

**A CORPORATE CULTURE? THE ENVIRONMENTAL JUSTICE CHALLENGES OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT**

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INTRODUCTION

The jurisdictional status enjoyed by Alaska Natives in the last fifty years has differed from that of most Native American groups in this country. In lieu of a reservation system, with tribal sovereignty over each reservation, a 1971 federal act gave Alaska Natives forty-four million acres of land dispersed throughout the state, to be administered by a series of regional Native-run corporations. The Act creating this corporation-based system led to arguably a more equitable settlement with a Native population

than that enjoyed by any other American indigenous group. But it also enacted an imperfect solution to complicated problems surrounding a majority culture's interactions with indigenous persons. Several scholars have written on the particular issue of the inapplicability of a corporation model to Native society.<sup>1</sup> The outstanding question of tribal sovereignty, unaddressed by the Act but still a pressing matter, has also been considered.<sup>2</sup> However, no one has yet analyzed the Native corporations from an environmental justice perspective.

This paper proposes to do so. It begins with a general analysis of the opportunities for procedural injustice posed by making development decisions within a corporate model. It then uses a detailed examination of one development decision to illustrate how some of these concerns play out in practice, showing how a corporation-based model is vulnerable to charges of environmental injustice. It explains how the Alaska Native corporations ("ANCs") are particularly problematic, for their structure and their application to Native society. After limning the corporations' failures, however, it adopts a more expansive view, and considers the circumstances under which this corporate structure was adopted. It concludes that while the corporations themselves may be an imperfect solution, this is hardly the sole fault of the Natives, who may be doing as well as could be expected at ushering a traditional society into the modern era, under a business model all but forced upon them.

#### I. HISTORICAL BACKGROUND: ANCSA AND THE CREATION OF THE ALASKA NATIVE CORPORATIONS

The Native<sup>3</sup> corporations that are the subject of this paper were created by the Alaska Native Claims Settlement Act of 1971

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<sup>1</sup> See, e.g., THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* 29–42 (1985); RAMONA ELLEN SKINNER, *ALASKA NATIVE POLICY IN THE TWENTIETH CENTURY* 117–22 (1997); James Allaway & Byron Mallott, *ANCSA Unrealized: Our Lives Are Not Measured in Dollars*, 25 J. LAND RESOURCES & ENVTL. L. 139, 140–42 (2005).

<sup>2</sup> See, e.g., David S. Case, *Commentary on Sovereignty: The Other Alaska Native Claim*, 25 J. LAND RESOURCES & ENVTL. L. 149 (2005). On ANCSA and sovereignty generally, see *infra* Part III.

<sup>3</sup> This paper adopts the standard practice, in Alaska, of using *Alaska* as an adjective when referring to indigenous peoples as a whole, as in "Alaska Natives" or

(ANCSA).<sup>4</sup> The Act grew out of a specific set of historical circumstances, which had the peculiar effect of allying western oil companies and Native groups on the side of settling Native land claims. The Act that resulted has been both praised and criticized, and has been amended by every Congress since its adoption.<sup>5</sup> Among other things it has done, it has indisputably given Alaska Natives more control over land than most Native American groups in the Lower 48. It has also complicated the environmental justice analysis: because indigenous groups comprise both the decision-making bodies and the affected communities, analysis must be more nuanced than simply identifying the minority population, and asking whether it has been fairly treated.

ANCSA was enacted in the aftermath of oil finds on Alaska's North Slope in 1968, which lent new urgency to a then-nascent battle over Alaska Native land claims.<sup>6</sup> At the time, the legal status of Native claims to state land was uncertain. The Statehood Act of 1958 had "forever disclaim[ed] all right and title to any lands or other property" then held by Native groups.<sup>7</sup> At the same time, it authorized the State of Alaska to select slightly over 100 million acres from the "vacant, unappropriated, and unreserved" public lands of the United States.<sup>8</sup> In 1959, the court of claims held that Native groups possessed their traditional areas by right of aboriginal title, which had continued unabated since the Alaska Purchase of 1867.<sup>9</sup> The case appears to have laid the legal foundation for Native groups to assert aboriginal claims to state land.

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"Alaska Native corporations." It refers to individual native groups by their chosen names, e.g., as Iñupiat or Tlingit. Anthropologists approve, suggesting that this terminology represents "the terms of self-designation acceptable to the indigenous peoples of Alaska." PATRICK J. DALEY & BEVERLY A. JAMES, *CULTURAL POLITICS AND THE MASS MEDIA: ALASKA NATIVE VOICES* 18 (2004).

<sup>4</sup> 43 U.S.C. §§ 1601–42 (2006).

<sup>5</sup> DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 155 & n.3 (2d ed. 2002).

<sup>6</sup> See ROBERT D. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 131 (1976); James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 *ROCKY MTN. MIN. L. INST.* 1, 2, 11–12 (2007).

<sup>7</sup> Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958).

<sup>8</sup> *Id.* § 6(b).

<sup>9</sup> *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 460–69 (Ct. Cl. 1959).

The implications of this precedent were perhaps most fully appreciated by Iñupiaq Willie Hensley, then a twenty-five-year-old finance student at the University of Alaska, Fairbanks. While researching his final paper for a 1966 undergraduate course in constitutional law, he reasoned that, as the state had never won land from Natives in battle, nor signed any treaties with them, Alaska Natives across the state retained aboriginal title to their land.<sup>10</sup> Inspired by the conclusions of his paper, Hensley promptly assumed an activist role. At his instigation, Native associations soon formed, for the express purpose of filing land claims and preventing the state of Alaska from proceeding with its claims for the 100 million acres granted to it under Section 6(b) of the Statehood Act.<sup>11</sup> The Native groups had soon advanced aboriginal land claims to virtually all the state, including any areas the State of Alaska could have hoped to select for its Section 6(b) allotment.<sup>12</sup> Secretary of the Interior Stewart Udall was ultimately forced to impose a land freeze halting federal approval of any state land selections until Native claims were resolved, thereby preempting potential state oil and gas leases.<sup>13</sup> This was a subject of some interest for the State of Alaska, by this point an “economic basket case”<sup>14</sup> attempting to support a deficit government on fewer than a quarter-million people with scant private land to tax. There was, to put it mildly, a strong impetus to resolve Native land claims, so that oil development could go forward.

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<sup>10</sup> WILLIAM L. HENSLEY, *FIFTY MILES FROM TOMORROW: A MEMOIR OF ALASKA AND THE REAL PEOPLE* 110–13 (2009); *see also* *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (establishing the doctrine of acquisition by discovery).

<sup>11</sup> HENSLEY, *supra* note 10, at 121–22.

<sup>12</sup> *Id.* at 136. Indeed, the total acreage potentially wrapped up in Native land claims exceeded the land area of the entire state. WALTER R. BORNEMAN, *ALASKA: SAGA OF A BOLD LAND* 467 (2003).

<sup>13</sup> Public Land Order 4582, 34 Fed. Reg. 1025 (Jan. 23, 1969). Wally Hickel soon succeeded Udall as Secretary of the Interior and modified the Order's terms, altering the land freeze to permit rights-of-way to be granted along the then-proposed route of the oil pipeline. *See* Public Land Order 4760, 35 Fed. Reg. 424 (Jan. 13, 1970); *see also* Peter Hoffman, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 *YALE L.J.* 1592, 1609–10 & n.88 (1972) (discussing history and background of Udall's land freeze). Native groups promptly obtained an injunction against the pipeline. Hoffman, *supra*, at 1611.

<sup>14</sup> HENSLEY, *supra* note 10, at 136.

The Alaska Native Claims Settlement Act was the solution. It resolved aboriginal land claims by conveying to Native groups fee simple title to roughly forty-four million acres of state land.<sup>15</sup> Native ownership was administered through Alaska Native corporations, or ANCs, whose membership consisted of qualifying Alaska Natives. Anyone born on or before ANCSA's passage (December 18, 1971),<sup>16</sup> and of at least one-quarter Native blood,<sup>17</sup> received 100 shares of stock in a regional corporation generally corresponding to geographic divisions.<sup>18</sup> A total of twelve regional corporations were created, encompassing the entire state.<sup>19</sup> Within the area covered by each regional corporation,<sup>20</sup> a number of smaller village corporations were formed, corresponding to roughly 200 tribes within the state.<sup>21</sup> Each village was entitled to select an allocated amount of land from the nearby area.<sup>22</sup> The village corporations received surface title to these lands,<sup>23</sup> while

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<sup>15</sup> The State of Alaska has a total land area of about 365 million acres. CASE & VOLUCK, *supra* note 5, at 157.

<sup>16</sup> 43 U.S.C. § 1604(a) (2006).

<sup>17</sup> 43 U.S.C. § 1602(b) (2006).

<sup>18</sup> 43 U.S.C. § 1606(g)(1)(A) (2006). The regional corporation boundaries were generally drawn to keep together Native groups with a common cultural heritage, though BERGER, *supra* note 1, at 90–91, critiques these divisions. For a map of the regional corporation boundaries, see *Regional Corporations Established Pursuant to the Alaska Native Claims Settlement Act, December 18, 1971*, NAT'L PARK SERV., [http://www.nps.gov/history/history/online\\_books/norris1/images/map4-1.jpg](http://www.nps.gov/history/history/online_books/norris1/images/map4-1.jpg) (last visited Jan. 13, 2012).

<sup>19</sup> 43 U.S.C. § 1606(a) (2006). A thirteenth regional corporation was later formed, to include Natives living outside the state; it was officially named the Thirteenth Regional Corporation. It did not receive a land settlement under ANCSA, but does share in the corporations' profit-sharing scheme. 43 U.S.C. §§ 1604(c), 1606(c) (2006).

<sup>20</sup> The largest regional corporation, Doyon, Ltd., draws members from a swath of interior Alaska nearly the size of Texas. Within this area, Doyon is entitled to roughly 12.5 million acres, making it the largest private landowner in the state. *Doyon Lands*, DOYON.COM, [www.doyon.com/lands/lands\\_overview.aspx](http://www.doyon.com/lands/lands_overview.aspx) (last visited Jan. 13, 2012).

<sup>21</sup> 43 U.S.C. § 1607 (2006).

<sup>22</sup> The allotment amounts, which were based on village population, are set forth in 43 U.S.C. § 1613(a) (2006). The selected lands were to include the areas contiguous to each village, 43 U.S.C. § 1610(a)(1) (2006), plus additional selections, as necessary to fill out each village's allotment. 43 U.S.C. § 1611(a) (2006). For a map of the land held by the Northwest Arctic Native Association (NANA), highlighting the patchwork nature of land ownership that characterizes ANC holdings, see *NANA Regional Corporation Land Status*, NANA LANDS, <http://www.nanalands.com/plotfiles/regional/regional.pdf> (last visited Jan. 13, 2012).

<sup>23</sup> 43 U.S.C. § 1613(a)–(b) (2006).

the regional corporations received title to the subsurface estate.<sup>24</sup> Land within the North Slope's newly established National Petroleum Reserve was off-limits for Native selections<sup>25</sup>—a driving force for ANCSA had been the state's desire to lease this land to private oil companies. The land distribution was accompanied by the Alaska Native Fund, a monetary settlement of, eventually, \$962.5 million, to be paid out to the regional corporations on a per capita basis.<sup>26</sup>

The ANCs have not enjoyed unmitigated economic success. Indeed, their financial performance in their first twenty years of existence was surprisingly poor, as the corporations made ill-advised business decisions, and some Native leaders struggled in their new roles as corporate executives.<sup>27</sup> After this rocky beginning, however, the corporations have been more successful. In 2004, the ANCs had total combined revenues of \$4.47 billion and distributed \$117.5 million in shareholder dividends.<sup>28</sup> Annual per capita payments to shareholders have ranged from nothing to as much as \$25,000, with the latter attributable to one-time payouts from the sale of timber or financial losses for tax shelter purposes.<sup>29</sup> From 1973 through 1998, payments to shareholders of Arctic Slope Regional Corporation averaged around \$600 per year, in 1998 dollars.<sup>30</sup> Today, ANCSA corporations account for seven of the ten most profitable Alaska-owned businesses.<sup>31</sup>

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<sup>24</sup> 43 U.S.C. § 1613(f) (2006).

<sup>25</sup> 43 U.S.C. §§ 1611(a)(1), 1613(f) (2006).

<sup>26</sup> Five hundred million dollars was to come from the State of Alaska, through revenue-sharing provisions for development on state and federal Alaska land, the remainder from the U.S. Treasury. 43 U.S.C. §§ 1605(a), 1608(g) (2006).

<sup>27</sup> Stephen Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND RESOURCES & ENVTL. L. 155, 160–62 (2005).

<sup>28</sup> Linxwiler, *supra* note 6, at 4-5, n.11 (quoting a 2006 economic report, the most recent data available).

<sup>29</sup> Lori Thomson, *Dividends: Not Very Many Natives Are Lucky Enough to See the Big Payments*, JUNEAU EMPIRE (Jan. 25, 1999), [http://juneauempire.com/stories/012599/Loc\\_dividend.html](http://juneauempire.com/stories/012599/Loc_dividend.html).

<sup>30</sup> *Id.*

<sup>31</sup> Linxwiler, *supra* note 6, at 4.

## II. ANALYSIS

A. *Theory: An Imperfect Solution? Native Corporations and Procedural Justice*

The Native corporations created by ANCSA are marked by fundamentally conflicting mandates: development and conservation. They are chartered as corporations and charged with creating shareholder dividends, a task that necessarily involves some level of development. At the same time, however, they presumably feel the need to serve as caretakers of the land, which is both the ancestral homeland for their people and the only real asset granted to the corporations. The conflict between conservation and development is hardly unique to Alaska, to Alaska Natives, or to Alaska Native corporations. With the ANCs specifically, however, an indigenous group is put in the more singular position of controlling both sides of this dynamic. There certainly is a conflict here, and it is not an easy one to resolve. But the ANCs, for better or worse, do have control over most aspects of this process.

Or at least the thirteen regional corporations do. The smaller villages within each region may have much less say in the actions of the regional corporation that includes them. When it comes to day-to-day activities, this is unobjectionable; it is presumably desirable for a corporation to operate with relative independence, and to not require shareholder approval for every small decision. Unfortunately, this lack of access may carry over to the regional corporation's large-scale development decisions. The potential result is village-level disenfranchisement over development decisions that affect them, a strong candidate for procedural injustice. This section highlights some aspects of the regional corporations' structure and organization that increase the potential for procedural injustice.

### 1. Board of Directors Composition and Village Access to Decision Making

The general concern here is that a regional corporation, which covers an area of tens of thousands of miles,<sup>32</sup> may be willing to subject a small corner of this area to undesirable development for the economic good of the corporation and region as a whole. The specific concern is that the composition of a corporation's board of directors will leave an individual village in the minority, creating the possibility of one village being outvoted by the rest of the board.<sup>33</sup> In the Arctic Slope Regional Corporation (ASRC), for example, the only corporation to make its bylaws readily available,<sup>34</sup> the fifteen-member board is composed of five directors from the town of Barrow, one each from seven villages, and three at-large positions.<sup>35</sup> At best, this means that a village will be in the minority should it wish to oppose a development decision favored by the board as a whole. At worst, there is the distinct possibility that Barrow will have eight (or more) votes and a majority of director seats, creating a strong "urban" bloc more willing to sign off on development in the villages.<sup>36</sup> This raises the specter of a village being outvoted by

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<sup>32</sup> NANA draws members from a region of 38,000 square miles, or roughly the size of Kentucky. *Introduction*, NANA LANDS, <http://www.nanalands.com/introduction.htm> (last visited Jan. 13, 2012). The largest ANC, Doyon, corresponds to a massive portion of interior Alaska, an area nearly the size of Texas. *See supra* note 20.

<sup>33</sup> The ANCs are overseen by boards of directors, each with one to two dozen board members. Several corporations delegate a specific number of director seats to individual villages within the larger region. For example, Doyon designates four out of twelve seats to particular villages, with the remainder filled on an at-large basis; NANA's twenty-three seats are divided between ten small villages (two each), the regional center of Kotzebue (one seat), and two at-large seats; Calista similarly designates seats by groups of villages, plus one for the regional hub of Bethel and one at large; and Ahtna designates all board seats to specific villages.

<sup>34</sup> Efforts to obtain these bylaws underscore the odd status of the Native corporations. They are not a federal government agency, and so would not come within the scope of a FOIA request. They fall outside the purview of the SEC, and so, unlike publicly-traded corporations, do not have to submit filings there. *See infra* note 49. The ANCs are, in fact, the beneficiaries of a remarkable lack of oversight for multimillion-dollar corporations.

<sup>35</sup> ARCTIC SLOPE REG'L CORP., RESTATED BY-LAWS OF ARCTIC SLOPE REGIONAL CORPORATION art. II, § 1 (Dec. 2010) [hereinafter ASRC Bylaws], *available at* [http://asrc.com/Documents/ASRC\\_By\\_Laws\\_December\\_2010.pdf](http://asrc.com/Documents/ASRC_By_Laws_December_2010.pdf).

<sup>36</sup> Barrow is hardly an urban center in most senses of the term. It has a population of roughly 4500, polar bears prowl the outskirts of town, and the local NAPA auto parts

Barrow on a development decision, or by most of the Barrow directors and some other village representatives. The distances involved are substantial (from Kaktovik to Point Hope, all within the ASRC region, is roughly 500 miles); it is not hard to engage in nimbyism at such a remove.<sup>37</sup>

The discrepant composition of the regional corporations' boards of directors presents a textbook example of what Robert Kuehn analyzed as problems with procedural justice, roughly definable as the belief that all groups should have equal access to the decision-making process.<sup>38</sup> While Kuehn's analysis primarily addresses a Western model in which minority groups are excluded from a scientific body or mistreated by a government permitting agency,<sup>39</sup> his general principles are readily applicable here.<sup>40</sup> The development decisions of, say, ASRC do not exhibit "the right . . . to equal concern and respect in the political decision"<sup>41</sup> of how goods are distributed when they are made by a board of directors weighted heavily towards the interests of a single town – Barrow, in this example. Coupled with the board's corporate mandate to pursue development that will economically benefit the entire corporation, a village has a legitimate complaint on grounds of

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store sells harpoon equipment. CHARLES P. WOHLFORTH, *THE WHALE AND THE SUPERCOMPUTER: ON THE NORTHERN FRONT OF CLIMATE CHANGE* 10 (2004). However, Barrow's population easily exceeds that of the other seven ASRC villages combined, and it is the region's healthcare and judicial center. Under the bylaws, ASRC's principal office is located in Barrow. ASRC Bylaws, *supra* note 35, art. VI, § 1. It is certainly the area's regional center, if not a traditionally "urban" environment.

<sup>37</sup> The sheer distances involved when traveling within an area served by a regional corporation pose their own challenges, which create practical barriers to involving corporation members and to treating everyone fairly. When an annual meeting is held in Barrow, hundreds of roadless miles from one of seven widely dispersed villages, it is difficult for individual shareholders even to attend. The logistical problems are mitigated for a regional corporation centered on a true urban area with commercial air service, like Anchorage or Fairbanks, though even this is hardly ideal; airplane tickets from the Bush into Anchorage run to hundreds of dollars—a major challenge for a shareholder in a subsistence-based, cash-poor village economy.

<sup>38</sup> Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, at 10,688 (2000).

<sup>39</sup> *Id.* at 10,688–93.

<sup>40</sup> Kuehn's analysis of Native American groups and procedural justice is, ironically, less directly applicable. *Id.* at 10,690–92. His examples focus on tribes advancing environmental justice claims on grounds of developers' insensitivity to tribal religious and cultural beliefs, which are not the concerns raised by ANC development decisions.

<sup>41</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273 (1977) (quoted in Kuehn, *supra* note 38, at 10,688).

procedural justice when a decision is made that adversely impacts its area specifically, and nowhere else within the larger region. The dynamic here is somewhat different than that envisioned by Kuehn or most environmental justice scholars; everyone involved is a member of an indigenous population, so it is unavailing to simply pick out the minority group, then ask if they have been excluded. At the same time, however, it is fair to look at the hardly homogenous population of Arctic Slope Iñupiat,<sup>42</sup> and to ask whether each community in this group has full access to decision-making and public participation procedures. When this analysis reveals that a smaller community may be easily outvoted by larger settlements on a development decision adversely affecting it, the affected community has hardly enjoyed “the right to participate as equal partners at every level of decision-making.”<sup>43</sup>

## 2. Proxies and Afterborns

The corporation system is not without its procedural safeguards. While its appositeness to Native culture can justly be questioned, it should nonetheless provide displeased shareholders with the opportunity to influence overall corporate operations, by voting in new directors more sympathetic to their interests.<sup>44</sup>

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<sup>42</sup> Cf. Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1159–60 (1994) (emphasizing that indigenous groups, viewed by the majority culture as fairly unified, may in fact be composed of disparate subgroups, and marked by heterogeneity and factionalism).

<sup>43</sup> PRINCIPLES OF ENVIRONMENTAL JUSTICE PROCEEDINGS, THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (Oct. 27, 1991), reprinted in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 23 (Clifford Rechtschaffen & Eileen Gauna eds., 2003).

<sup>44</sup> This action, the sole potential recourse for disgruntled ANC members, should be contrasted with the options available to shareholders of any publicly-traded corporation: If they are unhappy with the company's decisions, they can simply sell their stock and reinvest the money elsewhere. Cf. ALBERT O. HIRSCHMANN, EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970). Under ANCSA, however, shares of ANC stock cannot be sold or transferred, except in limited circumstances such as bequeathal or court order in a child custody proceeding. 43 U.S.C. § 1606(h)(1)(B)-(C) (2006). For a displeased ANC shareholder, taking action at the board of directors level is the only option. See also Colt, *supra* note 27, at 167 (analyzing agency problems in Native corporations from an economic

While the inherent disproportionality of some corporation boards may always skew the numbers against a smaller village, that village should at least be able to vote in a different representative director, and potentially influence voting for any at-large positions.

In practice, however, things do not always work as smoothly in ANCs elections. The corporations' proxy system has been criticized for being confusing, advantageous to the incumbent Board, and antithetical to a traditional culture of consensus-based decision-making.<sup>45</sup> Discretionary voting has come in for particular criticism, as a way for the Board to manipulate shareholder votes by putting its influence behind a particular candidate.<sup>46</sup> Some corporations have endured protracted legal disputes over the fairness or accuracy of election materials with Cook Inlet Regional Corporation, for example, being marked by several years of election-related legal wrangling.<sup>47</sup> Many of these problems are traceable to the growing pains of imposing a resolutely corporate structure onto a culture that may not readily accept it.<sup>48</sup>

From the shareholders' perspective, state regulation is lax, and assistance negligible. The importance of state regulatory agencies is magnified here, as the ANCs fall outside the purview

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perspective, suggesting that they are "exacerbated by the fact that stock cannot be traded").

<sup>45</sup> Lori Thomson, *Voting Methods Preserve Corporations' Status Quo: These Institutions Face Their Own Battles*, JUNEAU EMPIRE (Jan. 1999), <http://www.akhistorycourse.org/articles/article.php?artID=362>.

<sup>46</sup> *Id.* ("That part of the system [discretionary voting] angers some shareholders because it gives the board an advantage in getting its people elected. For instance, the board may know one of its candidates is popular and will get enough direct votes to win a board seat. But another candidate may have less of a chance to win. So the board puts discretionary votes behind that person, improving the candidate's odds.")

<sup>47</sup> See, e.g., Elizabeth Bluemink, *Battle Over CIRC Proxies Leads to a Countersuit: Board Members Say Information Misleads*, ANCHORAGE DAILY NEWS, June 29, 2008, at A3, available at 2008 WLNR 12362785; Paula Dobbyn, *Shareholders Dispute CIRC Vote: Independent Contender Jerry Ward Seeks Recount After Close Race*, ANCHORAGE DAILY NEWS, Aug. 18, 2005, at F1, available at 2005 WLNR 13069249.

<sup>48</sup> See BERGER, *supra* note 1, at 31 (discussing lawsuits over proxy technicalities that fomented bad blood within villages, discouraged people from serving on corporation boards, and tied up scarce resources); cf. Dobbyn, *supra* note 47 ("Complaints about elections at Native corporations . . . are not uncommon. The congressionally created companies are often run by board members with family ties, tribal connections and, sometimes, old axes to grind. The firms often operate more like families than mainstream businesses.").

of the federal Securities and Exchange Commission.<sup>49</sup> An audit requested by the Alaska legislature, however, critiqued the state's limited authority over the ANCs and lack of responsiveness to Native shareholders, leading to "anger and frustration among ANCSA shareholders who feel they have little power to challenge their corporations."<sup>50</sup> The audit concluded, "[T]he state does a poor job of guarding the interests of shareholders, and as a result, the intent of ANCSA is being undermined."<sup>51</sup> A corporate system that helps perpetuate the control of entrenched interests, amidst state oversight so weakened that shareholders wishing to be heard must "hire their own lawyers at their own expense,"<sup>52</sup> hardly provides an effective safeguard to the corporations' endemic problems with procedural injustice.

A final procedural quirk to the Native corporations' composition is that, under ANCSA, eligibility for tribal enrollment ended with qualifying Natives alive on the date of the Act's passage in December 1971.<sup>53</sup> Later revisions to the Act allowed ANCs to expand their membership to include these so-called afterborns,<sup>54</sup> if a majority of shareholders approve;<sup>55</sup> so far only four corporations have done so.<sup>56</sup> This bright-line division means

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<sup>49</sup> ANCSA exempted the Native corporations from mainstream federal securities laws, including the Securities Exchange Act of 1934. 43 U.S.C. § 1625(a) (2006). The Act as originally passed envisioned that the ANCs would have a twenty-year life span in their original form, and that ANC stock would become alienable on public markets in 1991, thus subjecting the companies to SEC oversight. 43 U.S.C. § 1620(d)(1) (2006). In the interim, Congress entrusted the State of Alaska to regulate the corporations. Dobbyn, *infra* note 50. Following the 1987 amendments, however, ANC stock remained inalienable. 43 U.S.C. § 1636(b)(1) (2006). The result is that ANCS remain outside the authority of the SEC, while seemingly enjoying a relaxed level of oversight from state regulators.

<sup>50</sup> Paula Dobbyn, *Audit Rips Native Corporation Oversight*, ANCHORAGE DAILY NEWS, Aug. 8, 1999, at C1, available at 1999 WLNR 7353575 (summarizing audit's findings).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 43 U.S.C. § 1604(a) (2006). ANCSA does allow for shares to be transferred—albeit only to Natives or descendants of Natives—by court decree in divorce or child custody disputes, or to be inherited upon the death of the original shareholder. 43 U.S.C. § 1606(h)(1)(C), (h)(2) (2006).

<sup>54</sup> 43 U.S.C. § 1606(g)(1)(B)(i)(I) (2006).

<sup>55</sup> 43 U.S.C. § 1606(g)(1)(B)(iv) (2006).

<sup>56</sup> The four are ASRC, NANA, Doyon, and Sealaska. Sealaska's solution involved granting new shareholders voting rights, but no dividend rights. For more on Sealaska's resolution, see *infra* note 57.

that children born to the same family in the same place in 1970 and 1972, respectively, would be treated differently despite their presumably identical claims to “Native-ness.” There are issues here of not only fairness but also culture; as one Sealaska Board member observed, excluding children conflicts with Tlingit law.<sup>57</sup> From a standpoint of procedural justice, finally, the afterborns issue means that many people who will be affected by a corporation’s decisions simply have no say in the matter at all. Natives who are ANCs shareholders may be outnumbered, and may have difficulty voting in someone more responsive to their needs. But at least they have this option. These shareholders’ younger neighbors, by contrast, while living in the same community, may have no such recourse available, even against development decisions that affect them equally. This disparate treatment of similarly situated minority groups would not pass muster under an equal protection analysis; it is similarly problematic from an environmental justice perspective. It seems a failure of procedural justice for an affected community member to be left without access to the relevant decision-making body in this manner.

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<sup>57</sup> See Cathy Brown, *The Next Generation: Corporations Must Decide Whether to Include Natives Born After 1971*, JUNEAU EMPIRE (Jan. 1999), <http://www.akhistorycourse.org/articles/article.php?artID=364> (paraphrasing Rosita Worl). As Worl observes in Brown’s article, the practice is at odds with traditional Tlingit custom: “In the past just by being born in a clan you have ownership rights in that clan.” Cf. BERGER, *supra* note 1, at 12 (quoting a villager from Huslia: “Our own belief about land is as strong as urban people’s law, but it’s not recognized.”) (internal quotation marks omitted). Worl is currently vice chair of the board of Sealaska Corporation, and has been a board member since 1987. *Rosita Worl, Juneau, AK (Board Vice Chair)*, SEALASKA, [http://www.sealaska.com/page/rosita\\_worl.html](http://www.sealaska.com/page/rosita_worl.html) (last visited Jan. 13, 2012). In 2007, she successfully advanced an afterborns resolution that a majority of Sealaska shareholders would support; that June, they passed a modified resolution affecting roughly 5500 descendants of original shareholders. *Sealaska Stockholders Agree that “After-Borns” Should Receive Shares*, ANCHORAGE DAILY NEWS, June 25, 2007, at B2, available at 2007 WLNR 12011015. Under the resolution, the newly franchised shareholders received voting rights in the corporation, but no monetary dividend. The fact that it took Worl years to accomplish this partial success, and two decades from the 1987 afterborns amendments to ANCSA, speaks to the difficulty in an individual’s achieving her goals within a corporate setting, even when that individual is a member of the board.

### 3. Village Corporations vs. Regional Corporations

For the initial Native land allotments, ANCSA directed that the villages within each region select the land to be owned by the regional corporation.<sup>58</sup> The villages received title to the surface estate of their selections, while the regional corporations were granted title to the corresponding subsurface estate.<sup>59</sup> The precise definition of “subsurface” has been much litigated, with particular disputes arising over how to classify “common varieties of sand, gravel, stone, pumice, peat, clay, or cinders.”<sup>60</sup>

The division of land into surface and subsurface estates, granted to village and regional corporations, respectively, is an unusual one. If nothing else, it violates the ancient maxim of *cuius est solum, eius est usque ad caelum et ad inferos*.<sup>61</sup> More pointedly, it raises the specter, for the villages, of development occurring uncomfortably close to home. When the villages set out to select land under their original ANCSA allotments, their incentive was to retain legal claim to their ancestral homeland. The years before ANCSA’s passage were marked by poignant instances of Native families losing “title” to the land they had occupied for centuries;<sup>62</sup> an immediate effect of ANCSA was to end such displacements. And the Act itself specified that villages were to select land from areas contiguous to the village.<sup>63</sup> While this had an immediate reassuring effect for each village, the long-term result may simply have been to bring development closer to home. That the lands the

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<sup>58</sup> See *supra* note 22.

<sup>59</sup> See *supra* notes 23–24.

<sup>60</sup> CASE & VOLUCK, *supra* note 5, at 162. Courts have generally held for the regional corporations (that “resources on village lands could not be sold without the consent of the region”), though the villages have successfully obtained the right to limited use of “regional gravel.” *Id.* at 164 & nn.53–56 (summarizing cases).

<sup>61</sup> “[F]or whoever owns the soil, it is theirs up to the sky and down to the depths . . . .” HOWARD R. WILLIAMS & CHARLES J. MEYERS, *MANUAL OF OIL AND GAS TERMS* 19 (7th ed. 1987).

<sup>62</sup> See, e.g., HENSLEY, *supra* note 10, at 107–10 (describing aftermath of a 1965 BLM land auction of lots around Kotzebue, which effectively dispossessed the entire Iñupiat community).

<sup>63</sup> 43 U.S.C. § 1610(a)(1) (2006); cf. *supra* note 22. For a demonstration of what this looks like in practice, see *KIC Land Status*, NANA LANDS, <http://www.nanalands.com/plotfiles/Subregion/KICSelections.pdf> (last visited Jan. 13, 2012) (showing that the holdings of Kikiktagruk Iñupiat Corporation, Kotzebue’s village corporation, are centered around Kotzebue).

village corporations selected to preserve, at the surface, were the same lands deeded to the regional corporations, at the subsurface level, means that mineral development became more likely to occur near the individual villages. The weak status of each village within the regional corporation raises the possibility of villagers making land selections that ultimately bring development upon themselves, then being unable to stop it.<sup>64</sup> This is a rather perverse incarnation of distributive justice.<sup>65</sup>

### B. Practice: Development Decisions in Action

Development decisions taken by the regional corporations demonstrate some of these concerns with procedural justice playing out in practice. This section analyzes one such decision, the development of Red Dog Mine, in some detail. It then cites a handful of other examples that could be explored in future work on this topic.

#### 1. Mining: Red Dog Mine, NANA, and Kivalina

Red Dog Mine is located in northwest Alaska, within the holdings of NANA Regional Corporation. It is about ninety miles north of Kotzebue, and fifty-five miles inland from the Chukchi Sea.<sup>66</sup> The nearest coastal settlement, the village of Kivalina, is roughly fifty miles southwest of the mine, and sixteen miles up the coast from the mine's port on the Chukchi Sea.<sup>67</sup> Kivalina is one of ten villages in the NANA region.<sup>68</sup>

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<sup>64</sup> Cf. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1066–68 (9th Cir. 1998) (suggesting that village corporation approval is required only for regional mining activity within the area directly occupied by the village itself, i.e., that a regional corporation would not need permission to mine inside the contiguous area selected under § 1610).

<sup>65</sup> Cf. Kuehn, *supra* note 38, at 10,683-88.

<sup>66</sup> *Red Dog by the Numbers*, NANA REG'L CORP., <http://www.nana.com/regional/resources/red-dog-mine/faq/> (last visited Jan. 13, 2012).

<sup>67</sup> *Kivalina*, NANA REG'L CORP., <http://www.nana.com/regional/about-us/overview-of-region/kivalina/> (last visited Jan. 13, 2012). The inland village of Noatak, also in the NANA region, is actually closer to the mine. However, its traditional subsistence activities have been relatively unaffected by Red Dog; Kivalina has had more disputes with NANA over the mine. This is presumably because Noatak, on the Noatak River, is in a separate watershed than Kivalina and the Wulik.

<sup>68</sup> *Overview of Region*, NANA REG'L CORP., <http://www.nana.com/regional/about-us/overview-of-region/> (last visited Jan. 13, 2012).

The mine is the chief economic engine of NANA and has over 500 employees.<sup>69</sup> Roughly fifty-eight percent of them are NANA shareholders,<sup>70</sup> and approximately twelve of them are from Kivalina.<sup>71</sup> Red Dog is an open-pit mine that extracts zinc, lead, and silver; it is the largest mine in the state, and one of the largest zinc mines in the world.<sup>72</sup> Its operating profit in 2007 was \$1.4 billion.<sup>73</sup> It is difficult to overstate the mine's centrality to NANA, or its economic importance to this otherwise impoverished region of northwest Alaska, "where jobs are scarce."<sup>74</sup>

Red Dog Mine has been an "environmental battleground" for decades.<sup>75</sup> Issues over the mine's safety arose even before its opening, in 1989, with the then-recent *Exxon Valdez* oil spill still very much on people's minds.<sup>76</sup> Alongside explicit environmental

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<sup>69</sup> *Red Dog Mine*, NANA REG'L CORP. <http://www.nana.com/regional/resources/red-dog-mine/> (last visited Jan. 13, 2012).

<sup>70</sup> *Id.*

<sup>71</sup> Elizabeth Bluemink, *Subsistence Effect? EPA Study Suggests Belief that Red Dog is Reducing Game Take May be Correct*, ANCHORAGE DAILY NEWS, Jan. 29, 2009, at A1, available at 2009 WLNR 1755719.

<sup>72</sup> NANA REG'L CORP., *supra* note 69; see also *Resources FAQ*, NANA REG'L CORP., <http://www.nana.com/regional/resources/resources-faq/> (last visited Jan. 13, 2012).

<sup>73</sup> Bluemink, *supra* note 71 (summarizing from Teck Cominco's 2007 annual report). The mine is operated by Teck, a Vancouver, Canada-based mining company. In lawsuits against the mine, Teck Cominco Alaska, Inc., has been the named defendant, but NANA retains ownership of the mine, and has been an intervening defendant. See, e.g., *Adams v. Teck Cominco Alaska, Inc.*, No. 3:04-CV-00049-JWS, 2006 WL 2105501 (D. Alaska July 28, 2006).

<sup>74</sup> Elizabeth Bluemink, *Mine's Pollutants Stir Controversy: Nearby Villagers, Others Question Effects on Human Health*, ANCHORAGE DAILY NEWS, Jan. 21, 2008, at A1, available at 2008 WLNR 1212111.

<sup>75</sup> *Id.* ("Red Dog was an environmental battleground even before it opened in 1989.")

<sup>76</sup> *Id.* The mine's problems with contaminant runoff, the subject of litigation as recently as 2006, *Adams v. Teck Cominco Alaska, Inc.*, 414 F. Supp. 2d 925 (D. Alaska 2006), were apparent before the mine even opened. David Hulen, *Zinc Levels in Creek Concern State Officials*, ANCHORAGE DAILY NEWS, Oct. 7, 1989, at B1, available at 1989 WLNR 2943868 ("State environmental authorities are worried about unusually high levels of zinc seeping into a creek near the soontoopen [sic] Red Dog Mine"). At the time, state environmental authorities believed that zinc runoff would be too diluted to pose a health risk by the time it reached Kivalina, fifty miles downstream. *Id.* Problems with runoff and water quality continued over much of the ensuing decade, leading to the formal litigation discussed below. See David Hulen, *Toxic Metals Foul Stream Near Mine*, ANCHORAGE DAILY NEWS, Aug. 18, 1990, at A1, available at 1990 WLNR 4066392; Kim Fararo, *Mine Spends \$11 Million to Clean up Creek Flows*, ANCHORAGE DAILY NEWS, July 25, 1991, at C1, available at 1991 WLNR 4262447; Kim Fararo, *Mine Dumps Metal-Laden Water: Spill Not Expected to Threaten Fish*,

concerns were subtler issues connected with introducing a large-scale open pit mine to a sensitive area. For example, the mine could have impacts on wildlife that were harmful to local game or to Native subsistence users, while still falling below the threshold that federal environmental agencies would find explicitly harmful.

One account of how these concerns were balanced against the desire for economic development came from Willie Hensley, by this point a NANA board member:

We [NANA leadership] also created an Elders Council, made up of some of our most prestigious village leaders, whose mission was to advise us on potentially contentious issues. When we decided to develop the Red Dog Mine about ninety miles north of Kotzebue . . . we had to face its inevitable impact on the migration of the caribou. With the help of the Elders Council, we consulted with our people and came to a consensus that the jobs the mine would create were well worth any effect it might have on our caribou hunting.<sup>77</sup>

A counter-argument comes from contemporary residents of Kivalina, “one of the most traditional villages in the NANA region.”<sup>78</sup> They gave concerns over water pollution more weight in light of the value they placed on the Wulik River (the village lies at the Wulik’s mouth), saying of the mine, “it won’t work if it destroys our river. We live from the river.”<sup>79</sup> They also neatly identified the conflicting mandates of conservation and development, while acknowledging the joint desirability of jobs and subsistence: “Sometimes I think we’re kind of fighting ourselves . . . I know NANA’s trying to look out for everyone’s interests. They want jobs and they want subsistence. And maybe we can have them both. Sometimes I wonder about that.”<sup>80</sup>

The villagers’ doubts seem to have been well-founded: Red Dog’s operation has been marked by persistent water quality

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*Humans*, ANCHORAGE DAILY NEWS, Apr. 22, 1992, at C1, available at 1992 WLNR 4549363; Bruce Melzer, *Dirty Mining to Cost Firm \$4.7 Million*, ANCHORAGE DAILY NEWS, July 14, 1997, at A1, available at 1997 WLNR 6357249.

<sup>77</sup> HENSLEY, *supra* note 10, at 172–73.

<sup>78</sup> David Hulen, *Red Dog Mine Changes Lives in 11 Villages*, ANCHORAGE DAILY NEWS, Jan. 7, 1990, at A1, available at 1990 WLNR 4064401.

<sup>79</sup> *Id.* (quoting Joseph Swan, Sr., a whaling captain and mayor of Kivalina).

<sup>80</sup> *Id.* (quoting Kivalina resident David Swan, a former NANA board member).

violations, posing a threat to the Kivalina residents' well-being.<sup>81</sup> There has also been emerging concern over the health risks posed by dust-borne pollution from trucks on the haul road between the mine and the port,<sup>82</sup> and about the cumulative effect of mining operations on subsistence activities.<sup>83</sup> The result is that the residents of Kivalina, in area or population only a small portion of the overall NANA region, have been made to bear a disproportionate impact from a massive project that has economically benefited the entire regional corporation. Basic concerns for procedural justice make this scenario troubling.

Over the past decade, Kivalina's opposition to a proposed expansion of Red Dog's port, and a growing awareness of the health hazards posed by mining operations, crystallize the challenges facing the village as it seeks to resolve its perceived inequitable treatment by NANA. In April 2000, for example, Kivalina's tribal government took out a full-page ad in the region's weekly newspaper to express its opposition to the proposed expansion.<sup>84</sup> The ad charged that NANA was "ignoring village concerns."<sup>85</sup> The following year, the National Park Service released a study on mineral levels near the twenty-four miles of the haul road that pass through nearby Cape Krusenstern National Monument—federally controlled national park land.<sup>86</sup> The study found lead levels exceeding 400 parts per million (ppm), as well as high levels of zinc and cadmium both at the roadside and up to a mile away, the furthest extent of the testing.<sup>87</sup> State regulators declined tribal requests, through environmental law

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<sup>81</sup> Water-quality issues from the mine's founding through the 1990s are discussed *supra* note 76 and accompanying text. Issues relating to water-quality problems during the 2000s are discussed *infra*.

<sup>82</sup> See Bluemink, *supra* note 74.

<sup>83</sup> See Bluemink, *supra* note 71 ("A new federal study says that the state's largest mine likely caused reduced caribou and beluga harvests by nearby villagers.").

<sup>84</sup> Paula Dobbyn, *Kivalina's Council Fights Port Project*, ANCHORAGE DAILY NEWS, Apr. 26, 2000, at E1, available at 2000 WLNR 9000872 (describing Kivalina's ad in *The Arctic Sounder*).

<sup>85</sup> *Id.* ("They haven't made any effort to have us sit down and discuss the matter," said [tribal council president David] Swan.).

<sup>86</sup> Paula Dobbyn, *Mine Road to Stay Open: Official Says Health Risk Isn't Enough to Justify Closure*, ANCHORAGE DAILY NEWS, July 14, 2001, at D1, available at 2001 WLNR 11282716.

<sup>87</sup> *Id.* (explaining how mineral dust escapes from trucks into the nearby landscape).

firm Trustees for Alaska, to close the road, ruling that there was not a sufficient health hazard present to warrant a closure.<sup>88</sup> Crucial to this holding was the state Department of Environmental Conservation's decision to treat the haul road as an industrial area, as opposed to a residential area: The cleanup standard for industrial areas is a less stringent 1,000 ppm, as opposed to 400 ppm for residential areas.<sup>89</sup> Kivalina residents did not appreciate the distinction, countering that they did not view the National Monument land as an industrial area.<sup>90</sup> They expressed displeasure over the state's lack of responsiveness,<sup>91</sup> and were troubled that their "health concerns [were] being ignored."<sup>92</sup>

Kivalina's experience to this point reflects a pattern common to many environmental justice communities: a negatively affected minority group turns to the government for assistance, but is rebuffed, while charging that the state consistently supports industry and development, here through an industry-friendly interpretation of an environmental statute.<sup>93</sup> The next step in this process is equally familiar: enter Luke Cole.

In September 2002, the Center on Race, Poverty & the Environment, with Cole as lead attorney, filed suit against Teck Cominco, alleging hundreds of violations of the Clean Water Act.<sup>94</sup> One Kivalina resident explained that they took legal action because they could not receive industry or government attention in any other manner.<sup>95</sup> Kivalina gained several years' worth of

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* ("Residents have historically hunted caribou and gathered berries and greens in the area.")

<sup>91</sup> *Id.* ("They're the state of Alaska and we're a tribal government. We're 98 percent Native and they've always supported Red Dog. It angers me even if it doesn't surprise me," said [administrator Colleen] Koenig.)

<sup>92</sup> *Id.*

<sup>93</sup> Compare Koenig's comments, *supra* note 91, or Swan's outlook in Dobbyn, *supra* note 84, "Swan predicts the feasibility study will basically rubber-stamp the project."

<sup>94</sup> Paula Dobbyn, *Kivalina Lawsuit Targets Red Dog: Village Group Claims Mine Is Fouling Primary Water, Food Source*, ANCHORAGE DAILY NEWS, Sept. 20, 2002, at D1, available at 2002 WLNR 13193202.

<sup>95</sup> Paula Dobbyn, *Kivalina Will Sue Teck Cominco: Villagers Say That Mine Discharges Are Affecting Their Water Supply*, ANCHORAGE DAILY NEWS, July 18, 2002, at E1, available at 2002 WLNR 13195331 ("The [Kivalina Relocation Planning] committee asked the California environmental justice center to assist them in suing

legal attention through its lawsuit; it was not until July 2006 that an Anchorage district court judge granted partial summary judgment in its favor.<sup>96</sup> Trial on the remaining claims was ultimately set for May 2008;<sup>97</sup> a settlement was reached shortly before trial.<sup>98</sup> Under the settlement, Cominco agreed to spend up to \$120 million to build a wastewater pipeline from the mine directly to the Chukchi Sea, allowing wastewater to be discharged into the ocean and bypassing the Wulik River entirely.<sup>99</sup> It also agreed to purchase water filtering units for most of the buildings in Kivalina, and to help pay for their installation.<sup>100</sup>

While the lawsuit may have finally solved Red Dog's problems with water quality and harmful runoff, the mine's effects on local wildlife—including beluga whales near the port and caribou migrations along the haul road—remain in dispute. A 2005 environmental impact statement for a proposed improvement to the port facility led to a discussion over declining harvests by Kivalina whalers, and counter-accusations as to who was responsible for falling beluga numbers.<sup>101</sup> A 2009 draft EPA report took up similar issues and effectively agreed with the villagers, concluding that the mine “likely caused reduced caribou

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Teck Cominco. It did so after years of trying to get government officials and mining executives to listen, [Kivalina teacher and lead plaintiff Enoch] Adams said. ‘We couldn’t get anyone’s ear.’”)

<sup>96</sup> Adams v. Teck Cominco Alaska, Inc., No. 3:04-CV-00049-JWS, 2006 WL 2105501 (D. Alaska July 28, 2006) (granting plaintiffs’ motion for summary judgment on 618 violations of a daily total dissolved solids limit; denying summary judgment on nearly 1400 other violations); see also Paula Dobbyn, *Red Dog Polluted: A Judge Has Upheld a Third of the Water-Quality Violations*, ANCHORAGE DAILY NEWS, Aug. 2, 2006, at F1, available at 2006 WLNR 13389882.

<sup>97</sup> Elizabeth Bluemink, *Court Date Set for Red Dog Pollution Lawsuit: Liability for Alleged Infractions at Issue*, ANCHORAGE DAILY NEWS, Mar. 22, 2008, at A6, available at 2008 WLNR 5684862.

<sup>98</sup> Tony Hopfinger & Joe Schneider, *Teck Cominco to Pay \$120 Million for Alaska Pipeline*, MONTREAL GAZETTE, Sept. 5, 2008, at B5, available at 2008 WLNR 28470343.

<sup>99</sup> *Teck Cominco to Spend Up to \$120 Million on Wastewater Line*, 29 No. 6 ANDREWS ENVTL. LITIG. REP. 6 (Oct. 15, 2008) (discussing Adams v. Teck Cominco Alaska, Inc., No. 04-00049, consent decree filed (D. Alaska Sept. 3, 2008)).

<sup>100</sup> *Id.*

<sup>101</sup> Tom Kizzia, *Beluga Migration Disputed: Villagers Say Whales Have Moved Due to Red Dog Zinc Shipments*, ANCHORAGE DAILY NEWS, Mar. 20, 2005, at B1, available at 2005 WLNR 4543680 (quoting the corporation’s officials suggesting that “increased hunting pressure” from local whalers is to blame, Kivalina residents countering that “noise and activity” at the dock had driven the whales farther offshore).

and beluga harvests by nearby villagers.”<sup>102</sup> The effects of pollution from the haul road on adjoining ecosystems, first tracked in a National Park Service study in 2001,<sup>103</sup> remain in question. A November 2007 report by Red Dog scientists found that dust pollution from the road was harming nearby plants,<sup>104</sup> while a USGS/NPS study from February 2009 found that the dust was not seriously harmful to small animals.<sup>105</sup> Though both studies found that the dust did not pose a threat to humans, local subsistence users drew their own conclusions. Enoch Adams, lead plaintiff in the 2002 suit against Cominco, explained that the Kivalina villagers “don’t pick berries around there. I don’t hunt caribou there,’ he said, referring to the land around the haul road and the port.”<sup>106</sup>

Kivalina’s experience reflects many attributes common to environmental justice communities. The Kivalina villagers were adversely impacted by a development decision they did not want and were to some extent excluded from the decision-making process. They sought resolution by a variety of means, ultimately achieving a partial success through the legal system, after concluding that neither industry nor government was taking them seriously. They have ongoing problems despite the legal settlement; beluga numbers in the Chukchi Sea remain diminished, and studies continue on the long-term effects of mineral dust dispersion from the haul road. And while a handful of villagers remain in town and commute to jobs at the mine,<sup>107</sup> more have moved hundreds of miles to Anchorage, and commute

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<sup>102</sup> Bluemink, *supra* note 71.

<sup>103</sup> See Dobbyn, *supra* note 86.

<sup>104</sup> See Bluemink, *supra* note 74.

<sup>105</sup> Elizabeth Bluemink, *Study Finds Little Harm in Red Dog Dust: Continued Monitoring is Recommended*, ANCHORAGE DAILY NEWS, Feb. 12, 2009, at A3, available at 2009 WLNR 2817511. The study found lead concentrations twenty times the norm in small birds and voles near the road, but concluded there was “no ‘clear evidence’ of serious biological effects.” *Id.*

<sup>106</sup> Bluemink, *supra* note 74.

<sup>107</sup> Red Dog Mine, like North Slope oil drilling, operates on a two-on, two-off schedule; workers fly into a remote area, work long hours for two weeks straight, then fly home for two weeks off. The flight in and out is typically paid for by the employer.

to Red Dog from there.<sup>108</sup> This final development seems a tacit acknowledgement of the mine's potential to harm the area, and a decision to, like the rest of NANA Regional Corporation, benefit from the mine economically, without suffering its adverse effects on the local environment.

## 2. Coal Extraction, Timber Sales, and Inland and Offshore Oil Drilling: Possibilities for Future Study

NANA's development decisions for Red Dog Mine form an effective case study, as its interactions with Kivalina reflect environmental justice concerns that play out in development decisions around the country. Moreover, the mine's extended operation, documented health concerns, involvement of the federal government, and filing of a lawsuit all create a record, making this history relatively easy to reconstruct. Analogous development decisions by other Native corporations merit similar scrutiny, and would likely reflect similar issues to those raised by NANA's development of Red Dog. In this vein, further work in this area could consider some or all of:

- ASRC's ongoing efforts to identify coal reserves for future development, to the dismay of neighboring Point Lay and Point Hope residents concerned about the project's potential to harm the caribou central to their subsistence lifestyle;<sup>109</sup>
- Eyak Corporation's decision to engage in clear-cut logging and timber sales in areas that many Eyak tribal members viewed as sacred ancestral lands;<sup>110</sup>

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<sup>108</sup> See Kizzia, *supra* note 101 ("A score of residents in the village of 370 [Kivalina] have had good-paying jobs at Red Dog . . . . But many of them have moved away to Anchorage and now commute to work by jet.").

<sup>109</sup> See Stephen E. Cotton, *Dispatch From the Arctic: In Two Remote Native Villages, "Think Globally, Act Locally" is an Understatement*, ENVTL. ADVOCATE (Spring 2009), at 2-3, available at [www.trustees.org/Documents/TrusteesforAK-NL43991.aspx](http://www.trustees.org/Documents/TrusteesforAK-NL43991.aspx); see also Gail Phillips & Arliss Sturgulewski, *Commentary, Alaska Now Has Funds to Revisit Big, Bold Ideas of the Past*, ANCHORAGE DAILY NEWS, July 3, 2008, at B5, available at 2008 WLNR 12535520 (arguing for developing this resource, and building a railroad from the mine to the coast to help transport the coal).

<sup>110</sup> See Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of*

- ASRC and Doyon's antagonism over plans for inland oil drilling, including proposals to open ANWR, which re-enacts traditional tribal antipathies in a corporate context;<sup>111</sup>

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*Life of Alaska's Native Americans?*, 12 J. ENVTL. L. & LITIG. 305, 328–33 (1997) (summarizing conflict and lawsuits filed by Eyak tribal members). From an environmental justice perspective, the most noteworthy aspect of this dispute is that it occurs at the microcosmic level of the village corporation, showing that concerns over disproportionate representation and access to the decision-making process can play out here as well. This paper previously argued for the potential disenfranchisement of a village outvoted by a regional corporation, *see supra* Part II.A.1; the Eyaks' experience shows that the insidious effects of a corporate voting structure may also be felt at the village corporation level. As Ford summarizes, only fifteen of 326 shareholders in the Eyak village corporation at this time were actually Eyaks; the rest were from other, non-local Native groups. Ford, *supra*, at 328. The result is that most village corporation shareholders were being asked to protect ancestral lands of scant personal significance, which they declined to do in the interest of profitable resource development. *See also* Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 422 (Alaska 1995) (resolving the Elders Council's voluntary dismissal of suit to halt logging on lands believed to be historical burial ground, withdrawn as moot once defendant completed logging operations on the site); Dune Lankard, *Sacred Places: Indian Rights After the Exxon Valdez Oil Spill*, 10 FORDHAM ENVTL. L.J. 371 (1999) (symposium speech by *Elders Council* plaintiff).

<sup>111</sup> Proposals to drill for oil in the coastal plain of the Arctic National Wildlife Refuge have been advanced for some time. The Obama administration is guarded about this prospect, but Alaska's congressional delegation continues its ongoing attempts to open the refuge for development. *ANWR Drilling Remains a Question*, ANCHORAGE DAILY NEWS, March 17, 2009, at A5, available at 2009 WLNR 5155375. In this context, it is often noted that the most visible Native opponents of ANWR development, the inland Gwich'in, live some distance from the refuge itself, while the Iñupiat of Kaktovik, who actually live on the coastal plain, favor development. *See, e.g.*, ROBERT JOHN MCMONAGLE, CARIBOU AND CONOCO: RETHINKING ENVIRONMENTAL POLICIES IN ALASKA'S ANWR AND BEYOND 73–74 (2008); *cf. Alaskan Natives Support Development*, ANWR, <http://www.anwr.org/People/Alaskan-Natives-Support-Development.php> (last visited Jan. 13, 2012) (a pro-development lobbying group). Lost in the ANWR publicity, and competing claims over who can serve as the nation's Native conscience, are two complicating facts. One, many North Slope Iñupiat support development in ANWR specifically because it will bring oil production onshore, thereby obviating risks from the alternative: expanded oil production in the Beaufort Sea, with the chance for off-shore oil spills and resulting harm to the Iñupiat's whaling culture. *See* Marie Carroll, Letter from the People, *Human Rights Group Picked One Set of Natives' Desires Over Another*, ANCHORAGE DAILY NEWS, Nov. 2, 2005, at B8, available at 2005 WLNR 17731309 (letter from Iñupiaq Barrow resident). Two, the Iñupiat and the Gwich'in do not, historically, like one another. *See* ERNEST S. BURCH, ALLIANCE AND CONFLICT: THE WORLD SYSTEM OF THE IÑUPIAQ ESKIMOS 124, 125–27 (2005) (explaining history of Gwich'in-initiated hostilities towards Iñupiat); Shepard Krech III, *Beyond The Ecological Indian*, in NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN 22–23 (Michael E. Harkin & David Rich Lewis eds., 2007)

- Doyon's less-publicized attempts to procure land in the Yukon Flats National Wildlife Refuge for oil and gas development, through a land swap with the federal government; local villagers have been skeptical of Doyon's promises of jobs and economic development in exchange for a slight risk of environmental harm;<sup>112</sup> and/or
- ASRC's attempts to engage in limited offshore oil drilling, over the objections of subsistence hunters in one ASRC village, Kaktovik, concerned about the effects of drilling on their bowhead whale harvest.<sup>113</sup>

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(using Natives and ANWR to critique environmental action based on “an image of uncorrupted indigenous nobility”). It is difficult to avoid the conclusion that the Iñupiat and Gwich'in are putting their own interests above those of another indigenous group in lobbying for or against development. That is, even when an ANC lacks the power to make a development decision directly, it can still play a part in problems with procedural injustice, as would happen if the subsistence lifestyle of Doyon's Gwich'in people were harmed by oil drilling occurring at the instigation of ASRC's Iñupiat, in an area important to the Gwich'in but not under their direct control.

<sup>112</sup> See *Federal Agency Postpones Decision on Yukon Flats Swap: Land Would Be Exchanged for Possible Oil-Rich Sites*, ANCHORAGE DAILY NEWS, Sept. 7, 2008, at A12 (U.S. Fish and Wildlife Service delays decision on land swap to complete more detailed land appraisal); Tom Kizzia, *Yukon Flats Villages Remain Opposed to Drilling: Tribal Leaders Say Oil Benefits are Short-Term*, ANCHORAGE DAILY NEWS, July 21, 2008, at A1, available at 2008 WLNR 13923828 (quoting concerned residents of Arctic Village, outside the boundaries of Doyon regional corporation but dependent on the wetlands basin that would be affected by development); see also News Release, Doyon, Ltd., Doyon, Limited Announces New Oil and Gas Exploration in Yukon Flats (Jan. 21, 2010), available at [www.doyon.com/pdfs/PressReleases/New%20Yukon%20Flats%20Exploration%20012110%20FINAL.pdf](http://www.doyon.com/pdfs/PressReleases/New%20Yukon%20Flats%20Exploration%20012110%20FINAL.pdf).

<sup>113</sup> Drilling opponents were initially, but not ultimately, successful in a recent legal challenge to administrative approval of ASRC's desired development. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825–33 (9th Cir. 2008) (holding that federal Minerals Management Service violated NEPA by failing to take the required “hard look” at Shell Oil's proposal's impacts on endangered bowhead whales and general Iñupiaq subsistence activities), *withdrawn and vacated*, 559 F.3d 916 (9th Cir. 2009). A Native plaintiff in *Alaska Wilderness League*, a subsistence hunter out of Kaktovik, responded to the first decision by emphasizing the importance of protecting subsistence activities. Robert Thompson, Op-Ed., *Push For Offshore Drilling Disregards Ocean, Culture*, ANCHORAGE DAILY NEWS, Dec. 23, 2008, at B5, available at 2008 WLNR 24770737. Mr. Thompson's concerns are not new ones; fifteen years earlier, a whaling captain out of Nuiqsut, also in the ASRC region, expressed similar misgivings about offshore oil activity. See David Whitney, *Whalers See Changes: Natives Believe Drilling Threatens Hunting*, ANCHORAGE DAILY NEWS, Sept. 7, 1993, at B1, available at 1993 WLNR 4629113.

## CONCLUSION: HISTORICAL BACKGROUND REDUX, OR, WHOSE FAULT IS THIS, ANYWAY?

As the preceding analysis shows, ANCSA in general, and some Native Corporations' development decisions in particular, come in for justifiable criticism. There are issues with procedural injustice stemming from the relationship between village and regional corporations, exacerbated by the distances and cultural issues involved and some peculiar quirks of the ANCs as corporations. Such criticisms, however, treat the ANCSA corporations system as the status quo, or as a received model for negotiating complex issues of tribal identity and resource management. This section takes into account some historical aspects of the Native corporations' creation. It begins with a brief survey of contemporary analysis following the Act's passage.

Critiques of the corporation model as a way to "manage" land within Native culture are ample. This is the point of *Village Journey*, a compilation of Native displeasure with ANCSA a decade after its passage, drawn from the author's travels through dozens of Alaska villages in summer 1984.<sup>114</sup> Sentiments such as "[w]hen you look through the corporate eye, our relationship to the land is altered" fill every page; as the author, a Canadian jurist, concluded, "[t]he promise of ANCSA has not been fulfilled."<sup>115</sup> Later anthropologists criticized ANCSA as "a major effort at social engineering by legislative fiat,"<sup>116</sup> while a political policy scholar suggested that ANCSA's goals were "thoroughly insensitive to the culture, abilities, and concerns of Natives on the receiving end."<sup>117</sup> One law professor posed a somewhat tendentious choice between viewing ANCSA as "self determination" or "destruction of [Natives'] heritage, culture, and way of life," coming down firmly in the latter camp.<sup>118</sup> Alaska Natives, finally, have spoken to the "dichotomy" that ANCSA creates between a corporate structure of private land ownership and a traditional view of community stewardship, or between historic respect for a people's elders and

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<sup>114</sup> BERGER, *supra* note 1.

<sup>115</sup> *Id.* at 27, 65.

<sup>116</sup> DALEY & JAMES, *supra* note 3, at 191.

<sup>117</sup> JOHN S. DRYZEK, *DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE* 118 (1990).

<sup>118</sup> Ford, *supra* note 110, at 336.

modern capitalism with new and younger leadership.<sup>119</sup> As one correspondent wrote to the *Tundra Times* in the early 1970s, “[ANCSA] is based on *competition*; the Native way is based on *cooperation*.”<sup>120</sup>

Such criticism, while likely justified, is addressed to the present realities of the Native corporations. This focus likewise characterizes much scholarship on the related issue of ANCSA and Native sovereignty. While a strict legal analysis of this question can be relatively brief,<sup>121</sup> concern for sovereignty generally, in the broader sense of self-determination, has been more expansive. As one recent scholar reasoned, ANCSA may be viewed as a boon to Native sovereignty, in that it granted Natives clear title to (some) land, established a vehicle for self-sufficiency and economic success, and let Natives decide how to use their resources.<sup>122</sup> Conversely, the Act may also be viewed as harmful to sovereignty, in that it ended the powers and protections of Indian country in Alaska, limited Natives’ ability to choose governance structures, and forced them to make resource management decisions within a resolutely corporate framework.<sup>123</sup> Other scholars have made similar points, with a similar focus.<sup>124</sup>

Such analyses are helpful, but they do not go far enough. While they are pragmatically justified in focusing on the Native corporations as they currently exist, insofar as ANCSA’s corporate

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<sup>119</sup> Allaway & Mallott, *supra* note 1, at 140–42.

<sup>120</sup> Daley & James, *supra* note 3, at 192 (emphasis in original) (quoting FREDERICK SEGAYUK BIGJIM, LETTERS TO HOWARD: AN INTERPRETATION OF THE ALASKA NATIVE LAND CLAIMS 82–83 (1974)).

<sup>121</sup> ANCSA simply did not address the issue of Native claims to sovereignty; questions of tribal jurisdiction had to be resolved in the courts. *See Case, supra* note 2, at 149, 151–52. The most relevant cases here are *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526–34 (1998) (holding that ANCSA lands do not constitute “Indian country”), and *John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000) (holding that tribes have jurisdiction on the basis of territory or membership, and that a tribal court decision from a tribe with proper jurisdiction should be accorded comity in state courts); *see also* Geoffrey D. Strommer & Stephen D. Osborne, “Indian Country” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1 (2005).

<sup>122</sup> Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 123–27 (2008) (discussing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)).

<sup>123</sup> *Id.* at 136–40 (discussing *Venetie* on the question of Indian country).

<sup>124</sup> *See, e.g.*, SKINNER, *supra* note 1, at 81–99; Allaway & Mallott, *supra* note 1, at 145–46.

model is unlikely to be disbanded, they would benefit from the historical perspective afforded by considering the circumstances surrounding the Act's passage. Such an expanded viewpoint raises some troubling issues about the Act.

From a standpoint of distributive justice, it is telling that ANCSA placed known oil reserves off-limits for the initial Native land selections.<sup>125</sup> This one detail is a potent reminder that the forces advocating for the Act's passage included the combined resources of both Big Oil and a young state desperate for the income that would result from resolving Native land claims and leasing state land to oil companies. Not only did the Act "solve" the problem of aboriginal land claims by awarding Alaska Natives title to roughly twelve percent of the state they had inhabited for millennia,<sup>126</sup> it ensured that Native groups would not gain possession of the most valuable known resources on this land. This raises an inconvenient point for the question of "who gets what?," the gravamen of any distributive justice analysis.<sup>127</sup> The answer here is that the Natives got a relatively small portion of their ancestral lands, not including the most profitable areas, while the state happily moved ahead with its oil leases.

Questions of procedural justice are also apposite. While the Alaska Federation of Natives (AFN) voted to "approve" ANCSA by a considerable majority, 511 to 56, at an Anchorage-based convention, the fact remains that, due in part to distance and logistics, no one voting on the Act in Anchorage had actually seen the final version of the statute at the time of its passage in Washington.<sup>128</sup> Indeed, the Act had been passed hours earlier, before the Native delegates' largely ceremonial vote.<sup>129</sup> There were also the logistical challenges associated with surveying

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<sup>125</sup> 43 U.S.C. §§ 1611(a)(1), 1613(f) (2006).

<sup>126</sup> Compare one contemporary Native response to this solution: "Why do we want forty million acres of hunting rights when we've got the whole state?" DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971, at 265 (2001).

<sup>127</sup> See Kuehn, *supra* note 38, at 10,683-84.

<sup>128</sup> BARRY SCOTT ZELLEN, BREAKING THE ICE: FROM LAND CLAIMS TO TRIBAL SOVEREIGNTY IN THE ARCTIC 44 (2008) (characterizing the AFN's endorsement as a "vote of faith").

<sup>129</sup> MITCHELL, *supra* note 126, at 487-93 (explaining that President Nixon had already signed the bill prior to learning of the Natives' stance on it, as he had no intention of vetoing the Act regardless of AFN's vote).

community sentiment from more than 200 Native settlements across much of Alaska, in an era when most villages lacked phone service or even radio reception.<sup>130</sup> It is unsurprising that many of the villagers surveyed in Berger's account express complaints about the process that redound to problems with procedural justice.<sup>131</sup>

Finally, aspects of social justice likewise gain more resonance when viewed from a historical perspective. While some (not unjustifiably) applaud ANCSA for treating Alaska Natives more equitably than most Native Americans in this country,<sup>132</sup> a focus on the realities of the corporations' early administration reveals a less rosy picture. In this light, the effect of ANCSA was to place Native groups ostensibly in charge of their own affairs, while forcing an inexperienced people into a foreign business model and leaving them with insufficient funds to successfully administer it.<sup>133</sup> This does not seem all that fair. Likewise, Kuehn's concerns about forcing tribes to play out social justice disputes within themselves, "as some members focus on the putative economic benefits from such facilities while others look to the environmental and cultural damages that may result,"<sup>134</sup> while a valid critique as applied to the Native corporations, may be tempered by a consideration of the alternatives available to Alaska Native leaders in the late 1960s and early 70s. When their

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<sup>130</sup> One author describes the disparity between the Washington reality and the good-faith understanding of village-based delegates to the AFN as an "unbridgeable chasm." MITCHELL, *supra* note 126, at 488.

<sup>131</sup> BERGER, *supra* note 1, at 6, 15, 26, 122, 124, 125.

<sup>132</sup> See, e.g., ALEXANDRA J. McCLANAHAN, ALASKA NATIVE CORPORATIONS: SAKUUKTUGUT, "WE ARE WORKING INCREDIBLY HARD": THE LAND, THE MONEY, THE HISTORY OF THE ALASKA CLAIMS SETTLEMENT ACT OF 1971 AND HOW ALASKAN NATIVE PEOPLE ARE WRITING AN EPIC STORY IN CULTURAL AND ECONOMIC DEVELOPMENT 6, 99, 144 (2006); Carl H. Marrs, ANCSA, *An Act of Self-Determination: Harnessing Business Endeavors to Achieve Alaska Native Goals*, 27.3 CULT. SURVIVAL Q. (Fall 2003), available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/ancsa-act-self-determination-harnessing-busin>; SKINNER, *supra* note 1, at 117; ZELLEN, *supra* note 128, at 62-63; cf. Jones v. State, 936 P.2d 1263, 1264 (Alaska Ct. App. 1997) ("White society developed a distinctive relationship with the indigenous peoples of Alaska, different from the whites' relationship with the indigenous peoples of the Lower 48.")

<sup>133</sup> Cf. BERGER, *supra* note 1, at 33 (explaining that initial monetary distributions from the Alaska Native Fund were woefully inadequate compared to the cost of administering a corporation).

<sup>134</sup> Kuehn, *supra* note 38, at 10,701.

options were to accede to a legislative solution granting them some land, or risk losing control of all land, their acquiescence to ANCSA makes perfect sense.<sup>135</sup> It does not, however, have to make later developments their fault.

Indeed, while this paper addressed, at some length, issues of procedural justice stemming from NANA's treatment of Kivalina, the real question of procedural justice here may be how NANA was placed in a position where it would be forced to take such action in the first place. A broader, historical perspective on the Native corporations should take into account not only the corporations as they currently exist, but also the Act that created them. In this light, questions about the corporations' resource use, generally phrased as "what are they doing with the resources they have?," can be more accurately stated as, "how did they obtain these resources, and how much say did they have in the matter?" From a sovereignty perspective, similarly, we can laud ANCSA for the increased control that it gave Native groups—yet we should also ask, within what parameters can they exercise this control? The answer, for the Native corporations, is that they do so within a corporate structure all but forced upon them by a distant Congress, a structure and worldview anathematic to their culture. There are indeed issues with procedural justice here, in both the passage of ANCSA and the operation of the ANCs it created, but the Native corporations are hardly the only culpable party.

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<sup>135</sup> Cf. BERGER, *supra* note 1, at 26 ("Although [Native association leaders] realized that ANCSA was defective on many counts, they nonetheless felt it was the best deal they could get at the time.").

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