

ALASKA NATIVE CORPORATION ENDOWMENT MODELS

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ABSTRACT***

New settlement trust provisions in the Tax Cuts and Jobs Act of 2017 have significant implications for Alaska Native Corporation (ANC) business longevity and the appropriateness of an operating business model given ANC goals as stated in their missions. The Alaska Native Claims Settlement Act (ANCSA) authorized the creation of for-profit corporations for the benefit of Alaska Native shareholders. But for Alaska Natives, cultural continuation was and continues to be a desired goal. Considering the typical life span of U.S. corporations and the inevitability of eventual failure, the for-profit corporate model is inconsistent with aspects of the ANC mission. Settlement trust amendments to ANCSA facilitate ANC cultural continuation goals solving the problem of business viability risk. We make a normative case that ANCs should consider increasing endowment business activity. We also discuss the Alaska Permanent Fund and lessons that those structuring settlement trusts might learn from literature on sovereign wealth funds and endowments.

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"In the long run, we are all dead."

John Maynard Keynes¹

*"By the end of 2020, we will be publishing a 100 year plan that sets a foundation for future generations of Sealaska."*²

I. ANCS' DUAL MISSION

What is the purpose of the Alaska Native Corporation (ANC)?³ For publicly traded corporations, a common maxim taught in MBA programs is to *maximize shareholder wealth*. Milton Friedman argued, "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."⁴ Under this rationale, companies' first, best, and only goal should be to maximize shareholder wealth.⁵ The "mission statements" of companies often do not state "maximization of shareholder wealth" or profit maximization as an explicit goal. That is the goal from the perspective of economics. From the perspective of companies' businesses, mission statements emphasize their companies' products or services and where they fit into the marketplace, or how they serve customers.

In the case of ANCs, virtually all boards and shareholders would agree that maximization of shareholder profit or wealth is not the only objective. Regional and village ANCs received title to large tracts of traditional lands as part of the settlement under the Alaska Native Claims Settlement Act (ANCSA).⁶ ANCs want to retain their land and desire the cultural continuation that is part and parcel with the land protection

1. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (London, MacMillan & Co. 1924).

2. Joe Nelson, *Sealaska's 2020 Vision and Message from Leadership*, SEALASKA (Feb. 18, 2020), <https://www.sealaska.com/shareholders/sealaskas-2020-vision-and-message-from-leadership/>.

3. ANCs were formed under the Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–29 (2018)). Although the examples in this article are from regional ANCs, most of the discussion pertains equally to village corporations.

4. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, NY TIMES MAG., Sept. 13, 1970, at *33.

5. *Id.* Hansen and Lott have a somewhat different view where externalities cause shareholders to want to maximize portfolio value. Robert G. Hansen & John R. Lott, Jr., *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers*, 31 J. FIN. & QUANTITATIVE ANALYSIS 43, 43 (1989).

6. Pub. L. 92-203, 85 Stat. 688 (1971) (codified in scattered chapters and sections of U.S.C.).

objective. This is reflected in a sampling of ANC annual reports, which often address management's adherence to these goals in addition to financial success. Consider the mission statements of the twelve surviving regional ANCs.⁷

Ahtna, Incorporated: Wise stewardship of Ahtna lands and responsible economic growth for future generations of Ahtna people.

Aleut Corporation: To Maximize Dividends and Opportunities for Our Shareholders.

Arctic Slope Regional Corporation (ASRC): ASRC'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.

Bering Straits Native Corporation (BSNC): Our mission is to improve the quality of life of our people through economic development while protecting our land and preserving our culture and heritage.

Bristol Bay Native Corporation (BBNC): Our Mission: Enriching our Native way of life. Our Vision: To protect the land in the Bristol Bay region, celebrate the legacy of its people, and enhance the lives of BBNC shareholders.

Calista Corporation: Increase Shareholder benefits and economic opportunities through innovation, growth, leadership, partnership, execution and financial discipline.

Chugach Alaska Corporation: Committed to profitability, celebration of our heritage, and ownership of our Lands.

Cook Inlet Region, Incorporated (CIRI): The mission of CIRI 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.

Doyon, Limited: To continually enhance our position as a financially strong Native corporation in order to promote the economic and social well-being of our shareholders and future shareholders, to strengthen our Native way of life, and to protect and enhance our land and resources.

Koniag, Incorporated: To achieve financial growth, honor our culture, protect our lands, advocate for our communities, and

7. These were obtained from ANC's websites in April 2021. We use the same name the regional corporation refers to for itself on its webpage as of 2021. This may be different than the corporate legal name.

make a meaningful impact on our Koniag family.

NANA Regional Corporation: To improve the quality of life for our people by maximizing economic growth, protecting and enhancing our lands, and promoting healthy communities with decisions, actions, and behaviors inspired by our Iñupiat Iilitqusiatic values consistent with our core principles.

Sealaska Corporation: Sealaska's purpose is to strengthen people, culture and homelands. We have strengthened business with culture since 1972. We are a Native institution owned by more than 22,000 shareholders whose core Native values guide all that Sealaska does and represent the rich heritage of the Tlingit, Haida and Tsimshian people. We are guided by values to build excellence in our Native enterprise and take action toward our purpose.

These regional ANCs aim to achieve business, operational, and financial success in order to pay dividends, etc., but also emphasize the importance of the related goals of protection of lands and continuation of culture. These community focused goals are not typical in the usual for-profit company mission statement. ANCs are unique in this regard. One commentator observes:

A question like 'I'm Doyon, what is your Native corporation?' is now part of the Alaska Native terminology. These shareholders have a personal and emotional attachment to their corporation. They look to their ANC for job training and employment, scholarships, and burial assistance on top of their dividends. Shareholders within the same region, in many cases, have similar ethnicities, and cultural values. They may also speak their Indigenous language. Some may even characterize their collective body of shareholders as a nation state; a strange concept for those on the outside looking in on an ANC. Today's Alaska Native shareholder may look to their ANC as part of their self-identity. The ANC, in some respects, has become a key identifier for the modern Alaska Native person.⁸

One can think of the above discussion as dealing with "the why?" of ANCs. There are implications to this broader view of ANCs' missions that ANCs regularly deal with in policy and business decisions. The following discusses "the how" by addressing two questions:

- 1) Given the long-term goals of ANCs, is the typical lifespan of a

8. Sharon Guenther Lind, *Opening Enrollment: The Alaska Native Way*, (Univ. of Alaska, Working Paper, 2015).

- corporation inconsistent with these cultural retention aims?
- 2) If so, should ANCs consider other models? Specifically, is an operating business model or a settlement trust endowment model better suited to achieve these long-term goals?

II. FUTURE ANC PROFIT AND DISTRIBUTIONS

Alaska Native regional corporations have significantly grown in revenue, income, and number of shareholders over time.⁹ Anecdotally, the median and average regional corporation has grown more than the village corporations, but data for the latter are difficult to collect and we focus here on the regional corporations.¹⁰ The twelve regional ANCs have grown their equity to \$4.3 billion.¹¹ These twelve regional ANCs received \$472,958,000¹² of the approximately \$1 billion settlement with Congress. The original distributions were paid out from 1973–1983.¹³ In their early

9. See STEPHEN CORNELL ET AL., THE ECON. RESEARCH GRP, INC., IMPLEMENTATION OF THE ALASKA NATIVES COMMISSION REPORT B-3 (1999) (highlighting the population growth of Alaska’s Native populations); INST. OF SOC. AND ECON. RESEARCH, BENEFITS OF ALASKA NATIVE CORPORATIONS AND THE SBA 8(A) PROGRAM TO ALASKA NATIVES AND ALASKA 8 (2009) (discussing the increase in profitability over time of ANCs).

10. We obtain our data from Sharon Guenther Lind, Alaska Pacific University. Lind hand-collected and kindly provided us individual ANC company financial reports and aggregated the proprietary data. The data on individual ANCs becomes available from their requirement to file with the State of Alaska. Although this information is public by law, for those ANCs meeting a minimum reporting threshold, ANC managements consider their detailed financial statement information proprietary and we do not reproduce a time series of detailed individual financial information here. We show aggregated profitability and 1982 and 2017 shareholder equity. The Alaska Securities Act requires corporations organized under ANCSA with 500 or more shareholders and over \$1,000,000 in assets to file their annual reports, proxies, consents or authorizations, proxy statements, and other materials relating to proxy solicitations with the State of Alaska Division of Banking and Securities. ALASKA STAT. § 45.55.139 (2018). Shareholders of these ANCSA corporations are required to file proxy materials as well. *Id.*

11. Sharon Guenther Lind, ALASKA NATIVE REGIONAL COMPANY PROPRIETARY DATASET (2019) [hereinafter *Lind Dataset*]. Much of the financial information reported herein on ANCs are aggregations from Lind’s dataset. Lind discusses her data in her dissertation. See generally Sharon Guenther Lind, Definitions of Success for Alaska Native Corporations (2019) (Ph.D. dissertation, University of Alaska Fairbanks) (on file with author). Data here end in 2017.

12. U.S. DEP’T OF INTERIOR, ANCSA 1985 STUDY: ALASKA NATIVE CLAIMS SETTLEMENT ACT (ANCSA) III-25 (1984).

13. David Hoffman & Michael Orr, ALASKA NATIVE CORPORATIONS ECONOMIC DATA 10 (2010); see generally Stephen Colt, *Alaska Natives and the New Harpoon: Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND, RES. & ENVTL. L. 155 (2005). Stephen Colt also kindly provided data he collected for earlier periods ending around 1990.

years, the ANCs experienced well-known and widely-documented growing pains.¹⁴ This is not surprising, given that the firms were funded via ANCSA provisions without clear ex-ante business rationales.¹⁵ It is likely that funding and distribution of shares to any widely disbursed rural population (or urban for that matter) would have fomented corporations that experienced general hardship—particularly in their early years. Quoting Alaska Native John Hope on this issue: “It’s like you and I never saw a baseball game in our lives. We’d never seen mitts or bats or baseballs. All of a sudden you were told, ‘Here’s your mitts. Here’s your bats. Here’s your balls. Tomorrow you play the Yankees.’”¹⁶ For these reasons we generally focus on 1982 and forward.

Figure 1: Profit Margins of 12 ANCSA Regionals vs. Large and Small Firms

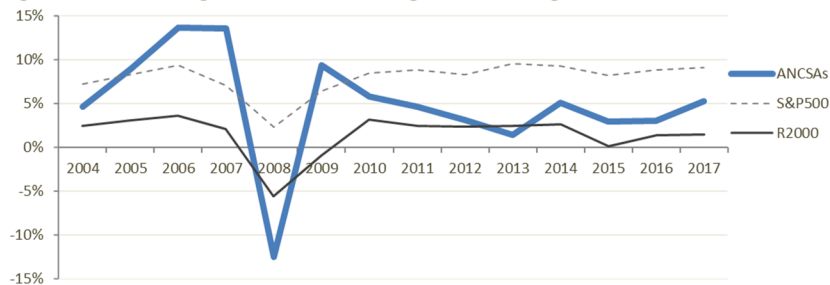


Figure 1 compares the average profit margin for ANCSAs (the twelve regional corporations formed under ANCSA) to that for the S&P 500 and the Russell 2000 Index. The Russell 2000 is an index of small company stocks and the average company in that index is more similar to

14. See generally Jonathan M. Karpoff & Edward M. Rice, *Organizational Form, Share Transferability, and Firm Performance: Evidence from the ANCSA Corporations*, 24 J. FIN. ECON. 69 (1989) (discussing the poor financial performance of ANCs in their first decade); Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L. J. 1331 (1991) (emphasizing financial and logistical difficulties that ANCs encountered despite Congressional amendment to ANCSA); Colt, *supra* note 13, at 155 (finding that between 1973 and 1993, the regional corporations had lost “more than eighty percent of their original cash endowment”); Christian G. Vasquez, Note, *A Business Entity by Any Other Name: Corporation, Community and Kinship*, 33 ALASKA L. REV. 353, 360–61 (2016) (describing the significant initial implementation costs that ANCs incurred).

15. ANCSA does not include strategic business or marketing plans. 43 U.S.C. § 1606 (d) (2018). Alaska Natives had various individual plans, but mineral exploitation was expected to be important. William L. Hensley, *Why the Natives of Alaska Have a Land Claim* (Nov. 1969).

16. Laurel Downing Bill, *Statehood Ignites Land Rights Legal Battle*, SENIOR VOICE (Dec. 1, 2017), <https://www.seniorvoicealaska.com/story/2017/12/01/columns/statehood-ignites-land-rights-legal-battle/1552.html>.

an ANC than is the S&P 500. ANCs are more profitable than the average Russell 2000 company. That is a useful indicator, but it is not the best indication of results for long term success for companies. A better indication is the change in value for the company. However, shares in ANCs are not marketable,¹⁷ hence we will look at their long-term accumulation of equity and compare that to index changes.

Table 1. Regional ANC Shareholders' Equity

Thousands of Dollars

	1982	2017
Ahtna, Incorporated	17,754	30,195,662
Aleut Corporation	16,611	158,179,460
Arctic Slope Regional Corporation	20,002	1,620,909,000
Bering Straits Native Corporation	4,953	105,292,188
Bristol Bay Native Corporation	34,360	396,894,000
Calista Corporation	54,717	229,548,229
Chugach Alaska Corporation	16,575	309,435,485
Cook Inlet Region, Incorporated	75,880	668,665,000
Doyon, Limited	57,991	372,343,000
Koniag, Incorporated	1,504	87,311,000
NANA Regional Corporation, Inc.	44,669	66,760,000
Sealaska Corporation	176,000	277,829,000
Average Equity	43,418	360,280,169
Summed Equity	521,016	4,323,362,024

Apparent different equity growth rates between ANCs do not include the payment of dividends, scholarships, shareholder employment, or other possible benefits to shareholders.

Table 1 compares the shareholder equity amounts for the twelve regional corporations in 1982 and 2017.¹⁸ Their combined value in 2017 was \$4.3 billion, which equates to a gain of more than eight times their combined value in 1972. Over this same period, the price gain (without

17. Alaska Native Claims Settlement Act of 1971 (ANCSA), Pub. L. No. 92-203, §§ 7 (i)-(j), 85 Stat. 688, 693 (codified at 43 U.S.C. §§ 1606(h)(1)(B)(i)-(vi) (2018)).

18. See U.S. DEP'T OF THE INTERIOR, *supra* note 12, at V-44-84 (showing the data displayed for 1982 in the Table). Note that at V-35 is a summary with mixed 1982 and 1983 data. *Id.* at V-35. The 2017 data is from Lind, *supra* note 11.

dividends) of the S&P 500 was approximately eighteen-fold.¹⁹ Small corporations, as indexed by the Russell 2000, saw gains of nearly sixteen and a half-fold during that time.²⁰ However, from 2004 to 2017,²¹ ANCs' average dividend payout ratio (dividends paid divided by net income) had been sixty-eight percent, which is higher than the forty-nine percent payout for the S&P 500 over the same period.²² For several years within this timeframe, total payout ratios for all ANCs exceeded one-hundred percent of their net income.²³ However, from the perspective of stock investors these stock index gains were pre-tax²⁴ and ANCs, which are taxable at federal and state levels,²⁵ could not have achieved these pre-tax index gains. But these levels of pre-tax gains are important when considering the future – ANCs now can invest at near tax-exempt status, as pension funds and endowments do. Shareholders also received dividends and other benefits.²⁶ Although these gains differ between ANCs, the apparent rate of growth for the individual corporations should not be directly used as a measure of the individual successes of different ANCs in achieving their goals. Individual ANCs are shown to provide a magnitude of their economic activity and demonstrate that outcomes vary widely.

From 2004 to 2017, regional ANC dividends per share averaged about \$16.98, or \$1,698 per 100 shares (the original number of shares

19. *Online Data Robert Shiller*, YALE UNIV. DEP'T OF ECON.: HOME PAGE OF ROBERT J. SHILLER, <http://www.econ.yale.edu/~shiller/data.htm> (last visited Jan. 30, 2020) [hereinafter *Shiller Data*].

20. *Id.* In 1981, Banz inaugurated the size premium literature, arguing that small stocks contain a return premium relative to large ones. Rolf W. Banz, *The Relationship Between Return and Market Value of Common Stocks*, 9 J. FIN. ECON. 3, 16 (1981). Its failure to manifest after his and other researchers' publications is well-known in the financial economics literature. *See, e.g.*, G. WILLIAM SCHWERT, *HANDBOOK OF THE ECONOMICS OF FINANCE* 939-74 (1st ed. 2003).

21. Lind's detailed data starts in 2004.

22. *Shiller Data*, *supra* note 19.

23. *Id.* This magnitude of payout is facilitated by factors unique to ANCs and are beyond the scope of this article. S&P 500 companies have paid out more than one-hundred percent of earnings in dividends, seven of one-hundred and forty-eight times (five percent) since 1871, once during 2004 to 2017 (during the 2008 crisis), while ANCs have done so three times (fourteen percent) from 2004 to 2017. *Id.*

24. The companies that make up the indexes are taxed, but ANCs' opportunity costs after tax law changes are endowment-like payouts. *See infra* Section 1.6.

25. *See, e.g.*, JANA PEIRCE ET AL., *THE ECONOMIC IMPACT OF ALASKA NATIVE ORGANIZATIONS ON INTERIOR ALASKA* 13 (2008) (detailing the federal tax burden that an ANC incurred in 2006).

26. This is why the price gain for the indexes are mentioned, and not a total return. A total return calculation includes dividends received and reinvested in the index, which would be an inaccurate comparison to the changes in book equity for ANCs, which are more closely related to an index price gain.

distributed to each eligible shareholder),²⁷ which equates to about three-and-a-half percent of average per capita annual income in Alaska of \$49,284 over those same fourteen years.²⁸ Using this data, we have forecasted the growth of earnings and dividends out 100 years with various population and earnings growth assumptions and found that the average ANC will never be able to exclusively support shareholders' income. The economic impact of dividends is—and will always be—ancillary to shareholders' other earnings. Still, for many, especially village shareholders, dividends are a material amount. We experimented with many growth scenarios, and ANC shareholders may be able to receive dividends that provide a similar low single digit magnitude of per capita income.²⁹ It will be less if ANCs open enrollment to shareholders born after 1971—an option offered with later amendments that many ANCs utilized.³⁰ It is a testament to the importance of cultural continuation that existing shareholders are willing to endure material dilution to bring in new shareholders born after the original 1971 cutoff date when they elect to conduct open enrollment. But there is a glaring problem with assuming dividends will continue—it assumes the continued business viability of ANCs.

III. RISK OF ACHIEVING THE CULTURAL CONTINUATION GOAL

As outlined earlier, ANCs have embraced cultural continuation as a crucial reason for their existence. To more fully answer how this goal is best achieved, we now discuss the question—is the operating business model the best way to achieve the cultural continuation goal? To answer that correctly we need to first consider a different question—how risky are ANSCA firms?

27. 43 U.S.C. § 1606(g)(1)(A) (2018).

28. Lind, *supra* note 11; *Per Capita Personal Income in Alaska*, FRED ECON. DATA, <https://fred.stlouisfed.org/series/AKPCPI> (last visited Feb. 21, 2021).

29. Modeling this involves a fairly complex forecast of shareholder population, ANC firm open enrollment assumptions, and per capita and business growth. Population growth models involve differential equations but for our purposes a simple thought experiment suffices: which grows faster; the shareholder population (additional distributions make the population grow more), or the ANC companies net of their survival rates? Depending on one's assumptions, one can defend either. However, Hendrik Bessembinder shows a given set of firms tends to be fairly short lived, hence if shareholder population grows dividends from firms will tend to shrink. See Hendrik Bessembinder, *Do Stocks Outperform Treasury Bills?*, 129 J. FIN. ECON. 440 (2018).

30. Alex DeMarban, *After Calista Vote, Descendant Dilemma Looms for Alaska Native Corporations*, ALASKA DISPATCH NEWS (July 19, 2015), <https://www.adn.com/alaska-news/article/question-enrolling-descendants-nags-corporations-after-calistas-expansion/2015/07/20/>.

In finance theory, risk is broken into two parts, *market risk* and *going concern risk*.³¹ Market risk is that which is common to all companies.³² All companies are exposed to macro-economic or aggregate risk that impacts the earnings for all companies and even government entities. This risk cannot be diversified away by owning a lot of different kinds of businesses or bonds in many different sovereign states.³³ It can only be diversified away by transferring anywhere from zero to one-hundred percent of a company's holdings into a risk-free asset. Such risk-free assets exist only in theory and in any case, there is little reward for a company holding only risk-free assets.³⁴ A risk-free proxy of Treasury bills has historically only matched inflation in terms of generating return.³⁵ Hence, a business or an investor is lucky to keep up with inflation by trying to avoid all risk. Businesses need to assume some degree of risk to grow their equity more than inflation.

Of course, businesses do not primarily invest in government bonds. They also are not usually holding companies comprised of many other companies. They willingly assume risk in conducting their own unique activities. In the case of ANCs, they assume the same overall market risk as all other companies, but each also has its own particular going concern risk. Unfortunately, the natural life cycle of businesses includes death.

31. In the financial economics literature, the terminology generally used for "market risk" and "going concern risk" are "systematic risk" and "idiosyncratic or unsystematic risk." See William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk*, 19 J. FIN. 425, 436 (1964) (discussing systematic and unsystematic risk). These have formal definitions, but the common language terms used here work for our purposes. *Id.* This theory of asset prices helped Sharpe win the 1990 Nobel Memorial Prize in Economic Sciences. More complicated factor models have been proposed that include other risks. See, e.g., Eugene F. Fama & Kenneth R. French, *Multifactor Explanations of Asset Pricing Anomalies*, 51 J. FIN. 55 (1996) (introducing a three-factor model to capture capital asset pricing model average-return anomalies). Relevant to ANCs' non-tradability (illiquidity) of shares is the risk model of Robert G. Snigaroff and David Wroblewski. Robert G. Snigaroff & David Wroblewski, *An Earnings, Liquidity, and Market Model*, 50 APPLIED ECON. 6220 (2018). This model of risk differentiates liquidity from earnings related risk. *Id.*

32. James Chen, *Market Risk*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/marketrisk.asp> (last updated Jan. 31, 2020). Popular internet sites often have inaccurate or not current explanations of standard investment theory, but the entries we cite herein are consistent with standard investment theory and are useful here.

33. For an overview of standard investment theory, see generally BODIE, Z ET AL., *INVESTMENTS* (4th ed. 1999).

34. See *id.* at 181 (providing an overview of the idea of a "risk-free asset" and using Treasury bills as a proxy).

35. See *Shiller Data*, *supra* note 19. The geometric mean of the "One-Year Interest Rate" is 1.046 and "Consumer Price Index" is 1.046; they have the same rate of growth of 4.6%.

Businesses routinely go out of business.³⁶ The risk to each individual company is their going concern risk (or idiosyncratic risk).³⁷ It is risk that is intrinsic to the company and cannot be diversified away by the company itself, even if the company is itself diversified across several business lines. Even though some ANC shareholders and managers have experienced bankruptcy,³⁸ many shareholders do not fully realize the significance of this risk. Casual observers sometimes believe that market risk is as great as or greater than individual businesses' going concern risk. But each business has a high degree of market risk embedded into its overall risk—even if the business is a privately owned company.³⁹

To appreciate the difference, consider the expected life cycle of an individual business and compare it to the life cycle of an entire stock market or economy. Businesses' lives are typically measured in years or decades while stock markets can last centuries.⁴⁰ With respect to going concern risk, every single ANC company will suffer some kind of bankruptcy or discontinuation. This has nothing to do with ANCs being inferior to other corporations. All companies discontinue, die, or merge; that is the nature of business. It is simply a question of how long they can survive before succumbing to going concern risk. The 7(i) distributions⁴¹

36. See *Small Business Statistics*, CHAMBER OF COM., <https://www.chamberofcommerce.org/small-business-statistics/> (last visited Feb. 21, 2021) (noting approximately 20% of small businesses fail in their first year).

37. "Substantial doubt about an entity's ability to continue as a going concern exists when relevant conditions and events, considered in the aggregate, indicate that it is probable that the entity will be unable to meet its obligations as they become due within one year . . ." FIN. ACCOUNTING STANDARDS BD., PRESENTATION OF FINANCIAL STATEMENTS—GOING CONCERN 2 (2014). We relate the accounting "going concern" principal of a business being able to continue, to the financial economic term of "unsystematic" or "idiosyncratic" risk. Both refer to the risk of a particular business. We adopt the more common language term "going concern" risk. *Id.*

38. Mark Baumgartner, *Alaska's Natives Getting Hard Lesson in Modern Business. Regional Corporations Run into Financial Difficulties*, THE CHRISTIAN SCI. MONITOR (Apr. 21, 1986), <https://www.csmonitor.com/1986/0421/adire.html#:~:text=In%20filing%20for%20bankruptcy%20protection,are%20Bering%20Straits's%20major%20creditors.>

39. Bodie, Z., Kane, A. and Marcus, A.J., 1996. Investments, Irwin series in Finance.

40. The beginnings of the U.S. stock market in the 18th century are covered in popular literature. See generally, EDWARD F. MCQUARRIE, THE FIRST 50 YEARS OF THE US STOCK MARKET: NEW EVIDENCE ON INVESTOR TOTAL RETURN INCLUDING DIVIDENDS 1793–1843 (2018).

41. This is a normative policy word, hence throughout we use the term commonly used today by ANC managements and shareholders. They refer to "7(i)" distributions from ANCSA. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1606(i)(1)(A) (2018)).

and risk pooling⁴² reduce but do not eliminate this risk. While ANCs have such special provisions of revenue sharing amongst themselves, discussed later,⁴³ they are not immune to the life cycle of business.

Is cultural continuation consistent with a business life cycle that is typically measured in decades? Some businesses last longer, but those are rare. As a simple example, of the original S&P 500 companies in the 1957 formation of the S&P 500 Index, most are no longer in existence.⁴⁴ Bessembinder finds that the median time that stocks are listed in the Center for Research in Security Prices from 1926 to 2015 is about seven years.⁴⁵ Bessembinder also runs simulations where he draws a single stock randomly from the universe of stocks through time and on average *most* have a lower rate of return than the risk-free rate.⁴⁶ The apparent discrepancy of high long-term stock index returns with low individual average stocks' failure to keep up with inflation, is that the distribution of individual returns is highly skewed; a few important winners make up a large share of the return of the stock market.⁴⁷ The vast majority of stocks are delisted or have middling performance.⁴⁸ And these are companies that are on average much larger and less risky in terms of continuation risk than ANCs.⁴⁹ It is important for shareholders to understand how high the actual ANC going concern (continuation) risk is.

Of the original thirteen regional ANCs, only one has ceased operations—The *13th Regional Corporation*.⁵⁰ However, some of the other twelve have undergone bankruptcy reorganizations.⁵¹ While some ANC regionals have filed for bankruptcy, they have been able to reorganize and reopen business operations.⁵² But that is not a given. Unlike The 13th

42. *Id.*

43. *See infra* Part V.

44. In 2007, eighty-six of the original companies from 1957 were still on the list. Fred Schneyer, *86 Companies in the S&P 500 Since the Start*, Plansponsor (Mar. 2, 2007), <https://www.plansponsor.com/86-companies-in-the-sp-500-since-the-start/>.

45. Bessembinder, *supra* note 29, at 441 (2018). Craig Doidge find the average age for public companies has grown in recent years, to twenty years, but most of these companies are far larger than ANCs. Craig Doidge et al., *Eclipse of the Public Corporation or Eclipse of the Public Markets?*, 30 J. APPLIED CORP. FIN. 8, 11 (2018).

46. Bessembinder, *supra* note 29, at 456.

47. *Id.* at 442.

48. *Id.* at 441.

49. *Compare id.*, with *supra* Section 1.2, Fig. 1.

50. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-121, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS 11 (2012) (noting that The 13th Regional Corporation became insolvent in 2007).

51. Kathryn A. Black et al., *When Worlds Collide: Alaska Native Corporations and the Bankruptcy Code*, 6 ALASKA L. REV. 73, 75 nn.5 & 6 (1989).

52. Baumgartner, *supra* note 38.

Regional Corporation, a bankrupt ANC has a better chance at reorganization, as they can conceivably monetize in some way their landholdings and 7(i) distributions from other regional ANCs.⁵³ Even if an ANC files for bankruptcy, it may well be able to eventually reorganize and obtain capital to finance natural resource exploitation, for example (legal ANC landholding issues are complex).⁵⁴ While it is a possibility that ANCs may be able to operate for long periods in a cycle of business demise and rebirth, the degree of economic benefit and the ability to foster cultural goals while operating in or near bankruptcy is certainly diminished. Although ANCs have obtained some unusual provisions that helps them continue to achieve economic success,⁵⁵ these will not always be available. As a group, ANCs have experienced success in their political and lobbying efforts.⁵⁶ But so have other large companies, and these other large companies still eventually cease operations or merge.⁵⁷ Lobbying success does not and will not ensure continued ANC business viability. Eventually, all companies—including ANCs—will cease to be. An attempt to address this ANC going concern issue has been the amendments to ANCSA involving settlement trusts.⁵⁸ Before discussion of that, however, it is useful to understand more about endowment models, why they exist and their potential applicability to ANCs.

53. 43 U.S.C. § 1606(1)(A) (2018).

54. *Id.*

55. For examples of critical coverage of ANC business practice, see Robert O'Harrow, *Washington Post Investigations: Two Worlds: Government Contractors, Alaska Natives*, WASH POST (Sept 20, 2010), <https://www.washingtonpost.com/wp-srv/special/nation/alaska-native/>. For arguments concerning a legal revamping of Section 8(a) for which ANCs derive large parts of their revenues, see Jenny J. Yang, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, 23 ALASKA L. REV. 315 (2006).

56. An example of this is Senator Lisa Murkowski's reelection campaign of 2010. See Richard Mauer, *Natives' super PAC Meant New Boost for Murkowski Campaign*, ANCHORAGE DAILY NEWS (Nov. 20, 2010), <https://www.adn.com/alaska-news/article/natives-super-pac-meant-new-boost-murkowski-campaign/2010/11/21/k> ("If Sen. Lisa Murkowski's reelection survives her opponent's challenges, she will in no small measure owe her historic write-in victory to . . . massive Native corporation spending on her behalf."); Yereth Rosen, *Senator Lisa Murkowski Wins Alaska Write-in Campaign*, REUTERS (Nov. 17, 2010), <https://www.reuters.com/article/us-usa-elections-murkowski-idUSTRE6AG51C20101118>.

57. See Bessembinder, *supra* note 29, at 451 (noting that common stocks in CRSP (Center for Research in Security Prices) exist for 7.5 years on average).

58. 43 U.S.C. § 1629e (2018).

IV. AN ENDOWMENT MODEL

Some cultures last millennia.⁵⁹ As stated in their mission statements, ANCs want to be involved in cultural continuation. How, then, can ANCs match the cultural life cycle with the institutions that house their corporate economic activity? To answer that, consider the kinds of institutions that last longer than businesses. Countries have life cycles that can span centuries or millennia. But ANSCA was an act that abrogated claims to Alaska Native sovereignty, at least with respect to the operation of ANCs including the traditional lands they own and manage.⁶⁰

Universities are another type of institution that has a long life cycle. Universities can last centuries, even millennia,⁶¹ and they have done so within different political environments and polities. While many may experience difficulty in the future given demographics and new educational delivery technology,⁶² those that have endowments are far more secure.⁶³ Indeed, an important reason why some individual universities can survive so long is because they have set up endowments that fund large portions of their mission.⁶⁴ Endowments can also conceivably last centuries.⁶⁵ Endowments pay out a portion of their

59. See *Inuit Culture*, VIRTUAL MUSEUM CAN., <http://www.virtualmuseum.ca/edu/ViewLoitLo.do?method=preview&lang=EN&id=10641> (last visited Jan. 29, 2021) (noting that Canadian Inuit have a 5,000 year cultural heritage).

60. See THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1985) for an account of ANCSA's passage and for far reaching amendment proposals. See generally DONALD CRAIG MITCHELL, *TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971* (2001); WILLIAM L. IGGIAGRUK HENSLEY, *FIFTY MILES FROM TOMORROW: A MEMOIR OF ALASKA AND THE REAL PEOPLE* (2009).

61. Bologna University is often regarded as the oldest continuously operating university, and "1088 is conventionally taken as [Bologna University's] year of birth." NURIA SANZ & SJUR BERGAN, *THE HERITAGE OF EUROPEAN UNIVERSITIES* 131 (1st ed. 2002).

62. Graeme Wood, *The Future of College?*, ATLANTIC (Sept. 2014), <https://www.theatlantic.com/magazine/archive/2014/09/the-future-of-college/375071/>.

63. Sarah Butrymowicz, *The Hechinger Report*, and Pete D'Amato, *A Crisis is Looming for U.S. Colleges – and Not Just Because of the Pandemic*, NBC NEWS (Aug. 4, 2020, 7:02 AM), <https://www.nbcnews.com/news/education/crisis-looming-u-s-colleges-not-just-because-pandemic-n1235338>.

64. See *id.* (noting that colleges with stronger endowments are more financially stable).

65. For a good overview of endowment investing, see generally Josh Lerner, Antoinette Schoar, and Jialan Wang, *Secrets of the Academy: The Drivers of University Endowment Success*, 22 J. ECON. PERSPECTIVES 207 (2008). Although endowments are generally thought to be of lower risk than individual companies as discussed, they too have risk. See, e.g., Philip H. Dybvig & Zhenjiang Qin, *How to Squander Your Endowment: Pitfalls and Remedies*,

earnings to fund their given mission, ideally after provision for inflation.⁶⁶ They are tax advantaged.⁶⁷ Endowments do assume market risk; their investments are not in risk-free assets as those only match inflation and would not provide any funding without corpus erosion.⁶⁸ Instead, they hold widely diversified portfolios of assets in the worldwide portfolio of investable assets and hence are shielded from the going concern risk failure of individual businesses.⁶⁹

A close to home example that ANCs should look to is the tremendously successful Alaska Permanent Fund (APF), which is managed by the Alaska Permanent Fund Corporation (APFC). Why is the APF so successful? The primary success does not arise from the investments the fund has made. APFC has made wise investments, but no wiser than the average endowment or institutional pension fund.⁷⁰ Indeed, being too clever in investments can be unwise, as it often means the assumption of too much going concern risk. The major risk that APFC has to date successfully mitigated is very real, and very dangerous—political risk and political investment that destroys value. APFC’s true success lies in a constitutionally grounded governance structure, and the behavior of the APFC and Alaska policy makers understanding and managing this risk.

V. POLITICAL INVESTMENT, RENT SEEKING, AND AGENCY ISSUES

Before the formation of the APF, Alaska politicians, in connection with business leaders, undertook several projects that promised jobs to Alaskan residents.⁷¹ However, a number of these became well-publicized failures.⁷² It is common for politicians’ platforms to include job creation plans and job creating investments.⁷³ These investments have high

https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=AFA2016&paper_id=616 (presented at the 2016 American Finance Association Annual Meeting, Jan. 3-5).

66. Brian O’Connell, *What is an Endowment and How are They Structured?*, THE STREET (Mar. 18, 2019, 5:54 PM), <https://www.thestreet.com/investing/what-is-an-endowment-14894094>.

67. William M. Gentry, *Debt, Investment and Endowment Accumulation: The Case of Not-For-Profit Hospitals*, 21 J. HEALTH ECON. 845, 849 (2002).

68. *Id.* at 851.

69. *See id.* at 852-53 (discussing how hospital endowments balance risk).

70. For an evaluation of the APFC in a global context, see generally APFC, A GLOBAL PERSPECTIVE: ANNUAL REPORT 2018, <https://www.ifswf.org/sites/default/files/annual-reports/2018-APFC-Annual-Report.pdf>.

71. JOHN STROHMEYER, *EXTREME CONDITIONS: BIG OIL AND THE TRANSFORMATION OF ALASKA* 110-22 (1993).

72. *Id.* at 99-109.

73. Adam Davidson, *Can Anyone Really Create Jobs?*, NY TIMES MAG.: IT’S THE

idiosyncratic risk, as each investment has unique risk associated with each project. It does a politician no political good to create an undefined number of jobs somewhere in the world, which is what an investor is effectively promoting when making diversified investments in the worldwide portfolio, when they can point to jobs created “here, at home,” where the voters are located. Even if the politician supports or proposes numerous projects, their aggregated going concern risk is still much higher than if investments are spread across the world as is done in a typical endowment, such as the APF.⁷⁴

To understand how dangerous this kind of political investment can be for a company’s longevity, consider an ANC regional or village corporation with a \$158 million book value: the equity value for the Aleut Corporation at the end of 2017.⁷⁵ This level of book equity is smaller than average for an ANC regional, but larger than most ANC village corporations.⁷⁶ If Aleut made a job promoting venture and paid an annual salary of \$50,000 to each employee in the venture, this implies 3,164 job years. Coincidentally, this is about the number of Aleut Corporation original shareholders. Aleut could employ every shareholder for a year, and if the venture did not generate revenue, would then be out of capital. Suppose the venture required 10% of Aleut’s shareholders, say 316 employees. Those could be employed for ten years before the capital was completely depleted. Of course, the venture could make money such that the employees could be employed longer. However, a rule of thumb for new ventures is 80% of them fail within five years.⁷⁷ Hence, the more likely outcome would be Aleut would spend all of its book value to employ several hundred employees and the venture would fail before ten years. Making investments simply to promote job creation is dangerous to long-term firm continuation and inconsistent with a goal of long-term cultural continuation. This is why ANC company managements have been careful about pursuing ventures to promote jobs.⁷⁸ Although board

ECONOMY (Nov. 3, 2011), <https://www.nytimes.com/2011/11/06/magazine/job-creation-campaign-promises.html>.

74. Diversified companies still have higher risk than the overall worldwide market. See BODIE, Z ET AL., *supra* note 33, at 202.

75. Aleut Corporation 2017 Annual Report 25.

76. This example assumes that Aleut would be able to sell all of its other investments for a net amount equal to its book value.

77. This rule of thumb was offered by the founding leader of a southern California venture capital firm in personal conversation. Interview with George Kenney, founder and Managing Director, Shepherd Ventures. Venture capital backed firms are generally riskier than public firms, hence this estimate is roughly consistent with Bessembinder. See Bessembinder, *supra* note 29, at 451 (noting that the median existence for a common stock in CRSP is 7.5 years).

78. See ANCSA REGIONAL ASS’N, 2017 ECONOMIC REPORT 8 (2017),

candidate statements sometimes feature a “jobs for shareholders platform,”⁷⁹ a better approach, in terms of longevity of the firm, is first to find ventures with economic rationale then secondarily having “shareholder preference” in hiring.⁸⁰ This is the practice of most ANC regional corporations.⁸¹

This kind of politically motivated investment activity is one problem. More insidious are the problems that economists refer to as “rent seeking”⁸² and “agency issues.”⁸³ *Rent seeking* occurs when a hired agent works for the best interest of themselves but does not add net economic value.⁸⁴ As an example, a manager at an ANC may be more interested in maintaining a paying position than in bettering their shareholders’ economic or cultural outcome. Whereas rent seeking is usually for the more obvious benefit of self-enrichment, *agency issues* are not always clear. Agency issues occur when a hired agent—or agents—are conflicted, meaning they do not work solely for the benefit of the entity that has hired them.⁸⁵

<https://ancsaregional.com/wp-content/uploads/2019/09/2017-ANCSA-Economic-Impact-Report.pdf>.

79. See, e.g., *Independent Candidates*, SEALASAKA,

<https://mysealaska.com/Election/IndependentCandidates>.

80. For a case history of shareholder hire, see Haley, S., et al., *Indigenous employment, training and retention: successes and challenges at Red Dog Mine*, in NATURAL RESOURCE EXTRACTION AND INDIGENOUS LIVELIHOODS: DEVELOPMENT CHALLENGES IN AN ERA OF GLOBALIZATION 24 (2014) (“There are not enough jobs at Red Dog for every shareholder that applies.”).

81. The introductory message of the most recent ANCSA Regional Association economic report indicates the relative priorities: “Ours is a story of long-term equity growth and of providing stable and very real economic benefit to our shareholders through the dividends we provide, the scholarships we invest in to develop our shareholders’ futures, and the investments we make in a wide variety of cultural and social non-profit organizations that benefit our shareholders.” ANCSA REGIONAL ASS’N, *supra* note 78, at 4. Jobs for shareholders and non-shareholders are not mentioned until page five. *Id.* at 5.

82. For a well-known paper that discusses rent seeking’s hindrance of economic growth, see generally Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *Why Is Rent-Seeking So Costly to Growth?*, 83 AM. ECON. REV. 409 (1993).

83. For a good overview of principal agency issues, see generally David E.M. Sappington, *Incentives in Principal-Agent Relationships*, 5 J. ECON. PERSP. 45 (1991).

84. ECONOMIC TIMES, *Definition of “Rent Seeking,”* (last accessed Feb. 27, 2021), <https://economictimes.indiatimes.com/definition/rent-seeking>.

85. See Sappington, *supra* note 83, at 45 (highlighting the concern of how to encourage the agent to perform as the principal desires in light of the costs of monitoring).

Table 2. Ownership of Top Ten Shareholders (Based on Original Distribution)

	Original Enrollment	% held, top 10 <i>Individuals (1972)</i>
ANC Regional		
Ahtna	1,074	0.93%
Aleut Corporation	3,249	0.31%
Arctic Slope Regional Corp.	3,734	0.27%
Bering Straits Native Corp.	6,333	0.16%
Bristol Bay Native Corp.	5,401	0.19%
Calista Corporation	13,306	0.08%
Chugach	1,904	0.53%
CIRI	6,278	0.16%
Doyon, Limited	9,061	0.11%
Koniag	3,716	0.27%
NANA	4,828	0.21%
Sealaska	15,752	0.06%
13th Regional Corporation	4,435	0.23%
	79,071	0.16%
		Wtgd Avg.

For ANCs, shareholder ownership is diffuse. While ownership figures for ANCs are kept private, we know that in 1972 shares were evenly distributed across individuals and can impute the percentage ownership, then, for the top ten holders.⁸⁶ The average across all ANCs has the top ten holders owning 0.16% of all shares. These figures have changed as some shareholders have died and willed their shares to other existing shareholders. However, despite these changes, ANCs still have highly diffuse ownership.⁸⁷ Also, for ANCs, ownership is exclusively held by individuals; not institutions (holding companies, investment advisors, etc.).⁸⁸ This means that elections of the board of directors can look more like a political campaign than is typical at U.S. publicly traded firms.⁸⁹ The board of directors of a regional ANC, who are interested in getting elected or reelected, may cause the regional company to act in the best interest of a certain village if that village is particularly influential in the elections.⁹⁰ Although this may be a subconscious

86. 43 U.S.C. § 1605(c) (2018).

87. See, e.g., *Our Corporation*, CIRI, <https://www.ciri.com/our-corporation/> (last visited Jan. 29, 2021) (noting that CIRI is owned by over 9,100 shareholders).

88. 43 U.S.C. § 1606(h) (2018).

89. See generally Jonathan M. Karpoff & Edward M. Rice, *Organizational Form, Share Transferability, and Firm Performance: Evidence from the ANCSA Corporations*, 24 J. FIN. ECON. 69 (1989); Colt, *supra* note 13.

90. When one of the authors was a Board member of an ANC, he observed this tendency in some board members. We all exhibit bias; the goal is to be aware of, minimize, and manage agency problems.

tendency, this “agency problem” can have very real consequences. For one thing, it is often difficult for shareholders to unseat a board member or slate of board members who are overseeing a poorly performing ANC.⁹¹

Further, the complicated property rights of ANCSA, which established the ANCs, also created additional agency issues that made business start-up more problematic for ANCs than is typical for start-up corporations. For ANCs, one corporation controls the subsurface rights of another corporation’s lands.⁹² Further, 7(i) distributions require ANC regionals to distribute seventy percent of their natural resource revenues to other regionals and then fifty percent of that revenue is distributed to the village corporations.⁹³ These provisions may have been included to improve the chances of success for all ANCs if natural resources were found and extracted on a particular ANCs lands, mitigate overall risk, and encourage collaboration between Native groups.⁹⁴ However, this system of property rights is unusual and has not always been easy to delineate, a fact that led to many expensive and polarizing lawsuits.⁹⁵ Studies such as Karpoff and Rice (1989)⁹⁶ that compare the performance of the thirteen ANCs’ performance to public companies do not factor in this special problem – an unintentional bias that factors against ANCs.

The APF endowment, on the other hand, has, through its political monitoring and legal structure and fund management, mitigated the risks of rent seeking, political investment, and agency issues.⁹⁷ The fund and

91. For Alaska Native regional board election examples, see Sharon Guenther Lind, *Definitions of Success for Alaska Native Corporations 135–39* (2019) (unpublished Ph.D. dissertation, University of Alaska Fairbanks) (on file with the UAF Rasmuson & Mather Libraries, University of Alaska Fairbanks).

92. 43 U.S.C. §§ 1606(i)(1)(A), (j) (2018).

93. *Id.*

94. See *About the Alaska Native Claims Settlement Act*, ANCSA REGIONAL ASSOCIATION, <https://ancsaregional.com/about-ancsa/> (explaining the history under the section header “The Revenue Sharing Provisions of ANCSA: Sections 7(i) and 7(j)”).

95. Author Robert Snigaroff was a board member of the Aleut Corporation in 1987 when ANCs were engaged in expensive, protracted litigation with other regional corporations over § 7 disputes. Since the adoption of ANCSA there have been several large and contentious lawsuits or arbitrations around how revenue sharing works between ANCs, including one ongoing dispute, in which author Craig Richards represents one of the claimants, related to whether revenues generated from the sale of carbon credit offsets are sharable. See generally Ethan G. Schutt & Aaron M. Schutt, *The Grand Compromise: The ANCSA Section 7(i) Settlement Agreement*, 34 ALASKA L. REV. 201 (2017); Aaron M. Schutt, *ANCSA Section 7(i): 40 Million Per Word And Counting*, 33 ALASKA L. REV. 229 (2016).

96. See generally Jonathan M. Karpoff & Edward M. Rice, *Organizational Form, Share Transferability, and Firm Performance: Evidence from the ANCSA Corporations*, 24 J. FIN. ECON. 69 (1989).

97. Some argue the fund, or at least the legislative policy of paying individual

its regular dividend distribution have created a cliental or constituency effect that encourages close monitoring of the fund by state citizens.⁹⁸ State politicians take political risk by suggesting use of the fund to pay for things other than dividends. Political and fund management officials are carefully watched and so act as careful agents for the health of the fund.⁹⁹ The APF state endowment structure helps successfully manage the agency risk. APFC fund managers' sole mission is to invest the fund to maximize the return given reasonable amounts of market risk so dividends can be maintained.¹⁰⁰ It is the case that fund managers want to have healthy careers,¹⁰¹ but it is difficult for a "rent seeking" fund official to grow a business empire to the detriment of the health of the fund. The legal governance structure minimizes rent seeking risk, and, in the substantial experience of the Authors, APFC fund officials have been conscientious professionals. Finally, the fund invests in the worldwide pool of assets, thus eliminating going concern risk. So long as there is economic growth throughout the world, and so long as the fund is not used to fund government at unsustainable levels or is expropriated,¹⁰² the fund will not "go out of business."

ANCs have observed the beneficial APF endowment and in some cases have set up investment pools that even use the name "permanent fund."¹⁰³ However, the ANC permanent funds have usually remained

Alaskans a dividend out of APF earnings, was unfortunate policy. We take no stance here on the contentious dividend issue, but we offer discussion on how a state endowment affects the management of agency issues. For an argument concerning fund agency issues, see generally Robert G. Snigaroff, *The Economics of Active Management*, 26 J. PORTFOLIO MGMT. 16 (2000).

98. See DAVE ROSE, *SAVING FOR THE FUTURE: MY LIFE AND THE ALASKA PERMANENT FUND* 166-168 (2008).

99. See, e.g., Dan Kaufman, *Why Alaskans are trying to recall their Governor*, THE NEW YORKER (Mar. 5, 2020) <https://www.newyorker.com/news/dispatch/why-alaskans-are-trying-to-recall-their-governor> (explaining that the recall effort is in part motivated by accusations of the Permanent Fund's mismanagement).

100. *The Board of Trustees*, ALASKA PERMANENT FUND CORP., <https://apfc.org/the-board-of-trustees/> (last visited Jan. 30, 2021). Alaska law does require the board to invest APF assets in in-state investments, but only to the extent that in-state investments are available and have a risk level and expected return comparable to alternative investment opportunities. ALASKA STAT. § 37.13.120(c) (2018).

101. One of the authors was a former employee at, and another is a current Trustee of the Board of, APFC.

102. Expropriation can take a number of forms besides unstable use of the fund by the Government of the State of Alaska, e.g., the U.S. Federal Government can change tax treatment for the endowment. Of course, the risk of political investment is always a real risk that Alaska State law, APFC management, and state governance have managed well.

103. THE ALEUT CORPORATION, ANNUAL REPORT 20 (2020).

small in relation to overall corporate assets.¹⁰⁴ There are several reasons for this, including management practice and the originally suboptimal tax structure. Regarding the latter, after the amendments to ANCSA providing for settlement trusts,¹⁰⁵ corporate managers may not want to reduce the size of their operating businesses to adopt an economically meaningfully sized endowment model. Once assets are moved to a settlement trust, ANC management cannot use such assets for regular corporate investments.¹⁰⁶ Settlement trust assets must be invested “passively,” that is, invested similar to how an endowment invests via diversified investments in the market (not by direct investments in operating businesses).¹⁰⁷ Regarding tax efficiency, it is the point of view of the authors that it was a design flaw of the original ANCSA to not allow ANCs to use their original endowment allotment to make distributions to settlement trusts or diversified endowment models on a pre-tax basis. The taxing of passive investments at the regular corporate rate encouraged an *operating business model*. However, as discussed, operating businesses definitionally have additional risk in the form of going concern risk and all businesses eventually cease. Originally, all shares in ANCs were also to become freely tradable in 1991.¹⁰⁸ From the perspective of the Alaska Natives who fiercely desire a degree of cultural continuation, the amendment to ANCSA that continued restrictions on share marketability unless shareholders opt to lift restrictions, was crucial.¹⁰⁹ It should be noted, no Alaska Native corporation has opted to make its shares publicly traded and all Alaska Native corporation shares remain restricted.

VI. IMPACT OF AN ENDOWMENT MODEL

In 1988, ANCSA was amended to authorize ANCs to form

104. *Id.* (noting that the Aleut Corporation has \$15.8 million in a “Permanent Fund” which is 4% of Total Assets of \$369.7 million).

105. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, ch. 11, § 10, 101 Stat. 1788, 1804-06 (1988) (codified as amended at 43 U.S.C. § 1629e (2018)).

106. 43 U.S.C. § 1629e(b).

107. *Id.*

108. 43 U.S.C. § 1636 (2018). (“[S]tock issued pursuant to subsection (g) [of this Act] . . . shall vest in the holder all rights of a stockholder . . . except that for a period of twenty years after the date of enactment of this Act the stock, inchoate rights thereto, and any dividends paid or distributions made with respect thereto may not be sold, pledged, subjected to a lien or judgment execution, assigned in present or future, or otherwise alienated.”).

109. *About the Alaska Native Claims Settlement Act*, ANCSA REGIONAL ASSOCIATION, <https://ancsaregional.com/about-ancsa/#> (last visited Mar. 24, 2021).

settlement trusts.¹¹⁰ Settlement trusts are designed “to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives.”¹¹¹ These purposes are accomplished by ANC placing cash, securities, real property, or other assets into the trust.¹¹² Earnings of trust assets can then be used to pay benefits to beneficiaries.¹¹³ Under ANCSA, the settlement trust may define beneficiaries as shareholders, Natives, and descendants of Natives.¹¹⁴ Typically, settlement trusts create one or more benefit programs for designated beneficiaries to, *inter alia*, create a permanent fund, pay distributions/dividends to shareholders, or provide for burials, elder care, scholarships, or other benefits.¹¹⁵

Settlement trusts, although created and controlled by the settling ANC,¹¹⁶ are fundamentally different than the more traditional corporate form. For instance, a settlement trust can hold passive investments (e.g., securities or an interest in a business) but cannot operate a business.¹¹⁷ A settlement trust also may not receive a subsurface estate from the ANC or sell timber for general profit,¹¹⁸ or alienate a surface estate received by one.¹¹⁹ In short, settlement trusts are designed to be in the mold of passive management—akin to an endowment—as opposed to active business operators, and therefore are designed to have a different risk profile.

But perhaps the most important practical difference lies in the tax treatment of settlement trusts as compared to corporations for purposes of federal income taxes. The 1989 Amendments and later legislation, such as the Economic Growth and Tax Relief Reconciliation Act of 2001,¹²⁰ created a fairly clear but not overly beneficial tax regime for settlement trusts and the settlor ANC. For instance, the tax rates applicable to a settlement trust prior to passage of Act of December 22, 2017, (the “2017 Tax Act”)¹²¹ were ten percent on the trust’s ordinary income (e.g., interest

110. 43 U.S.C. § 1629e (2018).

111. *Id.* § 1629e(b)(1).

112. *Id.* § 1629e.

113. Bruce N. Edwards, *Understanding and Making the New Section 646 Election for Alaska Native Settlement Trusts*, 18 ALASKA L. REV. 217, 221 (2001).

114. 43 U.S.C. § 1602(t) (“‘Settlement Trust’ means a trust— (1) established and registered by a Native Corporation under the laws of the State of Alaska pursuant to a resolution of its shareholders, and (2) operated for the benefit of shareholders, Natives, and descendants of Natives, in accordance with 43 U.S.C. § 1629e and the laws of the State of Alaska.”).

115. Bruce N. Edwards, *2017 Tax Act and Settlement Trusts*, 34 ALASKA L. REV. 1, 11 (2018) [hereinafter *2017 Tax Act*].

116. ANCSA provides the settling Native Corporation power to appoint and remove trustees. 43 U.S.C. § 1629e(b)(2).

117. *Id.* § 1629e(b)(1)(A).

118. *Id.* §§ 1629e(a)(2), (c)(2).

119. *Id.* § 1629e(b)(1)(B).

120. Pub. L. No. 107-16, 115 Stat. 38.

121. Pub. L. No. 115-97, 131 Stat. 2054.

and rental income), and zero percent on its net qualified gains.¹²² These rates, although favorable to settlement trusts, did not create a strong enough tax incentive for ANCs to divert substantial capital from business operations to passive savings via a trust.¹²³ Those same taxable rates for settlement trusts were left intact in the 2017 Tax Act,¹²⁴ but contributions by ANCs into a settlement trust became substantially more attractive after Congress provided those contributions would be made on a tax deductible rather than after-tax basis.¹²⁵ While deductions cannot exceed the taxable income of the ANC, unused contributions can be carried forward fifteen years.¹²⁶ Further, beneficiaries will usually not pay taxes on distributions received from the trust.¹²⁷ Thus, after adoption of the 2017 Tax Act:

- An ANC can deduct contributions to a settlement trust;
- The settlement trust pays a one-time ten percent tax on the contribution and any future ordinary income, but no taxes on capital gains; and
- In most circumstances beneficiaries will not pay taxes on distributions received from the trust.

This new paradigm has resulted in the creation of many settlement trusts and the influx of significant capital into them in the past several years.¹²⁸ In short, for the first time, settlement trusts are broadly

122. Edwards, *2017 Tax Act*, *supra* note 115, at 11 (citing I.R.C. §§ 646(b)(2), 1(c), (i) (ordinary income) and (b)(2), 1(h)(1)(B) (net capital gain) (2018)).

123. *See id.*

124. Edwards, *2017 Tax Act*, *supra* note 115, at 16.

125. I.R.C. § 247(a). When non-cash property is contributed, the amount of the deduction is the lesser of the ANC's adjusted basis or the fair market value of the property. *Id.* § 247(b)(2).

126. I.R.C. §§ 247(c)(1), (2).

127. There is a four-tier system for determining the taxability of distributions by a settlement trust:

Tier 1 (tax free): Distributions up to the settlement trust's taxable income

Tier 2 (tax free): Distributions up to the settlement trust's accumulated non-distributed taxable income

Tier 3 (taxable): Distributions in excess of the settlement trust's accumulated taxable income, up to the ANC's retained earnings/net profit

Tier 4 (tax free): Distributions in excess of the settlement trust's accumulated taxable income and ANC's retained earnings/net profit

I.R.C. § 646(e). Consequently, only if distributions exceed the settlement trust's current year or non-distributed taxable income, and the ANC has significant retained earnings/net profit, will a distribution be a taxable event to the receiving beneficiary. *See id.*

128. The authors have noted this anecdotally in our work with ANCs. *See also* Jennifer Carroll, *What Are ANCSA Settlement Trusts?*, DEPARTMENT OF ALASKA NATIVE STUDIES AND RURAL DEVELOPMENT (Nov. 3, 2018), <https://dansrd.community.uaf.edu/2018/11/03/what-are-ancsa-settlement-trusts-researched-and-written-by-jenny-bell-jones-with-input-from-current-and-former-dansrd-colleagues/> (noting that thirty settlement trusts are in existence by

competing with traditional business activities and shareholder dividends for ANC capital. Thus, the tax structure offered today by settlement trusts makes an endowment model more viable. Endowments have life cycles that are more consistent with cultural continuation and fostering a social responsibility mission. In fact, Congress stated the reasons for the changes were because the current laws “discouraged contributions by Native Corporations” to settlement trusts which are “effective tools for reducing dependence on state and federal welfare programs in Alaska Native communities” and more generally “improve the health, education, and welfare of the settlement trusts’ beneficiaries.”¹²⁹

ANC assets shifted to settlement trust endowments have the advantage of: (1) better long-term risk management consistent with cultural continuation; (2) far more tax efficiency; (3) dividend diversification via other payments to shareholders; and (4) can be used for cultural continuation activities and payments.¹³⁰ Regarding tax efficiency, in the five years prior to 2016, the ANCs’ average net income was nearly \$20 million per regional ANC and roughly half of that was paid out to shareholders in dividends.¹³¹ However, that profit figure is after tax. Taxes are complicated and depend on individual ANC situations, but settlement trusts can allow ninety percent of earnings to flow through to shareholders.¹³² Ignoring net operation losses (NOLs), a twenty one percent federal and approximately nine-and-a-half percent Alaska state corporate income tax rate is typical for large corporations.¹³³ ANC taxation is particular to each ANC’s tax situation (some have very large built up NOL positions). But generally, settlement trusts are a much more efficient tax investment vehicle, with less risk.

When an ANC moves assets to a settlement trust, such assets are no longer a part of the ANCs assets. Assets are in a separate entity and

late 2018, an increase of twenty-two from the eighteen in 1999, i.e., an implied creation of twelve in the nine years up to 2018, versus eighteen in the twenty-seven years to 1999).

129. STAFF OF S. COMM. ON THE BUDGET, 115TH CONG., RECONCILIATION RECOMMENDATIONS PURSUANT TO H. CON. RES. 71 (Comm. Print 2017) (“The Committee believes that restrictions on the activities and assets of Settlement Trusts may discourage contributions by Native Corporations. The Committee further believes that Settlement Trusts are effective tools for reducing dependence on state and federal welfare programs in Alaska Native communities. More generally, the Committee believes that it is desirable to promote the funding of Settlement Trusts as a means to improve the health, education, and welfare of the Settlement Trusts’ beneficiaries.”).

130. See Edwards, *2017 Tax Act*, *supra* note 115, at 1.

131. Lind, *supra* note 11.

132. See Edwards, *2017 Tax Act*, *supra* note 115, at 10-12.

133. For Alaska corporate income tax rates, see David M. Steingold, *Alaska State Business Income Tax*, NOLO, <https://www.nolo.com/legal-encyclopedia/alaska-state-business-income-tax.html> (last visited Jan. 30, 2021).

require a level of separate governance as created in the trust. Trustees also have clearly defined fiduciary obligations to trust beneficiaries under trust law, rather than the less strict fiduciary standards directors owe shareholders and the corporation under the Alaska Corporations Code.¹³⁴ Also, creation of the trust is expensive and difficult to undo.¹³⁵ Board and shareholder approval are required, and a trust must be registered with the state and assets can then be contributed.¹³⁶ The existence of the trust requires conscientious policy and effective governance under State of Alaska trust law.

This is not to say ANCs should abandon other business activities altogether. For instance, ANCs have many potential natural resource extraction opportunities and other opportunities that will arise as a result of their vast undeveloped land and subsurface land rights which Congress specifically prohibited from being transferred to settlement trusts.¹³⁷ ANCs will want to continue evaluating the potential development of these resources. They will also want to carefully analyze current business operations to determine if expected future returns can compete with the significantly tax-advantaged passive portfolio settlement trusts may hold.

VII. CHARACTERISTICS OF SUCCESSFUL ENDOWMENT MODELS: AN ALASKA PERMANENT FUND CASE STUDY

There are useful, but not exact, analogies to draw between settlement trusts and institutional endowments. Typical examples might be charitable trusts or university endowments. For ANCs, the APFC provides a useful comparison. That is not just because ANCs and the APFC are Alaska-based, but because they share underlying similarities in the form of a natural resource base being an important component to at least initial economic contribution, opportunities, and risks associated with the Alaska economy, demography and politics, and, importantly, a shared cultural tradition. To the latter point, it is hard to envision two structures that are more unique or economically critical to Alaska than ANCs and the APF.

A brief history of the APF is useful to contextualize the analogy. In 1968 Atlantic Richfield drilled the first successful exploratory well for oil at Prudhoe Bay on Alaska's North Slope at what turned out to be the largest oil field yet discovered in North America.¹³⁸ The subsequent

134. Alaska Stat. § 10.06.450(b) (2018).

135. Alaska Stat. §§ 10.06.605–10.06.678 (2018).

136. 43 U.S.C. § 1602(t)(2) (2018).

137. 43 U.S.C. § 1629e(a)(2) (2018).

138. For a list and some history about the discovery of large oil fields in the

Prudhoe Bay oil and gas lease sale in September of 1969 brought in \$900 million in revenue to the State of Alaska, an amount that was eight times larger than that year's unrestricted state revenue.¹³⁹ By 1975, the state had spent all available funds from leasing bonuses,¹⁴⁰ and the delay in the construction of the Trans Alaska Pipeline System had meant that alternative state revenues were not available to fill in the gap.¹⁴¹ The state ultimately negotiated a deal with the large oil companies to borrow against future production taxes as bridge funding,¹⁴² but the experience left many Alaska policymakers leery. One of the authors of this paper has often said "the best billion dollars the state ever spent was blowing through the initial leasing bonuses" as it brought to the forefront the need to preserve some portion of oil revenue wealth. That experience is comparable to the economic hardship, and maturation process, numerous ANCs had in the 1970-1980s after risky investment of ANCSA settlement funds left some close to, or actually in, bankruptcy.

For the State of Alaska, that history led many of its decision makers to support putting a portion of future oil and gas revenues into a permanent fund, where they would be out of reach of day-to-day government spending to generate income in perpetuity.¹⁴³ In 1976 the people of the state ratified a constitutional amendment establishing the APF, whereby at least twenty-five percent of all mineral lease rentals, bonuses, sale proceeds and the state share of federal mineral revenue sharing payments would be placed into the APF.¹⁴⁴ It was further constitutionalized that earnings of the APF could be deposited in the state general fund, but the principal of those deposits could not be spent by the legislature.¹⁴⁵ Soon thereafter, the legislature created a statutory regime

United States, see Charles Kennedy, *The Top 10 Largest Oil And Gas Fields In The United States*, OILPRICE.COM (Apr. 7, 2015, 1:33 PM CDT), <https://oilprice.com/Energy/Energy-General/The-Top-10-Largest-Oil-And-Gas-Fields-In-The-United-States.html>.

139. See Univ. of Alaska, Inst., of Soc., Econ. and Gov't Research, *Alaska's Economy in the 1960s*, ALASKA REV. BUS. AND ECON. CONDITIONS, Dec. 1970, at 20. Page 20 itemizes state taxes and other "Total Unrestricted Revenue" that sum to \$112 million.

140. Mike Bradner & Tim Bradner, *How We Got Here: Recapping the History of Alaska's Permanent Fund*, ANCHORAGE PRESS, https://www.anchorpress.com/news/how-we-got-here-recapping-the-history-of-alaska-s-permanent-fund/article_2df9cb56-9207-11e9-9dd3-b7cf7f00ad72.html (last updated July 24, 2020).

141. *Id.*

142. Alaska Stat. § 43.58 (repealed 1984).

143. *History of the Alaska Permanent Fund*, ALASKA PERMANENT FUND CORP., <https://apfc.org/who-we-are/history-of-the-alaska-permanent-fund> (last visited Jan. 31, 2021).

144. ALASKA CONST. art. IX, § 14.

145. *Id.*

whereby approximately fifty percent of earnings of the APF would be paid out as dividends on a pro rata basis to citizens of the state, with the rest residing in a statutorily created earnings reserves account.¹⁴⁶ The legislature established that both the “principal” and “earnings reserves” accounts were to be managed by the APFC with the mandate to conserve a portion of the state’s revenue from mineral resources to, among other goals: benefit all generations of Alaskans; maintain safety of principal while maximizing total return; and manage savings to allow the maximum use of disposable income for the purposes designated by law.¹⁴⁷

Although it is easy to critique flaws in the APF model, and there are aspects of the structure that could have been designed to more optimally increase overall welfare, judging by the widespread support of the APF, it was a public policy success.¹⁴⁸ The drop of oil prices in 2014 that has continued through 2021, in combination with sustained long-term drop in oil production from the Alaska North Slope from a high of 2,100,000 barrels per day in 1988 to 499,000 in 2019, has resulted in a material decline in state revenues from oil and gas.¹⁴⁹ Although the State of Alaska has had well publicized budget shortfalls in recent years,¹⁵⁰ it has still maintained savings in the two APF accounts of over \$78 billion.¹⁵¹

Income from the state’s natural resource economy, which a decade ago was thought to equate to a long future of governmental surpluses,¹⁵²

146. ALASKA STAT. § 37.13.145(b) (2018).

147. *Id.* § 37.13.020 (2018).

148. See Kate McFarland, *ALASKA, US: Survey Shows Support for Permanent Fund Dividend Amid Continued Legal Controversy*, BASIC INCOME EARTH NETWORK (July 10, 2017), <https://basicincome.org/news/2017/07/us-survey-shows-majority-support-for-permanent-fund-dividend-amid-continued-legal-controversy/> (highlighting a recent phone survey indicating general public support for the dividend).

149. Elwood Brehmer, *Alaska North Slope Oil Production is About to be at its Lowest Fiscal-Year Level Since Pipeline Startup*, ANCHORAGE DAILY NEWS (June 28, 2019), <https://www.adn.com/business-economy/energy/2019/06/28/alaska-north-slope-oil-production-is-about-to-be-at-its-lowest-level-since-startup/>.

150. See e.g., James Brooks, *As Alaska Deficit Nears \$1.3 Billion, Savings Accounts are Expected to Run Dry Next Year*, ANCHORAGE DAILY NEWS (July 23, 2020), <https://www.adn.com/politics/alaska-legislature/2020/07/23/as-alaska-deficit-nears-13-billion-savings-accounts-are-expected-to-run-dry-next-year/> (discussing the recent budget shortfalls and the impacts of the resulting deficit).

151. The Alaska Permanent Fund Management Corporation has various reports on investments. For a recent total sum see <https://apfc.org/financial-and-performance-reports/>.

152. See Andrew Kitchenman, *Alaska Has Lost a Greater Share of Revenue than Most States due to COVID-19*, NAT’L PUB. RADIO (Aug. 3, 2020, 7:00 AM), <https://www.npr.org/2020/08/03/895376851/alaska-has-lost-a-greater-share-of-revenue-than-most-states-due-to-covid-19> (discussing how oil and gas revenues used to cover over 100% of the budget but now cover less than a quarter

is now unlikely to support even a fraction of governmental spending going forward.¹⁵³ Yet, although Alaska is income poor, it is asset rich due to the structured savings mechanism of the APF. The balance of the APF has recently been about ten to fifteen times the size of the state's annual operating budget.¹⁵⁴ That level of savings is much higher than other natural resource economies. Norway, with the largest sovereign wealth fund in the world at over \$1 trillion, has only budget coverage from its fund at around five to six times its annual budget.¹⁵⁵ Wyoming, Alberta, and Saudi Arabia all have accumulated savings equal to between one to three years spending.¹⁵⁶ ANCs, most of which derive a substantial portion of income from either development of their lands, or revenue sharing from other ANCs,¹⁵⁷ can learn from that model. Revenue from business operation and from natural resource development can decline, for any number of reasons, but disciplined savings into a passively managed settlement trust can, over time, provide a powerful diversification tool. Businesses have a short natural life cycle—sovereign wealth funds, endowments, and ANCs can ideally survive and thrive in perpetuity.

An ANC might create a settlement trust for other reasons. Current tax laws make advantageous the creation of a settlement trust simply as a pass-through vehicle for dividends with no higher purpose. Settlement trusts may legally administer a beneficiary program such as the funding of elder payments to original shareholders or to fulfill an economic development mandate which, by design, defease over time.¹⁵⁸ Settlement trusts offer an opportunity for an intergenerational mandate, something which the classic corporate model is less suited to accomplish, and which definitionally requires the creation of a pool of long-lived investment assets (hereinafter referred to as a “permanent fund”). A review of the APFC literature surrounding successful endowments and sovereign wealth funds show critical elements that allow intergenerational success in such permanent funds, many of which translate directly to settlement trusts.

In February of 2020, the APFC published “Trustee Paper Volume 9” which analyzed aspects of its peers’ sovereign wealth funds that were relevant to the Alaska model that have tended to lead to long-term success

of the budget).

153. *Id.*

154. ALASKA PERMANENT FUND CORP., TRUSTEES’ PAPER, VOL. 9, at 7 (Feb. 2020).

155. *Id.*

156. *Id.*

157. See 43 U.S.C. § 1606(i)(1)(A)-(2)(j) (2018) (noting that seventy per cent of revenue is shared among the constituent corporations).

158. *Id.* § 1606(r).

and failure.¹⁵⁹ Several of those findings are informative to ANCs that seek to create settlement trusts with an objective of intergenerational preservation and growth of capital. For instance, the APFC has warned against the “three deadly sins” that have undermined sovereign wealth funds (SWFs) such as the Alberta Heritage Savings Trust Fund over the long-term: (1) loss-making development investments,¹⁶⁰ (2) ad hoc spending out of the fund’s principal; and (3) inadequate saving, including limiting or even suspended transfers into the fund or a lack of inflation proofing.¹⁶¹ For ANCs to create permanent funds that survive and thrive over many decades, trust creators should focus on the importance of mission clarity, adherence to a rules-based system, and well-defined savings and spending rules.

A. Mission Clarity as to the Investment Function of the Permanent Fund

Settlement trusts are often created to meet multiple objectives beneficial to shareholders and Natives. Those might include a permanent fund, payment of distributions/dividends to shareholders, and the funding of specific programs designed to benefit classes of shareholders or their relatives (e.g., elder or decedent benefits or scholarships). Certainly, such programs in the abstract are laudable and have the potential to fulfil cultural continuation and valuable social functions. But they also create a hazard that the mission clarity around the investment function of the settlement trust’s permanent fund will be degraded.

If a settlement trust has any purpose other than to preserve, grow capital, and pay distributions, then its investment management function should be separated from other objectives by clearly defined beneficiary programs. History has demonstrated that successful long-term management of financial assets requires an exclusive focus on the goal of investment management.¹⁶²

This hazard was a core finding of “APFC Trustee Paper 9.” Specifically, the paper discusses examples of SWFs where the goal of savings and income generation¹⁶³ was mixed with other goals such as

159. ALASKA PERMANENT FUND CORP., *supra* note 154.

160. *See id.* at 10 (describing loss making development investments as essentially public spending dressed up as investment).

161. *Id.*

162. *See id.* at 11 (providing Norway, New Zealand, Australia, and Chile as examples of successful SWFs who have focused an investment management).

163. The paper also discussed economic stabilization as a potentially important goal of SWFs. *Id.* at 9. The idea is that under a well-defined rules-based system, a SWF will save and release funds to the owning government based on defined macro-economic conditions and thus provide economic stabilization particularly

mandates for local development, economic diversification and infrastructure financing.¹⁶⁴ Essentially, there is a substantial risk of these alternative social objectives interfering with managing investments for long-term returns and resulting in unsystematic and unsustainable use of savings for social mandates in the short-term.¹⁶⁵ For ANCs, the permanent fund program should be managed to maximize long-term returns independent of any other settlement trust objectives. That means the permanent fund should exist in its own separate fund that is managed unrelated and without consideration of the goals of other beneficiary programs. Similarly, the most successful SWFs, such as those in Norway, New Zealand, Australia, and Chile, devote considerable resources to communicating their purposes and goals.¹⁶⁶ ANCs should do the same with shareholders and trust beneficiaries.¹⁶⁷

B. Adherence to a Rules-Based System for Permanent Funds

Part and parcel with the need for a permanent fund to have mission clarity around a long-term investment mandate is the need to have well-defined rules around the transfer of funds into and out of the permanent fund. In 2018, the APFC Board of Trustees adopted a resolution specifically highlighting the need for adherence to a rules-based system, pointing out that these systems are a part of the Santiago Principles which identify best practices for SWFs.¹⁶⁸

A rules-based system improves the likelihood that the Permanent Fund will be sustainable over time. Having a holistic

as related to the budgetary swings associated with commodity prices. This could have been a useful purpose of settlement trusts for ANCs. However, ANCSA specifically prevents settlement trusts from distributing capital back to the corporation which prohibits this function. See 43 U.S.C. § 1629e(b)(1) (noting that a settlement trust may not “operate as a business[,]” “alienate land or any interest in land” from the ANC, or “discriminate in favor of individuals” associated with the ANC).

164. ALASKA PERMANENT FUND CORP., *supra* note 154, at 9.

165. *Id.* at 9-11.

166. *Id.* at 11.

167. *Id.*

168. ALASKA PERMANENT FUND CORP., RESOLUTION 18-01: RESOLUTION OF THE BOARD OF TRUSTEES OF THE ALASKA PERMANENT FUND CORPORATION SUPPORTING ADHERENCE TO A RULES BASED LEGAL FRAMEWORK FOR FUND TRANSFERS (Mar. 2018), https://3zi9ys20feru1cmlnv3u4tep-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/2018_01_APFC_Resolution-Rules-Based-System-for-Fund-Transfers.pdf (internal footnotes omitted) (citing INT’L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES “SANTIAGO PRINCIPLES” at 13 (Oct. 2008), https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf [hereinafter SANTIAGO PRINCIPLES]).

framework rationalized by policymakers regarding the rules for savings, withdrawals, and growing the real value of the Fund results in a consistent approach to transfers over the long-term. This is a core element to ensuring sustainability. Conversely, the reliance on ad hoc draws to support government spending would substantially increase the chance of a non-sustainable withdrawal in any one year and the risk of nonformulaic draws compounding in an unsustainable manner over multiple years.¹⁶⁹

A binding rules-based framework is often difficult to achieve for general governmental savings. For instance, the APF principal is constitutionally protected from spending, but nothing prevents the legislature from spending some or all of the earnings reserve account ad hoc.¹⁷⁰ Custom and “good policy” are the tools currently available to enforce many of the rules around fund transfers.

ANCs have an excellent opportunity to adopt binding, long-term fiscal rules around their permanent funds. Each settlement trust must have a trust agreement, which, if properly created, is difficult to change.¹⁷¹ The trust agreement should be drafted with careful thought around the rules-based system that will be applied to the permanent fund in the trust. Specifically, we recommend that the trust agreement:

- separates the permanent fund from other pools of money and beneficiary programs so it is managed on a standalone basis;
- identifies that the primary priority of the permanent fund is to preserve the real value of the principal, which will not be diminished over the long-term by distributions, inflation, or costs and fees;
- identifies that the secondary priorities of the permanent fund are to manage the permanent fund for long-term returns and stable distributions; and
- has clearly articulated rules as to when distributions may and may not be made.

169. ALASKA PERMANENT FUND CORP., *supra* note 168, at 1.

170. ALASKA CONST. art. IX, § 15 (providing that the principal of the fund may only be used for income-producing investments and income from those investments shall be deposited in the general fund unless otherwise provided by law); Alaska Stat. § 37.13.145 (2018) (establishing the earnings reserve in which the permanent fund is to deposit income from principal and providing formulas for the annual transfer of funds from the earning reserve to pay dividends and offset the effect of inflation).

171. See 43 U.S.C. § 1629b(a)-(b) (2018) (outlining the basic procedure to establish a settlement trust).

C. Permanent Fund Savings and Spending Rules

In the SWF context, perhaps the two most important rules define when deposits will be made into (the “savings rule”) and out of (the “spending rule”) the fund. If the savings and spending rules are adhered to over time, the fund will grow with continued predictable deposits.¹⁷² This will avoid the fund becoming degraded by the government having too high of a withdrawal rate or through one-time ad hoc raids.¹⁷³

The APF has grown and flourished for over forty years with the constitutional rule that twenty five percent of royalties and similar payments from mineral development will be deposited into it.¹⁷⁴ Yet, in many oil-rich economies the absence of a binding savings rule has resulted in suboptimal savings during “boom periods,” such as the late 1970s to early 1980s; and, more recently, the period of steadily rising oil prices between 2002 and 2008.¹⁷⁵ A lack of a binding savings rules often also results in a failure to save in poor financial years.¹⁷⁶

Deposits into settlement trusts are at the discretion of the settling ANC and therefore cannot be a rule enforced by the trust. However, corporations on behalf of their trusts can establish their own rules, even if they are not binding. A key element is consistency over the long term. ANCs could adopt rules or guidelines to, for instance, deposit each year the amount that takes taxable income to zero (thus optimizing the tax savings), a certain percentage of revenues from land development or revenue sharing, or even a set amount of net income.

An alternative savings approach would be to target a desired fund size and have the ANC make one or more large contributions early in the trust’s life. Although most SWFs are funded through ongoing deposits of oil or natural resource revenues, some SWFs – particularly in Asia – have been funded by deposits of one-time windfalls such as from privatization of previously state-owned infrastructure.¹⁷⁷ A reasonable savings rule could be a schedule of deposits into the settlement trust over a few years to allow distributions of \$X per share. Later deposits could be added, but the savings rule would target a certain annual dividend that could be

172. See generally ALASKA PERMANENT FUND CORP., TRUSTEES’ PAPER, *supra* note 154, at 15–18.

173. See *id.* at 15 (explaining how oil-rich nations, notably Saudi Arabia in recent years, have squandered large oil-based windfalls due to unrestricted withdrawals).

174. ALASKA CONST. art. IX, § 15.

175. ALASKA PERMANENT FUND CORP., TRUSTEES’ PAPER, *supra* note 154, at 15.

176. *Id.* at 16.

177. See Javier Santiso, *Sovereign Development Funds: Key Financial Actors of the Shifting Wealth of Nations 7* (OECD Emerging Markets Network, Oct. 2008) (noting that Malaysia’s SWF had been funded through privatization receipts).

made in perpetuity (and short-term large deposits of assets would build up carryforward net operating losses in the event Congress revisits the tax rules).

Whereas settlement trusts are unlikely to have strongly enforceable savings rules, the structure of the trust and trust agreement lends itself to strong spending rules. The trust agreement should identify that the primary priority of the permanent fund is to preserve the real value of principal, which will not be diminished over the long term by distributions, inflation, or costs and fees. The secondary priorities are to manage for long-term returns and stable distributions. This establishes clear guidance for trustees, under well understood trust principles, that the fund should be managed to preserve its real value. However, more detailed spending rules are also desirable.

Historically trusts, such as university endowments and American state SWFs, provided that the principal of the trust was to be preserved and the income could be expended.¹⁷⁸ More sophisticated rules often developed to require the trust to retain a portion of earnings to offset inflation so the real and not just nominal value was preserved (e.g., the APF has statutorily required inflation proofing).¹⁷⁹ However, starting in the 1970s, the introduction of higher-returning but riskier asset classes, like equities, into what had largely been income-generating fixed income portfolios, resulted in university endowments with spending rules that focused not on income-generated but instead on total return over time.¹⁸⁰ If an endowment is invested for maximum total return, only by accident will the amount of dividends and interest earned in a given year be consistent with the targeted spending amount.¹⁸¹ Further, the need to provide a stable source of income should not have a major bearing on either the long-term asset allocation decision or the shorter-term decisions to sell assets to realize gains to fund a distribution.¹⁸²

Many endowments and SWFs have moved to spending rules based on a percentage of the market value (POMV) of the fund.¹⁸³ While ANCs can adopt trust principles that establish preservation of the real value of the permanent fund as a primary goal, we advise adoption of a specific POMV or other detailed spending rules that will preserve the real value of the fund and allow additional real growth at a thoughtfully targeted

178. ALASKA PERMANENT FUND CORP., TRUSTEES' PAPER, *supra* note 154, at 19.

179. Alaska Stat. § 37.13.145(c) (2018) (directing the corporation to transfer to the principal of the Alaska Permanent Fund an amount "sufficient to offset the effect of inflation" on the principal).

180. ALASKA PERMANENT FUND CORP., TRUSTEES' PAPER, *supra* note 154, at 18.

181. *Id.*

182. *Id.*

183. *Id.* at 20.

level. A POMV draw also gives the asset managers the ability to focus on maximizing total returns rather than the composition of returns between capital gains, interest and dividends.¹⁸⁴ The APF has found that for well-managed endowments, a POMV spending rate between four to five percent should preserve the real value of the fund.¹⁸⁵ A POMV draw less than that amount will embed real growth, and a greater withdrawal percentage creates significant risk that the real value of the fund will degrade over time.¹⁸⁶

VIII. CONCLUSION

Every ANC will at some point face insolvency. That is not a statement against the efficacy of ANC managements; it is a simple statement about the nature of all business viability. Indeed, ANC managements have achieved some remarkable successes in securing helpful policy for their companies and shareholders. In addition to the initial monies and lands received by ANCs as part of ANCSA, managements and policymakers enabled ANCs to receive many hundreds of millions in additional monies in the form of the sale of net operating losses—federal policy that acted as a very large (in relation to their capital) effective additional “capital contribution.”¹⁸⁷ Other companies lobby for preferential tax treatment, but it is rare to see the level of benefit ANCs have received which, as a result, created a very strong tailwind. Further, ANCs obtained significant benefit through the Small Business Act’s business contract bidding process known as “8(a) government contracting.”¹⁸⁸ The SBA’s 8(a) Business Development Program has become an important revenue and profit source for ANCs, but there have been periodic calls for significant changes and the possible elimination of ANCs in this program.¹⁸⁹ Overall, ANCs have been quite successful in fostering a beneficial business-political environment. Nevertheless, ANCs did not keep up with the average financial success of all U.S. companies. An important question over time is whether ANCs will be able to maintain this kind of favorable political environment.

Of course, the stock market is risky too, and if or when ANCs adopt endowment models, they need to build diversified portfolios of U.S. and

184. *Id.* at 22.

185. *Id.* at 12.

186. *Id.*

187. *See* Colt, *supra* note 13, at 8 (noting that one ANC sold its tax losses to prevent liquidation).

188. *See generally* Yang, *supra* note 55 (explaining why ANCs were especially positioned to benefit from section 8(a)).

189. *Id.*

foreign stocks and bonds. However, this market (systematic) risk is diversified across hundreds, or thousands of individual companies – and is much lower than the high going concern (idiosyncratic) risk currently incurred by individual ANCs.

Can ANC shareholders derive the same sort of cultural identification by operating these endowment models as their current ANC operating company models? The history of the Alaska Permanent Fund and strong constituency among Alaskans, including Alaska Natives, suggests the answer could be “yes.” Discussion on that question needs to include decision factors such as shareholder employment, a survey of endowment models as practiced elsewhere, the kinds of spending that endowment models can facilitate on culture, and much more. Materially-sized (that is, comparable in size to the operating ANC) endowment models are something that ANC managements and shareholders ought to discuss. The relative size and slow growth of the ANCs’ permanent funds and/or settlement trusts compared to their continued commitment to an operating business model indicate managements are, on average (some notable exceptions notwithstanding), not considering endowment models to a large enough degree to materially impact cultural continuation outcomes and distributions to shareholders. Operating business models are inconsistent with the very long-term life cycle of cultures. Endowment models are more consistent in terms of risk and longevity and are equally if not more consistent in terms of immediate cultural impact. They have much less risk and have experienced a higher monetary return than ANC shareholders have. We believe it was an unfortunate feature of the original ANCSA to not have facilitated a tax-efficient endowment model option via settlement trusts. While it is easy to second-guess what was accomplished nearly fifty years ago by Alaska Native leadership, current shareholders must always keep in mind that they obtained a truly historic settlement. Endowment models are an incremental structural change with large implications to the original ANCSA structure that are much more attainable and less intrusive on the lives of existing Alaska Natives than other proposals.¹⁹⁰ Today, ANCs can adopt an attractive settlement trust vehicle potentially more consistent in risk to cultural retention horizons. Even larger scale adoption of endowment models via the new settlement trusts are an important option ANCs and their shareholders should consider.

190. See Hirschfield, *supra* note 14, at 1354 (noting that ANCSA-incorporated villages should receive “quasi-governmental powers over the land they own”); see also Vazquez, *supra* note 14, at 372–73 (describing a proposed bill that would have transformed ANCs into benefit corporations (“B Corps”) that may “deviate from the profit maximization framework” of corporations).