

# A BUSINESS ENTITY BY ANY OTHER NAME: CORPORATION, COMMUNITY AND KINSHIP

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*“Congress finds and declares that (a) there is an immediate need for fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims; (b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation affecting their rights and property.”*

Alaska Native Claims Settlement Act, Pub. L. No. 92-203 § 2(a)-(b), 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2012))

*“Forty years ago, Natives in Alaska were told they needed to learn politics . . . . So we did. Thirty years ago they were told to learn business, so we have.*

John Christensen, former Vice President for the Chenega Bay Indian Reorganization Act (IRA) Council

## **ABSTRACT**

*Forty-five years ago, the Alaska Native Claims Settlement Act resolved outstanding land claims between the federal and state government and Alaska Natives. The fund created by the settlement was used as seed money to establish the Alaska Native Corporations. The Native corporations have particular features which make them distinct from other business entities, these differences have been lauded by some shareholders but have simultaneously drawn ire from others. In 2015 the Alaska legislature introduced H.B. 49, a benefit corporation bill that would allow entrepreneurs to pursue both profits and social ends. This note traces the rise of the modern Alaska Native Corporation. It then weighs the merits of each business entity and assesses which is best aligned to improve the lives of Alaska Natives.*

## **INTRODUCTION**

Long known for its pioneering spirit, the state of Alaska continued to build on this tradition when it settled land claims with Alaska Natives in a manner unlike any other settlement between a state and indigenous peoples—by using the corporate form. In 1971, the Alaska Native Claims

Settlement Act (ANCSA)<sup>1</sup> resulted in the formation of the Alaska Native Corporations (ANCs). Ultimately, thirteen regional corporations and over 200 village corporations were created<sup>2</sup> with the seed money derived from a one billion dollar settlement with the federal and state governments. Almost forty-five years since the settlement, these entities have undergone numerous readjustments, but, at their core, they strive to improve the lives of Alaska Natives. Since 2010, another corporate entity with a mission not limited to maximizing shareholder profits has come into vogue in the United States – the benefit corporation (also known as a “B Corp”) with an emphasis on social and environmental goals.<sup>3</sup> Essentially, the B Corp is a distinct entity choice that allows for-profit corporations to function in a middle zone between the non-profit and traditional business model by requiring socially responsible goals in its mission, rather than solely a commitment to profit maximization.<sup>4</sup> In 2015, the Alaska House of Representatives introduced a B Corp statute titled “House Bill 49” (H.B. 49)<sup>5</sup> which would have introduced a corporate form that might have been more attractive than ANCs.

Corporations are powerful entities – they aggregate capital, talent and labor toward a common goal. Historically, corporations accomplish their goal by making profits for shareholders; this Note will analyze the effects on the corporate form and accountability when goals other than profits are favored. Additionally, this Note will analyze how the experience of ANCs can serve as a reference point for the future of B Corps and vice-versa. Part I will trace the history of the ANCSA settlement, the structure of ANCs as business entities, and attendant legal considerations. Part II will trace the rise of the B Corps, comparing the merits of ANCs and B Corps. This Note will ultimately conclude that both

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\* J.D. Candidate, Duke University School of Law, 2017; B.A., History, Yale College, 2013. I would like to thank my mother, Martha, my father, Santiago, and my sisters, for their unending support and for always encouraging my curiosity to learn more; to Professor Jim Cox – a Duke Law legend – for taking the time to advise a Note about business associations slightly out of his usual domain, and to the staff of the *Alaska Law Review* for tirelessly working to improve this Note and for always making the law journal that covers the Last Frontier feel a little more like a family for this South Floridian.

1. ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2012)).

2. *Id.* §§ 1606-1607.

3. See generally Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013) (detailing the model legislation for Benefit Corporations and governance issues posed by this particular corporate form).

4. *Id.* at 1009.

5. H.R. 49, 29th Leg., 1st Sess. (Alaska 2015).

corporate forms are distinct enough that ANCs should be kept as different entities to serve very narrow goals for their sociocultural constituency.

## I. THE ALASKA NATIVE CORPORATIONS

*“The Native people themselves are often under a misapprehension regarding the land – they think that it is their land, when it is in fact corporate land. If you own stock in General Motors, you can’t walk in there and drive off in one of their cars. . . . What it is that our corporation owns the land. Sure, we elect the board of directors. I sit on the board of directors myself. However, there is [sic] certain things that you have to follow in a profitable corporation, and a lot of those rules of the game don’t allow you to get involved into the social, political aspects of the Native people that the Native peoples so much expect from a corporation.”*

Don Standifer, Tyonek Native Corporation<sup>6</sup>

*“It’s like you and I never saw a baseball game in our lives. We’d never seen mitts or bats or baseballs. All of a sudden you were told, ‘Here’s your mitts. Here’s your bats. Here’s your balls. Tomorrow, you play the Yankees.’”*

John Hope, a Tlingit and Juneau resident involved in land claims, describing the struggle to fill the business expertise gaps that developed in the years following the ANCSA settlement<sup>7</sup>

The formation of Alaska Native corporations (ANCs) has been widely lauded for its innovative approach to settling native claims. Rather than relying on the widely criticized reservation system used elsewhere to deal with the property claims of native peoples, Alaska Natives sought a different solution, through the corporate form.<sup>8</sup> However, ANCs have also been criticized for the disconnect between incorporation on the one hand and concepts of Native sovereignty and cultural traditions rooted in subsistence and kinship on the other.<sup>9</sup> ANCs are distinctive from other

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6. THOMAS BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION, 29–30 (1st ed. 1985).

7. Cathy Brown, Lori Thomson & Svend Holst, *Between Worlds: The History*, ALASKA HUMANITIES FORUM (last visited Sept. 23, 2016), <http://www.akhistorycourse.org/modern-alaska/between-worlds-the-history>. In 1998, the Juneau Empire staff, in collaboration with the Kenai Peninsula Clarion and Alaska Journal of Commerce traveled throughout the state of Alaska to prepare a special report detailing the impact of ANCSA on Alaska Natives. *Id.*

8. See Svend Holst, *Between Worlds: Political Clout*, ALASKA HUMANITIES FORUM (last visited Sept. 23, 2016), <http://www.akhistorycourse.org/modern-alaska/between-worlds-political-clout> (noting in a special report the increase in political and economic influence Native corporations have given Alaska Natives).

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

corporations in the manner that they were established – they were created by legislation and mandated by statute.<sup>10</sup> In this way, ANCs are a reversal of the traditional process of incorporation wherein a group finds an economic opportunity and organizes itself to exploit and capitalize on that opportunity.<sup>11</sup> ANCs are again peculiar because a source other than their owners provided capital.<sup>12</sup> Moreover, ANCs, unlike most corporations, did not begin with a business plan or product; instead they were funded first and then urged to create or find economic opportunities afterward.<sup>13</sup>

Additionally, the shareholders and management of ANCs are unlike those of most other large corporations. Native shareholders are connected by ties of kinship, culture, and affinity with the very land that the corporations have put into trust.<sup>14</sup> ANC corporate management is also distinct. Directors are not required to declare dividends to keep and attract shareholders, and shareholders were assigned by an act of Congress.<sup>15</sup> Shares were not tradable for the first twenty years after issue, and regional corporations are required to share revenue with one another.<sup>16</sup> All of these differences present both opportunities and obstacles to the core mission of ANCs – improving the lives of Alaska Natives.

#### A. Native Claims, Sovereignty, and Settlement

Before ANCSA's enactment, the legal status and property claims of Alaska Natives were unsettled. Although Article III of the 1867 Treaty of Cession between Russia and the United States provided that Alaska Natives be treated in the same manner as other Native American tribes,

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manner in which the corporate form contemplated by ANCSA failed the Alaska Natives in maintaining sovereignty and presenting alternatives). Hirschfield's note was written only twenty years after the settlement and much has changed since then. In particular, the economic viability of the business entities has taken a turn for the better. See Mara Kimmel, *Fate Control and Human Rights: The Policies and Practices of Local Governance in America's Arctic*, 31 ALASKA L. REV. 179, 180 (2014) (noting the adverse impact that losing territorial control over the land conveyed in ANCSA had on Alaskan tribal governance).

10. ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2012)) (establishing Alaska Native corporations and the manner in which they are organized).

11. BERGER, *supra* note 6, at 28.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 29.

16. 43 U.S.C. § 1606(i).

this obligation was rarely observed.<sup>17</sup> The treaty was further complicated by the fact that Article VI declared Alaska Natives:

to be free and unencumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, Russian, or any other, or by private parties, except merely private individual property holders.<sup>18</sup>

The federal Organic Act of 1884 further complicated the treaty's vagueness regarding the treatment of Alaska Natives because it failed to render a definitive stance on the status of lands claimed by Alaska Natives.<sup>19</sup> Ultimately, the Ninth Circuit interpreted Article VI of the treaty to have extinguished communal Native land claims and § 8 of the Organic Act to have recognized Indian title to a relatively small number of land plots.<sup>20</sup> In 1955, the Supreme Court disapproved of the Ninth Circuit's reasoning, holding that Native claims were aboriginal, rather than constitutionally compensable property interests.<sup>21</sup>

Alaska's admittance to statehood on January 3, 1959<sup>22</sup> began the chain of events that eventually led to the enactment of ANCSA and the formation of ANCs. Pursuant to section 4 of the Statehood Act, the state was required to "forever disclaim all right and title to any lands or other property . . . , the right or title to which may be held by any Indians, Eskimos, or Aleuts."<sup>23</sup> Furthermore, section 4 reserved "absolute jurisdiction and control" of such property to the federal government until Congress disposed of it.<sup>24</sup> Section 6 of the Statehood Act also allowed the state to select approximately 103 million acres from the "vacant, unappropriated, and unreserved" public lands held by the federal government.<sup>25</sup> In October of 1959, the Tlingit and Haida Tribes obtained a judgment from the United States Court of Claims concluding that they

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17. Treaty concerning the Cession of the Russian Possessions in North America, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539, 542.

18. *Id.* at 542-43.

19. See An Act Providing a Civil Government for Alaska, ch. 53, § 8, 23 Stat. 24, 26 (1884). The Organic Act extended federal laws over mining claims to Alaska as well as the first framework for territorial and civil government after the U.S. acquisition from Russia. *Id.* From 1867 to 1884, Alaska had been governed as a federal military district. See generally DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS chs. 1-2 (3d ed. 2012) [hereinafter CASE & VOLUCK].

20. *Miller v. United States*, 159 F.2d 997, 1002-03 (9th Cir. 1947).

21. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955).

22. Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339.

23. *Id.* at 339.

24. *Id.*

25. See *id.* at 340 (explaining the state's power to select public lands).

held aboriginal title to most of southeast Alaska and were entitled to just compensation<sup>26</sup> – a watershed moment for Alaska Natives.

The *Tlingit & Haida Indians v. United States*<sup>27</sup> decision served as an impetus for the founding of the Alaska Federation of Natives (AFN) in 1966.<sup>28</sup> At its first convention, AFN recommended that the Department of the Interior freeze all federal land conveyances pending settlement because an increasing number of non-Natives had begun purchasing Alaskan land following statehood.<sup>29</sup> Alaska Natives politically organized and protested the notion that lands would be conveyed without their own claims being heard first.<sup>30</sup> As a result, the Department, under the leadership of Secretary Stewart Udall, stopped the conveyance of all lands from the federal government to address Native claims.<sup>31</sup> In *Alaska v. Udall*,<sup>32</sup> the state sued to compel the Secretary of the Interior to resume the conveyance of land.<sup>33</sup> At the district court level, the state succeeded on a summary judgment claim, but lost the subsequent appeal asking for the freeze to be terminated when the Native Village of Nenana intervened as a defendant and established that there were genuine material issues as to whether the lands selected were truly “vacant, unappropriated and unreserved” as required by the Alaska Statehood Act. This pressed the need to settle claims to the land by the Natives.<sup>34</sup> These events coincided with the discovery of oil at the Prudhoe Bay oil field on the North Slope and the subsequent desire to construct an 800 mile pipeline to extract these reserves.<sup>35</sup> Congress introduced legislation resolving the Native claims to avert prolonged litigation and commence pipeline development.<sup>36</sup>

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26. *Tlingit & Haida Indians v. United States*, 147 Ct. Cl. 315, 342 (1959). In 1935, both Native groups had been authorized by Congressional Act to pursue aboriginal title claims in the U.S. Court of Claims for compensation owed prior to federal land withdrawals of their aboriginal claims. Act of June 19, 1935, Pub. L. No. 49-388, § 2, 49 Stat. 388, 388.

27. *Id.*

28. *History: AFN Founded in 1966*, ALASKA FED’N OF NATIVES (last visited Sept. 23, 2016), <http://www.nativefederation.org/about-afn/history/>.

29. BERGER, *supra* note 6, at 23.

30. R.D. ARNOLD, ALASKA NATIVE LAND CLAIMS 94–103 (1978).

31. *Id.* at 102.

32. 420 F.2d 938 (9th Cir. 1969).

33. *Id.* at 939–40.

34. *Id.*”

35. See generally Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 31 (2007) (reviewing the beneficial nexus of ANCSA to potential exploitation of oil and gas in the Prudhoe Bay region).

36. *Id.*

## B. ANCSA and the Structure of Native Corporations

The Alaska Native Claims Settlement Act was enacted on December 18, 1971.<sup>37</sup> ANCSA mandated the conveyance of almost forty-four million acres of land and the cash payment of \$962.5 million (about three dollars per acre) in exchange for the extinguishment of aboriginal land claims.<sup>38</sup> The federal government contributed \$462.5 million and the state of Alaska contributed \$500 million to the Alaska Native Fund which disbursed settlement payment.<sup>39</sup> ANCSA conveyed 10 percent of Alaska's territory to the natives, while the federal government retained 60 percent and the state of Alaska kept the outstanding 30 percent.<sup>40</sup>

The settlement also created two tiers of the aforementioned ANCs: regional and village corporations.<sup>41</sup> The first tier includes the twelve larger, regional corporations formed with the intent to group Natives "having a common heritage and sharing common interests."<sup>42</sup> A thirteenth regional corporation was also established for non-resident Alaska Natives.<sup>43</sup> The regional corporations were required to incorporate as for-profit entities under the laws of Alaska, and every Native enrolled in that region was issued 100 shares of stock after enrolling.<sup>44</sup> The second tier includes the village corporations, in which only Natives in eligible villages could enroll for stock.<sup>45</sup> Importantly, while village corporations were only allowed to hold title to the surface of the land, regional corporations were entitled to both surface and subsurface rights.<sup>46</sup>

ANCSA § 7 requires 70 percent of "all revenues received" by each regional corporation from "timber resources and subsurface estate patented to it" to be divided annually among all twelve of the land-

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37. ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2012)).

38. § 1605.

39. *Id.*

40. BERGER, *supra* note 6, at 24.

41. 43 U.S.C. §§ 1606-1607.

42. *Id.* § 1606(a).

43. 43 U.S.C. § 1606(c).

44. *Id.* § 1606(d), (g).

45. *Id.* § 1607(a). Generally, Alaska Natives received 100 shares from their regional corporations and 100 shares from one of the over 200 village corporations. BERGER, *supra* note 6, at 24. Natives associated with a region who did not reside in an eligible village received only regional stock. *Id.*

46. 43 U.S.C. § 1611(a). This has resulted in litigation between the regional and village corporations. However, this was ultimately resolved through the court's holding that anything that might be considered part of the mineral estate is subsurface and therefore belongs to the regional corporations. *See Koniag, Inc. v. Koncor*, 39 F.3d 991, 998-99 (9th Cir. 1994).

owning regional corporations.<sup>47</sup> Subsequently, ANCSA § 7(k) requires 50 percent of this revenue to be apportioned to the village corporations.<sup>48</sup>

Moreover, the stocks in ANCs were made inalienable for twenty years.<sup>49</sup> Natives born after the settlement was enacted were not granted shares under the Act—although some ANCs have allowed for disbursements to those born after the alienability period expired in 1991 through amendments to their own corporate bylaws.<sup>50</sup>

Fifteen years after ANCSA's enactment, the House Committee on Interior and Insular Affairs concluded that few of the statute's intended goals had been attained, particularly those regarding improvement in living standards for Alaska Natives.<sup>51</sup> The regional corporations were marginally better off than the village corporations, although a few were still facing bankruptcy.<sup>52</sup> Many of the problems with ANCSA were rooted in the exorbitant implementation costs.<sup>53</sup> Natives were given capital but then told to establish more than 200 business entities, select forty-million acres of land, and coordinate business activities where there had previously been none.<sup>54</sup> The daunting task presented to ANCs was described by then-President of the Alaska Federation of Natives Janie Leask in a 1984 submission to the President's Commission on Indian Reservation Economies:

What has fallen on Native people and their institutions during the past thirteen years is a legal and administrative burden so overwhelming that in many ways implementing ANCSA has become an end itself . . . . The entire effort has drawn off tens of

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47. 43 U.S.C. § 1606(i).

48. *See* *Aleut Corp. v. Arctic Slope Regional Corp.* (*Aleut IV*), 484 F. Supp. 482, 487 (D. Alaska 1980) (noting that the purpose of 7(i) revenue sharing is to even out the resource wealth of the Alaska Native regions by redistributing timber and mineral revenues).

49. ANCSA, Pub. L. No. 92-203, 85 Stat. 688, 692 (1971) (codified as amended at 43 U.S.C. § 1606(h)(1) (2012)).

50. *Id.* § 1604(a). Those born after 1971 have been referred to sardonically as the "after-borns." The manner in which the settlement failed to account for the children and grandchildren of Natives has been a point of contention and deeply divisive. Thomas R. Berger, Judge, Supreme Court of British Columbia, Speech at United Tribes of Alaska Convention (Oct. 1985), *available at* <http://www.alaskool.org/projects/ancsa/vlgjour.htm>. *See* BERGER, *supra* note 6, at 31-32 (discussing the manner in which this has strained kinship ties within ANCs); CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 237 (2005) (noting the new inequity created by a system that devised shares to Alaska Natives at a specific date to settle land claims).

51. H.R. REP. NO. 100-31, 100th Cong., 1st Sess. (Mar. 27, 1987) at 3.

52. *See id.* at 4-5 (finding the village corporations "failed to meet the economic social and cultural needs of the Alaska Native.").

53. CASE & VOLUCK, *supra* note 19, at 179.

54. *Id.*

millions of dollars which more properly could have been put into business investments, human-resource development, communications between stockholders and corporate leaders, and training and technical assistance for village corporation personnel . . . . If the implementation costs were heavy for regions it was worse for the villages, especially the small ones, because they had so little cash from the Alaska Native Fund to begin with. We now have villages which are almost broke from going through the steps of incorporation, corporate election, enrollments, stock issuances, land conveyances, CPA audits, meetings, decisions, public reporting, ect. [sic], etc., etc. They haven't made much money or really engaged in much economic development activity. But they have implemented ANCSA. And many of them have now come to a point where they have to sell some of their land in order to keep going.<sup>55</sup>

In response to these deficiencies and obstacles, Congress passed a series of amendments to ANCSA that included indefinite tax exemptions and protection from creditors on lands that were not developed as well as the continuance of the restriction on the sale of ANCSA stock.<sup>56</sup> Other amendments enabled shareholders to decide whether to admit children born after 1971.<sup>57</sup> Every two years, Congress has continued to relieve ANCs of many obligations that normally accompany corporate activities such as reporting requirements, transfer restrictions, and other board responsibilities.<sup>58</sup> These modifications, coupled with overcoming the growing pains of mastering the corporate form, can be credited with ANCs' subsequent ascent as an economic force in Alaska.<sup>59</sup> ANC annual revenues account for about a quarter of Alaska's gross domestic

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55. H.R. REP. NO. 100-31, at 4.

56. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, ch. 11, § 907, 101 Stat. 1788, 1806-07 (1988) (codified as amended at 43 U.S.C. § 1636 (2012)) [hereinafter 1987 Amendments]. Though titled the "Amendments of 1987," enactment occurred on February 3, 1988. CASE & VOLUCK, *supra* note 19, at 185 n.113. Moreover, they are popularly referred to as the "1991 Amendments" because of the provisions changing the original 1991 deadline on inalienability of the shares in ANCs. *Id.*

57. 43 U.S.C. § 1636.

58. CASE & VOLUCK, *supra* note 19, at 180.

59. Tim Bradner, *Native corporations doing well, for now, but problems still loom*, ALASKA JOURNAL OF COMMERCE (Oct. 13, 2011, 8:47 AM), <http://www.alaskajournal.com/community/2011-10-13/native-corporations-doing-well-now-problems-still-loom#.Vx0l-ZMrJE4>. In 2010, eight of the ten highest grossing Alaskan-owned businesses were Native corporations; four had revenues greater than \$1 billion. *Id.*

product.<sup>60</sup> Following a short dip in fiscal year 2013, corporate revenues have rebounded – the economic viability of ANCs is strong.<sup>61</sup> Specifically, in 2014, revenue performance increased just 1 percent from 2013 across all the regional corporations.<sup>62</sup> Although revenue remained relatively stagnant, profitability in 2014 increased by 98 percent from 2013.<sup>63</sup>

### C. ANCSA, Accountability, and Promoting the Good of Alaska Natives

ANCSA's primary purpose was to settle Native claims, but its innovative secondary purpose is closely tied to the corporate form: the rapid assimilation of Alaska Natives into the American free market economy.<sup>64</sup> Douglas Jones'<sup>65</sup> testimony at the March 1, 1984 Alaska Native Review Commission Round Table discussions in Anchorage noted that:

[The] mechanisms that we chose, of how the land was allotted and the money provided were really rooted, themselves, in what I think we were trying to accomplish in a social engineering way . . . [W]e were trying to accomplish some things socially. We were trying to accomplish some things individually. That is, for individual Natives and not just collectively, and that's why we had a mix of things that had to do with individuals and things that had to do with collectivism. . . . So there's a whole lot of things, devices, that were crafted in that act that I think . . . could

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60. Gerad Godfrey, *My Turn: Native corps. more important than ever*, JUNEAU EMPIRE (Dec. 16, 2015, 1:03 AM), <http://juneauempire.com/opinion/2015-12-16/my-turn-native-corps-more-important-ever>. Mr. Godfrey is Governor Bill Walker's senior advisor on rural business and intergovernmental affairs. *Id.*

61. Tim Bradner, *Native regional corporations net income rebounded in 2014*, ALASKA JOURNAL OF COMMERCE (Dec. 2, 2015, 2:11 PM), <http://www.alaskajournal.com/2015-12-02/native-regional-corporations-net-income-rebounded-2014#.Vx0mypMrJE4>. In 2014, total revenue for the corporations was \$8.57 billion compared with \$8.49 billion in 2013. Comparatively, the annual combined revenue of the regional corporations in 2001 stood at \$2.1 billion. Tim Bradner, *Native corporations prove their mettle*, ALASKA JOURNAL OF COMMERCE (Apr. 7, 2001, 8:00 PM), <http://www.alaskajournal.com/community/2001-04-08/native-corporations-prove-their-mettle#.Vx0qcJMrJE4>.

62. ANCSA REGIONAL ASSOCIATION, 2014 ECONOMIC IMPACT REPORT, 9 (2014) [http://ancsaregional.com/wp-content/uploads/2013/12/ANCSA\\_economic-report.pdf](http://ancsaregional.com/wp-content/uploads/2013/12/ANCSA_economic-report.pdf) [hereinafter 2014 ANCSA IMPACT REPORT].

63. *Id.*

64. CASE & VOLUCK, *supra* note 19, at 188.

65. Douglas Jones was a member of the Federal Field Committee which laid the groundwork for ANCSA. ALASKA NATIVE REVIEW COMMISSION, *ANCSA Institutions and Legal Regimes*, vol. IV at 293 (Mar. 1, 1984) (transcript available in the University of Alaska Fairbanks Rasmuson Library). He later served as Senator Mike Gravel's assistant. *Id.*

fairly be described as pointed toward a social individual and attitudinal changes. Now, I'm thinking [that] the private corporation matter and the financial experiences matter have to do with attitudinal changes that we were hoping to accomplish, maybe even some cultural ones.<sup>66</sup>

As a result, the corporate form became the vehicle by which Alaska Natives were given a form of control over their lands and, ultimately, economic life. Thus, it is worth assessing the following features of ANCs: (1) the restrictions on stocks; (2) the particular manner in which ANCs are regulated and managed; (3) the corporate structure; and (4) the benefits that they confer on shareholders.

1. *Stock Restrictions: Alienability and Transfer*

An initial concern facing Alaska Natives was the alienability of ANC stock.<sup>67</sup> Alaska Natives feared ANCs might fall into the hands of non-Natives.<sup>68</sup> This issue was resolved with the 1987 Amendments, which extended the initial two-decade resale restrictions on all shares indefinitely until a majority of all outstanding shareholders votes to eliminate them.<sup>69</sup> Only one ANC put the option to remove the stock restrictions to a shareholder vote, which narrowly rejected the option.<sup>70</sup> The 1987 Amendments thus preserved ANCs as special corporate entities that do not simply allow individual shareholders to sell stock outside the Native population, but rather require the community to act collectively to allow such sales.<sup>71</sup>

Transfer to subsequent generations was a related concern due to the limited seed money from the single settlement. ANCSA's drafters had only contemplated the issuance of stock to Natives born before the settlement.<sup>72</sup> Those born after December 18, 1971 were left without stock—straining filial relations of some Alaska Natives.<sup>73</sup> The 1987 Amendments resolved this problem by adding a provision allowing Native shareholders to issue stock to children born after the settlement if

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66. *Id.* at 363 (statement of Douglas Jones).

67. *See id.* at 360 (testimony from Douglas Jones noting that ANCs were structured with inalienable stock in order to prevent Native assets from ultimately "fall[ing] into non-Native hands" if the stock corporations were sold).

68. *Id.*

69. 1987 Amendments, sec. 5, § 7(h), 101 Stat. 1788, 1792-93 (1988).

70. Eve Rose, *Vote Keeps CIRI Stock Native-Held*, ANCHORAGE DAILY NEWS, Mar. 7, 1998, at A-1.

71. 1987 Amendments, § 5 (codified as amended at 43 U.S.C. § 1606(h)).

72. *Id.* § 4 (codified as amended at 43 U.S.C. § 1606(g)).

73. *Id.*

ANCs decided to do so through amendments to their bylaws and subsequent resolutions.<sup>74</sup>

2. *Securities Laws and Regulation of ANCs*

ANCSA's 1976 and subsequent 1987 amendments exempt ANCs from federal securities laws provided they do not issue unrestricted stock, terminate the restriction on the stock, or file a registration statement with the Securities Exchange Commission (SEC).<sup>75</sup> Exemption from federal securities laws is particularly advantageous to ANCs due to the high cost of compliance with SEC disclosure obligations.<sup>76</sup> Moreover, due to the composition of ANC shareholders, such disclosure is less crucial to protect the unaware investor.<sup>77</sup> Although ANCs are exempt from SEC disclosures, ANCs must still report "substantially all the information" included in an SEC registrant's annual report to shareholders.<sup>78</sup> Another shareholder safeguard required ANCs to conduct annual audits in accordance with generally accepted standards and that the audits be "transmitted to each shareholder."<sup>79</sup> Because ANCs provide the SEC with "substantially all the information" required in annual registration forms, this information differs from that required in an SEC registrant's annual report under Securities Exchange Act of 1934 and is likely less burdensome.<sup>80</sup> A 2012 Government Accountability Office (GAO) Report

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74. *Id.* At least eleven of the Native corporations have approved the issuance of stock to the children of the original shareholders. See Alex DeMarban, *After Calista vote, descendant dilemma looms for Alaska Native corporations*, ALASKA DISPATCH NEWS (July 19, 2015), <http://www.adn.com/article/20150719/after-calista-vote-descendant-dilemma-looms-alaska-native-corporations> (noting that this issue is one that the regional corporations are moving forward with very cautiously).

75. Act of Jan 2, 1976, sec. 3, § 28, 89 Stat. 1145, 1147 (amending ANCSA to exempt all ANCSA corporations from the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 until the end of 1991). These were likely the earliest amendments by Congress that made the regulatory burden on ANCs less cumbersome. See 1987 Amendments, sec. 14, § 28, 101 Stat. at 1811 (amending the 1976 exemptions). The 1987 Amendments extended the exemption from the federal securities laws beyond 1991 so long as the corporations continued the restrictions on shares. *Id.*

76. H.R. REP. NO. 94-729, 19 (1975).

77. See *id.* at 20 (noting that federal regulation of the Native corporations was not necessary to protect the Native shareholders or the public during the time period in which stock in ANCs could not be sold).

78. 1987 Amendments, sec. 14, § 28(a)(c)(1), 101 Stat. at 1811.

79. *Id.* See *id.* sec. 12(a), § 7(o), 101 Stat. at 1810 (striking the requirement that ANCs' audited financial statements be transmitted to the Secretary of the Interior and the Senate and House Committees on Interior and Insular Affairs).

80. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-121, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS, 34 (2012) [hereinafter GAO, REGIONAL ALASKA NATIVE

on the regional corporations collaborated with the SEC in assessing the content of the 2010 annual reports.<sup>81</sup> In the GAO report, SEC staff noted that ANCs' annual Management Discussion and Analysis disclosures (MD&A) did not fully explain material uncertainties that might reasonably affect future trends and prospects in the shares as would be required of other registrants.<sup>82</sup> Additionally, because ANCs are required to produce annual shareholder reports containing "substantially all the information" found in a regular SEC registration, the SEC staff faced uncertainty as to which accounting standards and disclosures the corporations should follow.<sup>83</sup>

Although ANCs are exempt from most federal reporting requirements, they must comply with other state regulations.<sup>84</sup> Following Congress's approval of exemption from federal securities laws, the State of Alaska enacted what might be called the "Alaska mini-securities statutes." These laws only apply to ANCs with 500 or more shareholders and \$1 million or more in assets.<sup>85</sup> ANCs must disclose information about the performance of the board of directors and the company as well as information related to the solicitation of proxies or propositions before shareholders at annual shareholders' meetings.<sup>86</sup> Alaska also requires ANCs to submit biennial reports containing information about the current board of directors, the number of shares issued, and other related information.<sup>87</sup> Failure to comply with the biennial reporting or biennial corporation tax allows the state to involuntarily dissolve the corporation.<sup>88</sup> If the State determines a violation has occurred, it may authorize administrative action.<sup>89</sup> Data from 1978 to 2011 indicates the

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CORPORATIONS]. Specifically, Rule 14a-3(b) of the 1934 Exchange Act establishes requirements for information included in annual reports to shareholders accompanying an SEC registrant's proxy solicitation. *Id.* at 31 n.51. This form is less detailed than the annual report known as Form 10-K that SEC registrants must file. *Id.*

81. *Id.* at 32-37.

82. *Id.* at 34.

83. *Id.*

84. ALASKA STAT. §§ 45.55.138-.139 (2012).

85. *Id.*

86. *Id.* §§ 08.305-.365 (2012).

87. *Id.* §§ 10.06.960(i), (k) (2012).

88. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 11. Alaska has never dissolved a regional corporation involuntarily. *Id.* n.24. However, in 2010 the thirteenth regional corporation – the designated corporation for those not living in Alaska at the time of the settlement – was put on notice of potential involuntary dissolution. *Id.* Several village corporations have been involuntarily dissolved by the state. *Id.* It should be noted that exploring preemption conflicts in the state's dissolution of federally mandated corporations, while possible, is a subject for another article.

89. *Id.* at 35-36. Administrative orders have been delivered in the case of the

State issued at least twenty-nine administrative actions against various regional corporations.<sup>90</sup> Violators may be ordered to cease the violation, to file future proxy solicitations before distribution to shareholders for a time period, and to pay fines.<sup>91</sup> The courts have also enforced traditional common law duties of care and loyalty on corporate directors and officers.<sup>92</sup>

The 2012 GAO Report noted that, although the State has the authority to review all proxy solicitations, it primarily reviews only those for which a corporation or shareholder has filed a complaint.<sup>93</sup> The State does not investigate whether ANCs are in compliance with the threshold requirements for proxy statements, but instead relies on these complaint and self-reporting mechanisms.<sup>94</sup>

### 3. Board Membership and Structure of the Corporations

Membership in a regional corporation board is subject to two major requirements: directors must be over the age of eighteen and must be a shareholder of the corporation.<sup>95</sup> All ANCs elect directors by cumulative shareholder voting.<sup>96</sup> However, notwithstanding these basic requirements, the corporations may establish their own bylaws.<sup>97</sup> Consequently, board sizes range from nine to twenty-three members.<sup>98</sup> The State requires regional corporations to include information for board candidates in their proxy solicitations for director elections including

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following violations: failure to file proxy materials meeting filing requirements, failure to include required information in proxy solicitations which could make statements materially false or misleading, and the inclusion of materially false and misleading information. *Id.*

90. *Id.* Six of the investigations resulting in administrative orders involved a regional corporation's board solicitation. *Id.* Twenty-two were related to shareholder solicitations. *Id.* One involved a village corporation's failure to comply with state proxy requirements by placing advertisements in a local newspaper requesting that the shareholders vote for two candidates seeking election to a regional corporation's board. *Id.*

91. *Id.*

92. *See, e.g.,* *Henrichs v. Chugach Alaska Corp.*, 250 P.3d 531, 532-33 (Alaska 2011) (affirming liability of a director and officer found to have breached their duties of loyalty and care and imposing a five-year sanction on service on the board of directors); *Brown v. Ward*, 593 P.2d 247, 251 (Alaska 1979) (invalidating false and misleading proxy solicitation forms).

93. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 35.

94. *Id.* Although self-regulation may provide autonomy, it is also a product of necessity. *See id.* (noting that State officials have indicated they do not lack the resources to routinely review proxy filings for compliance).

95. 43 U.S.C. § 1606(f).

96. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 74, at 25.

97. *See id.* at 17 (showing the variation of corporate policies and bylaws).

98. *Id.* at 17.

their name, age, address, all positions and offices presently held with the ANC, and business experience within the past five years.<sup>99</sup> Director terms are three years and staggered so that generally one-third of the positions are up for election each year.<sup>100</sup> Five regional corporations require board representation from specifically delineated regions within the greater area from which they draw shareholders to better represent the interests of all Alaska Native groups.<sup>101</sup>

ANCs are generally given more discretion to manage themselves than other corporations. This accounts for their substantial exemption from federal regulation and the manner in which they largely self-regulate in accordance with Alaska's securities laws. This is so because, unlike other corporations, the shares in ANCs are nontransferable, tying ownership to a community with goals that transcend profit maximization. Overall, the primary purpose of ANCs is to raise the standard of living for Alaska Natives.

#### 4. *ANCs, Conferring Benefits and the Greater Good of the Native Community*

Beyond its mission of bringing Alaska Natives into the mainstream commercial world, ANCSA also allows ANCs to provide a wide variety of benefits to shareholders.<sup>102</sup> Unlike traditional corporations, ANCs are not focused on boosting share prices or raising dividends.<sup>103</sup> To be sure, all ANCs confer dividends to enrolled Alaska Natives. However, ANCs also supply shareholders with other nonconventional benefits such as scholarships, funeral benefits, charitable and in-kind donations, employment opportunities, cultural preservation, land management, opportunities for economic development and advocacy.<sup>104</sup> All ANC shareholders hold the same class of stock and receive the same dividends

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99. ALASKA ADMIN. CODE tit. 3, §§ 08.345(b)(1)(A), (B), (F) (2016).

100. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 22.

101. *Id.*

102. *See, e.g., id.* at 38, 40–48 (describing benefits authorized by ANCSA, including those which “promote the health, education, or welfare of shareholders and other Alaska Natives”).

103. *See id.* at 38 (discussing the professed intent of regional corporations to “provide economic, cultural, social, or all three types of benefits” to shareholders).

104. *See id.* at 39 tbl.6, 40–48 (noting that regional corporation dividend payments in 2010 ranged from \$2.35 per share to \$64.26 per share, but that dividends declared in any year represent only a snapshot for the current year); *see also* Morgan X’atkeen Howard, *Dividends do not define success for Alaska Native Corporations*, ALASKA DISPATCH NEWS, Oct. 23, 2014, <http://www.adn.com/article/20141023/dividends-do-not-define-success-alaska-native-corporations> (noting that dividends are a poor measure of success for Native corporations because other benefits better gauge improvements to the lives of Alaska Natives).

across the board. These dividends are vital to defraying living expenses for Alaska Natives and are calculated annually by each regional corporation.<sup>105</sup>

Shareholder benefits occasionally differ within a particular ANC. For instance, at times, kinship ties have pressured ANCs to benefit particular Native members.<sup>106</sup> The 1987 Amendments allowed for such disproportionate benefits to “promote the health, education, and welfare” of the trust beneficiaries or “preserve the heritage and culture of Natives.”<sup>107</sup> In effect, this resulted in the distribution of additional funds apart from the dividend disbursement to those deemed trust beneficiaries—in many cases Elders.<sup>108</sup>

Other monetary benefits, less similar to those found in traditional corporations, are authorized under ANCSA’s 1998 Amendments—these are even less restrictive, not necessarily having to be filtered through a trust beneficiary.<sup>109</sup> These amendments confirmed ANC authority to provide benefits to promote the health, education or welfare of shareholders and their family members.<sup>110</sup> The 1998 Amendments are the basis for the regional corporations’ support of a variety of educational scholarships for shareholders and their children.<sup>111</sup> ANCs have different standards for scholarships—some are merit-based, while others fund as many eligible applicants as possible.<sup>112</sup>

A majority of the regional corporations provide assistance for memorial and funeral benefits for shareholders and their descendants.<sup>113</sup> This assistance is provided either directly or by an affiliated nonprofit organization.<sup>114</sup> The financial assistance is crucial to preserving Alaska Native burial traditions by helping offset the costs of family members

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105. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 79, at 38–39.

106. CASE & VOLUCK, *supra* note 19, at 197.

107. 1987 Amendments, sec. 10, § 39, 101 Stat. 1788, 1805 (1988).

108. CASE & VOLUCK, *supra* note 19, at 197.

109. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 38 n.63.

110. ANCSA Land Bank Protection Act of 1998, sec. 12, § 7(r), 112 Stat. 3129, 3135 (1998).

111. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 41–42. All twelve regional corporations provide such scholarships. *Id.*; Robert O’Harrow, Jr, *Despite questions over ANCs, many pay out millions in dividends, scholarships, charitable donations*, WASH. POST (Sept. 29, 2010, 9:27 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/29/AR2010092907614.html> [hereinafter O’Harrow, *Despite questions over ANCs*] (describing regional corporations payouts totaling \$35 million in 2008 for scholarships and charitable donations).

112. See GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, 41–42 tbl.7 (outlining the various scholarship models pursued by ANCs).

113. *Id.* at 42.

114. *Id.* at 42 n.67.

traveling to ceremonies.<sup>115</sup> Generally, the assistance is capped at an amount ranging from \$500 to \$3,000 per person or family.<sup>116</sup>

ANCs may also make both monetary and in-kind charitable contributions<sup>117</sup> to nonprofits and other entities that offer services to Native shareholders.<sup>118</sup> These funds generally support housing authorities, health organizations, or vocational schools in their respective regions.<sup>119</sup>

In addition to these monetary benefits, regional corporations also offer nonmonetary benefits through partnerships with village corporations, tribal organizations, and nonprofits in the region.<sup>120</sup> These benefits include employment opportunities, cultural preservation, land management, economic development, and issue advocacy.<sup>121</sup>

ANCs may also engage in preferential hiring for shareholders,<sup>122</sup> which may take the form of employment, training, or internships.<sup>123</sup> However, a major criticism of ANCs is that they have failed to supply enough such jobs.<sup>124</sup>

Cultural preservation is actively supported by ANCs by the establishment and funding of nonprofit organizations or heritage centers.<sup>125</sup> Several corporations sponsor inter-generational camps that

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115. *Id.* at 42.

116. *Id.*

117. These in-kind donations include firewood for winter heating or gravel for village infrastructure from gravel pits owned by the corporations. *Id.* at 43–44.

118. *Id.* at 43.

119. *Id.* One regional corporation provides funding for a flight school to train private and commercial Native pilots, a useful resource for villages only accessible by plane. *Id.*

120. *Id.* at 44–48.

121. *Id.*

122. 1987 Amendments, sec. 15, § 29, 101 Stat. at 1812 (codified as amended at 43 U.S.C. § 1626(g)). To not run afoul of provisions in civil rights laws that prohibit employment discrimination, the 1987 Amendments exempted the Native corporations and entities owned by the corporations. *Id.*; S. REP. NO. 100-201, at 39 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3269, 3290–91.

123. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 45. The employment policy of regional corporations varies substantially. *Id.* For example, in one regional corporation, 55% of employees at its zinc-lead mine are shareholders, and the decision to develop the mine took this condition into account. *Id.* Conversely, other corporations did not emphasize the importance of employment because such opportunities were less attractive to shareholders. *Id.*

124. See Robert O'Harrow, Jr., *For many with stake in Alaska native corporations, promise of better life remains unfulfilled*, WASH. POST (Sept. 30, 2010, 10:53 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/29/AR2010092906318.html> (noting that only 10% of employment opportunities created by ANCs have benefited Alaska Natives despite billions of dollars in defense contracting flowing into ANC coffers in the wake of the September 11 attacks).

125. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 46.

support traditional language education and the preparation of subsistence foods.<sup>126</sup> Others have helped protect artifacts and sites by funding preservation.<sup>127</sup>

Additionally, by actively managing claimed surface lands, ANCs provide a service to the Native community that seeks to preserve both their lifestyle rooted in subsistence and an economically viable future.<sup>128</sup>

The sheer size of ANCs and the influence they exert across the state makes them agents of economic development by coordinating massive projects that smaller business entities in the region would lack bandwidth for.<sup>129</sup> Thus, ANCs confer benefits not only on shareholders, but also on the citizens of Alaska as a whole, with ANCSA corporations in the 2015 Alaska Business Monthly Top 49ers list accounting for 18,542 jobs – 69.3% of Alaska jobs.<sup>130</sup> At times this comes into conflict with the core mission of ANCs because the majority of ANC employees are not Alaska Natives.<sup>131</sup>

One of the most unique benefits that ANCs confer on shareholders is the manner in which they serve as advocates for Alaska Natives.<sup>132</sup> Economies of scale permit ANCs to lobby and access legal expertise not otherwise possible for smaller villages or individual Alaska Natives.<sup>133</sup> Additionally, Executive Order 13,175<sup>134</sup> requires that the heads of federal agencies consult ANCs on the same basis as Indian tribes.<sup>135</sup> This not only ensures that interests of Alaska Natives are taken into account in the policy-making process, but that they are represented by competent legal experts.<sup>136</sup> All ANCs are also members of the Alaska Federation of Natives – the largest statewide Native organization.<sup>137</sup> ANCs have most

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126. See O'Harrow, *Despite questions over ANCs*, *supra* note 111 (detailing Sitnasuak Corporation's support for shareholders to attend "fish camps" along the Bering Sea and pursue subsistence traditions such as catching and drying salmon).

127. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 47.

128. See *id.* (describing regional corporations' use of active management for subsistence land uses).

129. *Id.*

130. 2014 ANCSA IMPACT REPORT, *supra* note 62, at 7.

131. *Id.*

132. GAO, REGIONAL ALASKA NATIVE CORPORATIONS, *supra* note 80, at 48.

133. *Id.*

134. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

135. *Id.*

136. Consolidated Appropriations Act of 2004, Pub L. No. 108-199, § 161, 118 Stat. 452 (2004). As amended, this Act requires the Director of the Office of Management and Budget and all federal agencies to consult with ANCs on policies that may have tribal implications. *Id.*

137. ALASKA FED'N OF NATIVES, *About AFN*, <http://www.nativefederation.org/about-afn/> (last visited Sept. 23, 2016). The AFN's mission includes advocating for Alaska Native people, fostering and

recently exerted their political muscle in national elections by supporting particular candidates for the U.S. Senate.<sup>138</sup> Accordingly, many state-wide candidates now court the Native vote at the annual Alaska Federation of Natives Convention.<sup>139</sup>

Although certainly not perfect, ANCs have managed to aggregate talent and capital for the Native peoples of Alaska. This has been accomplished by tailoring the needs of the corporate form towards those of Alaska Natives over the course of the last forty-five years. The subsequent entities that have developed from continuous Congressional adjustments to ANCSA are distinct from comparable corporations, with such deviations needed to bridge the gap between corporation, community, and kinship. While they have served as an effective experiment, however, ANCs are not the only corporate form utilized by Alaska Natives to address community interests.

## II. BENEFIT CORPORATIONS AND ALASKA HOUSE BILL 49

In the last decade, another corporate form has become quite popular—the benefit corporation (“B Corp”).<sup>140</sup> The Alaska state legislature considered, but ultimately failed to pass, House Bill 49 (H.B. 49) to enable business entities in the state to organize themselves as B

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encouraging the preservation of Alaska Native cultures, promoting understanding of Alaska Native’s economic needs, and encouraging development along the lines of such interests. *Id.*

138. See Julia O’Malley, *Alaska: Where Native groups have corporations - and political heft*, AL JAZEERA AM. (Nov. 3, 2014, 10:00 AM), <http://america.aljazeera.com/articles/2014/11/3/alaska-where-nativegroupshavecorporationsandpoliticalheft.html> (describing efforts by ANCs to support their chosen senatorial candidates in recent elections).

139. See *id.* (noting increasing importance of Alaska Natives in election of state-wide candidates).

140. Maryland became the first state to pass a B Corp statute in 2010. See MD. CODE ANN., CORPS & ASS’NS §§ 5-6C-01 to -08 (LexisNexis 2011); see also John Tozzi, *Maryland Passes ‘Benefit Corp.’ Law for Social Entrepreneurs*, BLOOMBERG BUS. WK. (Apr. 13, 2010), [http://www.paladinlaw.com/news\\_detail.php?Maryland-Passes-Benefit-Corp.-Law-for-Social-Entrepreneurs-49](http://www.paladinlaw.com/news_detail.php?Maryland-Passes-Benefit-Corp.-Law-for-Social-Entrepreneurs-49); B Lab, *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSRWIRE (Apr. 14, 2010, 10:57 AM), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation#](http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation#). Since 2010, thirty-one states have passed B Corp statutes, including: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, as well as Washington D.C. See *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Sept. 23, 2016).

Corps.<sup>141</sup> In states authorizing the B Corp form, these corporations may deviate from the profit maximization framework<sup>142</sup> rooted in the concept of shareholder primacy<sup>143</sup> and instead pursue the public benefit of society – such as the betterment of the Alaska Native community and the environment. This Part will analyze whether the B Corp form would be better for Native corporations in the decades to come. Arguably, a transition toward B Corps could make ANCs more accountable than the current entities while still subjecting them to fewer corporate law obligations than traditional corporations, further bringing the Native Community into the corporate mainstream.

By transforming ANCs into B Corps, the share alienability requirements could be removed while still allowing ANCs to pursue the goals of helping Natives attain higher standards of living. Essential to the B Corp structure is the ability to keep the corporation accountable to the beneficial interests that they support. However, this focus on accountability imposes other limitations that do not outweigh the benefits of the Native Corporate form created by ANCSA.

#### A. House Bill 49: Opportunities Presented by Reorganizing ANCs as B Corps

H.B. 49 was introduced on January 21, 2015 during the 29th legislature's first session.<sup>144</sup> H.B. 49 was quite similar to the Model Legislation for B Corps.<sup>145</sup> It had the typical requirement for the existence of a general public benefit.<sup>146</sup> It would have allowed Alaska B Corps to

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141. Paul Seaton, *Sponsor Statement: HB 49*, ALASKA STATE HOUSE OF REPRESENTATIVES (Jan. 19, 2015, 11:35 PM), <http://www.housemajority.org/2015/01/19/sponsor-statement-hb-49-2/>.

142. See Dana Brakman Reiser, *Benefit Corporations – A Sustainable Form of Organization?* 46 WAKE FOREST L. REV. 591, 593–606 (2011) (noting the manner in which benefit corporations are different from traditional for-profit and nonprofit entities because of their dual mission of profit and social good).

143. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (imposing a duty on managers of corporations to maximize shareholder profit).

144. H.R. 49, 29th Leg., 1st Sess. (Alaska 2015); Katie Moritz, *Prefiled bills in plain English: 23 pieces of legislation introduced Friday*, JUNEAU EMPIRE (Jan. 18, 2015, 1:06 AM), <http://juneauempire.com/local/2015-01-18/prefiled-bills-plain-english>.

145. See Loewenstein, *supra* note 3, at 1007 (describing model legislation for benefit corporations); see *infra* note 146.

146. Compare Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.030) (defining the general public benefit as “a material positive effect on people and their surroundings, taken as a whole, assessed against a third-party standard”), with MODEL BENEFIT CORP. LEGIS. (B LAB, Draft with Explanatory Comments, Apr. 4, 2016) (defining the general public benefit as “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”).

also pursue specific public benefits such as the provision of products, services, and educational opportunities to low-income or underserved individuals, families or communities; the promotion of economic opportunities beyond job creation in the normal course of business; improvements to human health; promotion of the arts, sciences or advancement of knowledge; and increase in the flow of capital to entities for the benefit of the public.<sup>147</sup> Because such specific purposes would have been an improper foundation for establishing a B Corp, however, these benefits could have occurred only as a byproduct of the general purpose identified. Therefore, the B Corp's potential to better serve the goals of Alaska Natives over the current ANC structure would likely have proven illusory.<sup>148</sup>

On the other hand, current federal securities reporting requirements impose limits on ANCs. ANC shares must be non-tradeable to remain exempt from federal securities reporting requirements. Re-organized as B Corps, ANCs could continue to provide the same benefits while being held more accountable to the interests of Alaska Natives by requiring annual reporting. These heightened reporting obligations would ameliorate the major criticism aimed at ANCs—that they fail to achieve the intended goals of improving the lives of Alaska Natives.<sup>149</sup>

## **B. The Limits of the B Corp Form: Accountability for Increased Costs and Compliance**

The B Corp structure also carries several limitations. The first major drawback is the process through which a corporation can be certified as a B Corp. Like in the model legislation, H.B. 49 would have allowed an existing corporation to convert by amending its articles of incorporation to contain a statement that it is a benefit corporation.<sup>150</sup> However, B Corps

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147. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. §§ 10.60.040(d)(1)–(6)). These six activities are analogous to the six activities listed in the model legislation. *Id.*; MODEL BENEFIT CORP. LEGIS. § 102 (defining “public benefits”). A seventh catch-all provision for specific purposes is also listed in both H.B. 49 and the model legislation. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.040(d)(7)); MODEL BENEFIT CORP. LEGIS. § 102.

148. See Loewenstein, *supra* note 3, at 1015 (noting that B Corp statute rigidity does not allow corporations to solely pursue specific benefits if they wish to do so).

149. See Michael Grabell, *Rampant fraud, self-dealing alleged in Alaska Native corporation*, PROPUBLICA (Dec. 15, 2010), <http://www.adn.com/article/rampant-fraud-self-dealing-alleged-alaska-native-corporation> (discussing investigation revealing that profits from government projects attained through 8(a) contracting have gone to outside contractors and Washington lobbyists rather than Native shareholders).

150. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.010(2)).

are generally certified by a third party known as “B Lab”, which makes assessments and provides corporations with necessary certifications.<sup>151</sup> Hence, an ANC choosing to convert would have needed to rely on a third party likely ill-informed of the particular issues facing Alaska Natives. The reliance on the third party would remove the semi-autonomy that ANCs have given Alaska Natives over their own affairs since the ANCSA settlement.

A second major limitation of B Corps is their overhead costs. While possible for larger companies like Ben & Jerry’s and Patagonia, it is unlikely that smaller companies can internalize the costs necessary to a successful transition to a B Corp structure. The imposition of corporate requirements when ANCs were formed already hindered them in the initial years after the settlement and would likely do so once again by reintroducing administrative stress just as they have begun to get their feet off the ground and thrive.<sup>152</sup> The requirement to appoint a benefit director<sup>153</sup> would only prove more cumbersome on the Native corporations that have recovered since the 1980s because of the relatively lax reporting regime with which they must comply.

The biennial benefit report required of B Corps might have been welcomed by Native shareholders looking to make ANCs more accountable for benefits other than the dividends. H.B. 49, similar to other state legislation, would have required B Corps to file such a report with the state outlining how it pursued public benefits and the relative success of those initiatives.<sup>154</sup> The biennial reports would have been assessed by an independent third-party standard.<sup>155</sup> The costs of such a report would likely have proven too high for regional corporations and would certainly be prohibitive for village corporations.<sup>156</sup> While the transparency benefits of such reports are arguably worth the costs, it begs the question of whether a sufficient number of shareholders would actually have consulted the reports.<sup>157</sup> Difficulties with quantifying less tangible benefits like employment training and cultural opportunities threaten to

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151. B Lab, *About Certified B Corps*, CERTIFIED B CORP., <http://www.bcorporation.net/about> (last visited Sept. 23, 2016).

152. See BERGER, *supra* note 6, at 30 (describing the administrative burden of implementing ANCSA, which left villages almost broke).

153. See MODEL BENEFIT CORP. LEGIS. § 304(b)(1)-(2) (defining the functions of a benefit officer as having “the powers and duties relating to the purpose of the corporation to create general public benefit or specific public benefit provided” and “the duty to prepare the benefit report required by section 401”).

154. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. §§ 10.60.500-501). See also Loewenstein, *supra* note 3, at 1015 (explaining general requirements of a Benefit Report in model legislation and its effects).

155. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.501(2)).

156. Loewenstein, *supra* note 3, at 1016.

157. *Id.*

render the reports altogether useless.<sup>158</sup> Third-parties generating these reports, such as B Lab, would likely lack the cultural insights and understanding of Alaska Natives' interests necessary to draw meaningful conclusions.<sup>159</sup> As a result, the B Corp form could have forced directors to rely upon metrics with faulty methodology to make their determinations to the detriment of the true interests most important to the Native community. Many of these interests, especially those that are not easily quantifiable such as the provision of particular vocational training in certain villages would suffer as a result.<sup>160</sup> Ultimately, reorganizing as B Corps might have increased the accountability of ANCs but would have simultaneously hamstrung them in other respects.

The B Corp model legislation's third party audit requirement might arguably resolve the difficulties of measuring the benefits provided by B Corps. However, H.B. 49 § 10.60.530 would not have required the benefit report assessment to be audited or certified by an independent party.<sup>161</sup> Rather, H.B. 49 required only that the annual report be assessed against a third-party standard and not by an independent auditor.<sup>162</sup>

Independent benefit directors, which would have been imposed upon B Corps by statute, could have created another regulatory burden for ANCs in two respects.<sup>163</sup> First, it could have resulted in an oversized influence of one individual over the benefits conferred to shareholders of the regional corporations that include different Native peoples and villages. Second, this requirement could have added another layer of bureaucracy and complexity to ANCs that have thrived with the increasingly simplified corporate form.

The potential oversized influence of a single individual could also have posed the risk of politicizing the election of directors because the director might be seen as having an undue influence over the type and recipient of particular benefits. Independence could also have proven difficult to accomplish for ANCs because, unless the benefit director were not a Native shareholder in the corporation, such autonomy would be

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158. *Id.* at 1018.

159. *See id.* at 1017-18.

160. *See id.*; see also Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 612 (2012) (noting that B Corp annual reports might result in discouraging "the pursuit of goals that are less easily quantified or that are not measured at all.").

161. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.530).

162. *Id.* (amending ALASKA STAT. § 10.60.510(2)). The logic of this provision may be rooted in the weakness of third-party auditing, and the manner in which corporations might be able to shop around for desired ratings. See Loewenstein, *supra* note 3, at 1019-20 (noting that benefit corporations are likely to game the auditing system in order to attain more favorable scores).

163. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.150).

impossible to attain. Moreover, the benefits of independence for such a director could be undercut by potential lack of insight into the values or concerns of Native shareholders. Indeed, the current structure of regional corporations strongly suggests their boards are to have a regional focus. This was at odds with the independent perspective embraced by the bill.

Furthermore, the requirement to add a benefit director would have imposed costs on converting corporations. Benefit directors are generally responsible for preparing a compliance statement for the annual benefit report to shareholders.<sup>164</sup> This statement requires the benefit director to provide an opinion on whether the B Corp acted in a manner consistent with its public benefit purpose.<sup>165</sup> Benefit directors also assess whether the other directors and officers complied with their duties to take into account the effects of their actions on shareholders, employees, and other constituencies.<sup>166</sup> Additionally, the benefit director is required to report any observed failures of the corporation and its directors and officers to act according to the public benefit.<sup>167</sup> Because ANCs already exhibit close filial ties, these requirements could have created an incentive to give in to popular opinion and groupthink.<sup>168</sup> These numerous obligations reveal that the role delegated to the benefit director is quite burdensome and possibly unnecessary – it would likely be even more so for ANCs, because the wide range of specific benefits they provide would all need individual scrutiny.

Additionally, in attempting to make ANCs more accountable to shareholders, a move toward a B Corp model might have opened ANCs to more liability in the form of benefit enforcement proceedings.<sup>169</sup> Under H.B. 49, a claim could have been brought by shareholders when the corporation, board, or officers failed to create the general or specific benefit set out in its articles of incorporation or violated one of the duties or obligations delineated in the bill.<sup>170</sup> The benefit enforcement proceedings could have remedied many of the complaints that ANCs are not doing enough for Alaska Natives – but at what cost?

This added liability would have limited the current substantial discretion granted to ANC directors and officers the decision-making

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164. *Id.* (amending ALASKA STAT. § 10.60.180).

165. *Id.* (amending ALASKA STAT. § 10.60.180(1)).

166. *Id.* (amending ALASKA STAT. § 10.60.180(2)). The duties of directors of a B Corp are outlined in § 10.60.100, while the duties of B Corp officers are outlined in § 10.60.230. *Id.*

167. *Id.* (amending ALASKA STAT. § 10.60.180(3)).

168. See Loewenstein, *supra* note 3, at 1024–25 (questioning the potential for the professionalization of benefit directors who would be retained and compensated for rendering favorable opinions).

169. *Id.* at 1020–21.

170. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.300).

process.<sup>171</sup> Unlike other B Corp statutes, H.B. 49 would have limited B Corps from any monetary damages in the case of an enforcement proceeding.<sup>172</sup> As a result, the enforcement proceeding would have given shareholders the means to override the authority of the board.<sup>173</sup> A highly contentious enforcement proceeding could have thus caused great harm to any corporation, but it could have been even more destructive to the sociocultural ties underlying ANCs. Furthermore, the open-ended text which allowed liability for “failure to pursue or create general public benefit or a specific public benefit” would surely have scared off any prospective directors or officers.<sup>174</sup> ANCs have strived to train and enhance the skills of their corporate leadership. Internecine turmoil, however, instigated by a small number of disgruntled shareholders dissatisfied with, for example, the allocation of a training program in one village over another could have deleterious effects. Such a specter could set back the progress of the last forty-five years.

The existence of the constituency provision in H.B. 49 could have also further complicated the decision-making process for ANC boards of directors.<sup>175</sup> The constituency provision could have possibly liberated Native corporations to expand benefits conferred on non-shareholder Natives under § 10.60.100(1)(D) as “community and societal factors,” which seems a catch-all term. But it could also have undermined the primary group ANCSA was made to serve. By placing shareholders in a grouping with six other constituencies who are to be considered by the Board in making decisions, H.B. 49 could have allowed the core needs of Alaska Natives to be ignored. Additionally, the constituency provision listed so many different constituencies that any interest could be used to rationalize the choices made by the board.<sup>176</sup> Should Alaska enact a B Corp statute, the shift could be tantalizing for ANCs. But the model may simply prove more burdensome than the benefits reaped.

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171. Loewenstein, *supra* note 3, at 1021.

172. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.310).

173. *Id.*

174. Loewenstein, *supra* note 3, at 1020–22 (noting that if a benefit corporation includes a specific public purpose to alleviate poverty in its community, it would be liable if poverty persisted).

175. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.100(1)). This provision requires the Board of Directors to consider effects of action and inaction on several interests: shareholders; employees; customers; community and societal factors; local and global health; the short term and long-term interest of the B Corp; and the ability of the B Corp to accomplish general and specific public benefit purposes. *Id.*

176. Loewenstein, *supra* note 3, at 1027.

## CONCLUSION

H.B. 49 was a great attempt to free entrepreneurs with a social-minded focus to pursue such ends. H.B. 49 was quite thorough, and, like much of Alaska's legal tradition, has had the chance to capitalize on developments in the lower forty-eight. This resulted in draft legislation that accounted for issues that have arisen since Maryland enacted the first B Corp statute in 2010. Moreover, the B Corp model could have presented Alaska Natives with the chance to make ANCs more accountable and to further shareholder control in benefit decision-making.

The corporate form that has evolved from Congress' repeated tweaks to ANCSA and the substantial autonomy given to ANCs is a continuing work in progress. ANCs are not perfect, but they have been receptive to the needs of Alaska Natives and will better maintain the balance of corporation, culture, and kinship inherent to those needs than a B Corps structure could. ANCs will likely continue to serve those interests as a new generation of Alaska Natives take the helm. While H.B. 49 failed to pass, Natives might have the option to choose a new corporate form if Alaska becomes the thirty-first jurisdiction to enact a B Corp statute in a later session. Therein lies the beauty of the corporate form—the opportunity to choose from many options. However, the organic evolution of ANCs and the particular legacy of the settlement between Alaska Natives and the government supports the notion that the special corporate form that has been created by ANCSA will continue to be the best fit for Alaska Natives.