (providing the duration of alienability restrictions on stock in Alaska Native corporations).

220. See *supra* note 70 (reporting on the continued existence of alienability restrictions upon Alaska Native stock).

221. *Id.*

222. See Smiddy, *supra* note 114, at 836 (discussing the dangers if alienability restrictions are lifted on the stock of Alaska Native corporations).

223. See Colt, *supra* note 51, at 157 (“ANCSA was intended to be a development tool as much as a claims settlement, a way for one of America’s poorest minority groups to escape from poverty on a self-determined path.”).

224. See *id.* at 155–56 (reporting that from the passage of the Settlement Act through 1993, Alaska Native corporations “lost about \$380 million, or more than eighty percent of their original cash endowment”); Kingsbury, *supra* note 155, at 190 (“Though some of the corporations have operated successfully, others have struggled.”); Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 474–75 (1994) (stating that the Settlement Act created “winners and losers” based on the financial performance of

corporations have declared bankruptcy.<sup>225</sup> Most Alaska Native village economies remain fragile<sup>226</sup> and have little opportunity for development.<sup>227</sup> The land occupied by many villages may be capable of supporting traditional subsistence activities, but often is not able to accommodate the business ventures of a corporation.<sup>228</sup> Worse yet, Alaska Native corporations are subject to the same type of corporate scandals and mismanagement as other corporations.<sup>229</sup>

Through the Settlement Act, Congress tied the well-being of Alaska Native communities to the economic performance of their corporations. When a corporation fails to perform, the related Alaska Native community suffers.<sup>230</sup> As evidence of this, despite the size of the settlement under the Act, many Alaska Natives continue to live in poverty.<sup>231</sup> Even though the Settlement Act may have been drafted to be a permanent solution to the needs of Alaska Natives, the poor performance of many of the Native corporations has done more to threaten Alaska Native communities than help them.

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the corporation representing a particular group of Alaska Natives); *see also* Porter, *supra* note 22, at 87 (discussing the difficulties experienced by Alaska Native corporations in attempting to improve the economic and social status of their shareholders).

225. *See* Jack F. Williams, *Integrating American Indian Law into the Commercial Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557, 567 (2001) (reporting that some Alaska Native corporations have experienced “severe financial difficulty” and have had to seek protection by declaring bankruptcy).

226. *See* Lee Huskey, *Alaska’s Village Economies*, 24 J. LAND RESOURCES & ENVTL. L. 435, 435 (2004) (describing the opportunities for economic development in Alaska Native villages).

227. *Id.* at 456 (“Economic development in Alaska villages is limited . . . : [v]illages are small and remote, villagers have limited access to and control over local resources, not all areas have commercial resources, relatively few projects in rural Alaska can meet market tests, and a significant share of existing jobs go to non-residents.”).

228. *See* Berardi, *supra* note 17, at 98 (discussing the cultural geography of Alaska Native villages and its ability to support corporate activities).

229. *See* Murphy, *supra* note 178, at 286–87 (reporting on the corporate scandals and financial mismanagement that occurred within the Cape Fox Corporation and the Kake Corporation).

230. *See* Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373 (2002) (“Alaska Natives continue to experience poverty and continue to seek ways to integrate a cash economy with their subsistence way of life.”).

231. *Id.*

## V. SUGGESTIONS FOR ANY FUTURE SIMILAR LEGISLATION

As previously stated, the purpose of this Article is not to make a final determination of whether the Settlement Act was a success or a failure. Such a blanket statement is not possible because the Act impacted multiple groups of Alaska Natives with different cultures, resources, and aspirations for the future. However, in the event that similar legislation is ever proposed or that the Settlement Act is ever amended, a number of ways exist to improve the corporate model that serves as a basis for the Act. Any future legislation should be drafted to conform to the realities of Native American life, re-imagine Indian Country, and provide for the long-term success of the business entities created.

### A. Conformance to the Realities of Native American Life

One of the major complaints about the Settlement Act is that it forced Alaska Native communities to conform to a corporate system that does not take into account their cultural practices and systems of governance.<sup>232</sup> If the Settlement Act is used as the basis for any future legislation, the drafters must ensure that the legislation conforms to the realities of the Native American group involved. Ways to improve any future legislation include using limited liability partnerships or limited liability companies, allowing any institution created to operate with nonprofit purposes, and studying the traditional practices of a group before drafting any legislation.

Drafters of any future legislation should use limited liability partnerships or limited liability companies as the basic business form because these forms have flexible management structures. One of the major complaints about the Settlement Act is that it superimposed corporate management requirements upon Alaska Native communities.<sup>233</sup> Corporations have a rigid management structure that requires that they be run in a specific way and be governed in a specific manner.<sup>234</sup> The Settlement Act has been viewed by some as an attempt to assimilate Alaska Natives because the Act forces them to adopt a corporate worldview.<sup>235</sup>

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232. See *supra* Part IV.A (arguing that the Settlement Act is harmful because it encased Alaska Native groups within a mandatory system of law that did not conform to their cultural practices).

233. *Id.*

234. See generally JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS (2d ed. 2003) (providing an overview of the corporate form and the complexity of the law governing that type of business entity).

235. See COHEN'S HANDBOOK, *supra* note 7, § 4.07[3][b][ii][B], at 340 (arguing that the Settlement Act was "an experimental model initially calculated to speed assimilation of Alaska Natives into corporate America"); Wallace Coffey & Rebecca

The rigidity of the corporate form inhibits Alaska Native communities' capacities for self-determination by forcing them to govern their land and resources in a certain way.<sup>236</sup>

If similar legislation is ever proposed, limited liability partnerships or limited liability companies should be used to allow the Native American group the freedom to determine its own governance structure. Limited liability partnerships or limited liability companies are the correct business forms to employ because the partners or members of the respective entities can draft agreements with whatever management structure they desire.<sup>237</sup> The partners or members can draft management provisions in an agreement that mimics traditional governance structures or adopt new provisions based on their own preferences.<sup>238</sup> Limited liability partnerships and limited liability companies would give a Native American group the capacity for self-determination in how the Native American business would be run. Of course, the management of a business entity is unlikely to ever exactly match the traditional governance practices of a Native American group, but the use of a limited liability partnership or limited liability company would still be an improvement over the corporations mandated by the Settlement Act.

The choice between using limited liability partnerships or limited liability companies is difficult because the business entities created under any future legislation would be governed by state law. The Settlement Act, for example, mandated that the business entities that it created be incorporated under the laws of Alaska.<sup>239</sup> Because limited liability partnerships and limited liability companies are relatively new business

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Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 195 (2001) (claiming that the Settlement Act constitutes a means of assimilating Alaska Natives into the dominant culture of the United States); Smiddy, *supra* note 114, at 824-25 (stating that the Settlement Act was designed to "accomplish economic assimilation of Native economies into the capitalistic economy of the broader society").

236. See Robert B. Porter, *A Proposal to the Hanodagany as to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 996-97 (1998) (suggesting that the governance provisions of the Settlement Act should be repealed, so that Alaska Native communities can adopt whatever governance system that they prefer for use of their land and resources).

237. See ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS § 6.4 (1996) (explaining the flexible management structure of limited liability companies).

238. See PETER C. KOSTANT, BUSINESS ORGANIZATIONS: PRACTICAL APPLICATIONS OF THE LAW 63-82 (1996) (explaining the process of drafting a limited liability company operating agreement).

239. 43 U.S.C. §§ 1601(d), 1607(a) (2000).

forms, the law governing these entities can vary from state to state.<sup>240</sup> Drafters of any future legislation would want to survey statutes and case law governing limited liability partnerships and limited liability companies before choosing which business form a Native American group should use and where the business entity would be required to organize. This is especially true because the fiduciary duties owed by partners or members of limited liability partnerships and limited liability companies can be higher than those owed by directors and officers to shareholders of corporations.

One way to ensure that the fiduciary duties and goals of the management of a Native American business conform to the realities of the people that it represents is to allow the business to operate with nonprofit goals, even if a for profit entity is formed for other reasons such as taxation or the ability of a for profit corporation to issue dividends. The Settlement Act required that the regional corporations that it created operate as for profit entities<sup>241</sup> and allowed the village corporations to operate with either for profit or nonprofit status.<sup>242</sup> All of the village corporations created by the Act chose to operate as for profit entities to allow dividends to be paid to their shareholders.<sup>243</sup> Based on the choices made by Alaska Native village corporations, a Native American community undertaking a similar settlement is likely to want to operate its businesses as for profit entities, so that it can provide direct financial assistance to its members through dividends and other payouts. In a for profit entity, financial performance is the main concern of management.<sup>244</sup>

If similar legislation is ever proposed, the drafters should allow any business created to operate with nonprofit goals because the business could better address the issues facing the Native American community that

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240. See HAMILTON, *supra* note 237, § 7.2, at 146–49 (discussing variations in the state statutes governing limited liability partnerships); KLEIN & COFFEE, *supra* note 128, at 104 (describing limited liability partnerships as the “newest organizational innovation” and explaining some of the differences in the law governing these entities); *id.* at 102–03 (describing limited liability companies as a “recent statutory development” and noting that the governing statutes “vary in some important respects,” although similarities do exist among the statutes).

241. 43 U.S.C. § 1606(d) (2000).

242. 43 U.S.C. § 1607(a) (2000); see also Summit, *supra* note 132, at 616 (reporting that all of the village corporations created by the Settlement Act opted to organize as for profit entities so that they could issue dividends to their shareholders).

243. See *supra* note 162 and accompanying text.

244. See *supra* note 158 (explaining that Alaska Native corporations are required to have financial performance as their primary focus because all of the corporations operate as for profit entities).



it represents.<sup>245</sup> Although financial performance may be a major concern of the individuals represented by a native corporation, it is by no means the only concern. Land ownership, land preservation, jobs, infrastructure, and a myriad of other concerns hold greater significance for many Native American communities.<sup>246</sup> Allowing a native business to operate with nonprofit goals would remove the emphasis on financial performance, and the Native American group could define the mission of the business in its articles of incorporation and by-laws. This approach would allow a Native American group the power of self-determination over the goals of any business entity designed to protect its interests without assuming that profit is the major goal of that group. This approach would also allow for the entity to make payouts that are traditionally restricted to for profit entities.

Another way to assure that any future legislation conforms to the realities of Native American life is to study the traditional practices of a group before drafting any legislation. The Settlement Act failed to fully define the relationship between Alaska Native governments existing at the time the Act and Native corporations created as a result of the Act. The Act did not mandate the dissolution of Alaska Native governments existing at the time of its passage nor the distribution of their assets.<sup>247</sup> Although Alaska Native corporations are designed to hold property, rather than govern communities, these corporations make independent decisions about how to use land and resources.<sup>248</sup> By failing to take into account the role of the governments existing at the time of the Act, the role and purpose of Alaska Native corporations becomes confused.

Moreover, as previously discussed, the drafters of the Settlement Act failed to take into account the realities of many Alaska Native communities

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245. See Smiddy, *supra* note 114, at 825 (“[Alaska] Natives’ modification of the business corporation form portends the development of a new, hybrid form of sustainable enterprise (or social enterprise) suitable to furthering both economic and eleemosynary purposes.”).

246. See, e.g., *supra* note 121 (suggesting that use and conservation of land may be more important to many Alaska Natives than the financial performance of their corporations); *supra* note 122 (suggesting that employment opportunities are more important to many Alaska Natives than the financial performance of their corporations).

247. See *supra* notes 75–76 and accompanying text (discussing the coexistence of Alaska Native governments and Native corporations).

248. See *supra* notes 75–79 and accompanying text (reporting on the role of Alaska Native corporations and confusion regarding its relationship to Native governments existing at the time of the Settlement Act).

in that they did not protect subsistence rights.<sup>249</sup> Although Alaska Natives received a significant amount of money and land under the Act, they relinquished hunting and fishing rights to the vast majority of the state.<sup>250</sup> Because many Alaska Native communities still followed migratory animals at the time the Act was passed, subsequent legislation was needed to restore their subsistence rights.<sup>251</sup>

In the event similar legislation is ever proposed or in case the Settlement Act is ever amended, the Native American group's cultural practices and values must be studied and understood prior to any legislative drafting. Such a cultural study might potentially lengthen the negotiation and drafting process for future, similar legislation. However, thoroughly understanding the Native American group's cultural practices would lessen or avoid the need for subsequent remedial legislation because of the failure to comprehend the needs of that native community.

## B. The Re-Imagination of Indian Country

Because of the Settlement Act, most Alaska Native communities are no longer subject to the trust relationship under which the federal government holds title to much of the land that Native American groups occupy.<sup>252</sup> The Act gave Alaska Native corporations full title to the land that they received in the settlement, but the sovereignty of land ownership came at the price of many of their other sovereign powers.<sup>253</sup> As held by the Supreme Court

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249. See *supra* note 165 (explaining the failure of the Settlement Act to protect the subsistence lifestyle of many Alaska Natives).

250. 43 U.S.C. § 1603(b) (2000).

251. See Theriault et al., *supra* note 165, at 42–44 (discussing the passage of the Alaska National Interest Lands Conservation Act in 1980, which was designed in part to protect the subsistence lifestyles of Alaska Natives); COHEN'S HANDBOOK, *supra* note 7, § 4.07[3][c][ii], at 354–60 (examining the Alaska National Interest Lands Conservation Act and how it operates to protect Alaska Native subsistence rights). See generally Sacks, *supra* note 3 (discussing the current state of Alaska Native subsistence rights).

252. 43 U.S.C. § 1601(b) (2000) (stating that the settlement of Alaska Native claims was to occur “without creating a reservation system or lengthy wardship or trusteeship”).

253. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1232 (2001) (“The effort to free Alaska Natives from federal paternalism has . . . resulted in diminishing their capacity for self-governance.”). Compare *supra* Part III.A (arguing that the Settlement Act increased Alaska Native sovereignty by giving them ownership of the land, a vehicle for economic success, and the power of self-determination) with *supra* Part IV.B (arguing that the Settlement Act diminished Alaska Native sovereignty by ending the powers of Indian Country, denying the ability to choose a governmental structure, and forcing conformance with Alaska corporate law).

of the United States in *Alaska v. Native Village of Venetie Tribal Government*,<sup>254</sup> most, if not all, of the land received under the Act no longer constitutes Indian Country, so Alaska Native communities no longer have the sovereign powers that Indian Country affords.<sup>255</sup> In the last line of the Court's opinion in *Venetie*, Justice Thomas stated: "Whether the concept of Indian Country should be modified is a question entirely for Congress."<sup>256</sup>

In the event that legislation similar to the Settlement Act is ever proposed, Congress should re-imagine Indian Country to allow for the continued sovereign powers of the Native American community and to provide for Native American land ownership while maintaining restrictions on alienability of land and stock. Although this approach to reinventing Indian Country does have some paternalistic aspects, it offers a means of respecting the sovereignty of Native American communities while providing for their long-term existence.

If legislation similar to the Settlement Act is ever adopted, the Native American community must continue to have sovereign power over the land that its business entities own. The existence of Indian Country ensures Native American communities a wide variety of sovereign powers, such as the power to tax, jurisdiction to adjudicate certain disputes, authority over non-members on tribal land, the power to regulate domestic relations, and the right to determine rules of inheritance.<sup>257</sup> Maintaining these sovereign rights is important because it provides Native American groups with control over their territory and promotes the well-being of their communities.<sup>258</sup> Rather than terminating recognition of a Native American group by recasting it in a business form,<sup>259</sup> Congress would be recognizing

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254. 522 U.S. 520 (1998).

255. *Id.* at 523 (holding that most, if not all, land conveyed to Alaska Native corporations no longer constitutes Indian Country).

256. *Id.* at 534.

257. See *supra* note 185 and accompanying text (discussing the sovereign powers that Native American tribes can exercise only in Indian Country).

258. See Strommer & Osborne, *supra* note 78, at 30–31 (suggesting that the sovereign powers of Indian Country are important because they help provide effective services to rural residents, enhance local control, encourage tolerance and diversity, and bridge culture divisions); Kendall-Miller, *supra* note 176, at 465 (arguing that the extent of Alaska Native sovereignty is important as these communities try to "address a broad array of issues affecting the health, welfare, and the general public good of their tribal communities").

259. See Thompson, *supra* note 196, at 444–50 (arguing that the Settlement Act constitutes a de facto termination of Alaska Native sovereignty); Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 339–42 (1997) (arguing that the Settlement Act has a "terminationist bent" because it was designed to

its distinct social and political value by allowing it to maintain its sovereign powers over its land. In fact, a number of commentators have suggested that the Settlement Act could be greatly improved by declaring Alaska Native corporate land to be Indian Country.<sup>260</sup>

Even though the sovereign powers of Indian Country should be maintained, any future legislation that is similar to the Settlement Act must provide for Native American land ownership. This Article should not be viewed as a defense of the federal trust relationship under which the federal government holds title to much of the land that Native Americans occupy.<sup>261</sup> Although the federal government designates this land as Indian Country and allows Native Americans who reside upon it certain sovereign powers, Native Americans do not own title to it.<sup>262</sup> The lack of title has allowed the federal government to frequently abuse its control over the land and reconfigure its relationships with Native American communities whenever it serves the government's own needs.<sup>263</sup>

If legislation similar to the Settlement Act is ever proposed, Congress must re-imagine Indian Country to allow for Native American land ownership while maintaining the Native American group's sovereign rights. Moreover, if legislation similar to the Settlement Act is ever proposed, Congress has the power to grant title to the land in fee simple to a Native American group, while preserving that group's sovereign rights over its land.

In re-imagining Indian Country through legislation similar to the Settlement Act, Congress should also put long-term restrictions on the alienability of land and stock. Two of the major concerns about the Settlement Act are that it granted ownership of settlement land in fee simple<sup>264</sup> and that it allows for stock to be sold to non-Natives.<sup>265</sup> Allowing for the sale of land and stock to non-Natives creates the dangers of

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extinguish Indian Country in Alaska and mirrors portions of other statutes designed to terminate support for other Native American tribes).

260. See, e.g., Strommer & Osborne, *supra* note 78, at 2 (arguing that Alaska Native corporate land should have its status restored as Indian Country); Suagee, *supra* note 185, at 504 (suggesting that Congress should declare Alaska Native corporate land to be Indian Country).

261. See *supra* Part III.A (discussing the trust relationship that was established in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)).

262. See *supra* Part III.A.

263. See Thompson, *supra* note 196, at 425–26 (noting that the trust doctrine prevents Native American communities from making various decisions affecting their futures and gives the federal government the power to interfere paternalistically in Native American affairs).

264. 43 U.S.C. §§ 1611, 1613, 1618 (2000) (providing for the selection and conveyance of settlement land).

265. 43 U.S.C. § 1629c (2000).

destruction of Alaska Native communities and divestment of heritage because Alaska Native communities could lose control of their territories and corporations.<sup>266</sup> Placing restrictions upon the sale of land and stock would prevent these concerns from arising.

Such restrictions on land and stock are troublesome because they are paternalistic and would lessen the ownership rights of the members of a Native American community. The restrictions, however, would ensure the long-term existence of both the Native American business entity and the Native American community because of the ties between the community, the business, and the land. With the alienability restrictions, legislation similar to the Settlement Act would become a means for keeping a Native American community together, rather than slowly divesting its members of land and ownership of a business entity that is supposed to operate for the community's benefit.

### C. Providing for Long-Term Business Success

The financial performances of the corporations created under the Settlement Act have been mixed. While some Native corporations have been successful,<sup>267</sup> others have become nearly insolvent, and some have had to declare bankruptcy.<sup>268</sup> Financial performance is clearly not the only measure of success because other issues, such as land conservation, subsistence rights, property ownership, and employment, are also important to Alaska Natives.<sup>269</sup> However, the mixed financial performance of the corporations demonstrates that the drafters of any similar, future settlement could do a better job providing for the long-term success of the business entities created. Any future, similar settlement should supply the Native American group with business and financial counseling, free legal services, and a mechanism for dealing with business failures.

Business and financial counseling should be a part of any future, similar settlement because many Native Americans have little business

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266. See Part IV.C (discussing why the Settlement Act arguably destroys Alaska Native community).

267. See Colt, *supra* note 51, at 156.

268. See *supra* note 225.

269. See, e.g., *supra* note 121 (suggesting that use and conservation of land may be a better measure of success of an Alaska Native corporation, rather than financial performance); *supra* note 122 (suggesting that employment opportunities for Alaska Natives may be a better measure of success of a Native corporation, rather than financial performance).

experience.<sup>270</sup> Drafting any future, similar settlement to conform to the realities of Native American life will help to alleviate some of the tensions between a Native American community and a business entity created under a settlement,<sup>271</sup> but tensions will still remain because many Native Americans do not have business training.<sup>272</sup> A major complaint about the Settlement Act is that it failed to prepare Alaska Natives to become shareholders, directors, and officers by not educating them of their rights, duties, and obligations.<sup>273</sup> Because of the lack of business knowledge, a large percent of the money received by Alaska Native groups under the Act went to paying corporate consultants and attorneys, rather than providing direct benefits to Alaska Natives and their communities.<sup>274</sup>

If legislation similar to the Settlement Act is ever passed, it should contain funding for business and financial counseling. Native American shareholders should be informed about their rights, e.g., how to pass resolutions, amend by-laws and articles of incorporation, and elect directors and officers. The directors and officers of Native American entities should be educated about basic business topics, including accounting, finance, management, and marketing. They also should receive extensive training regarding their fiduciary duties and the unique obligations that they have in representing a Native American community.

Any Native American business entities that are created by legislation similar to the Settlement Act should also be afforded free legal

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270. See Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 792–93 (2005) (reporting on the lack of business skills within many Native American tribes); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 837–41 (arguing that business training is needed for tribal economies to develop properly).

271. See *supra* Part IV.A (discussing the tensions between Alaska Native culture and corporate culture); *supra* Part V.A (providing methods for better conforming business entities to the realities of Native American life).

272. See *supra* note 270 (discussing the limited business training of many Native Americans).

273. See, e.g., Ford, *supra* note 45, at 450 (“A major criticism of ANCSA is that Congress created an overly complex corporate scheme . . . despite the fact that when deliberating the Act, Congress knew that many Alaska Natives were inexperienced in business matters generally and were completely unfamiliar with corporations and their operations.”); Sacks, *supra* note 3, at 263 (criticizing the Settlement Act for abandoning Alaska Native communities in the boardroom with little business training); Kathryn A. Black, David H. Bundy, Cynthia Pickering Christianson, and Cabot Christianson, *When Worlds Collide: Alaska Native Corporations and the Bankruptcy Code*, 6 ALASKA L. REV. 43, 83 (1989) (“Alaska’s Native culture did not have a long entrepreneurial tradition, and there were few Alaska Natives with substantial business experience to sit on the boards of directors, or serve as executives, of the new corporations.”).

274. See *supra* notes 171–73 and accompanying text.

representation. Lawyers have benefited substantially from the settlement of Alaska Native claims.<sup>275</sup> For example, section 1619 of the Act required that funds be withheld from the settlement to pay for services received by Alaska Natives from attorneys and consultants in connection with preparing settlement legislation and in connection with any suit dismissed by the Settlement Act.<sup>276</sup> Attorneys continue to benefit from the Act because of the legal fees required to operate and maintain Alaska Native corporations.<sup>277</sup> Moreover, because the Act represented a novel solution to the settlement of aboriginal claims, Alaska Native corporations have had to pay substantial litigation fees to clarify its meaning.<sup>278</sup>

Any future, similar legislation should provide free legal service to ensure that settlement funds go to the proper recipient, *i.e.*, the Native American community. Even if Congress is not willing to provide legal services indefinitely, Congress should pay for expenses incurred by Native Americans in preparing settlement legislation and establishing the Native business entities. This approach ensures that Native American communities understand the amount that they are receiving for settling their claims without allowing the settlement to be diminished by hidden legal fees.

Finally, if legislation similar to the Settlement Act is ever proposed, it must contain a mechanism for responding to Native American business failures that ensures the well-being of the community associated with the business. Business failures are a common event in the United States.<sup>279</sup> Due to poor financial performance, a number of Alaska Native corporations have filed for bankruptcy to receive protection from their creditors and to reorganize their business affairs.<sup>280</sup> Reorganization bankruptcy is problematic when undertaken by Native corporations because the reorganization process protects the corporation and its creditors prior to protecting the interests of Alaska Native shareholders.<sup>281</sup> Reorganization

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275. *Id.*

276. 43 U.S.C. § 1619 (2000).

277. *See supra* Part IV.A (discussing the legal burdens and legal costs created by operating an Alaska Native corporation).

278. *Id.* (explaining the difficulties and legal expense created by operating under an unrefined system of law, such as the Settlement Act).

279. *See* Black et al., *supra* note 273, at 84 (explaining that business failure and bankruptcy are inherent risks within the capitalist economic system).

280. *See* Williams, *supra* note 225, at 567 (discussing the poor financial performance of several Alaska Native corporations).

281. *See id.* (“[T]he absolute priority rule embodied in the Bankruptcy Code protects creditors at the expense of shareholders; whereas, the ANCSA seeks to

bankruptcy does little to safeguard the values and culture of an Alaska Native community because the process focuses on the corporation and not the community.<sup>282</sup> Liquidation bankruptcy is an even greater concern because it would mean the wrapping up and termination of an Alaska Native business.<sup>283</sup>

Any future legislation that is similar to the Settlement Act should contain a mechanism for dealing with business failures to protect the Native American community associated with the business. The nature of the mechanism should be negotiated between the Native American community and the federal government. Options for dealing with Native American business failures include: modifying the United States Bankruptcy Code, mandating that the government provide financing to a failing business, and imposing strict prohibitions on alienation of land and other essential resources. The exact mechanism for dealing with business failures is not important as long as the cultural and political well-being of the Native American community is protected in the process.

## VI. CONCLUSION

The Settlement Act represents a unique method of resolving aboriginal land claims. As this Article explains, the Act has both benefits<sup>284</sup> and shortcomings.<sup>285</sup> Readers can determine for themselves whether the Act constitutes a success or failure for Alaska Native communities. Such reflection is important because the passage of the Settlement Act marked the beginning of a period in which Congress has been willing to negotiate and legislatively settle land claims.<sup>286</sup>

This Article is unique and adds to existing scholarship because it provides substantive suggestions for the next time that legislation similar to the Settlement Act is proposed or if Congress chooses to amend the Settlement Act. Any future legislation should be drafted to conform to the realities of Native American life, re-imagine Indian Country, and provide for the long-term success of the business entities created. Most importantly,

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protect economic growth while protecting the lands and cultural values of the Natives.”).

282. *Id.*

283. See Black et al., *supra* note 273, at 89–90 (discussing the characteristics of liquidation bankruptcy).

284. See *supra* Part III (examining the benefits of the Settlement Act).

285. See *supra* Part IV (analyzing the harms and shortcomings of the Settlement Act).

286. See *supra* note 20 (providing a list of numerous other land claims settlement Acts that have been negotiated and codified by Congress since the passage of the Alaska Native Claims Settlement Act).



any future legislation must conform to the policy set forth in the Settlement Act requiring “maximum participation by Natives in decisions affecting their rights and property.”<sup>287</sup> Finally, any new legislation must actually settle Native American issues, rather than creating new uncertainty and tensions.

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287. 43 U.S.C. § 1601(b) (2000).