

**RESPONDING TO PROFESSOR JANDA—THE U.S.
EXPERIENCE: THE ALASKA NATIVE CLAIMS
SETTLEMENT ACT (ANCSA) REGIONAL CORPORATION
AS A FORM OF SOCIAL ENTERPRISE**

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INTRODUCTION

In 1971, the United States Congress passed the Alaska Native Claims Settlement Act (ANCSA or the Act) to settle Alaska natives' (Natives) aboriginal claims to vast tracts of lands in Alaska.¹ In 1975 and 1978, Canada and Quebec concluded, respectively, the James Bay and Northern Québec Agreement and the Northeastern Québec Agreement, to resolve aboriginal claims to lands in northern Quebec.² All three acts had similar purposes: to settle aboriginal claims to land; to provide an infusion of capital; and to improve social welfare and educational opportunities for the native peoples in the affected regions.³

In his thoughtful and stimulating Essay concerning the Canadian experience, Professor Richard Janda posed the question whether and to what extent it matters to indigenous communities which legal forms they use for enterprises managing settlement-act funds.⁴ Professor Janda based his discussion on the structure and governance of the Makivik Corporation of Northern Canada.⁵ Makivik is a hybrid organization comprised of a not-

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1. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629h (2000)).

2. The Northeastern Québec Agreement, Jan. 31, 1978, Indian and Northern Affairs Canada, Government of Canada, *available at* <http://digbig.com/4qdxw>; James Bay and Northern Québec Agreement, Nov. 11, 1975, *in* JAMES BAY AND NORTHERN QUÉBEC AGREEMENT AND COMPLEMENTARY AGREEMENTS 1, 1–2 (1998), *available at* <http://digbig.com/4phnw> [hereinafter JBNQA].

3. See 43 U.S.C. §§ 1601, 1605(a) (mentioning how the settlement should help “with the real economic and social needs of Natives”). For the Canadian and Quebec Agreements, see *supra* note 2. For ANCSA purposes, see discussion *infra* Part II.A–B.

4. Richard Janda, *Why Does Form Matter? The Hybrid Governance Structure of Makivik Corporation*, 30 VT. L. REV. 775, 775 (2006).

5. *Id.*

for-profit parent company with for-profit subsidiaries.⁶ In some circumstances, the not-for-profit parent also serves what can best be described as a quasi-governmental function.⁷ Professor Janda concludes that form does matter because form “provides collectively identifiable pathways for choices and relationships. [And] because it symbolizes the shared purposes pursued within the enterprise.”⁸ Professor Janda’s discussion of the Makivik Corporation provides an example of one way in which native groups have used combinations of for-profit and not-for-profit organizational forms to serve both economic and broader social purposes.⁹ Just as the use of the for-profit corporate form influenced the legal ordering of native groups’ economic practices, the need to accommodate traditional native practices has led to the use of a not-for-profit company as the parent company of for-profit enterprises.¹⁰ In this case, the combined use of both business and not-for-profit corporate forms enabled the natives to implement social welfare purposes through the not-for-profit form and to undertake commercial activities through the use of the business corporation form.¹¹ Further, the combined use of different forms with different objectives enabled the not-for-profit form to function as a bridge between traditional native governance practices and decision-making practices and governance forms developed for commercial enterprises.¹²

In contrast to the Canadian Acts, the ANCSA limited the organizational options available to Natives. The ANCSA, by its terms, required Native regional organizations to use the business corporation form to manage and invest transferred lands and settlement proceeds.¹³ Native village organizations, on the other hand, could organize as either business or nonprofit enterprises, although all chose the for-profit form.¹⁴ Thus, although Natives intended to use the settlement funds for both investment and broader social purposes, they were generally limited to the use of the business corporation form to accomplish these dual goals.¹⁵ This limitation furthered the ANCSA objective of using the business corporation form to

6. *Id.* at 776, 779–80.

7. *Id.* at 792.

8. *Id.* at 776.

9. *Id.* at 776–77, 779.

10. *Id.* at 776, 779–80.

11. *Id.* at 779–80, 792–93.

12. *Id.* at 786–88.

13. 43 U.S.C. § 1606(d) (2000).

14. *Id.* § 1607(a); S. REP. NO. 100-201, at 19 (1987), as reprinted in 1987 U.S.C.C.A.N. 3269, 3270.

15. As of the 1987 ANCSA Amendments, regional companies could also form State-Chartered Settlement Trusts. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 10, 101 Stat. 1788 (1988) (codified as amended at 43 U.S.C. § 1629e (2000)).

accomplish economic assimilation of Native economies into the capitalistic economy of the broader society.

This response to Professor Janda's Essay presents a preliminary inquiry into the extent to which Natives' use of the business corporation to achieve both business purposes and social objectives influenced the way the Native regional corporations were organized. This Essay does not attempt to assess the success or failure of the ANCSA, nor does it address the compelling question, one reserved for a future inquiry, of whether economic assimilation inevitably leads to social and cultural assimilation as well.¹⁶ Instead, this Essay explores the extent to which the use of the business corporation form has provided opportunities for accommodation of two different economic cultures and of the legal and social traditions on which they were based. The Essay also discusses some of the ways and the extent to which Natives' use of the business corporation form to accomplish social, as well as economic, purposes has begun to transform the corporate form itself. There is some evidence that Natives have adapted the business corporation form to reflect both Native cultural traditions involving collective relationships to land and subsistence economies¹⁷ and a Western culture characterized by private property, individual rights, and market capitalism.

Part I of this Essay briefly describes the ANCSA. Part II discusses three of the Act's purposes and, using Native regional corporations, particularly NANA, Inc., as examples, explores the relationships between the use of the business corporation form and three of the Act's primary purposes. Part III concludes that 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.

16. See Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 443–44, 451–52 (1997) (“[ANCSA] instead divided Alaska Natives, placed their lands and culture in jeopardy, and only brought worthwhile wealth and benefit to corporate consultants, lawyers, managers, employees, and directors.” (quoting ROBERT RUDE, AN ACT OF DECEPTION 3 (1996))); 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) (“[Many Native Alaskans] assert that ANCSA was designed to assimilate Alaska Natives into the mainstream of American society and divested them of their land, culture, heritage—and ultimately their inherent tribal sovereignty.”).

17. See *infra* Part II.A (discussing the complexities inherent in these characterizations).

I. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

The ANCSA was the congressional response to pressure by several groups to settle aboriginal land claims of Natives including Alaska Indians, Eskimos, and Aleuts.¹⁸ Natives' aboriginal land claims, though long-recognized, had remained unresolved since the United States purchased Alaska from Russia in 1867.¹⁹ During the 1960s, Native groups began to pressure the U.S. federal government to settle their claims.²⁰ At that time, Natives were concerned that actions taken by the State of Alaska and the U.S. federal government would potentially encroach on their traditional lands.²¹ In addition, the State of Alaska itself had unresolved land claims.²² The Alaska Statehood Act granted the Alaskan government the right to reserve 103 million acres of land for public use.²³ At that time, Alaska had not yet claimed the acreage.²⁴ And finally, and perhaps most importantly, oil was discovered in Prudhoe Bay, Alaska.²⁵ Resource development and exploitation of mineral rights required resolution of land claims and property rights.

The ANCSA was the legislative response to these competing demands. Participants in the process of developing legislation included: Natives, both individually²⁶ and as representatives of the statewide organization, the

18. DONALD CRAIG MITCHELL, *TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960–1971*, at 9 (2001) [hereinafter MITCHELL, *TAKE MY LAND*]; see also DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* (2d ed. 2002) (providing a thoughtful history and discussion of ANCSA).

19. FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 4.07[3][a], at 336–37 (LexisNexis ed., LexisNexis 2005); see DONALD CRAIG MITCHELL, *SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867–1959*, at 6–7 (1997) (discussing how people had claimed land after the United States purchased Alaska from Russia) [hereinafter MITCHELL, *SOLD AMERICAN*].

20. MITCHELL, *TAKE MY LAND*, *supra* note 18, at 8–9.

21. *Id.*

22. See *id.* at 8 (mentioning how the State of Alaska had not yet selected lands that it was authorized to pick under the Alaska Statehood Act).

23. Alaska Statehood Law, Pub. L. No. 85-508, § 6(b), 72 Stat. 339 (1958) (codified as amended at 48 U.S.C. ch. 2 (2000)); CASE & VOLUCK, *supra* note 18, at 57; MITCHELL, *TAKE MY LAND*, *supra* note 18, at 2, 5.

24. MITCHELL, *TAKE MY LAND*, *supra* note 18, at 8.

25. MITCHELL, *TAKE MY LAND*, *supra* note 18, at 8. Similarly, the recognition of the need to resolve aboriginal land claims as reflected in the JBNQA and the Northeastern Québec Agreement, referred to above, coincided with the Government of Quebec's creation of the James Bay Development Corporation to develop the resources of certain lands inhabited by native peoples. INDIAN AND NORTHERN AFFAIRS CANADA, *THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT AND THE NORTHEASTERN QUEBEC AGREEMENT* (1993), available at <http://digbig.com/4qfbt>. The James Bay hydroelectric project was among the projects for which the James Bay Development Corporation was responsible. *Id.*

26. Byron Mallott, a Native, participated in the process. James Allaway & Byron Mallott, *ANCSA Unrealized: Our Lives Are Not Measured in Dollars*, 25 J. LAND RESOURCES & ENVTL. L. 139,

Alaska Federation of Natives (AFN), as well as representatives of the federal and state governments, conservationists, and business.²⁷

The ANCSA is a complex piece of federal legislation. According to its terms, forty-four million acres of land in Alaska were to be selected by and transferred to Natives, who were also to be paid \$962 million as a settlement for all aboriginal land claims.²⁸ The U.S. Treasury was to pay an initial payment of \$425 million over ten years.²⁹ The remaining \$500 million would be derived from mineral extraction royalties that would otherwise have been paid to the State of Alaska.³⁰

By its terms, the ANCSA applies to the over two hundred Native villages and urban areas located in Alaska.³¹ Each village and urban area is located within one of the twelve geographic regions established by the ANCSA.³² A thirteenth region was created for the benefit of Natives living outside of Alaska.³³ The ANCSA requires five incorporators within each region to organize as a Native, for-profit, regional corporation under the business corporation laws of the State of Alaska.³⁴ Each Native enrolled in a region pursuant to § 1604 became a stockholder in that region's corporation.³⁵ The twelve regional corporations manage settlement assets including: a proportionate share of the total ANCSA cash settlement; the subsurface mineral rights to the land controlled by the regional corporation;

139 (2005).

27. See Alexander M. Ervin, *The Emergence of Native Alaskan Political Capacity, 1959-1971*, MUSK-OX, 1976, No. 19, at 3, 3, available at <http://digbig.com/4qfbw> (exploring how the AFN was able to get the ANCSA passed).

28. S. REP. NO. 100-201, at 19 (1987), as reprinted in 1987 U.S.C.C.A.N. 3269, 3269-70; see 43 U.S.C. §§ 1605, 1610 (2000) (establishing the Alaska Native Fund and allowing Native villages to withdraw certain land for its purposes). It would be interesting to consider, in a separate inquiry, why Congress not only agreed to pay for the land but also to pay such a substantial amount in light of the ruling in the U.S. Supreme Court case *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In that case, the United States harvested timber on Native-occupied land and the Natives sought compensation under the Fifth Amendment of the U.S. Constitution. *Id.* at 273. The Supreme Court held that since the Natives' ownership claims were based on occupancy and had not been recognized by Congress, the Tee-Hit-Ton Natives did not have a cognizable legal claim for compensation under the Fifth Amendment Due Process Clause as their rights of occupancy granted by the sovereign did not constitute property rights for the purposes of the Fifth Amendment. *Id.* at 278-79, 288-90.

29. H.R. REP. NO. 92-523 at 5 (1971), reprinted in 1971 U.S.C.C.A.N. 2192, 2193; see 43 U.S.C. § 1605(a) (authorizing \$462 million for the Alaska Native Fund to be garnered over a ten-year period).

30. 43 U.S.C. § 1608; H.R. REP. NO. 92-523, at 5, reprinted in 1971 U.S.C.C.A.N. 2192, 2193.

31. 43 U.S.C. § 1610(b)(1).

32. *Id.* § 1606(a).

33. *Id.* § 1606(c).

34. *Id.* § 1606(d).

35. *Id.* § 1606(g)(1). Originally, the designated beneficiaries were Natives who were alive on December 18, 1971. Subsequent amendments expanded the class of beneficiaries. *Id.* § 1606(g)(1)(B)(i); COHEN, *supra* note 19, § 4.07[3]b], at 345.

and income from investing the cash payments and from managing the property.³⁶ Regional corporations are generally required to share with other regions seventy percent of revenues generated from exploitation of subsurface natural resources.³⁷

The ANCSA authorized Natives living in Native villages and several urban towns within each region to form village corporations that could be organized as either for-profit corporations or not-for-profit corporations.³⁸ All villages elected to organize as for-profit corporations.³⁹ The assets of the village corporations consisted of “the surface estate of 22 million acres [that] was to be divided among the village corporations” according to population.⁴⁰ In addition:

Fifty percent of the money distributed to each regional corporation located in Alaska was required by ANCSA section 7(j) to be redistributed by the regions to the village corporations within each region, based on the number of original shareholders in each village per capita and to the original stockholders of the region who were *not* shareholders of the village corporation.⁴¹

Although the village corporations are not subsidiaries of the regional corporations, the regional corporations may approve or disapprove of village plans to use the monies distributed to them.⁴² Funds received by the village corporations must be used for the benefit of a Native village.⁴³ Villages have control over surface rights to land, while the regional corporations retain control of subsurface rights.⁴⁴ In 1987, the Act was amended to permit, *inter alia*, the creation of “State-Chartered Settlement Trusts” to provide a means of insulating land and other assets from the business risks of operating as a for-profit business corporation.⁴⁵ Regional

36. *See id.* § 1606(d), (g)–(i) (describing how the regional corporation should be managed as a for-profit business that may issue stock and collect certain natural resource revenues that it manages).

37. *Id.* § 1606(i)(1)(A).

38. *Id.* §§ 1602(j), 1607(a); S. REP. NO. 100-201, at 19 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3270.

39. S. REP. NO. 100-201, at 19, 1987 U.S.C.C.A.N. at 3270.

40. CASE & VOLUCK, *supra* note 18, at 161 (citing 43 U.S.C. § 1611(b)).

41. *Id.* at 165 (citing 43 U.S.C. § 1606(m)).

42. 43 U.S.C. § 1606(l).

43. *Id.* § 1602(j).

44. *Id.* §§ 1606(i), 1611(a), 1613(a), (e)–(f); H.R. REP. NO. 92-523 at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2197.

45. Alaska Native Claims Settlement Act Amendments of 1987 § 10, Pub. L. No. 100-241, 101 Stat. 1788 (codified as amended at 43 U.S.C. § 1629e (2000)); S. REP. NO. 100-201, at 35 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3285–86.

corporations retain oversight responsibility for the activities of the trusts.⁴⁶

In sum, the ANCSA permits the use of three different organizational forms to accomplish the purposes of the Act. The regional for-profit business corporation is mandatory. Villages may organize either as a for-profit corporation or a municipal not-for-profit corporation. Use of the Settlement Trust is optional. Each form is relevant to furthering the Act's purposes and policies and each operates in a different way, with different limitations and advantages.

The discussion in this Essay focuses on the ANCSA regional business corporations and the ways in which their statements of purposes and governance structures accommodate both economic and social benefit objectives. In order to appreciate why modification of the traditional corporate form occurred, one must consider three of the ANCSA's several purposes and policies.

II. ANSCA PURPOSES AND POLICIES

From the outset, the ANCSA was intended to further both economic and broader social welfare objectives.⁴⁷ Congressional findings and statement of policy declared that:

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

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

46. 43 U.S.C. § 1629e(b); S. REP. NO. 100-201, at 35 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3286.

47. These dual objectives were explicit in the House Report associated with the Act. Key considerations in the development of the Act were:

the extreme poverty and underprivileged status of the Natives generally, and the need for adequate resources to permit the Natives to help themselves economically. The Natives constitute about one-fifth of the total population of the State, but they are almost completely lacking in the capital needed to compete with the non-Native population and to raise their standard of living through their own efforts. The money grant in this bill is intended to provide that capital.

H.R. REP. NO. 92-523 at 5-6 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2196.

privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska⁴⁸

The Act's goals and objectives at once evoke both the aspirations of those who participated in the ANCSA's creation and the troubled and troubling history of the relations between the European settlers and the native peoples who were the original inhabitants of the lands that now form the United States.⁴⁹ Of the several goals and objectives set out above, only three will be discussed: the settlement of Natives' aboriginal land claims; the need to address "the real economic and social needs of Natives";⁵⁰ and the desire to achieve assimilation of Alaska Native economies into the broader economy.⁵¹

A. Settlement of Natives' Land Claims

One objective of the Act is an immediate, fair, and just settlement of Natives' aboriginal claims to lands in Alaska.⁵² The existence of aboriginal claims had been recognized since the United States purchased Alaska from Russia in 1867.⁵³ However, both the extent of those claims—in some cases they extended to almost the whole of Alaska—and the legal basis for recognizing them remained in doubt.⁵⁴ The legal form that the settlement of

48. 43 U.S.C. § 1601(a)–(b).

49. See MITCHELL, *SOLD AMERICAN*, *supra* note 19, at 6–8, 16–21 (recounting the adverse impact interaction with "White America" has had on lives of Native Alaskans and discussing the effects of various U.S. Government policies on Native Americans); MITCHELL, *TAKE MY LAND*, *supra* note 18, at 439, 514–16 (recognizing the lower priority that was assigned to Native concerns when conservation issues arose in the same contexts as Native issues and providing accounts of various attempts to solve the "Indian problem"); Monroe E. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA ALASKA L. REV. 89, 89–90 (1979) (recounting some of the main themes of the history of the relationship between the U.S. government and native peoples who were the original occupants of the geographical area that became the United States—a history characterized by, inter alia, assaults, in various forms, on the culture of the Native people).

50. 43 U.S.C. § 1601(b). The Act makes clear that an objective is "maximum participation by Natives in decisions affecting their rights and property . . . without creating a reservation system or lengthy wardship or trusteeship." *Id.*

51. COHEN, *supra* note 19, § 4.07[3][b], at 340; see also Price, *supra* note 49, at 90 ("It is possible that, to some extent, the dominant society has sought for Indians within its midst a role which it projected as the ideal for all within the community.").

52. 43 U.S.C. § 1601(a).

53. Treaty Concerning the Cession of the Russian Possessions in North America, U.S.-Russ., art. 3, Mar. 30, 1867, 15 Stat. 539; see also COHEN, *supra* note 19, § 4.07[3][b], at 337 ("Article 3 of the Treaty of Cession with Russia . . . preserved the aboriginal rights of Alaska natives." (citing Treaty Concerning the Cession of the Russian Possessions in North America, U.S.-Russ., art. 3, Mar. 30, 1867, 15 Stat. 539; *Tlingit & Haida Indians v. United States*, 177 F. Supp. 452, 463–64 (Ct. Cl. 1959))).

54. See generally CASE & VOLUCK, *supra* note 18, at 44–59 (going through the history of

claims should take was also a matter of consequence.

Alaska property law, like that of other U.S. states, is based on a common law property regime expressing notions of title and private ownership. The advancement of individual rights in specific tracts of land was originally associated with the individual's ability to resist the oppression of a feudal lord and even the king. Over time, it became a means of realizing individual potential, closely associated with an individual's liberty interests. Together with life and liberty, property is one of the triumvirate that cannot be taken without due process of law.⁵⁵

The legal constructs of title and private ownership of land have had social and economic consequences. Title to property enables land to be subdivided. The resulting units of land may be bartered and sold like any commercial commodity. Land is transformed into a possession, the accumulation of which creates economic power and wealth. The life-sustaining role of land has given way to concerns with its wealth-creating productive potential. The highest and best use of land is to realize its maximum productive capacity. This approach both fosters and is furthered by an economy based on market capitalism, in which the production of income and profit provides economic sustenance to the persons producing the income and in which the production of profit is spurred on through competition. Progress is measured in terms of economic growth. The emphasis is on future development.

The preceding description of common law property rights and of the U.S. culture in which they operate is not intended to suggest that the property system in place in Alaska is a monolithic whole. To the contrary, the federal and Alaska governments publicly own vast tracts of land.⁵⁶ In addition, federal and state environmental statutes express the idea that land and other natural resources cannot be used without regard to community interests.⁵⁷ Nevertheless, the concern with private property rights is central

aboriginal land claims in Alaska since the Treaty with Russia); MITCHELL, *SOLD AMERICAN*, *supra* note 19, at 320 (discussing the extent of Native's aboriginal claims to lands within the Tongass National Forest).

55. U.S. CONST. amend. XIV, § 1.

56. See Alaska Statehood Law, 48 U.S.C. ch. 2, § 6 (2000) (granting land to the State of Alaska). In resolving the Native aboriginal claims and determining which lands in Alaska would be available to satisfy those claims, the ANCSA also had to deal with Alaska's still unclaimed rights to land for public use—rights that had been granted to Alaska in the act granting Alaska statehood. COHEN, *supra* note 19, § 4.07[3][b], at 338–39; see MITCHELL, *TAKE MY LAND*, *supra* note 18, at 8 (discussing Alaska's first attempt at selecting federal lands as their own).

57. A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 562–63 (1993) (“[M]y principal argument asserts that it is difficult but possible to integrate the ‘imperatives’ of biodiversity protection with the protection of individual rights within the framework of federal [C]onstitutional law and local government regulatory authority.”).

to the resolution of the Natives' claims because according to the ANCSA, land claims were to be settled by transfer of title to land.⁵⁸

The Natives' traditional relationships to land and the bases for their land claims differ from the common law approach. Although at the time the ANCSA was enacted, there was—and still is—considerable variation among the culture, language, customs, and economies of the Native groups,⁵⁹ some generalizations about native cultures and economies may be appropriate, even though the generalizations may not fully apply to any particular group.

In contrast to common law ideas of individual ownership of land, aboriginal land claims arose from a group's collective relationship to land that can be imperfectly translated into the common law ideas of use and possession.⁶⁰ Yet this translation is awkward as “use and possession” convey notions of ownership, control, and possibly development that are incompatible with the way some Natives have described their relations to land and the natural environment.⁶¹

Throughout Alaska, traditional Native economies were substantially based on subsistence hunting, fishing, and gathering.⁶²

Internationally, “subsistence” refers to those economic activities . . . which are relatively self-contained within a community or region, which are not conducted primarily for profit-maximization, which aim primarily for present consumption, and which are governed by traditional patterns

58. 43 U.S.C. § 1613 (2000).

59. At the time the ANCSA was enacted, Natives were members of one of three principal groups: the Inuit (Eskimo), Aleuts, and Indians. 2 ALASKA NATIVES COMMISSION, FINAL REPORT 83 (1994), available at <http://digbig.com/4qfjp> [hereinafter FINAL REPORT]. Within each group, however, were subgroups whose cultures, customs, languages, and economies varied from village to village. See THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION vii–viii (1985) (noting that there are many subgroups and that the languages of some subgroups are distinct from the two primary languages). In 1990, Natives were approximately fifteen percent of Alaska's total population. FINAL REPORT, *supra*, at 91.

60. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278–79 (1955); see 43 U.S.C. § 1603(c) (extinguishing claims based on “aboriginal right, title, use, or occupancy of land or water areas in Alaska”). This characterization of Alaska Natives' claims as being based, in part, on use or occupancy is consistent with the treatment of aboriginal claims in the U.S. Supreme Court case *Tee-Hit-Ton Indians v. United States*, in which the Natives' ownership claims were based on occupancy rather than on formal legal title recognized by Congress. *Tee-Hit-Ton Indians*, 348 U.S. at 278–79. One effect of this ruling was that it excluded Native claims based on common law doctrines, such as adverse possession, since conquest had extinguished Native land claims not formally recognized by Congress. *Id.* at 279–80 (citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823)).

61. See FINAL REPORT, *supra* note 59, at 201 (recognizing that the Natives' “cultural patterns of sharing and providing for not only oneself but one's community” has largely been ignored).

62. BERGER, *supra* note 59, at 5.

rather than market conditions or immediate needs. A subsistence farmer, for example, is one who consumes most of what he produces, sells little in the cash market, buys few items for production and consumption, uses little non-family labor, employs noncapital demanding technology, possesses a limited standard of living, and whose decision making is dominated by family survival Subsistence is, in this way, a system of production for both use and exchange. Its objective is not total self-sufficiency nor capital formation but an endless flow of goods, services, and other products⁶³

According to the *Final Report* of the Alaska Natives Commission, a subsistence economy has a cultural significance that may escape the understanding of non-Natives.⁶⁴ The *Final Report* notes:

Subsistence, from the Alaska Native perspective, is - as many non-Natives clearly understand - an economic necessity. It is an honorable and ageless way in which Native people have, and can, provide for the nutritional needs of their families. But it is also a way of life; an Alaska Native way of life. This fact transcends any economic arguments in support of subsistence.

Alaska Native cultures, like most aboriginal cultures, are ancient; cultures tied directly to nature and the bounty it provides. The practices of hunting, fishing and gathering constitute a direct link between the old and the new. With its spiritual and religious underpinnings that are difficult to explain and even more difficult for non-aboriginal peoples to understand, subsistence is - quite clearly - an Alaska Native cultural imperative.⁶⁵

The central cultural role played by the subsistence economy can be demonstrated by research concluding that "the vast majority of village residents choose to practice subsistence, even if they have access to good wage incomes. The same research fails to establish any cash cutoff point at which Alaska Native individuals or households stop harvesting fish and game."⁶⁶ Thus, the continuation of subsistence economies reflects a

63. Thomas D. Lonner, *Subsistence as an Economic System in Alaska: Theoretical Observations and Management Implications*, in CONTEMPORARY ALASKAN NATIVE ECONOMIES 15, 15 (Steve J. Langdon ed., 1986) (internal citations omitted) (citing Clifton R. Wharton, Jr., *Risk, Uncertainty, and the Subsistence Farmer*, in ECONOMIC DEVELOPMENT AND SOCIAL CHANGE 566, 566 (George Dalton ed., 1971); MARSHALL SAHLINS, *STONE AGE ECONOMICS* 2-3 (1972)).

64. FINAL REPORT, *supra* note 59, at 58.

65. *Id.*

66. *Id.*

complex intertwining of sustenance, interconnection, values, and religion. At the center of this economy is the participants' communal relationship with each other, the land, and the natural environment. This relationship is viewed by many Natives as a central part of their culture. Their economies reflect cultural traditions rather than notions of future progress.

It is appropriate to introduce a second cautionary note about Natives' economies and cultures. They are more complex than the foregoing description would suggest. Native economies are, in fact, complex organizations of three interwoven economies: subsistence, market, and transfer economies. Natives participate in their village economies and also in the broader economy as workers and providers of products and services used by each other and by non-Natives.⁶⁷ They are also consumers of goods produced by the broader economy.⁶⁸ Thus, over time, Native economies have been transformed, in different ways and at different rates, from subsistence economies in which both necessities and other goods are locally available to mixed economies in which goods and services are both locally provided and bought from and sold to the larger economy.⁶⁹ According to Donald Craig Mitchell:

Today in most Native villages, Alaska Natives continue to hunt, fish, and gather to obtain food that collectively constitutes a significant percentage of the total amount of food consumed in village households. But rather than hunting geese with bolas, villagers harvest waterfowl with semiautomatic shotguns. They hunt caribou from snowmachines, catch salmon from metal boats powered by outboard motors with nylon nets purchased from a store, rather than nets hand-woven during the long northern winters from sinew. Few families any longer migrate with the cycle of the seasons between winter villages and trapping, hunting, and fish camps the way [Alaska Native families] did in the 1940s.⁷⁰

67. See, e.g., *Alaska Native Land Claims, Part II: Hearing on H.R. 14212, H.R. 13142, and H.R. 10193 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 91st Cong. 598–99 (1969) (statement of Richard Kito) (discussing his role in the herring industry and the 250 workers he has employed). See generally MITCHELL, *SOLD AMERICAN*, *supra* note 19, at 98–148 (detailing the Natives' economic endeavors).

68. See, e.g., BERGER, *supra* note 59, at 48 (showing a spring seal hunt where snowmobiles were used to pull sleds).

69. FINAL REPORT, *supra* note 59, at 58.

70. MITCHELL, *TAKE MY LAND*, *supra* note 18, at 527.

Whatever term is applied to Native economies, be it subsistence or mixed, the important point is that many aspects of the Natives' traditional economic and cultural relationships to the land and bodies of water differ in important ways from the relationships established by the common law system of property functioning in a capitalistic economy. In one, legal regimes of private property predominate while in the other, traditions and customs fostering communal relationships with land are paramount. Where the common law system of real property encourages private ownership and facilitates trade, the Native custom is based on communal sharing of the land's resources and sustainable extraction to satisfy individual and community needs.

Because the legal bases for aboriginal claims operated outside of the common law tradition, the legal basis and the scope of the aboriginal claims were uncertain. The ANCSA's solution was to settle aboriginal claims through the application of the common law system of private property.⁷¹ Under the ANCSA's terms, Native groups would select a total of forty-four million acres of land for which title would be transferred to one of the twelve territorially based regional corporations operating as business corporations.⁷² In this case, aboriginal claims were transformed from a system based on communal sharing and sustainable extraction to one in which land is a commodity to be bartered and transferred through the mechanism of titles and is developed for the production of wealth.

This transformation was consistent with the mandated use of the business corporation form to manage the land transferred to the Natives.⁷³ Settling aboriginal claims through the application of a title-based system facilitated the transfer of the land to the company and the transformation of the land into a corporate asset. Under this scheme, individual Natives do not own discrete plots of land. Instead, they own potentially transferable units of the companies that own the land.⁷⁴ Thus, in one sense, the corporate form mediates between the subdivision of the real property into individually owned units, an approach that was tried in the 1880s and failed

71. See 43 U.S.C. §§ 1611, 1613 (2000) (allowing village corporations to select lands and then provide title to the Natives).

72. *Id.* §§ 1611, 1613; S. REP. NO. 100-201, at 19 (1987), as reprinted in 1987 U.S.C.C.A.N. 3269, 3269-70.

73. § 1606(d).

74. *Id.* § 1606(g), (h)(1). Originally, the ANCSA authorized stock alienability as of July 16, 1993, but the 1987 Amendments to the ANCSA offered corporations the opportunity to extend the restrictions on stock alienability permanently. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 7(h), 85 Stat. 688, amended by Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 5, 101 Stat. 1788 (1988) (current version at 43 U.S.C. § 1606(h)(3)); James P. Mills, Comment, *The Use of Hiring Preferences by Alaska Native Corporations After Malabed v. North Slope Borough*, 28 SEATTLE U. L. REV. 403, 417-18 (2005).

dismally,⁷⁵ and traditional aboriginal communal ownership. Although the land would be owned by a private entity, corporate ownership would provide a kind of collective ownership by Native shareholders who were intended beneficiaries of the Act. This is particularly true when, as today, the shares of stock are inalienable.⁷⁶

One problem with the corporate approach is, of course, that the Natives' collective legal interests in the corporate form of ownership and in the land continue only so long as the shares remain inalienable or, if alienable, are not transferred. Over time, share alienation could eliminate the ownership interests of the Act's intended beneficiaries and thus completely separate them from the land. In addition, instead of having direct ownership of the land, whether individual or communal, with the corporate form, the Natives' legal relationship to the land is at best once removed and operated through the corporate entity.

The settlement of aboriginal claims through the application of a title-based system of private property facilitates the ANCSA's mandate that Natives use the business corporation form to own and manage regionally controlled lands. The ANCSA-land-claims-settlement approach is also consistent with the objectives of implementing a final resolution of Native land claims and providing for economic assimilation of Native economies. It may not, however, successfully mediate between the two cultures' approaches to the relationships of individuals to land, and it may not have, in fact, provided a complete resolution of the aboriginal land claims.

B. Addressing the Social Needs of the Natives

A second purpose of the Act is to address "the real economic and social needs of Natives."⁷⁷ Although the regional corporations' objectives were to make money, like any other business organization, the purpose of their profit-making endeavors was to improve the social and living conditions of the Natives. According to Sheri Buretta, President of the Association and Chair of the Board of Chugach Alaska Corp., "We are building our

75. See COHEN, *supra* note 19, § 4.07[3][b], at 348–49 (contrasting the approach taken in Alaska with the Alaska Allotment Act of May 17, 1906, ch. 2469, § 1, 34 Stat. 197, which permitted Alaska Natives to obtain title to one-quarter-acre units of land that were significant for traditional use, to the General Allotment Act of February 8, 1887, ch. 119, §§ 1, 5, 24 Stat. 388, which was intended to subdivide Indian reservations located in the lower forty-eight states into discrete parcels suitable for private ownership, assimilate Native American economies into the broader economy, and make each Native American a yeoman farmer with a plot of land to till); Price, *supra* note 49, at 92 (characterizing the General Allotment Act as "a disaster by almost every measure" and "ineffective").

76. 43 U.S.C. § 1606(h)(1)(B)(i)–(vi), (h)(3).

77. *Id.* § 1601(b).

businesses for one key reason: to improve the lives of our tribal members and Alaska Native corporation shareholders.”⁷⁸ The questions under consideration here are both the extent to which the dual goals were reflected in corporate documents and the extent to which the regional corporations were able to balance these competing goals.

An examination of the corporate documents of ANCSA regional corporations⁷⁹ reveals that the corporate form was expressly modified to accommodate the competing demands of the economic and social welfare objectives. In this regard, the “purposes” clauses of the companies’ articles of incorporation are of particular interest.

According to the Alaska Corporations Code, an Alaska business corporation may be formed “for any lawful purpose.”⁸⁰ This broad statement of corporate purpose is standard corporate law. An individual corporation’s statement of purpose is provided in its articles of incorporation and generally tracks the statutory language. Despite the generality of the language, it is widely understood that a for-profit corporation is managed to further the company’s business and to serve the shareholders’ financial or investment interests. For example, section 10.06.450(a) of the Alaska Corporations Code provides that the “business and affairs” of a business corporation shall be managed by the company’s Board of Directors.⁸¹ The interests of other constituencies may be served to the extent that such service also (and primarily) furthers shareholders financial interests.⁸² Although the Alaska Statute provides that a corporation has the power to make donations “for the public welfare or for charitable, scientific or educational purposes,”⁸³ the business activities are of primary importance.

78. Margaret Bauman, *Report on Native Corporations Shows Revenue Growth*, ALASKA J. COM., Nov. 20, 2005, at A9, available at 2005 WL 22116607.

79. The regional corporations examined were: Ahtna, Inc.; Aleut Corp.; Chugach Alaska Corp.; NANA, Inc.; and Sealaska, Inc.

80. ALASKA STAT. § 10.06.005 (2004).

81. *Id.* § 10.06.450(a).

82. Although it is a Delaware case, the following well-known judicial opinion is representative of the cases making the point that directors are required to manage business corporations in the best interests of the shareholders, based on financial considerations. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986) (mentioning how the “directors owe fiduciary duties of care and loyalty to the corporation and its shareholders” when discharging their functions (citing *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939))).

83. Alaska Stat. § 10.06.010(13).

Five Native corporations have made their dual economic and social welfare roles explicit in their respective articles of incorporation and have accorded them equal priority.⁸⁴ In addition, in some cases, preserving the culture of Natives living in each of the respective regions is also a stated corporate purpose,⁸⁵ as is the establishment of a private foundation to provide scholarships for Natives.⁸⁶ Thus, the purposes established in the ANCSA companies' articles of incorporation reflect the dual nature of the corporations' objectives and modify the profit-making priority of the usual business corporation. It is appropriate to consider whether, and to what extent, these statements of corporate purposes in the five regional corporations influenced and reflected corporate priorities, or whether they were aspirational statements that did not translate into corporate action.

From the time the ANCSA was passed and continuing to today, the collective economic and social plight of many Natives has been dismal at best. Poverty, unemployment, underemployment, lack of education and training, and lack of opportunity have often been the norm rather than the exception.⁸⁷ One pair of scholars noted the following as the key problems with Alaska Native rural economies:

The prescriptions for self-sufficiency are shaped by development constraints. Three types of problems are associated with economic development in Native villages. First, economic limits are imposed by the small size and remoteness of most villages; these limit opportunities for market activity and increase the cost of living. The second set of problems is associated with

84. See AHTNA, INC., ARTICLES OF INCORPORATION OF AHTNA, INC. art. 3(C) (1972), available at <http://digbig.com/4qfka> (follow "Creation Filing" hyperlink) (describing the company's purpose as "[t]o promote the economic, social, cultural and personal well-being of all Natives" in the region); CHUGACH ALASKA CORP., AMENDED AND RESTATED ARTICLES OF INCORPORATION OF CHUGACH ALASKA CORPORATION, art. 2 (1994), available at <http://digbig.com/4qfkj> (follow "Restated Articles/Organization" hyperlink) (describing its purposes as fulfilling its obligations under the ANCSA); NANA REGIONAL CORP., AMENDED AND RESTATED ARTICLES OF INCORPORATION OF NANA REGIONAL CORP., art. III(b) (2003), available at <http://digbig.com/4qfkc> (follow "Restated Articles/Organization" hyperlink) (describing its purpose as "[t]o promote the economic, social and personal well-being of the Natives of the northwest region of Alaska" and to engage in any lawful business); SEALASKA CORP., RESTATED ARTICLES OF INCORPORATION OF SEALASKA CORP., art. III (2003), available at <http://digbig.com/4qfkd> (follow "Restated Articles/Organization" hyperlink) (describing its purpose as "to secure and administer the benefits of [the ANCSA] for the Natives enrolled in [the] region"); Aleut Corp., Our Corporation, <http://digbig.com/4qfke> (last visited Dec. 8, 2006) (describing its corporate purpose as "[t]o maximize dividends to, and choices for, our shareholders").

85. See *supra* note 84.

86. Ahtna's Heritage Foundation, Mission Statement, <http://digbig.com/4qgdb> (last visited Dec. 11, 2006).

87. FINAL REPORT, *supra* note 59, at 83–91.

dependency and control; not only are decisions affecting the local economy made outside the region, there may also be external controls on access to local resources. Third, rapid growth of population in the villages complicates the problem of economic development by increasing the required level of economic activity⁸⁸

In 1981, ten years after the passage of the ANCSA, reports of the regional corporations' effectiveness were bleak, as viewed in terms of their ability to achieve the ANCSA's social welfare and economic objectives.⁸⁹ Today, reports are better but still mixed.⁹⁰ There has been decided improvement on the economic front.⁹¹ According to a report of the Association of ANCSA Regional Corporation Presidents/CEO's, the economic picture of ANCSA regional corporations has improved in some respects but they have continued to struggle in other important ways, such

88. Lee Huskey & Thomas A. Morehouse, *Development in Remote Regions: What Do We Know?*, 45 ARCTIC 128, 134 (1992) (citing J.C. Stabler & E.C. Howe, *Socio-Economic Transformation of the Native People of the Northwest Territories 1800-2000* (Univ. of Sask., Dep't of Econ., Working Paper No. 90-4, 1990); Stephen Langdon, *Commercial Fisheries: Implications for Western Alaska Development*, in DEVELOPING AMERICA'S NORTHERN FRONTIER 3, 4-6 (Theodore Lane ed., 1987)).

89. See, e.g., COHEN, *supra* note 19, § 4.07[3][b], at 344 ("By the early 1980s, it was clear to many that Congress's goal of establishing economically viable corporate entities that could return profits and protect native land and other assets after stock became alienable in 1991 would not be achieved." (citing S. Rep. No. 100-201, at 20-22 (1987), as reprinted in 1987 U.S.C.C.A.N. 3269, 3270-72; BERGER, *supra* note 59, at 6; CASE & VOLUCK, *supra* note 18, at 110-23)); Douglas M. Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 UCLA ALASKA L. REV. 103, 135 (1979) (expressing concern about the delivery of social services constituting a source of "friction" within the ANCSA-for-profit-business-corporation form); Lee Huskey, *Alaska's Village Economies*, 24 J. LAND RESOURCES & ENVTL. L. 435, 435-36, 438-41 (2004) (discussing Natives' continued dependence on government support during the 1980s and showing through tables how Natives' unemployment was higher than for most other people of Alaska, how unemployment was at a higher level in the early 1980s than with the turn of the decade, and how there was extreme poverty during these times); Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1331-32, 1338-40 (1992) (enumerating the ongoing problems experienced by ANCSA regional corporations during the first twenty years of their existence); John F. Walsh, Note, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227, 228, 232-34 (1985) (characterizing the ANCSA as a threat to the economic and cultural futures of Natives); Wallace Turner, *Alaskan People See a Fading of 'Spirit'*, N.Y. TIMES, June 18, 1981, at A25 (reporting that "[a]lcoholism, alienation and despondency" continue among Natives on the tenth anniversary of the settlement). At first, the use of the business corporation form seemed like a recipe for disaster. See MITCHELL, TAKE MY LAND, *supra* note 18, at 519-20 (explaining the many issues the Natives had with the corporate form).

90. See Allaway & Mallott, *supra* note 26, at 141 ("I think that, from an economic perspective, [the] ANCSA has unfolded surprisingly well, even though there have been grave difficulties."); Stephen Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND RESOURCES & ENVTL. L. 155, 161-65 (2005) (reporting on the history of economic successes and failure of various ANCSA regional corporations).

91. Allaway & Mallott, *supra* note 26, at 141.

as meeting social welfare objectives with respect to overall employment of Natives and significant improvement of their living conditions.⁹²

Many aspects of the economic report are encouraging. As of 1997, all twelve regional corporations operated profitably, with collective earnings totaling \$169 million.⁹³ Interestingly, some companies' financial successes of the 1990s grew Phoenix-like from the economic ashes of the 1980s, when many regional and village companies had suffered substantial losses.⁹⁴ The companies turned dross into gold by selling their operating losses, earning \$410 million for regional corporations and \$500 million for village companies.⁹⁵ Although their financial performance has varied considerably from corporation to corporation, these sales saved some ANCSA corporations from bankruptcy.⁹⁶ In 2003, the thirteen ANCSA regional corporations and twenty-eight of the village corporations collectively increased their revenues to \$2.9 billion, issued shareholder dividends of \$78 million, and controlled assets worth \$2.8 billion.⁹⁷ According to Mitchell:

Regional corporations today operate drilling and other oil field service companies in the North Slope oil patch. They also own operating oil and gas wells, a world-class zinc and lead mine, and companies that are involved in almost every aspect of the Alaska economy, from tourism to natural resource development to government contracting to high-tech fiber optics.⁹⁸

These are the kinds of accomplishments that were considered hallmarks of success by the Makivik Corporation in Canada.⁹⁹

There have also been gains on the social welfare side. Under the ANCSA-revenue-sharing provision, approximately \$725 million has been distributed among the poorer regions.¹⁰⁰ Regional corporations created

92. ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOS, NATIVE CORPORATIONS: A LEGACY OF SHARING 4-5 (2003), *available at* <http://digbig.com/4qgdj>.

93. MITCHELL, TAKE MY LAND, *supra* note 18, at 534.

94. Colt, *supra* note 90, at 162 (citing Stephen Colt, Presentation to the Alaska Bar Association, Native Law Section: ANCSA Regional Corporations: Mature, and Growing! (Oct. 18, 2000), *available at* <http://digbig.com/4qgdc>).

95. MITCHELL, TAKE MY LAND, *supra* note 18, at 534.; *see also* Colt, *supra* note 90, at 161-63 (discussing the phenomenon on a company-by-company basis).

96. Colt, *supra* note 90, at 160-62.

97. Bauman, *supra* note 78 (citing ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOS, ALASKA NATIVE CORPORATIONS 6 (2005), *available at* <http://digbig.com/4qgdf>). *See generally* Colt, *supra* note 90, at 161-63 (providing background information on how the success was achieved).

98. MITCHELL, TAKE MY LAND, *supra* note 18, at 534.

99. Janda, *supra* note 4, at 779-80.

100. Tom Kizzia, *Sharing ANWR's Wealth*, ANCHORAGE DAILY NEWS, Nov. 28, 2005, at A1,

foundations that donated \$7 million in support of charitable organizations and awarded 2,575 students a total of \$4.2 million in scholarships.¹⁰¹ According to Sheri Buretta, President of the Association and Chair of the Board of the Chugach Alaska Corp., some of the regional corporations' economic success was attributed to their participation in federal government contracting programs giving preference to Native companies.¹⁰² The government program "is helping us to bring economic self[-]sufficiency to our people, many of whom still live in third[]world conditions, lacking the most basic amenities of even sewer and water."¹⁰³

On the negative side, however, of a total of 10,541 workers employed by the regional corporations, only 2,685 were Alaska Natives, down from 3,103 in 2002.¹⁰⁴ The percentage of Natives employed by ANCSA regional corporations in 1991 varied from a high of 75% to a low of 2.3%.¹⁰⁵ Further, the 1990 census reported that Native unemployment ran as high as 22.1%, as compared with 8.8% unemployment in Alaska's overall

available at 2005 WL 19168689. However, the revenue sharing rules have also prompted a decade of litigation. *Id.*

101. Bauman, *supra* note 78 (citing ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOs, *supra* note 97, at 6). Attempts to accomplish social welfare objectives, at times, raised corporate law issues when distributions were made in connection with shares of stock. In *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320 (Alaska 1997), shareholders of an ANCSA village corporation brought a class action against the corporation for discriminatory payment of dividends pursuant to a financial security plan that was open only to ANCSA shareholder beneficiaries who received stock when the corporation was organized. *Id.* at 1322–23. The distributions were not charitable gifts or ANCSA social welfare programs. The purpose of the plan was to provide financial security to the original shareholders. *Id.* at 1322. Distributions were also not based on the need of distributees. *Id.* at 1322–23. Shareholders who were not original shareholders claimed the distribution was discriminatory and in violation of Alaska State Corporation Law. *Id.* at 1323. The Alaska Supreme Court concluded that the distributions did not qualify as permissible charitable gifts. *Id.* at 1324. Further, the creation of the stock associated with the distributions had required a shareholder vote or an amendment to the Kake articles of incorporation. *Id.* (citing 43 U.S.C.A. § 1629b (West Supp. 1996)). As the required procedures had not been followed, the distributions were impermissible. *Id.* Four years later, the Alaska Supreme Court permitted a corporation to issue elder stock to particular groups of native elders without the payment of consideration for the stock, as required by Alaska corporate law. *Sierra v. Goldbelt, Inc.*, 25 P.3d 697, 698–99, 701–02 (Alaska 2001). In *Sierra v. Goldbelt, Inc.*, the corporation created an elder-benefit program by issuing preferred stock to elders who owned original Goldbelt stock. *Id.* at 698–99. The court upheld the issuance of stock because the ANCSA permits issuing elder stock without consideration, thus preventing it from being characterized as an impermissible gift, and because the Goldbelt shareholders approved the issuance of the shares, thereby satisfying corporate procedural requirements. *Id.* at 701–02.

102. Bauman, *supra* note 78 (citing ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOs, *supra* note 97, at 3).

103. *Id.* (quoting ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOs, *supra* note 97, at 3).

104. *Id.* (citing ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOs, *supra* note 97, at 6; ASS'N OF ANCSA REG'L CORP. PRESIDENTS/CEOs, ANNUAL REPORT (2004)).

105. FINAL REPORT, *supra* note 59, at 101 tbl.2.

workforce.¹⁰⁶ Thus it is clear that despite the relative economic success of some of the Native regional corporations, their ability to accomplish many of their social objectives has been decidedly mixed. One reason is that there apparently has not been sufficient investment in developing the economies of villages where many Natives reside. According to one commentator, few villages are located in places compatible with private sector development of economic activity.¹⁰⁷ Villages generally are located in places suitable mostly for participation in a subsistence economy.¹⁰⁸ They are not suitable locations for developing wage economies for the production of goods and services consumed by village inhabitants.¹⁰⁹ Thus, although the effort to develop economic activity and improve Natives' economic well-being has attained some success at the regional level, village corporations have not matched their regional counterparts according to either measure.

ANCSA regional corporations have varied in their approaches to balancing economic and social objectives. Cook Inlet, the most economically successful company, focused almost exclusively on profits.¹¹⁰ The company did not also work to create jobs or pursue other social objectives. For example, in 1991, approximately 120, or 9.8%, of Cook Inlet's 1,222 employees were shareholders.¹¹¹ Only 2% of Cook Inlet's total number of shareholders were company employees.¹¹² Cook Inlet, however, is located in Anchorage and may have had shareholders who were already participants in the larger economy and had some experience with the corporate form.¹¹³ In contrast, two other companies, Arctic Slope and NANA, Inc., were successful both economically and in providing jobs, despite the fact that they are located in remote areas.¹¹⁴ According to

106. *Id.* at 91.

107. MITCHELL, TAKE MY LAND, *supra* note 18, at 535.

108. *Id.*

109. *Id.*

110. Colt, *supra* note 90, at 169.

111. *Id.* at 175 tbl. 3.

112. *Id.*

113. *Id.* at 169.

114. *Id.* at 161, 169. According to Colt,

[O]nly three corporations: Arctic Slope, N[ANA], and to a lesser extent Ahtna, provided significant numbers of jobs for their shareholders, while sacrificing little in the way of profits. By contrast, corporations with the greatest financial losses: Bering Straits and Calista, for instance produced little or no employment for shareholders. Only the N[ANA] corporation showed clear evidence of a rational trade[-]off of profits for jobs: N[ANA] appeared to lose money using accounting profits as a measuring stick, but made money when wages paid to shareholders are also included as a measure of net income.

Id. at 165 (citing Stephen Colt, Exploring Variation Among Alaska's Native Regional Corporations 100

Stephen Colt, Arctic Slope employed 2,162 people, of whom 827, or 38%, were shareholders; 22% of its shareholders were company employees.¹¹⁵ NANA employed 2,050 people, of whom 978, or 47%, were shareholders; 20% of its shareholders were company employees.¹¹⁶

As the foregoing discussion indicates, several of the Native regional corporations have pursued dual objectives with some measure of success. They actively engaged in economic activity to produce profits and used corporate profitability to improve the social and economic well-being of Natives. These regional corporations have been managed with both goals accorded equal priority. In many respects, significant progress has been made on both fronts.

To accomplish these goals, regional corporate directors and managers attempted to accommodate the demands of two cultures: one with traditions based on Western capitalism and the other with traditions based on subsistence economies. The nature of that interaction and accommodation in the corporate context is discussed in the following Part.

C. *The Objective of Economic Assimilation*

The ANCSA mandates that regional organizations administer settlement funds through the legal form of a for-profit business organization.¹¹⁷ As discussed in a preceding Part, the required use of the business corporation was intended to accomplish three purposes: to engage in economic activity; to use the fruits of that activity to improve the social well-being of Natives; and to promote the economic assimilation of Natives into the larger economy,¹¹⁸ despite the fact that the business corporation is “a form of economic organization that embodies social values that are antithetical to those embodied in traditional cultures that have evolved from Native participation in hunting, fishing, and gathering.”¹¹⁹ The objective of

(1999) (unpublished Ph.D. Dissertation, Essay 2, Massachusetts Institute of Technology)).

115. *Id.* at 175 tbl. 3.

116. *Id.* It should be noted, however, that despite gains in some areas, many Natives continue to be plagued with problems of poverty, substance abuse, suicide, and violent crime. MITCHELL, TAKE MY LAND, *supra* note 18, at 530–33.

117. 43 U.S.C. §§ 1605(c), 1606(d) (2000).

118. However, some commentators assert that subsequent amendments to ANCSA and other legislation suggest that Congress no longer considers economic assimilation an ANCSA objective. *See, e.g.,* COHEN, *supra* note 19, § 4.07[3][b], at 345–46 (“Congress has largely abandoned the assimilationist objectives manifested in 1971.” (citing § 1601(b); S. REP. NO. 100-201, at 43–44 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3293–94)). Nevertheless, Congress did not abandon its mandate that ANCSA regional corporations operate as business corporations. 43 U.S.C. § 1606(d). Thus the inquiry continues to be relevant.

119. MITCHELL, SOLD AMERICAN, *supra* note 19, at 11.

economic assimilation raises a complex of issues, only one of which will be addressed here: namely the extent to which the use of the business corporation form provided opportunities for accommodation of two different economic cultures and of the legal and social traditions on which they were based.

Although the various regions of Alaska differ significantly in comparisons based on economic attributes, at least one study has concluded that “economic development, as it is generally conceived in the United States (and historically in Western European society), leads to a lessening of options for most Alaska Natives, rather than an enhancement.”¹²⁰ According to the *Final Report*, traditional subsistence economies were self-sufficient.¹²¹ Local human and natural resources sustained local populations.¹²² In many cases, Western-style economic development transformed the Native economies for the worse:

Whereas all Alaska Native communities at one time enjoyed self-sufficient, subsistence economies relying on their own human and natural resources to provide for their population, the introduction of non-Native lifestyles and modern technology rapidly escalated cash needs, while opportunities to earn cash failed to grow along with those needs. This led to reliance on a transfer economy, dependence on the government, and resulting negative social and psychological consequences which prevail today.¹²³

120. FINAL REPORT, *supra* note 59, at 85.

121. *Id.* at 86.

122. *Id.*

123. *Id.* The resulting impact was vividly described by the testimony before the Commission on June 1, 1993, of Patrick J. Madros, Sr., from Nulato:

The first thing we have to do is go back in history and find out where our problems started. In my old hometown of Kaltag, I can only go back to the middle '50s and early '60s when the first electrical generator was brought into Kaltag by a barge in the summer. I'll use this as a starting point of the change from my subsistence way of life to a cash[-]based economy.

In order to maintain a light bulb in your home, you had to pay a monthly electric bill in cash. That changed the way of billing and so forth - a major change in our society. Rather than pay bills once a year at the end of a season, this bill was occurring monthly. If you didn't pay it on a monthly basis, you lost your electricity.

The second thing that we thought up is we became a state, and with that wedlock developed. A woman who had kids out of wedlock became eligible for assistance - I figured some three to four hundred dollars a month at that time. Three hundred times 12 is \$3,600 a year tax free to a person in our society out of wedlock, and that was a lot of money, especially when the per capita at that time was \$1,000 in our area. All of a sudden this person became a very rich person and the single-parent family became acceptable.

In testimony before the Alaska Natives Commission concerning the disjunctive relationship between the values of the dominant economy and the values of the Natives, John Shively, Executive Vice-President of NANA Regional Corporation, made the following observation:

[P]eople aren't, in our region, into wealth accumulation, which is the basis for [W]estern economy. They're into sharing; they're into other cultural activities; and it's a strength that has never been used, to my knowledge, very well in this state in any sort of ongoing business that can keep a broader work force working. Actually, money from projects like Red Dog [Mine], I think, goes much farther in the Native community than it would in the non-Native community, because it doesn't go [only] to the people that earn it, it [also] goes to their immediate and extended family.¹²⁴

As Shively indicated, the economic and cultural values of many Native groups have little in common with the Western capitalist values expressed in the corporate form. Nevertheless, despite that disjunction, Congress mandated the use of the business corporation to promote the assimilation of Natives into the wider economy.

Whether the business-corporation-form requirement was simply a congressional mandate or whether Congress took that action, in part, upon the recommendation of AFN,¹²⁵ is a matter of some dispute.¹²⁶ Regardless

It was during this era that the role of the Native male changed, and we did not realize it [then]. Instead of being the provider our culture called for, we took second place to welfare. The roles we played were not really important any more, as hunters, wood and water gatherers. We were replaced by PHS [Public Health Service], BIA [Bureau of Indian Affairs], free housing, energy assistance, food stamps and the list could just go on and on and on.

Id.

124. *Id.* at 88–89.

125. *Alaska Native Land Claims, Part II: Hearing on H.R. 14212, H.R. 13142, and H.R. 10193 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 91st Cong. 510–11 (1969) (statement of John Borbridge Jr., Vice President, Alaska Federation of Natives; President and General Manager, Central Council of Tlingit Indians of Alaska) (“I would like to make one point emphatically at the threshold. The substance of all the important provisions of H.R. 14212 was conceived by the elected representatives of the Native people of Alaska assembled as the Alaska Federation of Natives. It was not suggested, let alone dictated, by any person or persons not members of the Federation. The major provisions of this bill, those relating to compensation as well as to other subjects, reflect decisions taken by the Natives and the terms of the settlement they determined to recommend to the Congress.”); MITCHELL, *SOLD AMERICAN*, *supra* note 19, at 11 (“The fact that ANCSA critics rarely mention is that the idea of using [S]tate of Alaska-chartered business corporations to implement the settlement was recommended to Congress in 1968 by the Alaska Federation of Natives, rather than forced on Alaska Natives by Congress.”).

126. *See, e.g.,* COHEN, *supra* note 19, at 340–43 (giving the impression that the matter was

of the origins of the mandate, there are several reasons why this approach was chosen.

According to Donald Craig Mitchell, former Vice-President and General Counsel of the AFN, the recommendation seemed logical at the time as, unlike their Native counterparts in the lower forty-eight states, Natives had already begun to participate in commercial development of natural resources and had already been active in the political system in Alaska, including serving as representatives in the state's legislature.¹²⁷ In addition, according to Mitchell:

[T]he decision to provide Alaska Natives capital (in the form of money and legal title to land on and under which commercially marketable natural resources are located) and to require them to organize corporations to use that capital to participate with non-Natives in the development of the Alaska economy was a policy decision of unprecedented public importance—because for most of its two hundred years of dealings with Native Americans, Congress intended its Indian policies to bring about exactly the opposite result.¹²⁸

In addition, many Native economies, through subsistence by tradition, had already been transformed to varying extents by Natives' access to and use of consumer goods and services produced by the larger economy.¹²⁹ Thus, while many Natives' cultural traditions continued to be based on subsistence economies, in fact many of their economies had already become a mix of subsistence, wage, and transfer economies. In addition, the use of widely available goods and services, such as motors and electricity, often brought relief from difficult and dangerous labor and physical discomfort. And finally, the combination of transfer of title to vast acreages of land rich in surface and subsurface resources to Natives and payment of large settlement claims held the promise of an economically bright future. The corporate form was well-suited to collective ownership of assets and the management of large amounts of capital. Distributions of the profits derived from the use of the land would help improve Natives' overall

determined solely by Congress); MITCHELL, *SOLD AMERICAN*, *supra* note 19, at 11 (asserting that the choice of corporate form was based on the recommendation of the Natives).

127. MITCHELL, *SOLD AMERICAN*, *supra* note 19, at 11–12; Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 353 n.* (1997).

128. MITCHELL, *TAKE MY LAND*, *supra* note 18, at 514.

129. *See, e.g., id.* at 511 (describing the various products and services that Natives use that came from outside their culture).

standard of living. One Athabascan Indian viewed the promise of the ANCSA in the following way: “[It] is not just a question of land. . . . It is a grasp, a handhold for the development of our future.”¹³⁰

Nevertheless, the decision to use the business-corporation form to administer the ANCSA transfers of land and money was not welcomed by all. As Mitchell makes clear, the differences between the values embodied in the corporate form and those associated with participation in subsistence economies are immense.¹³¹ For many, this conflict in values raised the question whether it would be possible to retain any significant measure of cultural identity while being engaged in economic undertakings using the business-corporation form.¹³² Would the driving force of the corporate form, a powerful and dynamic engine of capitalism, not only force Natives to assimilate into the wider economy but also, in the process, destroy traditional Native values? Several scholars have expressed the concern that the mandatory use of the corporate form would, with disastrous results, overwhelm Native cultural values, at least to the extent that they operate in the corporate form.¹³³ One scholar also added that:

It is by the expansion of the industrial system that we in metropolitan North America have thrived and prospered. But when you seek to reproduce Main Street here in the Arctic and sub-Arctic regions, you affect the complex links between the Native people and their past, their culturally preferred way of life and their individual, familial, and political self[-]respect. We should not be surprised to learn that the economic forces that have broken these vital links caused serious disorders, frustration, confusion and indignation.¹³⁴

130. Hal Bernton, *Alaska's Native Corporations at 20: Mixed Results Amid Sharp Divisions*, WASH. POST, Jan. 2, 1992, at A3.

131. See MITCHELL, SOLD AMERICAN, *supra* note 19, at 12 (“To mention but two, in traditional Native cultures conflict was resolved by consensus rather than majority vote, and an individual’s social status was measured by the acquisition and distribution rather than the acquisition and retention of wealth.”).

132. See, e.g., *id.* (recognizing cultural disruption caused by the ANCSA); Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, *supra* note 16, at 443–44 (expressing how the ANCSA was an “[a]ct of deception” and placed the Natives’ culture in jeopardy); Ford & Rude, *supra* note 16, at 489 (mentioning how the culture of Natives was now in danger); Hirschfield, *supra* note 89, at 1340 (stipulating how the ANCSA created a tension between the goal of assimilation of the Natives and safeguarding their culture).

133. See, e.g., BERGER, *supra* note 59, at 42 (“[C]orporate executives in the urban centers may be estranged from their shareholders in the villages.”); Price, *supra* note 49, at 95–100 (“The corporate executives will be those who are willing to forego subsistence activities, to place a higher priority on board meetings than on salmon fishing, and to spend time talking to lawyers and financiers and bankers rather than the people of the villages.”).

134. Thomas Berger, Keynote Address at the 8th International Congress on Circumpolar Health

If the ANCSA regional corporations were to be successful in meeting the dual goals of economic success and serving Native welfare, company governance structures had to be fashioned to provide a bridge between traditional native culture and the larger economy. To accomplish these objectives, the NANA Regional Corporation modified the traditional corporate governance structure. As to the public at large, the company functioned like any other corporation. However, internally, its decision-making practices were transformed to make them compatible with Native requirements. The result, as described more fully below, was similar to that achieved by the Makivik Corporation in its use of a modified governance structure for internal decision making and a traditional corporate governance structure for dealings with the larger economy.¹³⁵

NANA, Inc., is the regional corporation formed by the Eskimo residents of Kotzebue and other villages located in the northwest Arctic.¹³⁶ At the time NANA was formed, there was little evidence that it might be successful in any respect. A subsistence economy was in place in the region, with few jobs available.¹³⁷ Homes lacked basic amenities, such as sewer and water.¹³⁸ The situation was described, as follows, by Willie Hensley, an early member of the NANA board of directors:

It is on this scene that the Settlement Act [ANCSA] arrived in 1971, and with great suddenness the Natives in part were forced to adopt the white man's way of doing things if they were to benefit under the Act. Many of the concepts involved were and still are totally foreign to them. Each village was told it had to form a corporation and the village residents would become stockholders and would own a certain number of shares of stock. The land, which for centuries had been used jointly b[y] everyone, would now be "owned" by the corporations. While the Natives of the villages always met periodically in a community meeting in their villages to discuss whatever problems arose and to resolve them, they now would have to hold annual stockholders' meetings. They would have to learn to operate a corporation, start some businesses with the money provided by

(May 20–25, 1990), in *CIRCUMPOLAR HEALTH* 90, at 2, 4 (Brian D. Postl et al. eds., 1991).

135. Janda, *supra* note 4, at 786–90.

136. MITCHELL, *TAKE MY LAND*, *supra* note 18, at 519.

137. *Id.* (quoting *Amendments to Alaska Native Claims Settlement Act: Hearing Before the Senate Committee on Interior and Insular Affairs on S. 1824 and S. 2384*, 94th Cong. 194–95 (1975) (statement of William Hensley, Member of Board of Directors, NANA, Inc.) [hereinafter ANCSA Hearing]).

138. *Id.* (quoting ANCSA Hearing, *supra* note 137, at 195).

Congress, and try to produce a profit. . . .

....

Their extremely remote location and the lack of communications make any normal business enterprise, perhaps even in competition with other corporations elsewhere in Alaska, virtually impossible. It must be realized that to undertake even routine business or corporate activities, such as holding stockholders' meetings or having the books audited, is far more expensive in bush Alaska than it is in the lower 48 states, or even in Anchorage or Fairbanks.

Experienced management talent invariably is also scarce. Most Native village inhabitants simply have never had anything to do with operating business corporations. As everyone knows, operating a corporation so as to produce a profit takes considerable training, skill and experience.¹³⁹

As previously indicated, NANA attempted to meet these challenges, in part, by designing a governance structure adapting both corporate and traditional forms. It was also one of the companies that, from the outset, attempted to accommodate the demands of both the capitalistic and traditional economies. The organization of the company's board of directors provides one example.

Modern business corporations usually select as their directors individuals from one of the following categories: officers of the company; company counsel; large shareholders or founding shareholders; executives of other companies with a personal or professional (i.e., representative of an important customer or supplier, etc.) connection with the company or its executives; academics; and individuals with government experience. Qualifications for directors are usually found in a company's bylaws, which, unlike articles of incorporation, are not required to be publicly filed and are therefore more difficult to obtain. NANA, Inc., is the exception, as it includes director qualifications in its articles of incorporation, a publicly filed and thus readily accessible document.¹⁴⁰

NANA uses an approach to governance that diverges from the corporate norm. NANA has twenty-seven directors.¹⁴¹ All must be shareholders, which means that under the terms of the ANCSA, all will be Natives.¹⁴² Each member of the board must also be associated with one of

139. *Id.* at 519–20 (first alteration in original) (quoting ANCSA hearing, *supra* note 137, at 196, 198).

140. NANA REGIONAL CORP., *supra* note 84, art. VII.

141. *Id.*

142. 43 U.S.C. § 1606(g)(1) (2000); NANA REGIONAL CORP., *supra* note 84, art. VII.

the villages within the NANA region.¹⁴³ Each village has a designated number of seats on the board.¹⁴⁴ The board has five committees that board members are assigned to based on the village in which each member resides.¹⁴⁵ Each committee is responsible for managing both the surface and subsurface of village lands located within the NANA region.¹⁴⁶ The members of the board perform the usual director's role of overseeing the company's economic undertakings. They also, however, function in a quasi-governmental capacity as managers of the use of village lands. This is a deviation from the traditional role of directors who, according to state corporate law, exercise business management rather than governmental management functions.¹⁴⁷ In sum, with respect to the structure and function of the board, NANA, Inc., represents an important deviation from the traditional for-profit corporate norm. In requiring both the board and the board committees to include representatives of each village, NANA has established an inclusive, decision-making process suggestive of the decision-making processes of a tribal council. This conclusion is affirmed by the following statement concerning NANA's management role:

The NANA corporation's efforts to manage the impact of social change through the human resources approach are reflected principally in three orientations: a primary goal of subsistence protection; localization of production and investment function to promote regional economic self-sufficiency; and a quasi-governmental "constituency" approach to management.¹⁴⁸

In 1976, John Schaeffer, NANA's President, stated that the corporation's mission was "to 'provide people with an opportunity to participate in western culture at whatever pace and degree they feel is possible for them.'"¹⁴⁹ NANA took that mission seriously. It conducted educational sessions for members of the NANA region to help them learn

143. NANA REGIONAL CORP., *supra* note 84, art. VII.

144. *Id.*

145. *Id.* art. VIII.

146. *Id.*

147. For example, under section 10.06.450 of the Alaska Corporations Code, the Board of Directors is charged with the responsibility of managing the "business and affairs" of the corporation. ALASKA STAT. § 10.06.450 (2004).

148. FINAL REPORT, *supra* note 59, at 102 (quoting Michael Gaffney, *The Human Resources Approach to Native Rural Development: A Special Case*, in ALASKA'S RURAL DEVELOPMENT 133, 141 (Peter G. Cornwall & Gerald McBeath eds., 1982)).

149. Colt, *supra* note 90, at 170 (quoting Interview by Victor Fischer, Dir. Emeritus, Inst. of Soc. & Econ. Research, Univ. of Alaska Anchorage, with John Shaeffer, President, NANA Corp. (1975)).

about corporate forms and requirements.¹⁵⁰ To further economic development in the region, it operated the water, sewer, and electric utilities for the North Slope area, coestablished a catering business for construction camps, codeveloped the Red Dog zinc mine, and expanded into tourism.¹⁵¹ Approximately half of the mine's employees were Alaska Natives.¹⁵² By 1991, the company employed almost twenty-five percent of the region's workforce.¹⁵³ Throughout, the company carefully balanced the dual needs to make profits and to provide jobs to Natives.

There are several reasons why NANA was successful in serving both its economic and social welfare corporate purposes. One is its emphasis on promoting Native culture. As John Shively, NANA executive Vice-President, stated:

I think that [cultural strength] really is critical, because . . . too often when we talk about economics, we talk about it from the Western standpoint. When we did Red Dog [mine], for instance, there were things that we put in there that . . . no mining company would have ever put in, but they were at the top of our list: things like subsistence protection, rotations, assuring that we maintained political control in the region, ability for our shareholders to have access to subsistence, cultural foods at the mine, things like that. . . . [T]hat was the head of our list; and, of course, the head of Cominco's list was how they were going to make money.¹⁵⁴

Shively's comments indicate the role played by the members of the board in their efforts to mediate between two cultures and to establish a governing structure marrying traditional norms with those imposed by the corporate form. The structure of the board was designed to facilitate that mediation. In addition, Colt has posited that "[t]he distinguishing feature of the successful employment-oriented groups is their relative isolation from the white[-]majority society and their internal political and social cohesion."¹⁵⁵ Colt has also identified three other factors that contributed to NANA's success: "early and consistent separation of ceremonial leadership

150. See NANA Regional Corp., Shareholder Development, <http://digbig.com/4qhad> (last visited Dec. 13, 2006) (helping shareholders gain experience in order for them to help NANA's companies grow).

151. Colt, *supra* note 90, at 161.

152. *Id.*

153. *Id.* (citing NANA REGIONAL CORPORATION, ANNUAL REPORT (1991)).

154. FINAL REPORT, *supra* note 59, at 88, 106 (quoting John Shively, Executive Vice President, NANA, Inc., Remarks at the Meeting of the Economic Task Force in Anchorage, Alaska, (Aug. 25, 1992)) (first three alterations in original).

155. Colt, *supra* note 90, at 169.

from day-to-day operations, a continuing emphasis on pride in culture, and an almost fanatical pursuit of employment on terms compatible with traditional Eskimo subsistence.”¹⁵⁶ There was also a ready willingness among NANA stockholders to share the benefits of the enterprise with the larger community. When amendments to the ANCSA expanded the qualifications for stock ownership, NANA shareholders amended the company’s governing documents to qualify as stockholders all descendants of the original ANCSA shareholders.¹⁵⁷

Thus, although the NANA Regional Corporation is, by law, a for-profit business corporation,¹⁵⁸ its form has been adjusted to serve both the economic and social benefit objectives of the ANCSA and the Corporation. The modified governance structure provides a bridge between the world of Western capitalism, with its attendant values, and the culture of the Natives in the NANA region, for whose benefit it was created. Like its Makivik counterpart in Canada,¹⁵⁹ the NANA Regional Corporation discussed above created a hybrid structure adapting traditional corporate forms to Native cultural traditions. In Makivik’s case, the principal corporation was a not-for-profit company.¹⁶⁰ Here, in contrast, the Native regional companies are business corporations. In both instances, however, the traditional legal form was transformed. To the external world, NANA is a business corporation; but with respect to its internal dealings, it has designed a decision-making form to reflect the values of the culture it represents.¹⁶¹

CONCLUSION

In its implementation of the mandate requiring ANCSA regional enterprises to organize as business corporations, NANA, Inc., has transformed the modern business-corporation structure in fundamental ways: it establishes both economic and social welfare objectives as dual corporate purposes of equal priority and it has created a governance structure that provides a bridge between the traditional governance practices of the region’s Native population and the demands of the corporate structure. In making these changes, the company, in turn, both connects with the historical development of the U.S. business corporation and holds

156. *Id.* at 170.

157. *Id.* (citing Associated Press, *Sealaska Mulls Adding 12,000 New Natives*, ANCHORAGE DAILY NEWS, May 19, 1994, at D2).

158. See 43 U.S.C. § 1606(d) (2000) (requiring the regional corporations to “incorporate under the laws of Alaska . . . to conduct business for profit”).

159. See Janda, *supra* note 4, at 775–76.

160. *Id.* at 776.

161. See *supra* Part II (classifying the ANCSA as a tool for the future).

promise for its future.

The U.S. business corporation developed as a vehicle to amass capital provided by many investors with the expectation that the capital would be put to productive use and provide a return to the investors.¹⁶² In the late eighteenth and early nineteenth centuries, some privately owned business enterprises were formed to build public works projects, like roads and bridges, and to earn profits for investors.¹⁶³ In addition, some for-profit business enterprises were owned and/or operated by not-for-profits, such as educational institutions. For example, in the 1650s, Harvard College operated a commercial ferry across the Charles River.¹⁶⁴ In cases like these, the lines between for-profit and not-for-profit activities were blurred, and enterprises engaged in both business and public welfare activities. These organizations were both business and social enterprises in that they served economic and public welfare purposes.

Like NANA, Inc., and other ANCSA regional corporations such as Arctic Slope, some early U.S. companies furthered the dual purposes of serving a public social objective and rewarding the investors who had put their money at risk in order that the project might succeed.¹⁶⁵ During that time, the business corporation was also used in ways familiar to the contemporary investor—to finance manufacturing and other profit-making enterprises that were forerunners of the modern corporation. In both cases, investors expected corporate assets to be put to productive use and to bring financial gain to investors providing the risk-capital.

The NANA Regional Corporation is a once-and-future corporation. Like its corporate predecessors, it is a profit-making enterprise that serves broader social objectives. It engages in mining; tourism; catering businesses; water, sewer, and electric-utilities operations; and in projects serving the social welfare of Natives whether or not they are shareholders.¹⁶⁶

162. See 1 JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 2–3 (2d ed. 2003).

163. *E.g.*, *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 423–24 (1837) (mentioning how plaintiffs are a corporation created for the purpose of erecting a bridge (citing Act of Mar. 9, 1785, ch. 52, 1785 Mass. Acts 135)); see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 189 (2d ed. 1985) (discussing how most of the early corporations were established for finance and transportation purposes).

164. *Proprietors of the Charles River Bridge*, 36 U.S. (11 Pet.) at 424.

165. See *id.* at 423–24 (stipulating how the act would allow the corporation to provide a social good while also collecting tolls to cover the proprietors' expenses (citing Act of Mar. 9, 1785, ch. 52, 1785 Mass. Acts 135)).

166. Colt, *supra* note 79, at 161.

The promise of this hybrid corporate structure was suggested by the following assessment of the ANCSA's impact:

To establish several hundred brand new business corporations and expect them to become prosperous, from a business[-]model perspective, looked ludicrous. To have them still in existence, many doing more than just surviving, and some even becoming prosperous—is a testament not to the ANCSA corporate model, but to the capacity of the model within the Native community.¹⁶⁷

The ANCSA business enterprises may also be a harbinger of future corporations in that their structure and successes anticipate the development of new types of sustainable enterprises formed to serve both for-profit and not-for-profit purposes and function as business and social enterprises.

167. Allaway & Mallott, *supra* note 26, at 141.