

# THE BENEFITS OF A BENEFIT CORPORATION STATUTE FOR ALASKA NATIVE CORPORATIONS

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## ABSTRACT

*In the forty-five years since the Alaska Native Claims Settlement Act (ANCSA) created the Alaska Native regional corporation and village corporations, shareholders and outside observers have criticized the statute's use of the traditional corporate form as inappropriate for Alaska Native communities. The emergence of the benefit corporation entity across the United States may soon mean that Native corporations have a promising alternative. If Alaska joins the majority of states that have adopted this new legal entity, Native corporations would have an opportunity to significantly reform their corporate governance within the existing framework of ANCSA. This Note will argue that Alaska should enact a benefit corporation statute because it would give Native corporations a legal entity that better fits their purpose. As benefit corporations, Native corporations would commit to pursuing public benefits, and their directors would be required to consider factors beyond shareholder value in making decisions.*

## INTRODUCTION

Forty-five years ago President Richard Nixon signed the Alaska Native Claims Settlement Act (ANCSA), granting roughly forty-five million acres of land and about \$1 billion to Alaska's Native population in exchange for relinquishing any other land claims they might have in the state.<sup>1</sup> ANCSA also directed the incorporation of regional and village corporations to manage the resources of Alaska Natives.<sup>2</sup> The larger regional corporations were required to be organized "for profit" under

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

2. *Id.* § 1606(a)-(c).

Alaska state law.<sup>3</sup> Congress and the Alaska Natives who advocated for the statute hoped the corporations would foster self-determination among Alaska Natives, allowing them to serve as stewards of the land and assets they received under ANCSA.<sup>4</sup>

Although many have recognized that ANCSA was a significant legislative accomplishment for Alaska Natives,<sup>5</sup> both Native corporation shareholders and outside observers have argued that the corporation was the wrong legal entity to effectuate the broad objectives of the Native corporations and ANCSA.<sup>6</sup> Critics of the Native corporation model have argued that corporate law and its imposition of shareholder primacy is at odds with Alaska Native culture and many of the broader goals of Native corporations.<sup>7</sup> For instance, Native corporation shareholders may prefer that Native corporation directors be required to consider factors other than maximizing dividends and shareholder value.<sup>8</sup> While ANCSA

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3. *Id.*

4. See DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971 541 (2001) ("ANCSA was an unprecedented experiment in Native American economic self-determination that Alaska Natives actively participated in crafting.").

5. See, e.g., *id.* (arguing that ANCSA was not forced upon Alaska Natives by Congress, but that Alaska Natives played a major role in advocating for the law); see also Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 32 (2007) (ANCSA "has been praised by many in terms of the amounts of land and money awarded, but others have decried [its] failings with respect to tribal sovereignty and protection of hunting, fishing, and gathering rights.").

6. See Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 146 (2008) (arguing that Native corporations should be allowed to operate with "nonprofit goals"); see also Morgan 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> (arguing that Native corporations have a broader purpose than paying out dividends and should instead value the collective over the individual in assessing how to benefit shareholders).

7. See, e.g., CERT. OF INC., AHTNA INC., ART. III (June 23, 1972) (stating a corporate purpose "to promote the economic, social, cultural and personal well-being of all Natives"); see also Chaffee, *supra* note 6, at 133 ("One major problem with forcing Alaska Native communities to adopt the corporate form is that corporations measure success by financial performance, rather than by success in land stewardship."); see also Native corp. charters, etc.; but see Linda O. Smiddy, *Responding to Professor Janda—The U.S. Experience: The Alaska Native Claims Settlement Act (ANCSA) Regional Corporation as a Form of Social Enterprise*, 30 VT. L. REV. 823, 825 (2006) ("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 economies and a Western culture characterized by private property, individual rights, and market capitalism.").

8. See, e.g., Howard, *supra* note 6 (writing in an op-ed, Howard, a village corporation director, argues that Native corporations should weigh broader

requires that regional corporations exist as “for profit” entities under Alaska law, some have argued that Native corporations would be better off as legal entities that more closely resemble non-profits.<sup>9</sup> For the past forty-five years, no such quasi-non-profit legal entity has existed in Alaska,<sup>10</sup> and Native corporations have had no transformative alternative option to consider.<sup>11</sup> However, that may soon change.<sup>12</sup>

In 2016, Alaska’s House of Representatives considered whether to pass a bill that would have allowed businesses to incorporate as benefit corporations (commonly referred to as “B Corps”) under state law.<sup>13</sup> If Alaska had passed the benefit corporation statute, it would have joined the majority of states that have already enacted similar statutes.<sup>14</sup> Under the proposed legislation, Native corporation shareholders would have been able to vote on whether to convert to benefit corporations.<sup>15</sup> If a Native corporation became a benefit corporation, its directors would be required to consider a range of factors beyond maximizing dividends and shareholder value.<sup>16</sup> The Native corporation would also need to commit to pursuing public benefits, and report biennially on its progress in furthering these objectives.<sup>17</sup> Directors would risk liability to the public if they failed to pursue these broad goals.<sup>18</sup> Converting to a benefit corporation would be a significant legal transformation for a Native corporation. This Note will argue that, given the criticism of Native corporations that has persisted since ANCSA’s enactment, Native corporations and their shareholders should at least have the chance to consider making this transformation.

Part I of this Note gives an overview of the Alaska Native corporations, tracing their history and some criticism received in the last

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objectives than dividend maximization).

9. Chaffee, *supra* note 6, at 146. ANCSA requires Native corporations to be organized “for profit.” 43 U.S.C. § 1606(d) (2012). Furthermore, the Native corporations have shareholders while non-profits may not have shareholders. *Id.*

10. See generally Daniel William Fessler, *The Alaska Corporations Code: The Forty-Ninth State Claims the Middle Ground*, 7 ALASKA L. REV. 1 (1990) (explaining the distinctive aspects of the Alaska Corporations Code).

11. They could potentially become limited liability companies, but their duties to members would not be dramatically different from their duties to shareholders.

12. See H.R. 49, 29th Leg., 1st Sess. (Alaska 2015) (proposing a new incorporation method for businesses).

13. *Id.*

14. RESPONSIFY, SOCIAL ENTERPRISE LAW TRACKER, <http://www.socentlawtracker.org/#/bcorps> (last visited Sept. 22, 2016) (United States map displaying state legislation on benefit corporations from 2009 to 2016).

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

16. *Id.* (amending ALASKA STAT. §§ 10.60.030–10.60.500).

17. *Id.*

18. *Id.* (amending ALASKA STAT. § 10.60.300).

forty-five years.<sup>19</sup> Part II describes the emergence of the benefit corporation entity in the U.S. and examines the implications of its possible introduction in Alaska. Part III argues that Alaska should seize the opportunity to pass a benefit corporation statute, and thus give Native corporations the chance to consider an alternative legal entity.

## I. OVERVIEW OF ANCSA'S ALASKA NATIVE CORPORATIONS

Following Alaska's first major oil strike in 1957 and its statehood two years later, oil companies began advocating<sup>20</sup> for resolution of the uncertainty around Alaska Native land ownership in the state.<sup>21</sup> Congress enacted ANCSA in 1971 as a comprehensive response.<sup>22</sup> The statute deals almost entirely with land.<sup>23</sup> Under ANCSA, Alaska Natives gave up "any claim" they might have to about 360 million acres of land in exchange for 45.5 million acres and \$962.5 million.<sup>24</sup>

ANCSA required that regional corporations be formed "for profit" under Alaska law to manage these assets.<sup>25</sup> ANCSA also required the formation of village corporations, and some assets were transferred to these local entities.<sup>26</sup> Village corporations typically received the "surface estate."<sup>27</sup> Regional corporations received some of the surface estate, but also acquired the resource-rich "subsurface estate."<sup>28</sup>

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19. Anderson, *supra* note 5, at 31 ("Passage of the ANCSA in 1971 was undoubtedly the most important event in the history of Alaska Native people since 1867. If one views it from the perspective of the state and oil companies' intent on development of oil and gas at Prudhoe Bay, ANCSA was a resounding success.")

20. MITCHELL, *supra* note 4, at 3-4; *see also* Anderson, *supra* note 5, at 28 (stating that possibly the most important pressure behind ANCSA's enactment "was the fact that the state and federal governments' effort to construct a pipeline to transport oil from newly discovered oil fields . . . was thwarted by Native claims to aboriginal title.")

21. Chaffee, *supra* note 6, at 116.

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

23. *See* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 35 (3d ed. 2012) (describing ANCSA as having a "relatively narrow purpose" to settle land claims and explaining that the statute "primarily describes the express procedures whereby land settlement was to be achieved.") [hereinafter CASE & VOLUCK]; *see also* Anderson, *supra* note 5, at 40 (stating that ANCSA did not address tribal self-governance issues or hunting, fishing, and gathering rights of Alaska Natives).

24. Chaffee, *supra* note 6, at 109.

25. 43 U.S.C. § 1606(d); twelve regional corporations were created, plus a thirteenth for Alaska Natives not residing in Alaska. *Id.* § 1606(a), (c).

26. 43 U.S.C. § 1607(a).

27. CASE & VOLUCK, *supra* note 23, at 171-72.

28. *Id.*

Each Alaska Native person alive on December 18, 1971<sup>29</sup> was entitled to receive one hundred shares in a corresponding regional corporation.<sup>30</sup> Share transfer was temporarily restricted by ANCSA<sup>31</sup> and later restricted indefinitely by the so-called 1991 amendments to ANCSA.<sup>32</sup> ANCSA generally exempted the Native corporations from the federal securities laws.<sup>33</sup> Further, ANCSA compels the regional Native corporations to share their timber and subsurface natural resource revenues with each other proportionally.<sup>34</sup> Regional corporations must also share revenue with the village corporations.<sup>35</sup> Otherwise, Native corporation shareholders are treated like other corporate shareholders under the Alaska Corporations Code.<sup>36</sup> Shareholders elect a board of directors that owes fiduciary duties, and they count on receiving regular dividend payments from the corporation.<sup>37</sup> Although their financial track record has been mixed,<sup>38</sup> Native corporations have developed businesses in oil

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29. Native corporations have taken different approaches on whether to issue shares to younger people. *See generally* CASE & VOLUCK, *supra* note 23, at 190 (noting that most corporations are weighing these interests in moving forward).

30. § 1606(g)(1)(A).

31. CASE & VOLUCK, *supra* note 23, at 159.

32. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][b][ii][C] (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] ("The major feature of the 1991 amendments is the indefinite extension of restrictions on alienation of Native corporation stock.").

33. 43 U.S.C. § 1625; *see also* CASE & VOLUCK, *supra* note 23, at 196 (describing the amendments to ANCSA that made the exemptions indefinite and detailing Alaska's state securities regulations, which are applicable to the largest Native corporations).

34. § 1606(i)-(m); *see also* CASE & VOLUCK, *supra* note 23, at 175-76 (stating that after extensive litigation over the revenue sharing provision, a settlement to modify it was ultimately agreed upon).

35. § 1606(i)-(m); *see also* CASE & VOLUCK, *supra* note 23, at 175-76 (stating that after extensive litigation over the revenue sharing provision, a settlement to modify it was ultimately agreed upon).

36. *See, e.g.*, Rude v. Cook Inlet Region, Inc., 294 P.3d 76 (Alaska 2012) (holding that a Native corporation did not have to list the candidates not recommended by its board in its proxy materials). Admittedly, Native Corporations have received significant special treatment under federal law, such as being able to sell their taxable losses during the 1980s, CASE & VOLUCK *supra* note 23, at 180-81, and receive federal contracting preferences, 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>.

37. *See, e.g.*, Holmes v. Wolf, 243 P.3d 584 (Alaska 2010) (interpreting the Alaska Corporations Code in ruling on a plaintiff's claim for director's breach of fiduciary duties against Leisnoi, Inc., a village corporation); *see also* MITCHELL, *supra* note 4, at 509 (describing how unemployed Alaska Natives may need to live off their dividend checks).

38. *See* Jennifer LaFleur and Michael Grabell, *Alaska Native Corporations Financials*, PROPUBLICA (Dec. 15, 2010, 8:00 PM), <http://projects.propublica.org/tables/alaska-native-corporations-financials>

and gas, mining, construction, timber, real estate, and a variety of other areas.<sup>39</sup> They have also taken advantage of preferences that allow them to receive discounts in Federal Communications Commission auctions by participating in high-profile transactions with other major U.S. corporations like Dish Network.<sup>40</sup>

### A. The Purpose of the Alaska Native Corporations

At their incorporation, shareholders, legislators, and other stakeholders ascribed an array of purposes to Alaska Native corporations. Congress mandated the corporate form for Alaska Native corporations in ANCSA because legislators and Alaska Native advocates for the statute believed it would promote self-determination for Alaska Natives.<sup>41</sup> Legislators also hoped to integrate Alaska Natives into the framework of American capitalism.<sup>42</sup> ANCSA said the statute's 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 . . ."<sup>43</sup>

The regional corporations' original certificates of incorporation include the standard corporate language,<sup>44</sup> such as the broad statement that the corporation will be formed to engage in "any and all lawful

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("[Native corporation] performance, as measured by revenue growth and dividends paid to shareholders, varies widely."); see also Stephen Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND RESOURCES & ENVTL. L. 155, 155-56 (2005) (stating that Native corporations mostly performed poorly for their first twenty years of existence with some notable exceptions).

39. Colt, *supra* note 38, at 161-62.

40. Shalini Ramachandran, Kate Linebaugh & Ryan Knutson, *Behind Dish Wireless Coup, Ties to Alaskan Native Groups*, WALL ST. J. (Feb. 3, 2015), <http://www.wsj.com/articles/behind-dish-wireless-coup-ties-to-alaskan-native-groups-1423017463>; see also Colt, *supra* note 38, at 162 (describing how Cook Inlet Region Inc. used federal preferences to participate in broadcast deals with other companies).

41. MITCHELL, *supra* note 4, at 541.

42. CASE & VOLUCK, *supra* note 23, at 188; see also COHEN'S HANDBOOK, *supra* note 32, § 4.07[3][b][ii][B] (stating that ANCSA was "calculated to speed assimilation of Alaska Natives into corporate America").

43. 43 U.S.C. § 1601(b) (2012).

44. Corporations typically state that they are formed for "any lawful purpose," or use similar language in their corporate charter. This allows them to avoid *ultra vires* lawsuits. See, e.g., *Askinuk Corp. v. Lower Yukon School Dist.*, 214 P.3d 259, 266 n.14 (Alaska 2009) (defining *ultra vires* as an action which is outside a corporation's powers as governed by corporate law and its articles of incorporation).

enterprises, businesses, undertakings and activities . . . .”<sup>45</sup> However, some Native corporations went further in their charters. Ahtna, Inc., for example, adopted as one of its corporate purposes: “to promote the economic, social, cultural and personal well-being of all Natives” in its ANCSA-designated region.<sup>46</sup> Bristol Bay Native Corporation listed among its corporate purposes the goal of furthering the interests of its stockholders, but also promoting the “economic development” of stockholders and villages.<sup>47</sup> Native corporations also listed land management as another corporate purpose in their original charters.<sup>48</sup>

Native corporations have often taken on roles more commonly associated with governments than with corporate entities because ANCSA did nothing to address questions surrounding tribal self-governance.<sup>49</sup> Many of the Native corporation mission statements reveal that they are guardians of Native culture,<sup>50</sup> as much as managers of shareholder value. On its website, Cook Inlet Region, Inc. (CIRI) states that its mission is: “to promote the economic and social well-being and Alaska Native heritage of our shareholders, now and into the future, through prudent stewardship of the company’s resources, while furthering self-sufficiency among CIRI shareholders and their families.”<sup>51</sup> Arctic Slope Regional Corporation’s website states that the corporation’s mission is to: “actively manage our businesses, our lands and resources, our investments, and our relationships to enhance Iñupiaq cultural and economic freedom – with continuity, responsibility, and integrity.”<sup>52</sup> Job

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45. CERT. OF INC., SEALASKA CORP., ART. III (June 16, 1972).

46. CERT. OF INC., AHTNA, INC., ART. III (June 23, 1972).

47. CERT. OF INC., BRISTOL BAY NATIVE CORP., ART. III (June 13, 1972).

48. *See, e.g., id.* (listing land management as a corporate purpose).

49. *See* Anderson, *supra* note 5, at 35–36 (describing how ANCSA was drafted to focus on land and stating that as a result it failed to include any mechanisms promoting Alaska Native self-government other than the Native corporations themselves); *see also* Alaska v. Native Vill. of Venetie Tribal Gov’t, 522 U.S. 520, 523 (1998) (holding that land Alaska Natives received under ANCSA is not “Indian country,” thus limiting tribal jurisdiction over the land).

50. It is also interesting to compare the statements on Native corporation websites and in the original charters with the statements made by the Native corporations’ associated nonprofits. *See, e.g., Mission and History*, BRISTOL BAY NATIVE ASS’N, <http://www.bna.com/about-us/mission-and-history> (last visited Oct. 2, 2016) (“The Mission of [Bristol Bay Native Ass’n] is to maintain and promote a strong regional organization . . . to serve as a unified voice to provide social, economic, cultural, educational opportunities and initiatives to benefit the Tribes and the Native people of Bristol Bay.”).

51. *Our CIRI, Our Values*, COOK INLET REGION, INC., <http://www.ciri.com/our-corporation/mission-vision-and-values/> (last visited Oct. 2, 2016).

52. *We Are ASRC*, ARCTIC SLOPE REGIONAL CORP., <https://www.asrc.com/Pages/We%20are%20ASRC.aspx> (last visited Oct. 2, 2016).

creation has been a priority for many Native corporations.<sup>53</sup> Village corporations have also sought to provide special financial assistance for elderly members of their communities.<sup>54</sup>

During the decades after ANCSA's enactment, the Alaska Native leaders who negotiated ANCSA and incorporated the Native corporations also formed non-profit organizations that focus on cultural, educational, and health objectives.<sup>55</sup> Every regional corporation and some of the village corporations now have corresponding non-profits that provide health and social services.<sup>56</sup> The regional Native corporations provide millions of dollars in annual funding for their corresponding regional non-profits.<sup>57</sup> ANCSA amendments allowing for "settlement trusts" and the provision of benefits to shareholders' families have provided Native corporations with programs they can use to support Alaska Native communities.<sup>58</sup> For an ordinary corporation, programs like these would violate corporate law's mandate that all shareholders of the same class receive equal distributions.<sup>59</sup> However, ANCSA has preempted state corporate law in order to allow Native corporations to use them.<sup>60</sup>

## B. Criticism of the Native Corporations and Their Perceived Shortcomings

This section outlines three of the most common criticisms of Alaska Native corporations: (1) overemphasis on dividend payouts to

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53. Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA) – Whose Settlement Was It? An Overview of Salient Issues*, 25 J. LAND RESOURCES & ENVTL. L. 131, 134 n.17 (2005).

54. See, e.g., *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320, 1323–24 (Alaska 1997) (describing a village corporation's plan to compensate its original elderly shareholders).

55. See, e.g., *Mission and History*, BRISTOL BAY NATIVE ASS'N, <http://www.bbna.com/about-us/mission-and-history/> (last visited Oct. 2, 2016) (stating that the BBNA was incorporated in 1973); *Perpetuating and Enhancing Southeast Alaska Native Cultures*, SEALASKA HERITAGE, <http://www.sealaskaheritage.org/about> (last visited Oct. 2, 2016) (stating that Sealaska Heritage was formed by the Sealaska corporation in 1980); see also CASE & VOLUCK, *supra* note 23, at 178 ("The regional nonprofit Native corporations were the advocacy organizations that pursued the settlement of the Alaska Native claims as well as the ANCSA-designated incorporators of the regional profit corporations.").

56. BOB POE, 2014 ECONOMIC IMPACT REPORT, ANCSA REGIONAL ASSOCIATION 6 (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).

57. *Id.*

58. CASE & VOLUCK, *supra* note 23, at 197.

59. *Id.*

60. *Id.*



shareholders, (2) the poor fit of corporate law to Alaska Native culture, and (3) the failure of corporations to improve the economic status of Alaska Natives. Much of this criticism is essentially an argument that the corporate form is the wrong legal entity for Native corporations.<sup>61</sup> In particular, critics charge that Native corporations are too focused on maximizing dividend payouts and therefore neglect their broader purposes.<sup>62</sup> Ultimately, this is a critique of the legal requirement that as corporations they must put shareholder value ahead of other objectives.

Corporations are legally obligated to maximize value for their shareholders, or else their directors risk liability.<sup>63</sup> Some states have passed stakeholder statutes that allow corporate directors to consider stakeholders other than shareholders—such as employees or community members—when making decisions.<sup>64</sup> However, Alaska is one of the few states that has not enacted a constituency statute.<sup>65</sup> Alaska corporations, including Native corporations, are therefore legally obligated to ensure that every decision they make is somehow related to boosting shareholder value.<sup>66</sup> In most situations, the business judgment rule applies<sup>67</sup> and gives corporations broad leeway to make decisions as long as they can show that the decision may boost shareholder value in some way.<sup>68</sup> Like most corporations, Alaska Native corporations are rarely challenged on the grounds that a proposed action is *ultra vires*.<sup>69</sup> Still, their flexibility is

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61. See MITCHELL, *supra* note 4, at 507 (“[I]n practice, the principal . . . standard Alaska Natives have employed to measure the success of regional and village corporations has been the size and frequency of dividend checks.”); Chaffee, *supra* note 6, at 134 (“Directors and officers are burdened with corporate fiduciary duties to achieve financial success while trying to represent traditional interests, such as conservation of the land and preservation of subsistence rights.”).

62. See *supra* note 61; see also Howard, *supra* note 6 (arguing that Native corporations should not overly focus on dividends).

63. See, e.g., Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 146 (2012) (“Ultimately, any for-profit corporation that sells shares to others has to be accountable to its stockholders for delivering a financial return.”).

64. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 122 (2004).

65. Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 217 (2012). Stakeholder statutes are also sometimes referred to as constituency statutes. *Id.* at 209.

66. See Strine, *supra* note 63, at 146–48 (providing background on shareholder primacy).

67. See, e.g., *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 278 (Alaska 1980) (stating that “judges are not business experts” and that fact underlies the business judgment rule).

68. *Id.*

69. See *supra* note 44 and accompanying text; see also *Askinuk Corp. v. Lower Yukon Sch. Dist.*, 214 P.3d 259, 266 n.14 (Alaska 2009) (stating that a Native corporation’s decision to lease land to a school district for one dollar a year was

limited by the requirement they put shareholders first and treat all shareholders equally.<sup>70</sup> Even the business judgment rule mandates that corporations show they are promoting shareholder interests in some way.<sup>71</sup>

Critics have also argued that corporate law is a poor cultural fit for Alaska Natives.<sup>72</sup> Specifically, some Alaska Natives have said that buying into corporate law doctrines was a departure from their heritage.<sup>73</sup> Some Alaska Native communities still follow a subsistence lifestyle, meaning that they engage in hunting, fishing, or gathering for the purpose of obtaining food, or for cultural or traditional reasons.<sup>74</sup> The rights and responsibilities of corporate shareholders often conflict with this lifestyle. Alaska Natives also have a sociocultural relationship with land, and they expect Native corporations to be stewards of land rather than simply asset managers.<sup>75</sup> The environment holds a position in Alaska Native culture that it does not necessarily assume for corporate managers. Corporate managers must view land as an asset to be managed for the benefit of shareholder payouts.<sup>76</sup> Alaska Native corporations' fiduciary duties to their shareholders have made it difficult for them to help Native communities maintain traditional cultural or subsistence lifestyles.<sup>77</sup> Many Alaska Natives have embraced modern amenities, even in areas where doing so conflicts with their traditional lifestyles.<sup>78</sup> Nearly every Congress since ANCSA was passed in 1971 has amended the statute to address various concerns,<sup>79</sup> and the idea that the federal government

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not *ultra vires*).

70. See *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320, 1324 (Alaska 1997) (holding that Native corporation program meant to compensate elderly shareholders was illegal); *but see Sierra v. Goldbelt, Inc.*, 25 P.3d 697, 702 (Alaska 2001) (holding that ANCSA authorized a Native corporation program to compensate the elderly).

71. Jesse Finfrock & Eric Talley, *Social Entrepreneurship and Uncorporations*, 2014 U. ILL. L. REV. 1867, 1870–71 (2014).

72. Chaffee, *supra* note 6, at 132.

73. See, e.g., MITCHELL, *supra* note 4, at 520 (stating that Alaska Native rights activist and ANCSA advocate Willie Hensley believed that requiring all villages to form a corporation was a mistake).

74. See CASE & VOLUCK, *supra* note 23, 265–66 (stating that defining “subsistence” is “politically difficult,” but that the term can encompass “economic and physical reliance,” as well as culture and tradition).

75. See MITCHELL, *supra* note 4, at 521 (describing Alaska Natives' view that “the land is their life” and the “contention that Alaska Natives have a psychological relationship with, and spiritual attachment to, land that is different, and in some way qualitatively superior to, that of non-Natives . . .”).

76. *Id.* at 521–23.

77. Chaffee, *supra* note 6, at 132.

78. MITCHELL, *supra* note 4, at 512–13.

79. CASE & VOLUCK, *supra* note 23, at 165.

could simply direct the integration of Alaska Natives with American capitalism and thereby solve their problems has been mostly rejected.<sup>80</sup>

Still, the most damaging criticism of Alaska Native corporations is that they have failed to boost the economic well-being of Alaska Natives.<sup>81</sup> While their financial performance has varied widely, the Native corporations have lost money overall and some have had to declare bankruptcy.<sup>82</sup> By the 1980s, both regional and village corporations were struggling financially due largely to the costs of implementing ANCSA.<sup>83</sup> According to David S. Case and David A. Voluck, the Native corporations were effectively refinanced in the 1980s by a provision in the federal tax code that allowed them to sell their net operating losses to profitable companies.<sup>84</sup> During this period, sales of operating losses generated a return of \$1.25 billion for the Native corporations and restored many of them to financial stability.<sup>85</sup> This bailed out many Native corporations.<sup>86</sup>

Despite the government bailout of the Native corporations, many Alaska Natives still face dire economic circumstances in their personal lives. The percentage of Alaska Natives living in poverty is almost double the national rate.<sup>87</sup> Native corporations are commonly criticized for failing to bring jobs back to Native communities.<sup>88</sup> Lucrative management jobs at Native corporations are often held by non-Native executives.<sup>89</sup> Native shareholders receive dividend payments, which often function as welfare payments.<sup>90</sup> Native corporations have to a meaningful extent

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80. See COHEN'S HANDBOOK, *supra* note 32, § 4.07[3][b][ii][C] ("Alaska Natives have been included expressly among the beneficiaries in most major Indian legislation since the enactment of ANCSA, based on the continuing fiduciary relationship between the federal government and Alaska Natives. These measures indicate that Congress has largely abandoned the assimilationist objectives manifested in 1971.").

81. O'Harrow, *supra* note 36.

82. Colt, *supra* note 38, at 155-56, 161.

83. CASE & VOLUCK, *supra* note 23, at 179.

84. *Id.* at 186; see also MITCHELL, *supra* note 4, at 518 ("In 1986, when [U.S. Senator] Ted Stevens arranged for Congress to insert the provision in the Internal Revenue Code that authorized ANCSA corporations to sell operating losses, southeast Alaska corporations sold most of their remaining timber at fire-sale prices in order to generate losses that they then sold to other corporations for cash, much of which was distributed to shareholders as dividends.").

85. CASE & VOLUCK, *supra* note 23, at 181.

86. *Id.*

87. STEPHANIE MARTIN & ALEXANDRA HILL, THE CHANGING ECONOMIC STATUS OF ALASKA NATIVES, 1970-2007 1 (Institute of Social and Economic Research, University of Alaska Anchorage ed., 2009), <http://www.iser.uaa.alaska.edu/Publications/webnote/WebNote5.pdf>.

88. MITCHELL, *supra* note 4, at 534-35.

89. O'Harrow, *supra* note 36.

90. See MITCHELL, *supra* note 4, at 509 (citing an *Anchorage Daily News* article

failed to boost economic growth, especially in the remote regions where many Alaska Natives live.<sup>91</sup> In addition to these distributional problems, tension now exists over how best to incorporate younger Alaska Natives as corporate shareholders.<sup>92</sup>

In sum, the Native corporations have not only failed to meet their broader goals as guardians of culture, heritage, and land; they have also failed by traditional corporate measures like profitability.

## II. OVERVIEW OF BENEFIT CORPORATIONS IN THE U.S. AND POSSIBLE USE IN ALASKA

A benefit corporation is a business that operates for profit, yet is legally obligated to consider how it will benefit the public.<sup>93</sup> Unlike a constituency statute, which makes considering groups other than shareholders permissive, the benefit corporation legal entity makes it mandatory for directors to consider how corporate actions will affect constituencies other than shareholders.<sup>94</sup> Under the model legislation, an existing corporation can convert to a benefit corporation by getting approval from two-thirds of its shareholders or by amending its charter.<sup>95</sup>

The Model Benefit Corporation Legislation, which is promoted by a nonprofit called B Lab,<sup>96</sup> requires that benefit corporations create a general public benefit, which it describes as a “material positive impact on society and the environment . . . .”<sup>97</sup> Corporations can optionally identify additional specific public benefits.<sup>98</sup> For example, these may

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describing the possibility that some Alaska Natives may need to live off their dividend checks due to widespread unemployment).

91. See O’Harrow, *supra* note 36 (describing lack of benefits to Alaska natives that live a subsistence lifestyle).

92. See CASE & VOLUCK, *supra* note 23, at 186 (describing the approaches taken by Native corporations on whether to issue shares to children of original shareholders).

93. See generally Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013) (analyzing and criticizing benefit corporation statutes).

94. *Id.* at 1025–26.

95. MODEL BENEFIT CORP. LEGIS. §§ 104(a), 102 (B LAB, Draft with Explanatory Comments, Apr. 4, 2016), [http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation\\_4\\_16.pdf](http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf).

96. B Lab encourages states to adopt the model legislation. Loewenstein, *supra* note 93 at 1013. It also reviews benefit corporations and designates them as “Certified B Corporation[s]” if they pay a fee and meet certain conditions. *Id.*

97. MODEL BENEFIT CORP. LEGIS. § 102 (2016), [http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation\\_4\\_16.pdf](http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf).

98. *Id.* § 201(b).

include promoting economic opportunities for a particular community.<sup>99</sup> The benefit corporation is *required* to focus on creating or pursuing the stated public benefits when it makes any decision.<sup>100</sup> In other words, it is not allowed to focus solely on boosting shareholder value.<sup>101</sup> Shareholder value is only one of several factors the directors of a benefit corporation must consider, along with other objectives like positively affecting the environment.<sup>102</sup> Under B Lab's model legislation, the corporation must appoint an independent benefit director.<sup>103</sup> This director supervises the corporation's commitment to pursuing public benefits and considering various constituencies.<sup>104</sup> The benefit corporations must also issue an annual benefit report to update shareholders and the public on its progress in pursuing public benefits.<sup>105</sup> The model legislation also includes a provision for a benefit enforcement proceeding, which would make directors liable if they failed to pursue a public benefit or focused only on boosting shareholder value.<sup>106</sup>

In sum, the Business Corporation Model Legislation goes much further than a constituency statute or nonlegal ideals like corporate social responsibility. The model legislation requires directors to actively work toward public benefits, or risk legal liability.<sup>107</sup>

#### A. Adoption of U.S. Benefit Corporation Statutes

Since 2010, a majority of states have enacted a benefit corporation statute.<sup>108</sup> While state legislators have embraced benefit corporations, business promoters have not flocked to the new entity. Relatively few businesses have chosen to take advantage of the new laws by incorporating as benefit corporations.<sup>109</sup> However, some evidence suggests that the entity's growth trajectory is tracking that of the limited liability company.<sup>110</sup>

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99. *Id.* § 102.

100. Loewenstein, *supra* note 93, at 1013-15.

101. *Id.*

102. *Id.* at 1007.

103. MODEL BENEFIT CORP. LEGIS. § 302(b).

104. Loewenstein, *supra* note 93, at 1023-25.

105. *Id.* at 1015-20.

106. MODEL BENEFIT CORP. LEGIS. §§ 102, 305(a)(1).

107. Loewenstein, *supra* note 93, at 1020.

108. Maryland enacted the first benefit corporation statute in 2010. RESPONSIFY, SOCIAL ENTERPRISE LAW TRACKER, <http://www.socentlawtracker.org/#/bcorps> (last visited Sept. 22, 2016).

109. Finfrock & Talley, *supra* note 71, at 1869.

110. *Id.*

In addition, benefit corporations are the subject of significant skepticism, especially from legal scholars.<sup>111</sup> One view is that benefit corporations are unnecessary because traditional corporations already have the freedom to spend their money just about any way they choose, as long as their spending has some link to the benefit of shareholders.<sup>112</sup> William H. Clark, Jr., the drafter of the model legislation, rebuts this premise.<sup>113</sup> Clark argues that the requirement of shareholder primacy dating to the Michigan Supreme Court's 1919 holding in *Dodge v. Ford*<sup>114</sup> is still pervasive in corporate law.<sup>115</sup> In Clark's view, the benefit corporation statute provides a meaningful alternative because it requires corporate directors to consider factors other than shareholder value.<sup>116</sup>

A cynical observer could also characterize the decision to become a benefit corporation as a public relations or marketing gimmick.<sup>117</sup> Many of the businesses that have chosen to become benefit corporations are consumer-oriented. Ice cream chain Ben & Jerry's and apparel brand Patagonia are two examples of benefit corporations well known to U.S. consumers.<sup>118</sup> Part of the legal entity's appeal for these businesses was likely the opportunity to show their customers that they are socially conscious brands.

In addition, some legal scholars view the Model Benefit Corporation Legislation as impractical because directors are forced to make unstructured decisions about vague objectives.<sup>119</sup> Professor Mark J. Loewenstein argues that benefit corporation directors have an "impossible task" under the model legislation.<sup>120</sup> In his view, a benefit corporation that is committed both to protecting the environment and bringing jobs to its local community must ultimately choose between

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111. See, e.g., Loewenstein, *supra* note 93, at 1036 (arguing that benefit corporation directors have an "impossible task").

112. See *id.* ("Some have argued that benefit corporation legislation is unnecessary because current corporate statutes provide the necessary flexibility to allow social entrepreneurs to pursue non-profit maximizing strategies.").

113. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825-29 (2012).

114. 170 N.W. 668 (Mich. 1919).

115. Clark & Babson, *supra* note 113, at 825-29.

116. *Id.* at 840.

117. See Jena McGregor, *What Etsy, Patagonia and Warby Parker Have in Common*, WASH. POST (Apr. 20, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/04/20/what-etsy-patagonia-and-warby-parker-have-in-common/> ("Some companies that go through the [B Lab] certification see it as a marketing tool that helps promote their do-gooder business approach in a credible way to customers, potential employees or socially minded investors.").

118. *Id.*

119. Loewenstein, *supra* note 93, at 1011.

120. *Id.* at 1036.

these ideals.<sup>121</sup> Furthermore, Delaware Chancellor Leo E. Strine, Jr. argues that corporate directors are entrusted with other people's money and therefore can only be tasked with the goal of making money for investors.<sup>122</sup> Strine argues that it is not feasible for directors to use outside investors' money to achieve social goals, especially because there are so many different social goals to pursue.<sup>123</sup> In sum, corporate law experts remain skeptical about benefit corporations even though a majority of state legislatures have now enacted benefit corporation statutes. Alaska's legislature can take these critiques into consideration when it considers adopting its own benefit corporation statute.

## **B. The Benefit Corporation Bill Recently Proposed in the Alaska House of Representatives**

The Alaska House of Representative considered passing a benefit corporation statute this year.<sup>124</sup> The proposed statute largely tracked B Lab's model legislation and contained relatively insignificant deviations from it.<sup>125</sup> Although the bill had bipartisan support from legislators, it did not pass in 2016.<sup>126</sup> According to a legislative aide for one of the bill's sponsors, similar legislation may be reintroduced in a future legislative session.<sup>127</sup> The bill required benefit corporations to add a benefit director.<sup>128</sup> It also required all directors to consider a variety of constituencies.<sup>129</sup> Although it did not use the phrase "benefit enforcement proceeding," this appears to have been only a semantic deviation from the model legislation because it included a provision that put effectively the same scheme in place.<sup>130</sup>

Alaska's benefit corporation bill did not mention the Native corporations, apparently affording them the same treatment as other

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121. *Id.* at 1029.

122. *See* Strine, *supra* note 63, at 150-51 (arguing that it is unrealistic for directors to aspire to goals other than shareholder wealth maximization).

123. *Id.*

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

125. *Compare* Alaska H.R. 49, sec. 1-3 *with* MODEL BENEFIT CORP. LEGIS. §§ 101-402.

126. Alaska H.R. 49 (including sponsors from both parties such as Republican Rep. Paul Seaton and Democrat Rep. Jonathan Kreiss-Tomkins); *House of Representatives, THE ALASKA STATE LEGISLATURE*, <http://house.legis.state.ak.us/rep.php?id=san> (last visited Sept. 15, 2016); e-mail from Taneeka Hansen, legislative aide to Alaska Rep. Paul Seaton, to author (Nov. 7, 2016) (on file with author) [hereinafter Hansen e-mail].

127. Hansen e-mail, *supra* note 126.

128. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.160).

129. *Id.* (amending ALASKA STAT. § 10.60.100).

130. *Compare id.* (amending ALASKA STAT. § 10.60.300) *with* MODEL BENEFIT CORP. LEGIS. §§ 102, 305(a)(1).

existing corporations.<sup>131</sup> The bill was not proposed to reform Native corporations, but was instead introduced for many of the same reasons that other states have adopted benefit corporation statutes—to give business promoters another choice in entity formation.<sup>132</sup> Under the bill, Alaska corporations, including Native corporations, could have converted to benefit corporations by a two-thirds shareholder vote to amend their articles of incorporation.<sup>133</sup>

### III. A PROPOSAL TO CONSIDER THE BENEFITS OF THE BENEFIT CORPORATION ENTITY FOR ALASKA NATIVE CORPORATIONS

Alaska should enact a benefit corporation statute because it would give Native corporations a legal entity that better aligns with their purpose. Native corporations have frequently been criticized as a poor legal entity to further the purposes of ANCSA.<sup>134</sup> The benefit corporation entity offers Alaska Native corporations a promising alternative.

#### A. Benefit Corporation Legislation Offers an Attainable and Significant Reform Opportunity for Native Corporations

This section will explain why the benefit corporation entity is a better reform opportunity for Native corporations than (1) attempting to convert Native corporations to non-profits or (2) enacting a constituency statute in Alaska. Enacting a benefit corporation statute is the most attainable opportunity to significantly reform the Native corporations. A widespread conversion of Native corporations into non-profits is impractical. ANCSA directed the regional corporations to organize as for-profit businesses under state law,<sup>135</sup> and amending ANCSA is a federal legislative task.<sup>136</sup> Furthermore, non-profits are not allowed to have shareholders or pay out a portion of their profits as dividends.<sup>137</sup> Taking the ability to pay dividends away from the regional Native corporations

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131. Telephone Interview with Taneeka Hansen, legislative aide to Alaska Rep. Paul Seaton (Feb. 22, 2016); *see generally* Alaska H.R. 49.

132. *See generally* Alaska H.R. 49 (creating alternative corporate form); *see also* SPONSOR STATEMENT: CSHB 49 (L&C), ALASKA STATE H.R., <http://www.housemajority.org/2015/02/18/sponsor-statement-cshb-49-lc/> (stating that the goal of the bill is to “give businesses more flexibility and control over their decisions and to provide investors with a clear social investment option,” and making no mention of Alaska Native issues in particular).

133. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. §§ 10.60.010(2), 10.60.700(a)).

134. Chaffee, *supra* note 6, at 131–43.

135. 43 U.S.C. § 1606(d) (2012).

136. *Id.* § 1606(e).

137. ALASKA STAT. § 10.20.136.



would be far too drastic. Professor Eric C. Chaffee, writing in 2008 before the emergence of benefit corporations, argued for reforms that would allow Native corporations to operate with “nonprofit goals.”<sup>138</sup> A benefit corporation statute would allow Native corporations to do precisely that. The benefit corporation structure, which only emerged as an option for states in 2010,<sup>139</sup> requires directors to function somewhat like a non-profit board. They must consider how their decisions will affect constituencies and further a variety of public benefits.<sup>140</sup> Native corporations could also convert to benefit corporations without jeopardizing their ability to pay dividends to shareholders.<sup>141</sup>

Although Alaska does not currently have a constituency statute,<sup>142</sup> enacting one would also fail to provide Native corporations with a meaningful reform opportunity. Constituency statutes, also known as stakeholder statutes, are essentially just takeover defense mechanisms, and mergers and acquisitions are not generally relevant to Native corporations.<sup>143</sup> As noted earlier in this Note, benefit corporation statutes make mandatory what stakeholder statutes make permissive. Corporations already have considerable flexibility to make decisions and take actions that relate in some way to benefitting their shareholders.<sup>144</sup> Constituency statutes simply give them cover to do so when a takeover is imminent, adding nothing to the goal of promoting public benefits.<sup>145</sup>

## **B. Benefit Corporation Legislation Allows Alaska to Initiate Native Corporation Reform without Federal Involvement**

A benefit corporation statute is an ideal reform opportunity for Native corporations because Alaska could pass a benefit corporation statute on its own without involving other states or the federal government. Enacting a benefit corporation statute would not require an amendment to ANCSA.<sup>146</sup> Michael M. Pacheco has called for a federal

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138. Chaffee, *supra* note 6, at 146–47.

139. RESPONSIFY, SOCIAL ENTERPRISE LAW TRACKER, <http://www.socentlawtracker.org/#/bcorps> (last visited Sept. 22, 2016).

140. Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.100).

141. *Id.* (amending ALASKA STAT. § 10.60.700(c)).

142. Standley, *supra* note 65, at 217.

143. See CASE & VOLUCK, *supra* note 23, at 196–97 (stating that no regional corporations have merged and few village corporation mergers have occurred).

144. See, e.g., Loewenstein, *supra* note 93, at 1036 (“Some have argued that benefit corporation legislation is unnecessary because current corporate statutes provide the necessary flexibility to allow social entrepreneurs to pursue non-profit maximizing strategies.”).

145. Standley, *supra* note 65, at 218–19.

146. See Alaska H.R. 49, sec. 2 (amending ALASKA STAT. § 10.60.010(2)) (allowing corporations to change form by amendment to their articles of

Model Business Corporation Act that would only apply to Indian tribes.<sup>147</sup> In his view, this would allow Indian corporations to achieve greater independence from state laws and regulations.<sup>148</sup> However, Alaska's courts already have experience deciding cases about Native corporation issues.<sup>149</sup> In light of this experience, it does not make sense to cede key disputes about Native corporations to the federal courts. Enacting a benefit corporation statute is a sensible approach because it is a local solution. Alaska can pass the legislation on its own without any federal involvement or coordination with other states required. Moreover, nothing in the language of ANCSA would seem to preclude Native corporations from becoming benefit corporations.<sup>150</sup>

In addition, the introduction of the benefit corporation legal entity in Alaska may prevent the need for future changes to ANCSA. Congress typically amends ANCSA every couple years.<sup>151</sup> These amendments have given Native corporations the ability to distribute payouts disproportionately to support certain groups, such as the elderly or shareholders' families.<sup>152</sup> Benefit corporations would give Native corporations a greater level of flexibility on payout distribution and other confining aspects of traditional corporate law, such as shareholder primacy. Constant federal revisions to ANCSA in order to preempt state corporate law would become less of a necessity. This could better position Native corporations for the long term by reducing their reliance on the federal government's biannual amendments to ANCSA, which have become customary to fix problems as they arise.

The benefit corporation would also be a better model than the current disjointed structure in which each regional Native corporation donates money to an associated non-profit. Corporations are allowed to donate to non-profits, but it may be difficult for shareholders to force them to commit to do so. Through a benefit corporation, Native corporations could effectively merge with their associated non-profits and streamline their efforts and operations. Corporations could also

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incorporation).

147. Michael M. Pacheco, *Toward a Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations*, 39 S.D. L. REV. 49, 90 (1994).

148. *Id.* at 91.

149. *See, e.g.,* *Nenana Fuel Co. v. Native Vill. of Venetie*, 834 P.3d 1229 (Alaska 1992) (considering whether Native corporations are sovereign entities).

150. ANCSA required the regional corporations to incorporate as for-profit businesses under state law. 43 U.S.C. § 1606(d) (2012). The village corporations can also incorporate under state law, but may be set up as non-profits. § 1607(a).

151. *See* CASE & VOLUCK, *supra* note 23, at 165 ("Enacted on December 18, 1971, the Alaska Native Claims Settlement Act was to be amended by nearly every Congress for the next thirty-five years.").

152. *Id.* at 197.

commit to provide specified levels of funding to the services that are currently provided by the regional Native corporations' associated non-profits.

**C. The Chance to Provide Native Corporations an Alternative Legal Entity is Sufficient Reason for Alaska to Enact a Benefit Corporation Statute**

In Alaska, the chance to provide Native corporations with an alternative legal entity is sufficient reason to enact a benefit corporation statute. While benefit corporations are the subject of significant skepticism, they have unique promise in Alaska because of the reform opportunity they offer to Native corporations.

When the criticism of the benefit corporation legal entity is analyzed in relation to Native corporations, much is either irrelevant or mitigated. Native corporations have a legal obligation to boost shareholder value, but they are already viewed as having other constituencies.<sup>153</sup> The benefit corporation entity would *force* them to take these other groups into account. As benefit corporations, Native corporations would need to pursue public benefits, both general and specific.<sup>154</sup> According to the model legislation, a corporation can identify a "specific public benefit," such as "providing low-income or underserved individuals or communities with beneficial products or services."<sup>155</sup> This language would allow Native corporations to focus on providing benefits to a specific tribe or village, or for Alaska Natives in a designated region.

Within the benefit corporation structure, independent benefit directors would hold Native corporation directors accountable for pursuing public benefits.<sup>156</sup> Annual benefit reports would also subject directors to public scrutiny.<sup>157</sup> As benefit corporations, Native corporation directors would be legally required to consider shareholder value as one of many factors.<sup>158</sup> Shareholder value and dividend payments would have to be assessed alongside other considerations such as environmental protection, land conservation, cultural heritage, job creation for villages, or whatever other factors the Native corporation

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153. Howard, *supra* note 6 ("All Native business leaders are faced with far more taxing demands than just creating profit. Most mission statements include language like 'improving the lives of shareholders.'").

154. MODEL BENEFIT CORP. LEGIS. § 301(a)(1)(iii)-(vii).

155. *Id.* § 102.

156. *Id.* § 302(c).

157. *Id.* § 401.

158. *Id.* § 301.

identified *ex ante*.<sup>159</sup> Becoming a benefit corporation would require a Native corporation to reject shareholder primacy in favor of a multifaceted decision-making approach that considers the needs of many constituencies.

Because Native corporations often play a role in Native self-governance,<sup>160</sup> they are more prepared than other corporations to consider multiple constituencies and competing factors in their decision-making. Professor Loewenstein has criticized the Model Benefit Corporation Legislation as unworkable.<sup>161</sup> He argues that benefit corporation directors have an “impossible task” because they are legally required to weigh many different factors and consider a variety of constituencies in making their decisions.<sup>162</sup> This criticism of benefit corporations is overly cynical. The task that the benefit corporation statute requires of the benefit corporation does not greatly differ from the task required of non-profit directors like university trustees, elected government officials, or any other board that is required to consider factors other than the bottom line. Since Native corporations already occupy a role in Alaskan society that somewhat parallels a government entity, their directors are perhaps better conceived as trustees for the Alaska Native population in the corporation’s respective region or village.<sup>163</sup> The benefit corporation legal entity would mandate this role for Native corporation directors.

However, Native corporations have been restricted in their activities by traditional corporate law. Amendments to ANCSA in 1987 allowed for the creation of “settlement trusts,” which are a vehicle for providing disproportionate benefits to particular members of a Native

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159. *Id.*

160. See Douglas M. Branson, *Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities*, 24 ALASKA L. REV. 203, 205–06 (2007) (“Despite certificates as business corporations, however, ANSCA corporations . . . act as political entities . . . .”); see also Anderson, *supra* note 5, at 34–36 (describing how ANCSA was drafted to focus on land and stating that, as a result, it failed to include any mechanisms promoting Alaska Native self-government other than the Native corporations themselves, which were used as “administrative mechanisms” to resolve land disputes); *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 523 (1998) (holding that land received by Alaska Natives under ANCSA is not “Indian country,” thus limiting tribal jurisdiction over the land).

161. Loewenstein, *supra* note 93, at 1036.

162. *Id.*

163. Biographies of Native corporation directors show that they are respected leaders in Native communities. See, e.g., *Board of Directors, ARCTIC SLOPE REGIONAL CORP.*, <https://www.asrc.com/About/Pages/Board.aspx#inline14> (last visited Sept. 16, 2016) (describing how board seats are reserved for residents of each village).

community.<sup>164</sup> Previous efforts by Native corporations to support particular groups in their communities have violated the rule that corporate dividends must be equally distributed.<sup>165</sup> For example, in *Hanson v. Kake Tribal Corp.*,<sup>166</sup> the Alaska Supreme Court held that Native corporations could not engage in a “social welfare program” in which benefits would flow only to original shareholders.<sup>167</sup> The proposed program was intended to support families of elderly shareholders through the purchase of life insurance policies.<sup>168</sup> When the Alaska Supreme Court struck down the Native corporation’s shareholder life insurance plan, Congress responded by amending ANCSA in 1998 to allow the provision of disproportionate benefits to both shareholders and their families.<sup>169</sup> By naming support of the elderly members of the Native community and their families as one of the corporation’s specific public benefits, the Native corporations could justify these kinds of programs if they were benefit corporations. Although the creation of “settlement trusts” and the 1998 amendments have addressed these problems through federal intervention, the benefit corporation would allow for an Alaska-specific approach to resolving such problems.

As benefit corporation directors, Native corporation directors would be legally required to assume the public-serving role that to some extent they are already expected to fulfill. Their decisions would be no more arbitrary than decisions made by governments or non-profits, such as universities. Further, the criticism of benefit corporations as merely public relations or marketing gimmicks does not hold up because benefit corporation directors face legal liability when they neglect the factors they are required by the statute to consider.<sup>170</sup> Additionally, Native corporations do not generally operate consumer-oriented businesses since they tend to concentrate their businesses in industries like timber, oil and gas, or mining.<sup>171</sup>

Moreover, since Native corporations do not have outside investors, their relationship with shareholders is perhaps better suited to the benefit corporation entity structure. Chancellor Strine’s argument – that directors should not be deciding how to spend other people’s money on social causes – is not relevant for considering Native corporations as benefit

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164. CASE & VOLUCK, *supra* note 23, at 197.

165. *Id.*

166. 939 P.2d 1320 (Alaska 1997).

167. *Id.* at 1324.

168. *Id.* at 1322.

169. CASE & VOLUCK, *supra* note 23, at 197.

170. MODEL BENEFIT CORP. LEGIS. § 305.

171. CASE & VOLUCK, *supra* note 23, at 178, 182.

corporations.<sup>172</sup> Native corporation directors must make decisions about how to spend money and deploy resources that were entrusted to them by the federal government through ANCSA. They do not have outside investors who are expecting a return on their investment. This bolsters the case for Native corporations as benefit corporations.

Furthermore, Native corporations need a significant reform opportunity because their financial and economic status quo is unsatisfactory. Native corporations were bailed out by the federal government in the 1980s through the use of special tax treatment.<sup>173</sup> Although some are well-run, successful businesses, others have continued to struggle.<sup>174</sup> Many Alaska Native communities are still stuck in poverty or lack employment opportunities. Admittedly, changing a corporation's legal entity is not itself a business strategy. No evidence suggests that either the financial performance of Native corporations or the economic conditions of Alaska Natives would improve solely due to the transformation of Native corporations into benefit corporations.<sup>175</sup> However, the financial and economic status quo of the Native corporations is also not a compelling reason to reject the significant reform opportunity that benefit corporation legislation offers. Native corporations need a new approach to consider.

In sum, Alaska should enact a benefit corporation statute because it would provide Native corporations with a meaningful reform opportunity. Given the persistent criticism of Native corporations and their significance for Alaska Natives, the opportunities offered by this reform are sufficient reason for Alaska's legislature to move forward and enact a benefit corporation statute.

#### **D. Native Corporations Should Give their Shareholders the Opportunity to Vote on Converting to a Benefit Corporation**

If Alaska were to enact a benefit corporation statute, the law would only give Native corporations an alternative legal entity to consider. The statute would not require them to change their legal structure.<sup>176</sup> This is a reasonable approach. Alaska should not force Native corporations to

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172. Strine, *supra* note 63, at 149–51.

173. See CASE & VOLUCK, *supra* note 23, at 180–81 (describing the congressionally-established temporary moratorium on land taxes for Native corporations).

174. Chaffee, *supra* note 6, at 151.

175. See Branson, *supra* note 160, at 235–36 (arguing that the choice of legal entity matters less than is commonly believed).

176. See Alaska H.R. 49, sec. 2 (amending ALASKA STAT. §§ 10.60.010(2), 10.60.700(a) (giving corporations' shareholders the choice to change form by amendment to their articles of incorporation)).

change their legal entity because such coercion would contravene federal policy. Native corporations should have the chance to decide for themselves whether their current legal entity status is deficient, and whether the benefit corporation legal entity would be worthwhile reform. This Note argues that conversion would be a valuable reform for Native corporations, but recognizes that the ultimate decision must rest with the Alaska Native corporations.

Under the model legislation, Native corporations could convert to benefit corporations by a two-thirds shareholder vote amending their articles of incorporation.<sup>177</sup> This is a high threshold. Given that many Alaska Natives rely on the dividend payments from their Native corporations for their livelihood,<sup>178</sup> this threshold may be too high to allow any Native corporation to become a benefit corporation. Thus, the Alaska legislature may want to consider setting a lower conversion threshold with Native corporations in mind.

Still, this Note argues that Alaska should give Native corporation shareholders the opportunity to make this choice because conversion would be worthwhile. Criticism of Native corporations has persisted for forty-five years and a significant opportunity for reform now exists. Alaska should seize this opportunity because Native corporations are integral to the state and Native communities.

## CONCLUSION

Alaska should join the majority of states that have enacted benefit corporation statutes. A benefit corporation statute would provide Native corporations an opportunity to significantly reform their corporate governance within the existing framework of ANCSA. The benefit corporation legal entity better suits the broader intended purpose of the Native corporations than does their current corporate structure.

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177. MODEL BENEFIT CORP. LEGIS. § 305; *see also* Alaska H.R. 49, sec. 2 (amending ALASKA STAT. §§ 10.60.010, 10.60.700(a)(2)) (proposing a two-thirds shareholder vote for a conversion in line with the model legislation).

178. *See* MITCHELL, *supra* note 4, at 509 (citing an *Anchorage Daily News* article describing the possibility that some Alaska Natives may need to live off their dividend checks due to widespread unemployment).