
ARTICLES

WHEN WORLDS COLLIDE: ALASKA NATIVE CORPORATIONS AND THE BANKRUPTCY CODE

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I. INTRODUCTION

The Alaska Native Claims Settlement Act¹ ("ANCSA"), historic legislation intended to settle the aboriginal land claims and titles of Alaska Natives,² was enacted by Congress in 1971 after many years of debate and discussion on the best method of resolving Native claims.³

Though filled with detail, the basic theme of ANCSA is straightforward. In exchange for the now-extinguished aboriginal claims,

1. 43 U.S.C. §§ 1601-1629e (1982 & West Supp. 1988). This statute, as amended from time to time, is referred to in this article as "ANCSA." ANCSA has been amended by nearly every Congress since its passage in 1971. Pub. L. No. 93-153, title IV, § 407, Nov. 16, 1973, 87 Stat. 591; Pub. L. No. 94-204, §§ 3, 4, 6, 7, 9-10, 13, 17, Jan. 2, 1976, 89 Stat. 1147-50, 1154, 1156; Pub. L. No. 94-273, § 38, Apr. 21, 1976, 90 Stat. 380; Pub. L. No. 94-456, § 1, Oct. 4, 1976, 90 Stat. 1934; Pub. L. No. 95-178, §§ 2, 4, Nov. 15, 1977, 91 Stat. 1369-70; Pub. L. No. 95-600, title V, § 541, Nov. 6, 1978, 92 Stat. 2887; Pub. L. No. 96-55, § 2, Aug. 14, 1979, 93 Stat. 386; Pub. L. No. 96-311, July 17, 1980, 94 Stat. 947; Pub. L. No. 96-487, title XIV, §§ 904, 908, 1401-10, Dec. 2, 1980, 94 Stat. 2434, 2447, 2491-96; Pub. L. No. 97-468, title VI, § 606, Jan. 14, 1983, 96 Stat. 2566; Pub. L. No. 99-96, § 1, Sept. 25, 1985, 99 Stat. 460-62; Pub. L. No. 99-500, title I, § 101(h), Oct. 18, 1986, 100 Stat. 1783-287; Pub. L. No. 99-591, title I, § 101(h), Oct. 30, 1986, 100 Stat. 3341-287; Pub. L. No. 99-396, § 22, Aug. 27, 1986, 100 Stat. 846; Pub. L. No. 100-241, §§ 3-5, 7-10, 12, 14-15, Feb. 3, 1988, 101 Stat. 1789-90, 1793, 1795, 1797, 1803, 1805, 1810-12.

2. ANCSA's preamble provides, in part:

Congress finds and declares that —

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

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

43 U.S.C. §§ 1601(a), (b) (1982).

3. R. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 99-144 (1st ed. 1976). Willie Hensley, a Native leader, described the land claims struggle:

A controversy of immense proportions is rapidly coming to a head in Alaska. It is a situation which has lain dormant (except for sporadic outbursts) since Alaska was purchased from Russia in 1867. This problem has been skirted by Congress, alternately grappled with by the Department of the Interior then dropped to allow the furor to settle, kept Alaskan political leaders frustrated, and the courts have ruled time and again — but never with finality nor clarity. The problem is simply this: What are the rights of the Alaskan Natives to the property and resources upon which they have lived since time immemorial?

Id. at 93 (quoting WILLIAM L. HENSLEY (IGAGRUK), *WHAT RIGHTS TO LAND HAVE THE ALASKA NATIVES?* (1966)).

ANCSA directs the transfer of land and cash to Native-owned corporate entities:⁴ twelve regional corporations⁵ and over two hundred village corporations.

After nearly two decades of operation, some of the regional and village corporations have experienced severe financial difficulties, and a few have sought relief under the United States Bankruptcy Code.⁶ In the course of these bankruptcy proceedings, conflicts between the legislative purposes inherent in ANCSA and in the Bankruptcy Code have come to light. Given these conflicts of purpose, the two statutes do not mesh well, creating some significant questions as to how some provisions of the Bankruptcy Code should be implemented in the case of a Native corporation bankruptcy. This article will examine those conflicts and questions and explore their implications for Native corporations and their creditors.

Section 7 of ANCSA⁷ divides the state into twelve regions and directs that each person defined as an eligible Native be a shareholder of the regional corporation for the region in which the Native is enrolled pursuant to section 5 of ANCSA.⁸ The majority of Natives are also shareholders of a village corporation. Sections 11 and 16 of ANCSA⁹ list Native villages potentially eligible for ANCSA's benefits, and section 8¹⁰ directs the residents of each village to organize as a village corporation.¹¹ Those not residents of or enrolled in a village

4. 43 U.S.C. §§ 1605(c), 1613 (1982).

5. ANCSA provided for the possibility of a thirteenth corporation to be formed for the benefit of Natives not resident in Alaska. *Id.* § 1606(c). The Thirteenth Regional Corporation was formed. It, also, has sought bankruptcy relief. *In re Thirteenth Regional Corp.*, No. 86-06675 (Bankr. W.D. Wash. filed Sept. 17, 1986).

6. *In re Tigara Corp.*, No. 3-86-00707 (Bankr. D. Alaska filed Nov. 12, 1986); *In re Thirteenth Regional Corp.*, No. 86-06675 (Bankr. W.D. Wash. filed Sept. 17, 1986); *In re Bering Straights Native Corp.*, No. 2-86-00002 (Bankr. D. Alaska filed Mar. 5, 1986); *In re Haida Corp.*, No. 5X-85-00007 (Bankr. D. Alaska filed May 15, 1985).

7. 43 U.S.C. § 1606(a) (1982).

8. *Id.* §§ 1604(a), (b).

9. *Id.* §§ 1610(b), 1615(a).

10. *Id.* § 1607(a).

11. Under ANCSA, village corporations are, to a degree, dependent upon the larger and, theoretically, more sophisticated and prosperous regional corporations; however, the village corporations are not subsidiaries of the regionals. Section 5 of ANCSA directs the Secretary of the Interior to enroll Natives in one of the twelve regions of the state, and section 7(g) requires each regional corporation to issue 100 shares of common stock to each Native enrolled in the region. 43 U.S.C. §§ 1604, 1606(g) (1982). Section 8 of ANCSA directs the Natives of each village to organize as a village corporation and incorporates by reference the stock transfer restrictions applicable to regional corporations. *Id.* § 1607. Certain provisions of ANCSA section 7 contemplate payments by regional corporations to village corporations in the region and to regional corporation shareholders who are not residents of those villages. *Id.* § 1606(j), (m). Thus, regional and village corporations have common shareholders

are referred to as "at-large" shareholders of their regional corporation.¹²

Both regional and village corporations are organized under Alaska law. Village corporations may be either profit or nonprofit,¹³ but all have elected to be organized for profit;¹⁴ regional corporations are to be profit-making.¹⁵ To conform to standard Alaska practice, regional and village corporations are referred to generically in this article as "Native corporations."

Both regional and village corporations are entitled to cash and land selections under ANCSA. Section 6 of ANCSA¹⁶ establishes the Alaska Native Fund, aggregating \$962.5 million for distribution to Native corporations and their shareholders. Pursuant to sections 11 and 16 of the Act,¹⁷ federal land was withdrawn for selection by village and regional corporations under sections 12 and 16.¹⁸ Following review of the selections, the lands are conveyed to the corporations.¹⁹ The total land entitlement under the Act is some 44 million acres.²⁰

because each village corporation shareholder is also a shareholder of the regional corporation in which the village is located. However, because they are separate corporations, each regional and village corporation has separate directors and officers. In fact, a village corporation may operate at odds with "its" regional corporation. The 205 potential village corporations listed in ANCSA and the additional eligible villages, *id.* § 1610(b), have now been reduced, through mergers, consolidations, and otherwise, to approximately 175.

12. Approximately one-third of enrolled Natives are "at-large" shareholders. About two-thirds are shareholders of village corporations as well as regional corporations. R. ARNOLD, *supra* note 3, at 219.

13. 43 U.S.C. § 1607(a) (1982).

14. U.S. DEP'T OF THE INTERIOR, ANCSA 1985 STUDY, III-2 (Draft June 29, 1984) (prepared in response to requirements of section 23 of ANCSA). See also Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89, 95 (1979). It should be noted that Alaska law does not permit nonprofit corporations to issue stock. ALASKA STAT. § 10.20.136 (1988). This by itself may have resulted in all of the villages organizing as for-profit companies.

15. 43 U.S.C. § 1606(d) (1982).

16. *Id.* § 1605.

17. *Id.* §§ 1610, 1615.

18. *Id.* §§ 1611, 1615.

19. *Id.* §§ 1613(a), (b).

20. ANCSA authorizes the conveyance of 40 million acres of federal lands to Native corporations, subject to certain third-party claims. 43 U.S.C. §§ 1611(a), (b), (c), 1613(h) (1982). Section 19(b) of ANCSA authorizes the conveyance of former reserve lands to Native corporations. *Id.* § 1618(b). About 4 million acres of lands are affected by section 19(b). Interview with Robert Arndorfer, Deputy State Director, Cadastral Survey, Bureau of Land Management, Dep't of the Interior (Feb. 25, 1989).

These transfers of cash and land are the consideration given by Congress in exchange for the extinguishment of the aboriginal land claims of Alaska Natives.²¹

The decision to transfer land and cash directly to corporations of which Natives would be shareholders,²² rather than to more traditional entities, such as tribal or reservation units, was an experiment. The legislation hoped to foster independence and avoid the government-as-trustee approach characterizing previous settlements with Indians of the "lower 48."²³ Drafters and sponsors of the legislation, as well as Native and state leaders who participated in the drafting and lobbying effort that preceded the enactment of ANCSA, were aware of the imperfections of federal Indian policy and the inconsistent results which had been achieved.²⁴ Proponents of the legislation wished to

21. 43 U.S.C. § 1603 (1982). See also *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1021 (D. Alaska 1977), *aff'd*, 612 F.2d 1132, 1135 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980).

22. See *Alaska Native Claims: Hearings on S. 2906, et al. Before the Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess., Part 2, 580 (1968) (statement of Senator Jackson).

Despite the fact that the use of corporations to receive and administer the land and cash constitutes a radical departure from previous federal settlements with Native Americans, the legislative history of ANCSA does not contain significant discussions of the policy choice. Following the 1968 Federal Field Commission Report, which recommended the use of corporations, all subsequent proposals for legislation incorporated the concept of the corporation as the vehicle for administration of the settlement. K. Bass, III, *The ANCSA Structure Beyond 1991 — Patching Up or Total Revision*, in ALASKA FEDERATION OF NATIVES, INC., 1991: A LEGAL ANALYSIS (Oct. 1984). See also Note, *Legislation: The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and the Future*, 9 AM. INDIAN L. REV. 135 (1981) (author concludes that the Natives suggested the corporate form of administration in order to increase economic development and avoid dependency upon reservation status).

23. The desire not to follow previous methods of settling Indian claims is apparent from the disavowal in section 2 of ANCSA of "permanent racially defined institutions," "lengthy wardship," or "reservation system." AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D. SESS., SPECIAL JOINT TASK FORCE REPORT ON ALASKA NATIVE ISSUES 18 (1976).

24. *Id.* The report includes the following testimony from the Tlingit-Haida Central Council regarding the Native sentiment in southeast Alaska preceding passage of the Act: "Alaskan Natives rejected the idea of reservation trust land, and [Bureau of Indian Affairs] interference because they saw the gross mismanagement of the canneries in [southeastern Alaska] by the [Bureau of Indian Affairs]. They felt they wanted to make their own mistakes." *Id.* at 48. The Commission reported: "The natives wanted to be free of Federal incompetency at any cost — even at the cost of eventually losing their money and land." *Id.* at 39.

See generally 1 ALASKA NATIVE REVIEW COMM'N, TRANSCRIPT OF PROCEEDINGS, OVERVIEW ROUNDTABLE DISCUSSIONS (Feb. 27, 1984) [hereinafter ROUNDTABLE DISCUSSIONS]. These Roundtable Discussions, led by Judge Thomas Berger, attempted to identify the aspirations and expectations of Alaska Natives when ANCSA was formulated, whether they had been fulfilled or met, and how they had

adopt a new, more capitalist-style model, utilizing the form of the corporation to manage the benefits of ANCSA and to attempt to obtain ever-elusive prosperity for Alaska's Native people.²⁵

changed; they also examined the effects of using the corporate model as the settlement vehicle. John Borbridge, a participant in the Roundtable Discussions, president of Tlingit-Haida Central Council during passage of ANCSA, and an early president of Sealaska Corporation, described a goal of ANCSA's proponents as "freedom from interference by the Department of Interior and the [Bureau of Indian Affairs], who, much of the Native leadership felt, had not been too successful in addressing, over many, many years, the concerns that have been repeatedly expressed by the Native people." *Id.* at 42.

Emil Notti, one of the first presidents of the Alaska Federation of Natives, testified in field hearings before the Senate Committee on Interior and Insular Affairs:

[T]here is a strong feeling among the native people in Alaska, that they want to have control of their own destiny. And if there are going to be mistakes made, we want to make them, not let the bad decisions be made in Juneau, or even farther away in Washington, D.C. I stand here before you to state in the strongest terms possible that the representatives here today, of 50,000 native people in Alaska do not want paternal guidance from Washington, D.C. We feel we have the ability to make our own way and once we get a fair settlement of our lands, it will enable us to operate our businesses. At first, no doubt, with the aid of competent advice, until our own men learn business management.

Alaska Native Land Claims: Hearing on S.2906 et al. Before the Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 33 (1968) (statement of Notti).

25. Fred Paul, a Native attorney who worked as a representative of the Arctic Slope Native Association during passage of ANCSA, stated at the Roundtable Discussions: "Western society was moving in and it was necessary that the settlement provide enough white man's tools to compete in a white man's world, and so that's in part, the acceptance by the Native leadership of the corporate concept." 1 ROUND-TABLE DISCUSSIONS, *supra* note 24, at 61.

ANCSA's drafters stated: "The corporation will very rapidly become an important element in the economic development of the natives in Alaska. The permanency of the corporate form as well as the protection against personal liabilities of its officers and directors is quite important given the nature of this undertaking." H.R. REP. NO. 523, 92d Cong., 1st Sess. 19 (1971), *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2192, 2209.

Much as Indian allotments (which are similar to homesteads) were seen as a way of "mainstreaming" Native Americans in the late nineteenth century at a time when the family farm represented the American way of life, corporations were seen as a way of "mainstreaming" Native Alaskans in the late twentieth century. An article in *Fortune* characterized ANCSA as follows: "Rather than set up more Indian reservations, Congress turned to modern society's most sophisticated and efficient institution, the corporation, to receive and administer the land and cash." Schuyten, *A Novel Corporation Takes Charge in Alaska's Wilderness*, FORTUNE, Oct. 1975, at 158.

However, according to Ann Fineup-Riordan, an anthropologist whose paper, "The Spirit of ANCSA: Native Aspirations and the Alaska Native Claims Settlement Act," served as the starting point of the Alaska Native Review Commission's Roundtable Discussions:

The idea, as expressed in the testimony [of Alaska Natives in 1968 concerning the proposed legislation], was that Western material advantages would be used to support rather than to supplant the maintenance of traditional

Congress selected the corporation as the primary vehicle for compensating Alaska Natives, but Congress did not identify any particular mission for Native corporations to fulfill once they had received their land and their cash.²⁶ The selection of the corporate model and the

Native values. The maintenance of cultural integrity was a conscious goal in the [1968] testimony but it had relatively low profile. It didn't get talked about explicitly a lot. However, it was clearly underlying the discussions of the inherent value of the land and the way of life that living off the land made possible. Thus, it was an implicit goal while the testimony was dominated by the mechanics of the settlement

Again, the Natives, in the [1968] testimony, expressed a desire to escape their immediate past of powerlessness and poverty but not their past values. They wanted . . . were willing to conform to Western standards but they did not want total integration.

1 ROUNDTABLE DISCUSSIONS, *supra* note 24, at 32.

26. This is particularly true for regional corporations. The term "Regional Corporation" is defined in subsection 3(g) of ANCSA simply as: "an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this [Act]; . . ." 43 U.S.C. § 1602(g) (1982). *See also* Note, *Settling the Alaska Native Claims Settlement Act*, 38 STANFORD L. REV. 227 (1985).

The definition of "Village Corporation" more amply describes the role village corporations are to fulfill. Subsection 3(j) of ANCSA states:

"Village Corporation" means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this [Act];

Id. § 1602(g).

In other legislation, Congress has recognized the "Native" character of the Native corporations and given them special treatment accordingly, equating them with traditional Indian tribes for certain federal benefit purposes. *See, e.g.*, 25 U.S.C. § 450b(b) (1982) (Indian Self-Determination and Education Assistance Act); *id.* §§ 1903(3), 1903(8) (Indian Child Welfare Act). However, these acts provide Native corporations with opportunities, not mandates.

Within the framework of the corporate form, Congress has left the specific goals and purposes of the corporations up to the individual corporations and their shareholders. The recent amendments to ANCSA reflect this orientation.

Section 2. The Congress finds and declares that —

. . .

(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, the Alaska Native Claims Settlement Act must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs;

(6) among other things, the shareholders of each Native Corporation must be permitted to decide —

(A) when restriction on alienation of stock issued as part of the settlement should be terminated, and

(B) whether Natives born after December 18, 1971, should participate in the settlement;

(7) by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not

injection of a billion dollars implied that the Native corporations should develop and operate as businesses which make a profit.²⁷ Yet most corporations appear to devote at least some resources to improving the social and economic welfare of their shareholders.²⁸ Many Native corporations have acted as employers of last resort; and they operate unprofitable or marginally profitable businesses needed by their communities. Native corporations also sponsor cultural programs and subsidize educational opportunities of their shareholders. In addition, costs of land management, which may include management for subsistence, may be substantial.²⁹

In the fifteen years since ANCSA corporations were organized, some have fared very well in the commercial world but many have not. Some of the regional corporations now operate diverse enterprises at a profit and play a major role in Alaska's economy.³⁰ Others

expressing an opinion on the manner in which such shareholders choose to balance individual rights and communal rights; . . .

Pub. L. No. 100-241, § 2, Feb. 3, 1988, 101 Stat. 1788. *See also* Note, *supra*, at 248 (ANCSA does not explain relationship between Native corporations and government, nor position of corporations within body of Indian law).

27. In describing the early testimony by Natives on the land claims legislation, which for the most part concerned the settlement as a whole as opposed to the mechanics of a particular bill, Fineup-Riordan states: "[T]he emphasis was on economic self-sufficiency and development. This emphasis was both pronounced and explicit and it . . . [sic] of what was asked of ANCSA. If the native community has reservations about the issue of the corporate vehicle, for instance, these reservations were not in the testimony." 1 ROUNDTABLE DISCUSSIONS, *supra* note 24, at 34.

This pro-economic development, capitalist-oriented mission is implicit in the requirement that the regional corporations be "for profit" business corporations. 43 U.S.C. § 1606(d) (1982). *See also* S. REP. NO. 405, 92d Cong., 1st Sess. 105 (1971).

28. Worl, *Larry Mercurieff: A Corporate Leader with Traditional Values*, ALASKA NATIVE NEWS, Apr. 1983, at 28 ("[T]he village corporation is much more than a profit-making organization" and provides "the means through its profits to work for the cultural as well as economic survival of the people."); *Willie Hensley: Native Corporations Aim to Produce More than Profits*, 14 ALASKA BUS. AND INDUSTRY, Sept. 1982, at 21 (president of NANA Regional Corporation states objectives not limited to profits); *Social Impact Seminar Held*, ALASKA NATIVE MGMT. REP., Nov. 15, 1976, at 7 (quoting Jack Wick, President of Koniag: "The responsibility of (Alaska Native) Corporations to shareholders is much more than the rate of return on investments."); Sackett, *Viewpoint: Doyon President Tells Regional Firm's Plans for Future*, 6 ALASKA INDUSTRY, June 1974, at 46, 82 (president discusses Doyon, Ltd.'s dual purpose of profit and employment).

29. Roy Huhndorf, President of Cook Inlet Region, Inc., stated: "Progress in Native communities depends to a great deal on self-esteem. Human development entails a much broader focus than required of conventional corporations. It's an all-encompassing job, much larger than that facing the average corporation." Fuerst, *Trailblazers*, ALASKA BUS. MONTHLY, Dec. 1988, at 26.

30. One profitable regional corporation is Cook Inlet Region, Inc. ("CIRI"). According to the CIRI's 1987 Annual Report, CIRI had retained earnings of \$120,300,017 as of December 31, 1987.

are struggling,³¹ and two, Bering Straits Native Corporation and the Thirteenth Regional Corporation, filed petitions under chapter 11 of the United States Bankruptcy Code in 1986.³²

The record of the village corporations has also been mixed. It is not surprising that many of the village corporations, which are smaller and less well capitalized than the regional corporations and which generally operate outside the state's major economic centers, have achieved little economically.³³ Two village corporations, Haida

31. Koniag, Inc., reported an accumulated deficit of \$19,457,394 as of March 31, 1987, as compared to a deficit of \$20,813,620 a year earlier. Koniag, Inc., and Subsidiaries, Consolidated Financial Statements, May 29, 1987. In 1983, Koniag announced it might be forced to seek bankruptcy protection. *A Year of Change for Alaska's Regional Native Companies*, ALASKA BUS. AND INDUSTRY, Sept. 1983, at 26.

32. See *In re* Bering Straits Native Corp., No. 2-86-00002 (Bankr. D. Alaska filed Mar. 5, 1986); *In re* Thirteenth Regional Corp., No. 86-06675 (Bankr. W.D. Wash. filed Sept. 17, 1986). Bering Straits' series of poor investments shortly after incorporation brought about an involuntary bankruptcy petition against it in 1977. ALASKA INDUSTRY, Jan. 1978, at 26. Bering Straits' case was resolved by confirmation of a plan of reorganization on May 3, 1988, modified January 4, 1989.

33. A General Accounting Office study reported a December 1982/January 1983 survey of all regional and village corporations regarding their financial condition and prospects. One hundred percent of the regional corporations and 74% of the village corporations responded. Forty-four of 107 respondents reported a loss in 1982, and 35 of the 107 reported a loss in each of the previous three years. GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE TED STEVENS, UNITED STATES SENATE — INFORMATION ON ALASKA NATIVE CORPORATIONS (Aug. 16, 1983).

In March 1983, Tanana Chiefs Conference, Inc., published a study consisting of a series of papers on the perceived inadequacies of the ANCSA solution to Native claims settlement. TANANA CHIEFS CONFERENCE, INC., INTERIOR REGION POST-ANCSA IMPACT ANALYSIS (Mar. 1983) [hereinafter POST-ANCSA IMPACT STUDY].

A paper by K. Grabinska in the Post-ANCSA Impact Study notes that village corporations typically suffer from remote locations and limited personnel with business experience. POST-ANCSA IMPACT STUDY, *supra*, at 9.

According to an Alaska Native Management Report dated September 1, 1976, two village corporations had enrollments over 2,000; two had between 1,000 and 2,000; five others had over 600 shareholders; and 37 had between 300 and 600 shareholders. This left approximately 150 with smaller populations. While the number of village corporations has subsequently been reduced through merger to about 172, nearly all are still in the under-300 group.

All Native corporations under ANCSA were set up in a vacuum, without first developing entrepreneurial skills or capital wealth in the area served by the corporations. POST-ANCSA IMPACT STUDY, *supra*, at 18. The difficulties of operating a small village corporation according to standard business principles are illustrated in an article published in *Alaska Industry Magazine*. The article points out that, in April 1978, over 70% of the village corporations were delinquent in their required filings with the State Division of Banking, Securities, and Corporations. Sanak Native Corporation, located on the Aleutian Chain, with 26 shareholders, spent twice its annual income on its required annual corporate audit. *A Helping Hand for the Native Village Firms*, ALASKA INDUSTRY MAG., July 1987.

Some of the village corporations, particularly those with larger enrollments, have been successful. Sitnasuak Native Corporation, the village corporation for Nome, had

Corporation and Tigara Corporation, have also filed chapter 11 petitions.³⁴ Others, in contrast, have achieved substantial profits and probably will continue to prosper.³⁵

a January 1, 1987, enrollment of 2,147, larger than the enrollment of Ahtna, Inc., or Chugach Natives, Inc., two of the 13 regional corporations. Sitnasuak reported earnings of \$396,771 for 1987, with retained earnings at the end of the year of \$1,994,073. Sitnasuak Native Corp. and Subsidiaries, Consolidated Statement of Earnings (Loss), Feb. 19, 1988, at 9. According to an article in *Alaska Native News*, March 1983, Sitnasuak's success is attributed to a conservative investment policy and concentration in local business ventures with which the shareholders and management are familiar. Bloom, *Nome Native Corporation Has Bright Future*, ALASKA NATIVE NEWS, Mar. 1983, at 27.

However, not all of the larger village corporations have been successful. Goldbelt, Inc., the village corporation for Juneau, had an accumulated earnings deficit of \$166,511,200 as of December 31, 1986. A 1987 sale of net operating losses reduced the deficit to \$121,432,900 by December 31, 1987. Goldbelt, Inc., and Subsidiaries, Consolidated Balance Sheets as of December 31, 1987 and 1986, Jan. 21, 1988. According to an article in *Alaska Native Magazine*, Dec. 1987, Goldbelt was near bankruptcy until rescued by this loss sale. Hoffman, *A Review of Southeast Village and Urban Corporations*, ALASKA NATIVE MAG., Dec. 1987, at 40.

Village Journey, the Report of the Alaska Native Review Commission by the Honorable Thomas R. Berger, contains an eloquent summary of the problems faced by village corporations:

A village corporation with one hundred shareholders received about \$80,000 from the initial distribution of funds in December 1973. The Alaska Native Foundation has calculated that the minimum cost to a village of carrying out the corporate duties that ANCSA has imposed on it is about \$70,000 annually. Over ten years, most villages received less than \$200,000 in total from the Native Fund, and that amount could not long support operating budgets, let alone pay dividends. As early as 1974, a study carried out by the Department of the Interior estimated that any village with fewer than six hundred shareholders had little chance of success. Only eight villages out of the more than two hundred village corporations exceeded six hundred shareholders; another five had five hundred or more shareholders. From the beginning, the great majority of village corporations were seriously undercapitalized.

...

... In most villages, no commercial business could have succeeded, and the bankruptcy of many village corporations seems to be inevitable.

T. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* 33, 36 (1985).

34. *In re Haida Corp.*, No. 5X-85-00007 (Bankr. D. Alaska filed May 15, 1985), *In re Tigara Corp.*, No. 3-86-00707 (Bankr. D. Alaska filed Nov. 12, 1986). A plan of reorganization for Haida Corporation was confirmed July 19, 1988, pursuant to which Haida Corporation's creditors are paid in full. Haida Corporation succeeded in obtaining federal legislation in 1986 and 1987 authorizing the sale of some of its land to the United States for cash. Pub. L. No. 99-664 (Nov. 17, 1986).

35. Klukwan, Inc. was ranked by the Alaska Business Monthly magazine as the tenth largest company in Alaska for 1986 and it is expected to climb even higher in 1987. It is the only village corporation to rank among the top 50 corporations in the state. In 1986, its sales reached an all time record of \$47 million, up from the previous year's sales of \$28.3 million.

The company's major investments include subsidiaries in timber development, stevedoring, expediting and an investment company. The company

In the two village corporation bankruptcies, the regional corporation for each village was a major unsecured creditor. In one of the two regional corporation bankruptcies, the villages collectively held most of the debt. The other regional corporation that filed, the Thirteenth Regional Corporation, does not have villages. The fact that Native corporations, themselves, may be major creditors in Native corporation bankruptcies adds yet another layer of complexity to the issues addressed in this article.

Alaska's Native culture did not have a long entrepreneurial tradition, and there were few Alaska Natives with substantial business experience to sit on the boards of directors, or serve as executives, of the new corporations.³⁶ From the perspective of hindsight, it may have been a mistake to assume that these fledgling businesses would thrive. In fact, many have not. The newly acquired capital was invested, or even squandered, by some of the regional corporations in acquiring existing businesses, some at inflated prices, which the corporations were unable to manage efficiently.³⁷ Some of the regional and village corporations commenced doing business in traditionally risky fields (for example, construction) in the hope of providing employment for

also has a real estate joint-venture in Phoenix, Arizona, with an outside company.

Klukwan has been the lead in providing shareholder benefits and services. The corporation provides its shareholders with scholarships, job training, services for the elders, a monthly corporate newsletter, opportunities for employment and substantial monthly dividends

Hoffman, *supra* note 33.

36. Lillie McGarvey, an Aleut long active in Native affairs, remarked at the Alaska Native Review Commission's Roundtable Discussions:

Congress said we must be corporations, both regional and village. So all of a sudden, people . . . some of us could hardly spell corporation . . . were all of a sudden managing corporations. We became boards of directors, we became presidents, secretaries, vice presidents, treasurers of million dollar corporations. It's just as if somebody went down on the streets of Anchorage, picked up anybody coming up the street and said, "Hey, you're a corporation president" or "You're a corporation secretary." There was no provision for any type of training to really show us what a corporation was, how it should be run. So we have struggled.

2 ROUNDTABLE DISCUSSIONS, *supra* note 24, at 105.

37. These unfortunate developments were predicted by at least one commentator:

The final feature of the Regional Corporations distinguishing them from other Alaska business corporations will be their lack of business background or purpose. Most corporations are formed either after the business is a going concern or when there is at least a contemplation of particular business ventures. The Regional Corporations, by contrast, will have to develop their business orientation after the fact. A possible effect of this is that a great deal of money may be wasted in the early life of the Regional Corporations through poor management and hastily conceived endeavors."

Note, *Charitable Donations Under the Alaska Native Claims Settlement Act*, 3 UCLA-ALASKA L. REV. 148, 154 (1973).

their shareholders and, consequently, suffered severe losses which have crippled their ability to become the economic forces their founders intended.

The risk of financial loss, or even collapse and bankruptcy, is inherent in the capitalist economic system in which the Native corporations were intended to operate. Business failure, whether or not formally recognized by bankruptcy proceedings, is a common event in the United States.³⁸ However painful for those directly affected, it is not generally thought to have profound social or economic policy implications, except in the rare case of very large corporations whose collapse would substantially disrupt the economy or in the case of businesses which provide goods or services thought vital to national security. Indeed, laissez-faire economic theory teaches that a certain degree of failure must be accepted as the price of progress. More efficient and productive enterprises should prosper and grow as those less successful lag behind in competition. Businesses which cannot profitably produce goods or services at a competitive price should be allowed, if not encouraged, to fail and make room for those more capable of satisfying the community's needs. Subsidizing or protecting unproductive or inefficient enterprises can be done only at the cost of higher consumer prices and the diversion of investment capital from more profitable uses.

This, however, is a difficult and perhaps callous doctrine to apply to the Native corporations. The corporations were created as the vehicle for satisfying the historic claims of Alaska Natives to Alaska's lands and mineral wealth, and they were intended to provide for the social and economic progress of their shareholders. The proponents and drafters of ANCSA regarded the corporate concept as a means of bringing economic gain and progress to Alaska Natives. However, they also intended the regional and village corporations to serve purposes more complex than pure profit.³⁹ Therefore, it is difficult to conclude that Native Corporations, as opposed to ordinary business

38. "A capitalist without the threat of bankruptcy is like a Christian without the threat of Hell." Robert Gray, President of National Bank of Alaska, *Anchorage Daily News*, Feb. 26, 1989, at B-1.

39. ANCSA's legislative history indicates that Native corporations were to perform broader functions than just those of business and profit-making. Although earlier versions of ANCSA separated the investment and social welfare functions of ANCSA corporations into different entities, they were combined in the final version. See C. Goldmark, J. Wickwire & J. Hanley, *The 1991 Takeover Problem: A Report to the Alaska Federation of Natives*, in ALASKA FEDERATION OF NATIVES, INC., 1991: A LEGAL ANALYSIS 1-6, 16-20 (1984).

Fineup-Riordan summarized the early testimony of the Alaska Native community on the claims legislation as emphasizing five major concerns: (1) continuity of use and occupancy of the land; (2) the importance of cash compensation for economic development; (3) the resolution of past social ills and full participation in the future;

ventures, should be allowed to fail as the marketplace dictates.⁴⁰ The failure and disappearance of a regional or village corporation would risk the loss of the compensation granted the Native shareholders as settlement of their aboriginal claims. Failure of the corporation also would deprive the Native shareholders of the social and cultural support that many of the corporations have come to provide in response to perceived community needs.⁴¹

(4) the achievement of self-sufficiency and self-determination; and (5) continuity as cultural integrity. 1 ROUNDTABLE DISCUSSIONS, *supra* note 24, at 23-35.

The difficulties of achieving these complex purposes were aptly described by Byron Mallott, President of Sealaska Corporation, in the Alaska Native Review Commission's Roundtable Discussions. Mr. Mallott discussed the view that ANCSA was characterized as a major social and economic experiment, unique in the annals of U.S. history. I bought that concept and I thought that the corporate vehicle, the legal corporate structure, could be used to do more than traditionally it had done, that it could be more than just an economic institution, that it could influence by our having control of the institution, political and social and other issues beyond just the economic. And, at least my experience subsequently has been, that is very difficult to do. Corporations demand an incredible sense of discipline and economic focus in order to be competitive on the business side. And the utilization of corporate assets requires that almost all of those assets be employed in some sort of economic kind of activity, and the demands upon the management and the policy-makers of those institutions are so much demanding of continuing in almost pure focus on economic and business kinds of activities, that, over time, other priorities and other obligations, if you're not careful, begin to fade. And, in my judgment also, that is a difficulty that we face as a people.

. . . But so long as the land . . . which most Native people at the time felt was given to the corporations as stewards for some long-term, Native-oriented, subsistence-oriented, tribal-oriented, culturally [sic] oriented purpose, is retained in ownership of the corporations, I think we have a major difficulty because at 1991 . . . if you sell your stock, you sell your land. . . .

. . . [T]he corporations, for all the pressures upon them, for economic success, have retained ownership of the land, and they've done it because of the strong sense that they are stewards. But the question becomes, how long can that be maintained with the business and legal imperatives and obligations that corporations, as institutions, have upon them?

4 ROUNDTABLE DISCUSSIONS, *supra* note 24, at 311-312.

40. The Institute of Social and Economic Research summarizes a number of proposed changes to ANCSA which were discussed in the mid-1980s.

These and other changes that Native groups want are major, and they would alter a basic premise of the 1971 settlement act — which was that corporations established under the act would, after a certain period, be much like any other American corporation, subject to the same risks and opportunities. Many Native leaders today say that lands awarded Alaska Natives in settlement of their aboriginal land claims should not be at such risk of loss — that their ownership should be protected for future generations.

INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, UNIV. OF ALASKA (Oct. 1985), at 26.

41. See, e.g., *Take Our Land, Take Our Stock, Take Our Life*, ALASKA NATIVE NEWS, Sept. 1984, at 7 (Sealaska Corporation must "respond to social and cultural demands of its constituency," as well as make profit).

Business corporations were originally conceived as vehicles for voluntary investment of risk capital. Failure of the venture was a foreseeable possibility from the outset and a risk assumed by the voluntary investor. Native corporations, on the other hand, were created by a political process. Though the Alaska Native leadership testified at congressional hearings, participated in the drafting of many of ANCSA's provisions, and approved the bill prior to its signing, the individual Alaska Native did not make an informed and voluntary choice to subject his or her ancestral land claims to the risks of a laissez-faire economic system. The original ANCSA may have left ambiguities about the role the corporations⁴² were to play and the degree to which the corporations were charged with protecting the traditional way of life while creating a new one, but the Act clearly jeopardized the assets necessary for maintenance of the traditional lifestyle (that is, the land) in the course of making it available for use as capital in the cash economy. With the exception of a twenty-year exemption from real property taxation, ANCSA, as originally enacted,⁴³ contained nothing to stem the loss of Native corporation lands to creditors, even though scores of Native Americans had lost their land that way for generations.

As the year 1991, the twentieth anniversary of ANCSA, has approached, the question of whether it is appropriate to conclude that the business failure of a Native corporation should cause the loss of all its lands and income rights and, therefore, cause its shareholders to lose their entire investment, representing the lands and revenues to which they claimed aboriginal title, has been increasingly voiced.⁴⁴ According to the original ANCSA provisions, restrictions on share transfer and limitation on taxes of ANCSA corporations' lands were to end in 1991,⁴⁵ and the corporations and their shareholders would, it

42. Senator Henry Jackson, Chairman of the Senate Interior and Insular Affairs Committee during consideration and passage of ANCSA and a sponsor of the legislation, reportedly stated that the wording of the Act was deliberately left vague in order to allow room for flexibility. Schuyten, *supra* note 25, at 168.

43. 43 U.S.C. § 1606(h)(1) (1982) (originally enacted as Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688, 781 (1971)).

44. See, e.g., S. REP. NO. 201, 100th Cong., 1st Sess. 2021 (1987) (threat of involuntary loss of Native land by failing Native corporations on e of significant problems in implementation of ANCSA settlement); T. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 167-68* (1985) (recommends lands be transferred out of corporate control to keep them in Native hands); *Oversight Hearings on the Alaska Native Claims Settlement Act Before the Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 7, 20, 24 (1985); *1991 Issues and AFN Work Plan*, ALASKA NATIVE NEWS, May/June 1984, at 14; *Alaska Federation of Natives Draft 1991 Resolutions*, ALASKA NATIVE NEWS, June 1985, at 28; Worl, *The Quest for Tribal Survival*, ALASKA NATIVE MAG., Oct. 1985, at 8.

45. 43 U.S.C. § 1606(h)(3) (1982).

was hoped, be ready to compete on an equal footing with all other business ventures. However, doubt over the viability of many Native corporations, concern that they should not be forced to compete in the free marketplace for investors' funds, and a strong desire to retain the corporations and their land assets in Native hands, led to the passage of the Alaska Native Claims Settlement Act Amendments of 1987.⁴⁶ These amendments were the result of extraordinary efforts on the part of the Alaska Native community to overhaul and revise ANCSA to make it more responsive to their needs. This legislation, often referred to as the "1991 Amendments" because of its impact on provisions intended to be operative in 1991, continues share transfer restrictions and makes other changes intended to enhance Native control of ANCSA corporate stock and property.⁴⁷ While allaying some of the concerns of loss due to business failure or takeover, the 1991 Amendments by no means protect the Native corporations from all risks inherent in business operations.

At a time of increasing concern over the future of Native corporations and their assets, the question of the degree to which they were intended to, or should now, be subject to the risks of the marketplace

46. Pub. L. No. 100-241, 101 Stat. 1788 (1988). The congressional findings and statement of policy enacted as part of the ANCSA Amendments of 1987 contain the following statement:

The Congress finds and declares that —

...

(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, [ANCSA] must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in the light of their particular circumstances and needs;

Id.

47. Among these changes is a provision that alienability restrictions on stock issued to Native corporation shareholders ("Settlement Common Stock") shall continue until terminated by shareholder vote in accordance with 43 U.S.C.A. § 1629b(c) and (d) (West Supp. 1988), and a provision that undeveloped land conveyed to Native corporations by the federal government shall be exempt from execution and real property taxation, 43 U.S.C.A. § 1636(d) (West Supp. 1988).

Recent amendments to ANCSA provide a mechanism by which Native corporations can spin assets off to a separate entity, called a "settlement trust," specifically charged with the promotion of the health, education, and welfare of the corporation's Native shareholders and the preservation of Native heritage and culture. 43 U.S.C.A. § 1629e(b) (West Supp. 1988). Settlement trusts permanently insulate those assets from the business risks of the corporation because their assets are protected from the claims of the grantor corporation's creditors. Settlement trusts may not operate as a business. Congress established this new form of ownership for the proceeds of the ANCSA settlement in recognition of the fact that "the purposes of the Act may be carried out better by allowing Alaska Natives to alter their form of ownership." 133 CONG. REC. H11,936 (daily ed. Dec. 21, 1987) (joint analysis submitted by Congressmen Udall and Young); 133 CONG. REC. S18,702 (daily ed. Dec. 21, 1987) (joint analysis submitted by Senators Murkowski and Stevens).

is presented in the context of the pending bankruptcy cases and will arise again if other Native corporations choose to seek bankruptcy protection. This question may also surface if creditors commence involuntary proceedings against a Native corporation under section 303 of the United States Bankruptcy Code.

The United States Bankruptcy Code ("the Code"), codified at title 11 of the United States Code,⁴⁸ is designed to provide an orderly and rational means for the liquidation or financial reorganization (if possible) of the property of individuals and businesses which have sought bankruptcy relief (referred to in the Code, and here, as "debtors").⁴⁹ While insolvency is not a requirement for the filing of a voluntary bankruptcy petition,⁵⁰ most individuals and businesses seeking bankruptcy relief are insolvent under either a "balance sheet test" (insufficient assets to meet liabilities) or an "equity test" (inability to meet debts as they mature, usually due to a lack of financial liquidity).

A comprehensive discussion of the pertinent Bankruptcy Code provisions is beyond the scope of this article. However, a brief summary of the provisions will be attempted. In general, the Code fulfills several purposes. It provides a period of relief from creditor pressure during which the assets and liabilities of the debtor, and the prospects for continuation of the business conducted by the debtor, can be analyzed.⁵¹ It furnishes a means for identifying the property to be used for paying creditors' claims or reorganizing the business to generate the income for claim payment.⁵² It dictates how the assets of the debtor are to be managed during the liquidation or reorganization process, which may continue for months or years.⁵³ It sets forth the priority in which creditors' claims are to be paid.⁵⁴ It also dictates the degree to and manner in which the claims of creditors are to be satisfied if the business is to be successfully reorganized and avoid liquidation.⁵⁵

The Code implicitly assumes that artificial entities, such as corporations and partnerships, which are presumed to have been voluntarily created (usually for profit), have no valid reason to continue in existence once they are unprofitable and are judicially determined to be incapable of financial resurrection. In comparison, natural persons

48. 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986).

49. 11 U.S.C. § 101(12) (1982). Though the Bankruptcy Code deals with both "consumer" and "business" bankruptcies, this article will concentrate on provisions pertaining to the reorganization or liquidation of insolvent businesses.

50. 11 U.S.C. §§ 109, 301 (1982 & Supp. IV 1986).

51. *Id.* § 362(a).

52. *Id.* § 541.

53. *Id.* §§ 704, 1106(a), 1107.

54. *Id.* § 726.

55. *Id.* § 1129.

who request or suffer bankruptcy relief and whose property is liquidated for the benefit of their creditors are permitted to be discharged from their debts and to retain some property, as well as all earned income acquired after the bankruptcy filing date, so as to have a "fresh start."⁵⁶ However, the Code assumes that artificial entities have no such right to retain property or to be automatically discharged. There is no purpose in a "fresh start" for an artificial entity whose assets are to be liquidated for the benefit of creditors. If the owners wish to form a new business venture, they can do so, after simply abandoning the unsuccessful prior attempt.

As outlined above, the Code provides a structure and organization for distribution to creditors in an equitable manner of the assets and income of a business entity, whether a sole proprietorship, partnership, or corporation, which has become subject to bankruptcy court jurisdiction by the entry of an "order for relief" under sections 301, 302, or 303 of the Code.⁵⁷ Generally, a business bankruptcy will be handled under chapter 7 of title 11, providing for liquidation of business assets by a trustee, who distributes the proceeds to creditors according to statutory priorities,⁵⁸ or under chapter 11 of title 11, which contemplates that the business will continue in existence. Chapter 11 provides for the payment to creditors, usually over time, of an amount acceptable to the requisite majority of creditors and at least equal to that available in a chapter 7 liquidation.⁵⁹

A chapter 7 liquidation proceeding represents the termination of the business and the extinguishment of the debtor as a going concern. In a chapter 7 proceeding, all assets of the debtor are turned over to an independent trustee whose function it is to liquidate the available assets to pay claims of creditors to the extent possible.⁶⁰ Though a corporation which is liquidated under chapter 7 does not cease to exist as a corporation, it becomes an "empty shell" from which all assets of

56. *Id.* §§ 541, 707, 1141, 1328.

57. *Id.* §§ 301-303.

58. *Id.* §§ 507, 726.

59. Section 1129(a) of the Bankruptcy Code provides, in part:

(a) The court shall confirm a plan only if all of the following requirements are met:

...

(7) With respect to each impaired class of claims or interests —

(A) each holder of a claim or interest of such class —

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date;

Id. § 1129(a).

60. *Id.* § 704.

value have been removed and which, therefore, cannot function economically in the future. A corporation does not receive a discharge in a chapter 7 liquidation proceeding, so any assets it might acquire after the bankruptcy case is concluded are subject to the claims of creditors who have not been satisfied through the bankruptcy process.⁶¹ For this reason, a corporation which is subjected to chapter 7 relief will be abandoned by its owners, whose investment will have been lost.

Chapter 11 of the Code is designed to promote reorganization, as opposed to liquidation, of the business. Chapter 11 also furthers the socially useful goals of promoting employment and preventing the disruption caused by a major business collapse. In addition, if the business can become profitable over a period of time, more funds can be generated for creditor payments under a chapter 11 reorganization proceeding than is possible in a liquidation. Liquidation frequently causes the distress sale of assets in a "fire sale" atmosphere or causes the foreclosure on assets subject to secured creditors' liens, with no value derived for unsecured creditors. In a reorganization under chapter 11, the primary function, which must be fulfilled before any other goals can be achieved, is payment of creditors' claims, at least to the extent that claims would be paid in a liquidation under chapter 7.⁶² While a chapter 11 proceeding may involve a trustee, the debtor generally conducts its own reorganization, serves as its own trustee, and has many of the statutory powers of an independent trustee appointed to take charge of the debtor's property and affairs. In the usual chapter 11 case, the debtor remains in possession of the assets of the bankruptcy estate and is, therefore, referred to as a "debtor-in-possession."⁶³

To a considerable degree, the goals and values embodied in the Bankruptcy Code conflict with those reflected in ANCSA. The Bankruptcy Code creates a complex but systematic ordering of creditors' claims, but gives relatively scant attention to equity-holders' (including shareholders') interests. Further, the Bankruptcy Code accords payment of creditors' claims a higher priority than protection of the value of shareholders' stock;⁶⁴ ANCSA, as amended, inverts this preference by protecting ANCSA stock and ANCSA land from certain

61. 11 U.S.C. § 727(a)(1) (1982).

62. The precondition for plan confirmation cannot be waived except by the affected creditor, even if other creditors are willing to take less than a liquidation payment in order to see that the business continues. *See supra* note 59. The same test is applicable to bankruptcies of individuals with regular incomes, usually wage earners, filed under chapter 13 of the Code, and family farmers. 11 U.S.C. §§ 1225, 1325(a)(4) (1982 & Supp. IV 1986).

63. 11 U.S.C. §§ 1101(1), 1107 (1982 & Supp. IV 1986).

64. *See* text accompanying notes 189-200.

voluntary and involuntary conveyances and creditors' claims.⁶⁵ The byzantine complexity of ANCSA's provisions regarding the issuance and transfer of stock stands in stark contrast to its sometimes incomplete treatment of creditors' claims. Indeed, ANCSA as originally enacted, practically ignored the powerful role played by debt-holders of a corporation.

These two statutory schemes value the rights of the debt-holders as compared to the equity-holders quite differently. Many of the Bankruptcy Code's most fundamental underlying assumptions about corporations (that is, voluntary creation, capitalization for the purpose of investing risk capital, performance measured entirely by financial indicators, no need for a fresh start because a new entity can be created) do not apply to Native corporations at all. Indeed, ANCSA, and its amendments, can be viewed as a progression of efforts to protect Native corporations from creditors' claims and the threat of non-Native control in order to fulfill Congress' promise of just compensation for extinguishment of Alaska Natives' aboriginal claims.⁶⁶ The stock transfer restrictions contained in ANCSA as enacted in 1971, the land bank provisions contained in the 1980 amendments, and the automatic land bank provisions and stock inalienability extensions of the 1987 amendments were all specifically designed to insulate the corporations and their shareholders from free market and creditor pressures. Thus, as amended, ANCSA attempts to provide Alaska Native corporations with the flexibility to enter the marketplace on the one hand, and protect some of their assets from loss on the other.

Bankruptcy is the acid test of whether the dominant culture will, in fact, permit the Alaska Native people to maintain the basis for a lifestyle outside the mainstream of the cash economy, while also giving them a chance at the brass ring offered by a capitalistic society. In the context of a bankruptcy, creditors of the Native corporation, relying upon the explicit provisions of the Bankruptcy Code and the policies implicit in the Code, will seek to apply the assets and income of the

65. Section 7(h) of ANCSA makes ANCSA stock nontransferable. 43 U.S.C. § 1606(h) (1982). As discussed *infra*, this provision may override the Bankruptcy Code's absolute priority rule which in certain circumstances permits creditors to extinguish stockholders' interests in a chapter 11 debtor corporation if creditors' claims are not paid in full. See text accompanying notes 189-200. ANCSA as originally enacted provided that the stock restrictions would expire in 1991; the 1987 amendments extend these restrictions indefinitely until the ANCSA corporation chooses otherwise. See text accompanying note 47. ANCSA section 11, as enacted in 1970 and amended in 1987, protects certain undeveloped land owned by ANCSA corporations from creditors' claims. 43 U.S.C. § 1610 (1982); see text accompanying note 109. Additionally, ANCSA section 21(d) exempts certain undeveloped land from real property taxation. 43 U.S.C. § 1620(d) (1982).

66. See *supra* note 2.

Native corporation to their claims. The shareholders and management of the Native corporation, on the other hand, will rely on ANCSA's purposes and legislative language to support their desire to preserve the corporate existence and minimize creditor payments so that the debtor will continue to fulfill its functions as provided in ANCSA.⁶⁷ When an ANCSA corporation enters the bankruptcy process, these tensions must be resolved.⁶⁸

II. PROPERTY OF THE ESTATE

A. Introduction

Central to the organization and resolution of a bankruptcy case is the concept of "property of the estate" as defined in section 541 of the Bankruptcy Code.⁶⁹ A bankruptcy case is commenced and the bankruptcy estate is created upon the debtor's filing a voluntary petition in the United States Bankruptcy Court.⁷⁰ With limited exceptions, the estate consists of all legal or equitable interests in property owned by the debtor at the commencement of the case and any interest in property acquired by the debtor's estate thereafter. The estate's property comes under the jurisdiction of the bankruptcy court and is potentially

67. In resolving these conflicts, courts will give considerable weight to the status of ANCSA as "Indian legislation." Section 2(a) of the 1987 amendments to ANCSA recites that "the Alaska Native Claims Settlement Act and this Act are Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs." 43 U.S.C.A. § 1601(9) (West Supp. 1988). This is very strong language. The United States Supreme Court has recognized a canon of construction that Indian legislation (defined as legislation intended to benefit Indians) is to be construed liberally in favor of Indians, and ambiguities in non-Indian legislation are to be resolved in favor of Indians. See *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 275-76 (1982).

68. A related topic was analyzed by a commentator, discussing the difficulty in harmonizing the realities of Alaska Native lifestyles and the purposes of ANCSA corporations with the demands of the Model Business Corporation Act. Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations under Corporate Law*, 8 *UCLA-ALASKA L. REV.* 103 (1979).

69. Section 541 of the Bankruptcy Code provides, in part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541 (1982 & Supp. IV 1986).

70. 11 U.S.C. § 301 (1982). The bankruptcy estate may also be created upon the entry of an "order for relief" (that is, a determination that bankruptcy administration should proceed) in an involuntary case. 11 U.S.C. § 303 (1982 & Supp. IV 1986).

subject to distribution to creditors and other third parties. In a chapter 7 liquidation case, the concept of property of the estate defines the property which the trustee is required to collect and reduce to money under section 704 of the Code.⁷¹ In a chapter 11 reorganization, it is the property which the trustee or debtor-in-possession may manage, sell, or utilize in a plan of reorganization under section 1123.⁷² Any trustee appointed in a chapter 7 case must determine the scope of the estate available for payment of creditors' claims and expenses of administration in the bankruptcy case. In a chapter 11 reorganization, determination of the property of the estate is equally essential, as the amount which can, or must, be paid under a plan of reorganization cannot otherwise be known. Under section 1129(a)(7), no plan can be confirmed unless the court determines that each creditor who has voted against the plan will receive payment at least equal to the amount available to that creditor in a chapter 7 liquidation.⁷³

Any corporate reorganization proceeding involves explicit or implicit bargaining between the debtor and the contending groups of creditors. This negotiation cannot be effectively carried out unless there is general agreement concerning the assets of the debtor available for distribution.

For an "ordinary" debtor corporation, ascertaining the contents of a bankruptcy estate usually is neither difficult nor controversial. The estate in the typical corporate bankruptcy is usually all-encompassing, and its composition under most circumstances may be taken for granted. With a Native corporation, the questions are more intricate. Moreover, the answers may compromise or destroy the ability of the corporation to fulfill the functions intended for it under ANCSA.

Native corporations possess a wide variety of property, both real and personal. The initial capitalization of Native corporations derived

71. Section 704 provides, in part, as follows:

The trustee shall —

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest;

11 U.S.C. § 704 (1982).

72. Section 1123, entitled "Contents of Plan," provides, in part:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall —

. . . .

(5) provide adequate means for the plan's implementation, such as —

. . . .

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

Id. § 1123.

73. *Id.* § 1129(a)(7).

entirely from transfers of land and cash from the federal government,⁷⁴ and much of the property received was subject to unique and often complex statutory conditions. In addition, ANCSA, as amended, contains a number of provisions affecting the rights of creditors of Native corporations, which may in turn affect the composition of the bankruptcy estate. Defining the property of a Native corporation's bankruptcy estate requires the examination of these provisions of ANCSA, together with relevant commercial and bankruptcy law. The problem in defining property of a Native corporation's bankruptcy estate arises both with its land and with cash income received from the land and from other corporations.

In contrast to non-Native corporations, the property of Native corporations can at times lie beyond the reach of creditors. ANCSA, as amended, has made this automatic under certain circumstances for certain types of assets (for example, undeveloped land). In addition, Native corporations have the option of voluntarily placing assets beyond the reach of their creditors if they take steps prescribed in the statute for establishment of a settlement trust.⁷⁵ At the opposite end of the spectrum, corporation property such as general revenue appears to be no different from an asset owned by any non-Native corporation and would presumably come within a creditor's reach.

The concept of "exempt assets" in a corporate bankruptcy is unique to Native corporations. Outside of ANCSA, only individuals, as opposed to artificial business entities such as corporations, can possess property immune from creditors' claims. Unfortunately, ANCSA prescribes few details concerning the implementation of the exemption provisions, especially in the context of a bankruptcy.

Many of the protections from the risks of the marketplace afforded Native corporations have come in amendments to ANCSA, enacted as members of Congress, Alaska Natives, and others became increasingly concerned that the Alaska Native settlement might be lost through creditor action. These amendments have sought to facilitate the maintenance of Native control over Native property and, in particular, Native land.

B. Land Issues

1. *Undeveloped Land.* Acting under its plenary authority to regulate Indian affairs,⁷⁶ Congress recently enacted amendments to ANCSA ("the 1991 Amendments") affording sweeping protection to

74. 43 U.S.C. §§ 1605, 1613 (1982).

75. See *supra* note 47.

76. See Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241 § 2(9), 101 Stat. 1788 (1988); 133 CONG. REC. S15,405 (daily ed. Oct. 29, 1987).

undeveloped lands held by Native corporations.⁷⁷ Alaska Congressman Don Young, a sponsor of the legislation, stated in urging its passage in the House of Representatives:

H.R. 278 is intended to correct a serious flaw in the Alaska Native Claims Settlement Act of 1971 — a flaw which threatens the intent of that act by allowing the loss of land owned by Alaska Natives. This flaw will be corrected through passage of this legislation⁷⁸

Indeed, at the outset of the hearings in the 99th Congress which ultimately led to the 1991 Amendments, Young announced that his main goal as Congressman for the State of Alaska was to make sure that the land that was granted to the Alaska Natives would still belong to Alaska Natives after 1991.⁷⁹ The theme of protection for Native lands echoed throughout the proceedings leading to passage of the 1991 Amendments.⁸⁰

77. 43 U.S.C.A. § 1636 (West Supp. 1988).

78. 133 CONG. REC. H11,933 (daily ed. Dec. 21, 1987).

79. *Oversight Hearings on the Alaska Native Claims Settlement Act Before the Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 5 (1985).

80. In its report on the proposed amendments, the Senate Committee on Energy and Natural Resources stated:

Another concern is that many of the Regional, Village and Urban Corporations and Native Groups do not have sufficient cash and natural resources to become and remain economically viable and that, consequently, title to lands owned by Native Corporations which remain in Native control will be lost involuntarily. Section 21(d) of ANCSA currently exempts Native Corporation land which has not been developed or leased from State and local property taxation for 20 years after the date of conveyance. Section 21(d) implicitly assumes that 20 years after the date of conveyance all undeveloped Native Corporation land, including tens of millions of acres of land which is only valuable as wildlife habitat needed to support the continuation of the Native subsistence economy, will be sufficiently integrated into the non-Native economy to generate sufficient revenue to pay a property tax, or, if it is not, that the Native Corporation which owns the land will be able to pay the tax with money earned from other sources. In addition, nothing in section 21(d) presently protects Native Corporation land from involuntarily passing out of Native ownership to pay creditors in bankruptcy proceedings, or through adverse possession.

...

Finally, concern was expressed that the for-profit corporation may not always be the only appropriate form of legal entity to implement the settlement in all regions and all villages. Some corporations have done a remarkable job of using their portions of the land and money settlement to advance the well-being of Native people in their respective geographic regions. Other corporations, particularly small village corporations, have experienced considerably more difficulty.

These difficulties have arisen due to several factors. First, Village Corporations were drastically undercapitalized. Although \$962.5 million is a significant sum of money, when paid out over a number of years and divided among 13 Regional Corporations, over 200 Village Corporations, and over

The provisions, known as the "automatic land bank provisions," which deal with undeveloped land appear in section 11 of the 1991 Amendments, which provides:

(d) AUTOMATIC PROTECTIONS FOR LANDS CONVEYED PURSUANT TO THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.—(1)(A) Notwithstanding any other provisions of law or doctrine of equity, *all land and interests in land in Alaska conveyed by the Federal Government pursuant to the Alaska Native Claims Settlement Act* to a Native individual or Native Corporation or subsequently reconveyed by a Native Corporation pursuant to section 39 of that Act to a Settlement Trust *shall be exempt, so long as such land and interests are not developed or leased or sold to third parties from —*

- (i) adverse possession and similar claims based upon estoppel;
- (ii) real property taxes by any government entity;
- (iii) judgments resulting from a claim based upon or arising under —

(I) Title 11 of the United States Code or any successor statute,

(II) other insolvency or moratorium laws, or

(III) other laws generally affecting creditors' rights;

- (iv) judgments in any action at law or in equity to recover sums owed or penalties incurred by a Native Corporation or Settlement Trust or any employee, officer, director, or shareholder of such corporation or trust, unless this exemption is contractually waived prior to the commencement of such action; and

- (v) involuntary distributions or conveyances related to the involuntary dissolution of a Native Corporation or Settlement Trust.⁸¹

80,000 individual Natives, the average Village Corporation received very little money. In addition to undercapitalization, at the time ANCSA was enacted, many individuals who later served as officers, employees, or members of the boards of directors had little experience dealing with the corporate form of organization or the business world. The lack of a private cash economy in much of rural Alaska compounded the problem. Most Native villages are sited at locations which enable village residents to participate in the subsistence hunting, fishing and gathering economy, not the cash economy.

In addition to the problems already discussed, a number of Native witnesses who appeared before the Committee testified that they and many other Alaska Natives, particularly those who live in isolated rural villages who participate in the subsistence hunting, fishing and gathering economy, feel that the social and human values embodied in the corporate form of organization frequently conflict with traditional Native values and Alaska's traditional Native cultures.

H.R. 278, as ordered reported, seeks to address these and other concerns regarding the implementation of the Alaska Native Claims Settlement Act.

S. REP. NO. 201, 100th Cong., 1st Sess. 20-21 (1987).

81. 43 U.S.C.A. § 1636 (West Supp. 1988) (emphasis added).

Like its conceptual antecedent section 21(d)⁸² which exempted Native corporation lands from real property taxation in 1971, section 11's protections are tied to the factual condition of the lands in question, that is, whether they are "developed," "leased," or "sold."⁸³ Section 11 of the 1991 Amendments defines "developed" and "leased"⁸⁴ and specifically precludes a trustee, receiver, or custodian (including, presumably, a trustee in a bankruptcy case) from assigning, leasing, developing or conveying any land or interests in land exempt from creditor action under section 907 of the Alaska National Interest Land Conservation Act ("ANILCA"), as amended.⁸⁵ This condition will prevent a bankruptcy trustee from destroying the protection from creditor action or including undeveloped land in a bankruptcy estate by changing its character.

While the purpose of subsection 11(d), providing that ANCSA lands shall be exempt from "judgment resulting from or claims based upon or arising under . . . (I) title 11 of the United States Code [the Bankruptcy Code] or any successor statute,"⁸⁶ may have been to exclude undeveloped land from a Native corporation's bankruptcy estate, the language is singularly ill-chosen. A debtor's assets are part of the debtor's bankruptcy estate under section 541 of the Code without any "judgment" being entered to that effect, and claims of creditors in a bankruptcy case are "based upon" and "arise under" substantive non-bankruptcy law; they are not "based upon," nor do they "arise under" the Bankruptcy Code.⁸⁷ The Bankruptcy Code provides the procedural vehicle for satisfying those claims when bankruptcy relief is sought by or imposed upon the debtor.

Congress could have excluded the undeveloped land from a bankruptcy estate by expressly providing for the exclusion. Instead, the imprecision of the enacted language, coupled with the broad inclusions

82. 43 U.S.C. § 1620(d) (1982).

83. 43 U.S.C.A. § 1636(d)(1)(A) (West Supp. 1988). The difficulty with defining "development" and "leasing" is pointed out in a Federal-State Land Use Planning Commission for Alaska Study, which notes that "development" can be slight or major, can encompass a large or a small area, and that "leasing," as for a recreational purpose, may not alter the character of the land at all. Price, Purtich & Gerber, *The Tax Exemption of Native Lands Under Section 21(d) of the Alaska Native Claims Settlement Act*, 6 UCLA-ALASKA L. REV. (1976).

84. 43 U.S.C.A. § 1636(d)(2)(A) (West Supp. 1988).

85. *Id.* § 1636.

86. The concept of a case "arising under" or "arising in" the Bankruptcy Code has been utilized in the jurisdictional provisions of the Judicial Code, which confer jurisdiction over bankruptcy matters in the district courts. The district courts have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C.A. § 1334(b) (West Supp. 1988).

87. *Id.*

found in section 541, at least gives the opportunity for Native corporation trustees or creditors to contend that no exclusion from an estate was intended, only exclusion from "judgments."⁸⁸ Still, it is hard to see what else Congress could reasonably have intended by the reference to title 11 of the United States Code, and it is certain that all Native corporations seeking bankruptcy relief will contend that their unencumbered, undeveloped land is to be excluded from the estate.⁸⁹

Prior to the amendments, protection for undeveloped lands against general unsecured creditors and real property taxation was

88. While certain types of judgments, such as judgments to deny a discharge or determine the nondischargeability of a debt are entered by bankruptcy courts, and may be said to be "based upon title 11 of the United States Code in that they are entered based on the bankruptcy law, itself, and not upon substantive non-bankruptcy law," this type of judgment represents a fairly narrow spectrum of the claims routinely dealt with in bankruptcy cases. It is unlikely that Congress intended the automatic land bank exceptions to apply to only this limited group of judgments. *See* 11 U.S.C. §§ 523, 727 (1982).

89. There is no official conference committee report covering the final compromise reached between the House of Representatives and the Senate on the 1991 Amendments. However, sponsors of the legislation jointly submitted a description and analysis of the House-Senate compromise bill which is included in both the House floor debate and Senate floor debate accepting the compromise. 133 CONG. REC. H11,936 (daily ed. Dec. 21, 1987) (joint analysis submitted by Congressmen Udall and Young); 133 CONG. REC. S18,702 (daily ed. Dec. 21, 1987) (analysis submitted by Senators Murkowski and Stevens). *See also* S. REP. NO. 201, 100th Cong., 1st Sess. (1987); H.R. REP. NO. 31, 100th Cong., 1st Sess. (1987); S. REP. NO. 201, 99th Cong., 2d Sess. (1986).

The Report of the Committee on Interior and Insular Affairs on H.R. 4162 (a predecessor bill to the final compromise bill, in the 99th Congress) states:

Subparagraph A [of section 13 of the bill] provides that lands conveyed to Native individuals or entities under ANCSA shall, from the date of that conveyance, be immune from certain legal processes as long as such lands are not developed or leased to third parties or are used solely for purposes of exploration. These processes include adverse possession and similar claims; real property taxes; judgments resulting from bankruptcy and similar laws; judgments in any action at law or in equity to recover sums owed or penalties incurred by any Native Corporation or Group or their representatives, unless such immunity is waived in a contract executed prior to the commencement of such action; and involuntary dissolution.

...

While mindful of the need to protect Native corporations from the involuntary loss of undeveloped lands, most of which are used for subsistence purposes, the Committee does not intend to interfere with normal business relations. Thus, the immunity under the Bankruptcy Code will not affect secured creditors, whose lien will take the land out of the Land Bank, but rather will curtail only the interests of unsecured creditors, who did not look to the land as a source of repayment in the first place.

...

In view of the lack of progress of land bank agreements under existing authorities, the Committee has chosen to adopt these statutory protections in addition to existing elective land bank authorities.

H.R. REP. NO. 712, 99th Cong., 2d Sess. 29 (1986).

available through the Alaska Land Bank program established in 1980, with passage of ANILCA.⁹⁰ Protection against state and local real property taxation was also provided under section 21(d) of ANCSA for Native corporation land which was not developed or leased. However, this protection lasted only twenty years.⁹¹

Under the land bank program, set forth in section 907 of ANILCA,⁹² persons or entities who received land under ANCSA could enter into an agreement with the Secretary of the Interior,⁹³ whereby they would manage their land in a restricted manner and would then receive protection for the land from claims of adverse possession, property taxes, and unsecured claims against the owner. The tax protections ceased if the lands were leased or developed.⁹⁴ Use of the ANILCA land bank as a means of freeing land from creditor action was a mixed blessing because as long as the land was so held its management was restricted and had to be coordinated with management of nearby federal lands. Thus, the owner may have been prevented from using the land for the economic benefit of the shareholders and the region. Since the land bank concept was enacted in 1980 and until the enactment of the 1991 Amendments, only a few corporations entered into agreements with the Department of the Interior. The administration of the program was cumbersome and costly.⁹⁵

Under the provisions of the 1991 Amendments, agreements with the federal government were no longer required for Native corporations to obtain land bank protections.⁹⁶ So long as the lands are not developed, leased, or sold, they are protected. Thus, with the 1991 Amendments, Congress intended to offer greater protection and impose fewer restraints on Native lands than existed under ANILCA.⁹⁷

90. 43 U.S.C.A. § 1636 (West Supp. 1988).

91. 43 U.S.C. § 1620(d) (1982).

92. 43 U.S.C.A. § 1636(d) (West Supp. 1988). "Land bank" status was automatic for the first three years after conveyance of the land.

93. *Id.* §§ 1636(c)(2), (d).

94. *Id.* § 1636(c)(2)(B).

95. S. REP. NO. 201, 100th Cong., 1st Sess. 36 (1987).

96. Donald C. Mitchell, counsel to the Alaska Federation of Natives ("AFN"), urged in a 1984 briefing paper to AFN that Congress should consider making the land bank program automatic rather than requiring a burdensome agreement before the land could be protected. Mitchell, *Analysis of the Provisions in the Alaska Native Claims Settlement Act Relating to Land Protection*, in *ALASKA FEDERATION OF NATIVES, INC., 1991: A LEGAL ANALYSIS* (Oct. 1984).

97. The reason Natives became more desirous of protection for the undeveloped land was stated by Byron Mallott, President of Sealaska Corporation:

And the land was placed in the corporations without really an appreciation, I believe, of what the corporations were and what they could do, because the corporations are essentially a business machine. . . . Their entire history in law, in precedent, in myth, in reality has 99 percent to do with

There is room for disagreement as to the extent of the 1991 automatic land bank protection; that is, whether it applies to all claims or simply those that arose after the 1991 Amendments were signed into law.⁹⁸ ANCSA afforded no protection at all for ANCSA land from general creditors' claims until, as noted above, the enactment of ANILCA and its land bank provisions in 1980. The 1991 Amendments made protection for undeveloped land automatic.

Congressman Don Young's floor statement states explicitly that the 1991 land bank protections apply to any creditors' claims that arise after 1980:

As enacted in 1980, Section 907 of the ANILCA established the Congressional policy that Native and Native corporation land should not be involuntarily lost as a result of the execution of judgments based on claims of creditors which arose either before or after December 2, 1980, or of insolvency or bankruptcy proceedings.

For that reason, Section 907 authorized Natives and Native corporations to protect undeveloped land from creditors by executing a land bank agreement without regard to whether executing the agreement might render the Native or Native corporation insolvent. In that regard, to the extent the execution of a land bank agreement might otherwise have violated 11 U.S.C. 548, A.S. 34.40.010, or other laws generally affecting creditors' rights, Section 907, as originally enacted, superseded such statutes insofar as they might otherwise have applied to void the execution of such an agreement.

The automatic extension of the land protection immunities afforded by this section reaffirms this important Congressional policy. As a matter of law, the section automatically protects Natives and Native corporation land from claims of creditors which arose either before or after December 2, 1980, from the execution of judgments based on such claims, and supersedes title 11 of the United States Code, other State and federal insolvency and moratorium laws and

making money and adhering to the P and L [profit and loss] and, maybe, one percent the ability to influence and to change and to impact public policy as it affects the social course of a people or a nation.

And the land, by that act, by the act of putting the land into the corporations, the land became an economic asset, under law, under every other imaginable understanding of what it means to place an asset into a for-profit business corporation. And so immediately we were on a divergent course as to how the land could best be utilized and how best it could be maintained on behalf of Native people for the long-term future.

Because that's not what the land was for. The land was not viewed as an economic asset. It was viewed as the touchstone and the basis from which Native people could maintain their value systems and their cultures and all those things that have brought us to where we're at today.

3 ROUNDTABLE DISCUSSIONS, *supra* note 24, at 202-03.

98. The authors of this article are in disagreement on this issue.

all other State and federal laws generally affecting creditors' rights.⁹⁹

Creditors seeking to avoid this result will assert that the language of section 907(d)(6) of ANILCA, as amended by the 1991 Amendments, proscribes such an interpretation. That clause reads: "No provision of this subsection shall be construed to impair, or otherwise affect, any valid contract or other obligation that was entered into prior to February 3, 1988 [the date of the enactment of the Alaska Native Claims Settlement Act Amendments of 1987]."¹⁰⁰

As a practical matter, the automatic land bank protections of section 11 will create procedural and management issues to be addressed by prospective debtors in chapter 11 reorganization proceedings, who will at the same time become debtors-in-possession. A debtor-in-possession is required by the Bankruptcy Code to act as trustee for the benefit of its creditors in the management of the bankruptcy estate.¹⁰¹ On the other hand, the debtor-in-possession in a Native corporation bankruptcy remains the owner of undeveloped land, outside the estate, with management and supervision responsibilities for that property as well. However, with the possible exception of revenues derived from sources defined in sections 7(i) and 7(j) of ANCSA,¹⁰² the debtor corporation's resources of cash are subjected to the restrictions of the Bankruptcy Code. It can be expected that the creditors of the estate will resist the expenditure of estate funds or the cost of the use of debtor personnel to manage the undeveloped land from which the creditors cannot benefit. These creditors may seek the appointment of a trustee to prevent the misapplication of estate resources on non-estate assets.

If a trustee is appointed in a chapter 11 case, and if the trustee heeds the creditors' wishes and does not try to administer the land from which the creditors are statutorily excluded, then presumably the board of directors of the corporation will have control over, and may select or manage, the Native corporation's undeveloped land. Because, however, all the income-generating assets of the debtor, with the possible exception of section 7(i) or 7(j) revenue,¹⁰³ will be under the trustee's control, the undeveloped land may, as a practical matter, be neglected until the reorganization is completed and the property and income of the estate are returned to the debtor.

99. 133 CONG. REC. H11,938 (daily ed. Dec. 21, 1987) (statement of Congressman Young).

100. 43 U.S.C.A. § 1636(d)(6)(A) (West Supp. 1988).

101. 11 U.S.C. § 1108 (1983).

102. See *infra* text accompanying notes 140-52.

103. *Id.*

If the reorganization fails and the chapter 11 case is converted to a case under chapter 7, or if a chapter 7 case is originally filed by or against a Native corporation, the conflict presented by the recent automatic land protections and the "dual" nature of the debtor becomes even more pronounced. A typical chapter 7 case, as outlined above, contemplates the functional extinction of the corporate or partnership debtor, yet it does not cause the literal extinction of the entity, which will survive chapter 7 as a shell without assets but with continued liabilities to the extent unsatisfied by the bankruptcy case.¹⁰⁴ If a Native corporation undergoes a chapter 7 proceeding, the trustee will sell or transfer to creditors all assets other than the undeveloped land, and possibly the section 7(i) or 7(j) revenue, and will then ask the bankruptcy court to close the case. The debtor will still exist and will still own its undeveloped land, but unless section 7(i) or 7(j) revenues are exempt, it will have no money with which to operate and will, thus, have no functioning organization or employees with which to manage the land.¹⁰⁵ As the corporation will not have been discharged from its debts, it will not be able to develop or lease its properties in the future, even assuming it could find the means to do so, because the developed or leased land would then become available to unpaid creditors, who could then seek renewed bankruptcy proceedings in order to have that property administered for their benefit.¹⁰⁶

It can, therefore, be concluded that while the 1991 Amendments have provided Native corporations with some protection from the rigors of bankruptcy proceedings, they may have done so at the price of making undeveloped land essentially undevelopable unless and until creditors have been paid or have consented to the development. This result neither furthers the goals of ANCSA nor satisfies desires for an efficient and orderly mechanism for payment of the corporations' debts. Further legislation in this area is needed.

2. *Selected Land.* Regional and village corporations receive federal land pursuant to sections 12¹⁰⁷ and 14¹⁰⁸ of ANCSA. They are entitled to select land from federal lands which have been withdrawn from the public domain under section 11 of ANCSA.¹⁰⁹ The selection

104. 11 U.S.C. § 727(a) (1983).

105. If a Native corporation was sufficiently prescient to place revenue-generating assets or the land itself in a settlement trust, these problems might be avoided. See *supra* note 47.

106. 11 U.S.C. § 303(a) (1982).

107. 43 U.S.C. § 1611 (1982).

108. *Id.* § 1613.

109. *Id.* § 1610.

process is governed by ANCSA and regulations promulgated and administered by the Department of the Interior.¹¹⁰ ANCSA requires that selections have been made by the Native corporations within the three years following enactment of the Act.¹¹¹ The corporations' selections are subject to approval of the Department of the Interior, which is charged with identifying third party claims and easements on the lands and, also, with their survey and the issuance of patents. The ANCSA land conveyance process has been extraordinarily slow.¹¹²

Because of delays in land conveyancing, Native corporations may file for bankruptcy with some of their land entitlement still outstanding. Lands selected but not yet conveyed by patent or interim conveyance¹¹³ cannot be sold, leased, mortgaged, or developed by a regional

110. 43 C.F.R. §§ 2650.0-1-2655.4 (1987).

111. 43 U.S.C. §§ 1611, 1615(b) (1982); 43 C.F.R. §§ 2651.3, 2652.2 (1987).

112. As of December 31, 1983, 27 million acres of the ANCSA corporations' entitlement had been transferred by interim conveyance, and 4 million acres had been patented, for a total of 70% of the ANCSA corporations' entitlement. GENERAL ACCOUNTING OFFICE, REPORT TO THE SECRETARY OF THE INTERIOR — ALASKA LAND CONVEYANCE PROGRAM — A SLOW, COMPLEX AND COSTLY PROCESS 8 (June 12, 1984).

The delays in the land conveyance process and the unfortunate consequences were the focus of many days of hearings prior to the passage of ANILCA, prompting hard questioning of government officials. See S. REP. NO. 413, 96th Cong., 1st Sess. 236 (1979), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5180 (despite Congress' directive of an early transfer of title, the Natives collectively have not been able to acquire title to more than 5 million of their 44 million acre entitlement, 7 years after the enactment of ANCSA); *Oversight Hearings Before the Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975) (statement of Congressman Seiberling) ("Some deference must be given to the shortness of life.").

113. A conveyance under ANCSA may be by interim conveyance or patent, whichever occurs first. 43 C.F.R. § 2650.0-5(j) (1987), 43 U.S.C. § 1621(j) (1982). An "interim conveyance" transfers legal title of unsurveyed land under ANCSA from the federal government to a Native corporation prior to survey. 43 C.F.R. § 2650.0-5(h) (1987).

The vast acreage and remote location of much of the selected land has combined with the limited funds available for surveys to make the final patent of all ANCSA-selected lands a distant goal. Approximately 35 million acres have been conveyed out of the 44 million to be conveyed, of which about 7 million has been by patent, as of the writing of this article. The Bureau of Land Management presently estimates it will take another 20 years to complete survey and patent of Native corporation land, if present funding levels continue. Interview with Robert Arndorfer, Deputy State Director, Cadastral Survey, Bureau of Land Management, Dep't of the Interior (Feb. 25, 1989).

ANCSA corporations have treated interim-conveyed land as owned in fee simple; they have mortgaged, sold, and developed the lands, treating them as freely alienable. See 43 U.S.C. § 1621(j)(1) (1982). For example, the plan of reorganization in the Bering Straights Native Corporation ("BSNC") bankruptcy, No. 2-86-00002 (Bankr. D. Alaska filed Mar. 5, 1986), requires the transfer of land from BSNC to village

or village corporation.¹¹⁴ However, once it has been selected, the corporation possesses certain rights to the land, primarily the right to receive it in the future assuming no superior entitlements prevail over the selection.¹¹⁵

If the lands would otherwise be part of the bankruptcy estate, the right to receive the land should also pass to the bankruptcy estate, as should the land once conveyed, even if the conveyance occurs after a bankruptcy case has been commenced.¹¹⁶ In fact, a chapter 7 case could not be fully administered until all selected lands have been received and disposed of, or until the trustee has determined that the effort and expense of doing so is not justified by any return which could be reasonably anticipated; in this case, the trustee will seek court

corporation creditors. Much of this land has been transferred to BSNC by interim conveyance, not by patent.

Under these conditions, it is difficult to see why lands conveyed by interim conveyance would not be part of a bankruptcy estate subject to the automatic land bank protection discussed above.

114. 43 U.S.C. § 1621(i); *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 801, 804 (D. Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981); *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223 (1983).

115. *See* 43 U.S.C. § 1621(i) (1982). *See also* *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 808 (D. Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981).

116. Section 541 of the Bankruptcy Code provides, in part:

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property wherever located and by whomever held:

...

(6) Proceeds, product, offspring, rents or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 541 (1982 & Supp. IV 1986).

However, in the Report of the Committee on Interior and Insular Affairs on the Haida Land Exchange Act of 1986, the Committee stated that certain land exchange rights were meant only to benefit Haida Corporation and not a successor.

At the same time, the Committee is well aware that Haida Corporation is already experiencing economic difficulties, and also that the Alaska Native Claims Settlement Act presently provides that the restrictions on alienability of shares of Village Corporations such as Haida Corporation will end prior to January 1, 1995. The Committee has already addressed that situation in other legislation reported in this Congress. With respect to this bill, the Committee stresses that H.R. 5353 is an offer to Haida Corporation and to Sealaska Corporation as Native Corporations under the Alaska Native Claims Settlement Act. Should their status change, the Committee would expect to reevaluate the desirability of this bill, including the provisions of section 10.

H.R. REP. NO. 930, 99th Cong., 2d Sess. 16 (1986).

approval to abandon the remaining property or right to receive it under section 554 of the Bankruptcy Code.¹¹⁷

Whether the trustee, as the representative of the debtor, should also have the power to deal with the federal agencies reviewing the land selections made by the debtor pre-petition and set the corporation's priorities among the lands selected is a more difficult question. Given Congress' enactment of automatic protections for undeveloped land and the strong likelihood that the newly conveyed land will be undeveloped, such land will probably be exempt from creditors' claims. Thus, it is likely that a trustee will seek to abandon unselected lands from the estate. The right to receive conveyance of the lands will then revert to the debtor, although the debtor may be without means to carry out the steps necessary to complete the process if all of the debtor's funds are held by the trustee. Without funds, the debtor will be unable to hire employees to negotiate with federal agencies, analyze possible selection priorities, or manage the land once conveyed.

If a Native corporation is acting as a debtor-in-possession in a chapter 11 proceeding, the corporation itself will not have the abandonment problem, but it may face objections from creditors regarding whether funds of the estate in the hands of the debtor-in-possession should be used to select or administer property from which the creditors will receive no benefit.¹¹⁸ The creditors will have support for their objections in the Code¹¹⁹ and numerous judicial decisions under the Code¹²⁰ to the effect that all acts of a debtor-in-possession must be directed toward the preservation and strengthening of the estate so that the creditors may benefit.

A bankruptcy court dealing with a Native corporation's case will have to decide whether the trustee (or the debtor-in-possession, acting as trustee) should exercise the debtor's land selection rights, assuming that the debtor has not selected or "prioritized" all of its allowed acreage at the time a bankruptcy estate is commenced. The court may also have to determine whether the right to select land, or to select alternate land if initial selections are not available, also passes to the estate

117. 11 U.S.C. § 554(a) (1982 & Supp. IV 1986).

118. This is similar to situations in which individual debtors seek to use funds of the estate to pursue personal goals, such as obtaining exempt property or defeating objections to discharge. Bankruptcy courts routinely reject application to pay attorneys' fees for these services from estate assets. *See, e.g., In re Zweig*, 35 Bankr. 37 (Bankr. N.D. Ga. 1983).

119. 11 U.S.C. §§ 1106, 1107 (1982).

120. A debtor-in-possession has most of the powers and duties of a bankruptcy trustee. *Id.* § 1107(a). A bankruptcy trustee is a fiduciary. *Mosser v. Darrow*, 341 U.S. 267 (1951); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 196 (9th Cir. 1977); *Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1977).

under section 541 of the Bankruptcy Code and whether the right to select land under section 12 of ANCSA constitutes a legal or equitable interest in property.

The right to "prioritize" a selection may be considered analogous to an option to purchase one of a number of possible items or the right to compel performance of a contract in one of several alternative ways, both of which have been held to give the trustee rights to the affected property.¹²¹ The concept of property is broad,¹²² and it is not essential that property which the debtor may have a contractual right to acquire be specifically identified, or even exist, when the bankruptcy petition is filed. It is well known that Native corporations are entitled to substantial acreages of land, and it may be in reliance on these assets that credit has been extended.¹²³ Thus, where there is land available for selection that would be protected by the land bank, the trustee may be allowed to exercise the debtor's rights to selected land.¹²⁴

3. *Taxation and Tax Basis.* ANCSA contains certain tax protections unique to lands conveyed to regional and village corporations. Initial land conveyances to Native corporations are non-taxable, and the income tax basis of a mine or block of timber shall not be less than the fair value at the time of the first commercial development of the property.¹²⁵ In addition, undeveloped and unleased lands, and lands received in exchange therefor, are exempt from state and local real property taxes. Any income from the lands, however, is not exempt.¹²⁶ Provisions were also enacted limiting or preventing taxation

121. See generally *In re Bialac*, 712 F.2d 426 (9th Cir. 1983), where the court said, in holding that a bankruptcy estate was entitled to the benefit of the debtor's option to redeem collateral: "[T]he courts have consistently said that options or contingent interests are property of the bankruptcy estate under section 541. 'The term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or enjoyment must be postponed.'" *Id.* at 431 (citations omitted).

122. *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705 (9th Cir. 1986) (finding that an emotional distress claim was the property of a bankruptcy estate under a broad construction of section 541).

123. This is not likely to be the case in the future under the current land bank provisions found in the 1991 Amendments, as a creditor will be aware that reliance on undeveloped land assets is unwarranted.

124. Approximately 35 million acres have been conveyed out of the 44 million to be conveyed, of which about 7 million has been by patent, as of the writing of this article. The Bureau of Land Management presently estimates it will take another 20 years to complete survey and patent of Native corporation land, if present funding levels continue. Interview with Robert Arndorfer, Deputy State Director, Cadastral Survey, Bureau of Land Management, Dep't of the Interior (Feb. 25, 1989).

125. 43 U.S.C. § 1620(c) (1982).

126. *Id.* § 1620(d). This exemption was made permanent under the 1991 Amendments so long as the land is not leased or developed. Pub. L. No. 100-241, Feb. 3, 1988, 101 Stat. 1789.

of individual Natives by reason of their receipt of regional or village corporation stock.¹²⁷

A bankruptcy estate of a Native corporation presumably enjoys the same tax exemptions as the Native corporation itself, though there is no specific statutory language on this point. In general, a bankruptcy estate inherits the debtor's federal income tax attributes such as net operating loss carryforwards and tax basis.¹²⁸ It is reasonable to conclude, by analogy, that a court would grant the same tax exemptions to an estate holding the Native corporation's assets.

C. Obligations of Trustee with Respect to Lands

1. *Section 7(i)*. ANCSA sets forth certain specific obligations to which selected lands, or the regional and village corporations selecting them, are subject. The best known and most intricate of these is found in section 7(i) of ANCSA, which requires the original twelve regional corporations to share with each other according to population seventy percent of the revenue received by each regional corporation from its timber resources and subsurface estate.¹²⁹ Although it is one of the shortest provisions in ANCSA, section 7(i) has spawned enormous quantities of litigation as the resource-rich regional corporations argue with the resource-poor corporations over the resolution of numerous interpretation questions.¹³⁰

127. *Id.* § 1620(b).

128. 26 U.S.C. §§ 1398, 1399 (1982).

129. Section 7(i) of ANCSA provides:

Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this [Act] shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

43 U.S.C. § 1606(i) (1982).

130. *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F. Supp. 482 (D. Alaska 1980); *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F. Supp. 900 (D. Alaska 1976). Both of these cases involved the interpretation of section 7(i). Numerous interpretation questions were litigated; all twelve of the Alaska-based regional corporations were parties. The litigation's history was recently reviewed by the United States District Court for the District of Alaska in yet another decision interpreting section 7(i):

The dispute underlying each of the cases now before the court involves the regional corporations' obligations under section 7(i) of ANCSA, 43 U.S.C. § 1606(i), to share with one another seventy percent (70%) of the revenues they receive from timber and subsurface resources. In the oldest of the cases at bar, No. 75-053, this court in 1976 determined that the revenue sharing obligation extended to some species of "net" as opposed to "gross" revenues, but stopped short of devising formulae by which net revenues could be calculated. [*Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862,

In 1982, the regional corporations entered into a "Section 7(i) Settlement Agreement" which disposed of many problems and provided for arbitration to handle future disputes.¹³¹ In general, regional corporations must annually account for and distribute to each other, in accordance with population, seventy percent of their net receipts, after related expenses, from section 7(i) resources. Such resources are defined in the Section 7(i) Settlement Agreement as: "The timber resources (other than timber acquired by merger with a village corporation) and resources from the subsurface estate in ANCSA lands."¹³²

868-69 (1976)]. In 1980, after four more years of costly and divisive litigation, this court upon stipulation of the twelve regional corporations appointed a special master to assist the parties in resolving their disputes over the calculation of net revenues. On June 29, 1982 all twelve of the regional corporations executed an historic 121-page settlement agreement ("Agreement"), finally resolving their disputes concerning their ANCSA § 7(i) obligations. In 1983, after reviewing the special master's 37 page report endorsing the Agreement, the court gave its approval and entered judgment of dismissal.

Sealaska Corp. v. Aleut Corp., No. A88-515 (D. Alaska Jan. 25, 1989) (footnotes omitted).

In this recent decision, the district court upheld the Section 7(i) Settlement Agreement's arbitration provisions and refused to review or disturb an arbitration award adverse to Sealaska Corporation, under which it was required to pay approximately \$14 million in additional section 7(i) revenue to the other regional corporations.

131. The Section 7(i) Settlement Agreement is not published in any publicly available source; it is, however, part of the record in *Sealaska Corp. v. Aleut Corp.*, No. A88-515 (D. Alaska Jan. 25, 1989) [hereinafter *Settlement Agreement*] (copy on file at offices of Alaska Law Review).

132. *Settlement Agreement*, *supra* note 131, § 2(5). ANCSA Lands are defined as:

All lands or interests in lands withdrawn for selection or selected by a Corporation pursuant to the provisions of ANCSA, or which may be obtainable by a Corporation by agreement, exchange or otherwise by virtue of or in lieu of the Corporation's land selection rights under ANCSA, or acquired in a trade of lands or interests in lands in accordance with Article II, Section 6. Lands shall not constitute ANCSA Lands after the occurrence of any of the following:

(i) Acquisition of title (by fee or patented mining claim) to Section 7(i) Resources in such lands by a Third Party other than the state or federal government;

(ii) Relinquishment by a Corporation of an application under ANCSA to select such lands or completion of administrative or judicial proceedings finally resulting in rejection of such an application; or

(iii) Acquisition of title to such lands or interests therein by the Corporation by any means other than through the provisions of ANCSA. The foregoing notwithstanding, ANCSA Lands shall include lands deemed to be ANCSA Lands pursuant to Article III, Sections 2(a) and (h).

Id. § 2(4).

Section 7(i) has proved a substantial benefit, especially to the corporations which lack resources or which have been slower to develop them.¹³³

The trustee or debtor-in-possession takes a regional corporation's land subject to the section 7(i) obligations, and it may be considered that the share of net revenue to be distributed to other regional corporations is held by the bankruptcy estate in trust for those other regional corporations. Thus, the beneficial interest in these funds would be excluded from the estate under Bankruptcy Code section 541(b)(1).¹³⁴ Additionally, the bankruptcy trustee would be subject to the section 7(i) obligations of the debtor. Further, as the Section 7(i) Settlement Agreement confirms, lands sold by the regional corporation to a non-ANCSA entity are freed of further section 7(i) obligations, but the sale proceeds are subject to distribution.¹³⁵ The same rule is followed if the lands are mortgaged. The lender who forecloses should have no obligation to comply with further section 7(i) obligations. Generally, a lender would "purchase" the property at the sale

133. The largest distributor of funds under section 7(i) has been Cook Inlet Region, Inc. ("CIRI"). CIRI's 1987 Annual Report discloses that prior to the distribution for fiscal year 1987, payable in March 1988, CIRI had distributed \$67,982,838 to other regional corporations. CIRI also had recorded a current liability of \$5,504,724 to other regional and village corporations and at-large shareholders, though how much of this was owed to other regional corporations under section 7(i) was not shown.

CIRI's 1987 Annual Report also states that CIRI had received aggregate section 7(i) revenue of \$4,348,194 from other regions. As CIRI's enrollment was 7.8% of the total Native population for distribution purposes, and as section 7(i) income is shared between the regional corporations in accordance with population, arithmetic shows that other regional corporations have distributed a total of \$55,746,077 under section 7(i).

Of total section 7(i) revenue of \$123,728,914 distributed through December 31, 1987, 50% is payable to village corporations and at-large shareholders by the recipient regions under ANCSA section 7(j). Precise figures are difficult to gather, but this could equate to more than \$300,000 per village corporation since 1972 (though the amount received by a particular village corporation is also dependent on shareholder enrollment). For many village corporations, this income represents their most dependable source of cash flow.

134. 11 U.S.C. § 541(b)(1) (Supp. IV 1986).

135. The Section 7(i) Settlement Agreement contemplates transfers to an unrelated entity (defined as a "Third Party") under the Agreement.

When a corporation disposes of its Section 7(i) Resources pursuant to an agreement with a Third Party that provides the Corporation an interest in the profits from the Section 7(i) Resources conveyed . . . , Gross Section 7(i) Revenues shall include *only* the net amount received by the Corporation pursuant to the agreement"

Settlement Agreement, *supra* note 131, at Art. II, § 1(h) (emphasis added). The Agreement prohibits transfers to related entities unless such entities agree to be bound by the Agreement. *Id.* at Art. II, § 1(i).

(at least in the absence of other bidders) by offset bid, and no cash proceeds would be generated.¹³⁶

A sale by a chapter 7 trustee to a non-ANCSA entity would remove the section 7(i) obligations from the property. If other ANCSA entities, whether or not they are creditors of the debtor, believe that they might benefit from further development or sale of mineral or timber property upon which a creditor of the debtor is seeking to foreclose, they should be able to object to a motion for relief from stay filed by that creditor. Still, it will be necessary for the debtor or the objecting ANCSA entities to show that the interests of the foreclosing creditor will be adequately protected as required by section 362(d) of the Bankruptcy Code.¹³⁷

If a Native corporate debtor or its trustee proposes to sell mineral or timber property to a non-ANCSA entity, any other regional or village corporation could argue that it has an interest in the property by virtue of section 7(i)'s requiring notice and an opportunity to be heard before the property is to be sold under section 364 of the Code on the basis that the property has a future income potential which is cut off by the sale. The response to the argument, however, is that the proceeds of sale are subject to sharing under section 7(i) and neither Congress nor the regional corporations in the Section 7(i) Settlement Agreement imposed a greater burden, nor did Congress or the Settlement Agreement intend to extend the obligations under section 7(i) to a species of joint ownership of the real estate itself.

2. *Sections 14(c) and 14(g)*. Section 14(c) of ANCSA imposes obligations on each village corporation to convey from its lands (1) to the individual occupants, the surface estate of their residences or business premises; (2) to nonprofit corporations, the surface estate of land occupied by them; (3) to municipal corporations, or to the state in trust for them, the surface estate occupied by each Native village; and

136. Section 7(i) Settlement Agreement, Article II, Revenues Section 1(d), provides, in part, that:

In the event of a Foreclosure of any loan secured by a Section 7(i) Resource or an interest therein, to the extent the proceeds of such Foreclosure, net of the costs thereof, do not exceed the underlying obligation (plus interest and other financing costs) with respect to such borrowing, any Section 7(i) Resources or their proceeds delivered in satisfaction of such borrowing . . . shall not be included in Gross Section 7(i) Revenues

Id. supra note 131 at 19-20.

This is analogous to *Northern Lights Inn Co. v. Employment Security Division, Dep't of Labor, State of Alaska*, 695 P.2d 723 (Alaska 1985), where the effect of a statute attaching a tax lien to "proceeds" was abrogated when the sale at foreclosure did not result in "cash" and "there is no fund available from which . . . to withhold the amount of the tax debt . . ." 695 P.2d at 725.

137. 11 U.S.C. § 362(d) (1982).

(4) to the federal government, the state, or the appropriate municipal corporation, the surface estate necessary for airport facilities.¹³⁸ These obligations are binding on a bankruptcy estate, and the trustee must convey the land as specified by section 14(c). The trustee must also recognize all “valid existing rights” to which conveyances of land to regional and village corporations are subject, as required under ANCSA section 14(g).¹³⁹

The burden these subsections place on a village corporation can be enormous. If the extent of the private rights could have been defined and determined immediately upon the passage of ANCSA, some of this burden could have been lessened or eliminated. Now, however, the determination of the extent of section 14(c) selections and section 14(g) rights can be extremely complex, requiring the services of a trained title examiner, surveyor, and/or land status engineer. If the lands subject to determinations are part of a bankruptcy estate, the administrative cost and expense incurred by the trustee in bankruptcy could be formidable and might not be justified given the possible benefits flowing to the creditors of the estate. No conveyances could be made, however, even in satisfaction of debts, without the settlement of the land status and resolution of rights under subsections 14(c) and 14(g). No village corporation chapter 7 bankruptcy could be settled without this expensive, and considerable, delay in determining the status of the property of the estate.

D. Income of Regional and Village Corporations

1. *Ordinary Income.* Most regional corporations and some of the village corporations conduct substantial business activities, and some of the regional corporations have become extremely diversified. Their revenues from general business activity are not subject to any particular restrictions under ANCSA or any of the later amendments to ANCSA. Accordingly, there is no reason to attempt to exclude any general revenues from a bankruptcy estate.

2. *Income Under Sections 7(i) and 7(j).* The ordinary business corporation generates regular income from the sale of its products or

138. 43 U.S.C. § 1613(c) (1982).

139. Section 1613(g) of ANCSA provides, in part:

All conveyances made pursuant to this [Act] shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this [Act], a lease, contract, permit, right-of-way, or easement . . . has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement

Id. § 1613(g). See *Seldovia Native Ass'n v. Hodel*, No. A-81-008 (D. Alaska Feb. 3, 1989).

services and from the disposition of its assets. It may also receive income in the form of damages or awards from breach of contract or loss of its property. Never does an ordinary business corporation receive income simply because the corporation exists. But Native corporations are not ordinary business corporations. Both regional and village corporations do receive substantial income under sections 7(i) and 7(j) of ANCSA simply because they exist.¹⁴⁰

Section 7(j) requires each regional corporation to distribute to the village corporations in its region, and to its at-large shareholders (shareholders who do not live in a village and who hold no village corporation stock), half of all funds received from other regional corporations under section 7(i).¹⁴¹ Many village corporations conduct little business and have few income-producing assets; others operate at a loss and have done so for years. These companies depend on their section 7(j) receipts as regular cash flow, and, if this cash flow were to cease, it is likely that a substantial number of village corporations would simply stop functioning as economic entities. Accounting for and distributing the section 7(j) funds also requires each regional corporation to maintain current shareholder lists, both of itself and of the village corporations in its region. This is a constant effort, as the shareholder rosters are constantly changing through death, relocation, and inheritance among the Alaska Native population, which numbered approximately 80,000 people as of 1986.¹⁴²

Inquiries regarding shareholder status and payments must be dealt with. Also, undeveloped land, which under the 1991 Amendments is immune from creditor action and probably excluded from a bankruptcy estate, must be managed. This requires the regional corporation to maintain a paid staff, which is purely an overhead expense. For profitable corporations, the accounting and record keeping required may be just an inconvenience; for those which are not profitable, the burden can be severe. If, under the demands of the Bankruptcy Code, the debtor must surrender all of its developed or

140. See *supra* note 129; 43 U.S.C. §§ 1606(i), (j) (1982). Section 7(j) provides, in part:

Not less than 45% of funds from such sources [including funds received under subsection (i)] during the first five-year period [following enactment of ANCSA], and 50% thereafter, shall be distributed [by the regional corporations] among the Village Corporations in the region and the class of stockholders who are not residents of those villages

43 U.S.C. § 1606(j) (1982).

141. *Id.*

142. As of December 31, 1985, the Alaska Native Roll, prepared pursuant to section 5 of ANCSA, numbered 80,239 eligible Natives. R. Reyes, Enrollment Coordinator, United States Dep't of the Interior, Bureau of Indian Affairs, Tribal Government Section, Juneau, Alaska 99801. The enrollment has not been updated since December 31, 1985.

monetary assets for creditor payments, this burden, imposed or implied by statute, may be impossible for a regional corporation which is forced to seek bankruptcy protection.

Village corporations face parallel issues. As noted above, village corporations are charged with untangling section 14(c) and section 14(g) rights, and they typically perform a variety of social welfare functions for their communities. Like regional corporations, the village corporations must maintain their undeveloped lands.¹⁴³ These activities are either unique to, or uncommonly expensive for, the Native corporations. For the village corporations, the section 7(j) revenue may be essential in order to continue their existence.

Any Native corporation faced with or contemplating bankruptcy relief must consider the status of its section 7(i) or section 7(j) income, which may be the only source of cash available to cover its day-to-day expenses as well as the extraordinary administrative costs imposed by bankruptcy proceedings. But the creditors also will have their eyes on the section 7(i) or section 7(j) income of the debtor as possibly their only source of payment in the future; this income stream can be depended upon, in some amount, regardless of the debtor's independent business efforts.

Section 541 of the Bankruptcy Code makes all section 7(i) or 7(j) cash, on hand or received during the bankruptcy case, property of the estate.¹⁴⁴ Section 541(b)(1) excludes property of which the debtor is solely the trustee "for the benefit of an entity other than the debtor." In an unreported decision, an Alaska trial court held that, upon receipt of funds pursuant to section 7(i), a regional corporation becomes the trustee of a resulting trust¹⁴⁵ of that portion of such monies which are received by the regional corporation for the beneficial use of the village corporations.¹⁴⁶

143. ALASKA STAT. § 10.05.138 (1985) (meeting of shareholders); *id.* § 10.05.144 (stock transfer books); *id.* § 10.05.147 (voting lists); 43 U.S.C. § 1607(c) (1982) (audit); *id.* § 1602(j) (land management); *id.* § 1606 (applicable to villages).

144. *See supra* note 69. Everything not excluded from the estate by section 541 is available for creditors' claims unless exempt under section 522. 11 U.S.C. § 522 (1982 & Supp. IV 1986).

145. A "resulting trust" is one in which a party becomes invested with legal title to property, but holds that title for the benefit of another, although without expressed intent to do so, because of a presumption of such intent arising by operation of law. *First Nat'l Bank of Denver v. Harry W. Rabb Foundation*, 479 P.2d 986 (Colo. Ct. App. 1970).

146. *Bering Straits Native Corp. v. Alaska Nat'l Bank of the North*, No. 3AN-80-6815 Civ. (Anchorage Super. Ct., Feb. 27, 1984) (order granting and denying motion and cross-motions for summary judgment). Judge Rowland did not in his order expand upon his finding, but he did find the briefs of Sitnasuak Native Corporation persuasive. Those briefs refer to the following authorities:

Is it, therefore, proper to award to the trustee in a chapter 7 case the right to the "non-trust" portion of all future section 7(i) or 7(j) income to pay creditors until their claims are paid in full? Is it proper to require a chapter 11 plan, in order to satisfy the "best interests of creditors" test in section 1129(a)(7) of the Code to calculate and distribute the present liquidation value of the debtor's indefinite future section 7(i) or 7(j) income? ANCSA does not address these questions at all. Because section 7(i) and section 7(j) income is without parallel in commercial law, the Bankruptcy Code provides no hints as to whether section 7(i) and section 7(j) income is treated differently from other kinds of income.

The language of the Claims Act is clear in that regional corporations do not take funds, revenues, or other income which the law mandates be shared or redistributed as beneficial owners or even under a claim of right, but instead are mere conduits, the instruments chosen by Congress to receive and pass along funds which the Federal Government would have practical difficulties in itself disbursing.

Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, LAW & CONTEMP. PROBS., Winter 1976, at 132, 143.

Subsections (j) and (k) of the Settlement Act create purely administrative duties on the part of regional corporations allowing them no discretion in their performance. In these instances, the regional corporations have no authority to make decisions either favorable or adverse to the interests of village corporations.

Peter Pan Seafoods, Inc. v. Chignik Fisheries, Inc., No. A80-195 Civ. (D. Alaska 1982), at 70-71.

When Alaska Native fund money is received by the regional corporations, 55% [sic] (50% after the first five years) of the amount does not belong to the regional corporations but must be distributed to stockholders, village corporations and non-village residents. *This distributable portion may not be used as working capital of the corporation.*

TOUCHE ROSS AND CO., ANCSA: A TECHNICAL ANALYSIS 70-71 (1974) (emphasis added).

In his later June 5, 1987, Memorandum of Decision in *Bering Straits*, Judge Rowland expanded upon the implications of his finding that sections 7(i) and 7(j) create a resulting trust:

[The village corporation] had a beneficial interest in the monies which would form the trust res, and that . . . beneficial interest had been created by the United States Government and not [the regional corporation]. The regional corporation, although it had legal title to the monies, had no power, by virtue of ANCSA or otherwise, to destroy such beneficial interest or right to convert the villages' portion to their own use. [Memorandum of Decision, at 3.]

...

[The regional corporation] had a fiduciary responsibility to ultimately turn over the village portion of the monies held in the trust account to the villages [Memorandum of Decision, at 10.]

...

[The regional corporation], in receiving monies legislatively destined for the villages under the conditions established by ANCSA, was a resulting trustee. . . . [The regional corporation] could not spend the village monies as if the monies belonged to it. [Memorandum of Decision, at 20.]

Creditors in a bankruptcy may be expected to insist that they should be entitled to this income stream or its present value. There are administrative difficulties in calculating the future benefits, and inquiry of the profitable regional corporations which are the sources of future section 7(i) income may be of little benefit, given their reluctance to disclose the needed information for competitive reasons. Still, if an estimate must be made, it can be done, however roughly, using historical data, known mineral and timber resources, and a considerable amount of educated guesswork. If this process develops anything other than a minimal present value for the calculations, the creditors may oppose confirmation of a plan of reorganization which calls for abandoning future section 7(i) or section 7(j) income.

Because section 7(i) or 7(j) income simply "arrives," as opposed to being earned through sale of services or property, it does not fit the traditional asset categories with which bankruptcy cases usually deal. Because it is statutorily created rather than arising through traditional market methods, and because the statute which created it was drafted to provide compensation and benefits to Alaska Natives, it may be argued that the section 7(i) and 7(j) income is excluded from the bankruptcy estate completely; this is the case with the post-petition income of a chapter 7 or 11 individual debtor earned through personal services.¹⁴⁷

ANILCA and the 1991 Amendments afforded the opportunity to exempt regional and village corporation lands from creditor action through the land bank. The lack of any further express exemption¹⁴⁸ suggests that a court may be reluctant to infer one.

Judge Rowland found that the following conduct, among others, amounted to a breach of the regional corporation's fiduciary duty:

1. The trustee failed to segregate the funds destined for the villages and failed to account separately for the village interests.
2. The regional corporation granted assignments of its section 7(i) receipts to secure various indebtedness without the consent of the village corporations.
3. The regional corporation did not provide an accounting or disclose any information regarding its use of the monies which ultimately should have gone to the village corporations.
4. The regional corporation used the village share of section 7(i) monies in investments of less than trust quality.
5. The regional corporation failed to make the trust assets productive and failed to dispose of bad investments.

[Memorandum of Decision, at 18-19.]

147. Section 541(a)(6) includes in the bankruptcy estate: "Proceeds, product, off-spring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6) (Supp. IV 1986).

148. Section 522 of the Bankruptcy Code sets out certain property which individual debtors are permitted to exempt from the estate. This is designed to permit a "fresh start" and prevent total destitution of individual debtors. Section 522 provides

However, one of the reasons artificial entities lack exemptions in bankruptcy is that they are assumed to have no reason to exist once they will no longer be profitable. As voluntary associations for profit, corporations and partnerships are simply abandoned once they cease to further their owners' goals (though they may continue to linger while management theoretically pursues resuscitation efforts). Having no further social reason to exist, there is no economic reason to retain assets for their benefit.

This assumption does not apply to Native corporations. Even after a chapter 7 liquidation, the Native corporations will continue to exist, maintain shareholder rolls, be audited, and hold shareholder meetings. Village corporations will continue to be subject to section 14(c) and 14(g) responsibilities. In addition, the regional corporations must calculate, receive, and distribute their respective shares of section 7(i) and 7(j) income; they must also monitor and, where necessary, challenge the section 7(i) payments by other regional corporations. These functions cannot be performed by an "empty shell" which has been deprived of all income and assets by a trustee in bankruptcy liquidating assets in a chapter 7 case, or by a debtor operating under a chapter 11 plan which requires all available cash flow to be paid to creditors.

Because section 7(i) or section 7(j) income is property of the estate, a chapter 7 trustee can claim it all, at least as long as the estate is open. The costs of computing and maintaining the shareholder register, calculating section 7(i) and 7(j) income due and distributable to village corporations and at-large shareholders, and monitoring other Native corporation payments can be paid out of the debtor's section 7(i) or 7(j) income as administrative expenses. The trustee may not be able to sell or assign the debtor's future section 7(i) or 7(j) income for a lump sum discount to cash out the creditors, but the estate can remain open as long as section 7(i) and 7(j) income is available or until creditors have been paid.

A chapter 11 plan, which must pay dissenting creditors at least as much as they would receive in a liquidation under chapter 7,¹⁴⁹ can provide that all section 7(i) or 7(j) income, above that necessary to perform required accounting and shareholder registry functions, be paid to creditors, as they would receive that income in a chapter 7 case. Neither of these uses of section 7(i) or 7(j) income is of any

these exemptions "[n]otwithstanding section 541 of this title" (which establishes the estate). There is no provision in section 522 for non-individual exemptions from the coverage of section 541, so any exclusion from the estate must be found within section 541 itself or must be found outside the confines of the Bankruptcy Code. 11 U.S.C. § 522 (1982 & Supp. IV 1986).

149. 11 U.S.C. § 1129(a)(7) (Supp. IV 1986).

direct benefit to shareholders, except to the extent that the regional or village corporation may eventually recover financial strength as its debts are paid. For this reason, it can be more forcefully argued that including section 7(i) or 7(j) income in the definition of property of the estate does not further the special policies behind ANCSA. Such policies would favor exempting ANCSA corporations from the rules generally applicable in bankruptcy proceedings. Congress did not, however, accompany the special policies with any special exemptions for section 7(i) or 7(j) income. At present, the concept that post-confirmation section 7(i) and 7(j) income is excluded from a bankruptcy estate has not been addressed by any court.

The court does have discretion at various points in the chapter 11 process to consider the special purposes and historical genesis of ANCSA. This can occur under section 1112(b)¹⁵⁰ in determining whether a case should be converted to chapter 7. It can also arise under section 1129(a) in deciding the liquidation value of a chapter 11 debtor¹⁵¹ and under section 1129(c) in deciding what plan to confirm when more than one plan meets the confirmation tests.¹⁵² In the final analysis, absent further clarifying legislation, the status of these payments will remain in doubt.

3. *Net Operating Losses.* For approximately eighteen months between October 1986¹⁵³ and April 1988¹⁵⁴ Native corporations were the beneficiaries of highly favorable tax legislation which enabled them to

150. Section 1112(b) provides, in part:

[O]n request of a party in interest or the United States trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause . . .

Id. § 1112(b).

151. 11 U.S.C. § 1129(a)(7) (1982 & Supp. IV 1986).

152. Section 1129(c) provides, in part: "If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm." *Id.* § 1129(c).

153. The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, was enacted into law October 22, 1986. The Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, had also contained liberalized standards for ANCSA corporations to enter into net operating loss ("NOL") transactions. A few corporations entered into NOL transactions under the 1984 Act (including Bering Straits, under the aegis of the bankruptcy court). But questions remained under the 1984 Act as to whether NOL transactions with thin or nonexistent business purpose could withstand audit; it was not until the 1986 Act swept away any reservations as to this issue that NOLs were freely bought and sold.

154. Section 5021 of the Technical Corrections and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, provides for a phaseout of NOL transactions. The general rule, codified in subsection (a), was that such transactions cannot be entered into after April 26, 1988. Subsection (b) extended that deadline for certain

"sell" their net operating losses and similar tax attributes ("NOLs")¹⁵⁵ to third parties who had no other economic relationship to the Native corporations except to "buy" the NOLs. The NOL transactions entered into by all the Native corporations during this brief span of time aggregated hundreds of millions of dollars. Since chapter 11 debtors, almost by definition, have accumulated large operating losses, several of these NOL transactions were entered into by chapter 11 debtors with the blessing of the bankruptcy court and to the delight of the corporations' creditors and shareholders.

These NOL transactions raised a number of thorny and unprecedented legal issues which by now have been either mooted by full payment of creditors' claims or have been fully adjudicated. Inasmuch as it is improbable in the extreme that Congress will once again favor Native corporations with the ability to sell NOLs, some of the NOL-related issues are now only of historical interest. However, because the NOL proceeds¹⁵⁶ from the NOL sales remain escrowed pending audit by the Internal Revenue Service ("IRS") or a closing of the parties' tax books, NOL transactions remain an extremely important facet of Native corporations' financial health. Ironically, a working knowledge of NOLs is as important to Native corporation leaders today as the feeding habits and migration patterns of creatures of the land and sea were to tribal elders generations ago.

NOLs can be utilized (that is, used to reduce federal income taxes on what would be taxable income in the absence of the NOL) in two basic ways. One is for the taxpayer, itself, to generate a profit which would otherwise give rise to a tax liability and to offset that profit against the taxpayer's own NOL.¹⁵⁷ This is the "normal" way to utilize the NOL. The other way is to "sell" the NOL; that is, to enter into a transaction under which a second taxpayer's income is utilized to offset the first taxpayer's NOL.¹⁵⁸

In the second situation, the "loss" corporation does not simply exchange the NOL for an agreed upon purchase price. Instead, the loss corporation and the profit corporation enter into a complicated

NOL transactions in process, and subparagraph (3) of subsection (6) extended the deadline further for ANCSA corporations then in chapter 11 bankruptcy proceedings.

155. In this article, NOLs encompass net operating loss carryovers, tax credit carryovers, capital loss carryovers, and similar tax attributes.

156. NOL proceeds typically consist of a combination of cash paid to the ANCSA corporation at closing, together with cash paid into escrow to be released from escrow upon a favorable audit, the closing of the parties' tax books, or other conditions.

157. 26 U.S.C. § 172(a) (1982 & Supp. IV 1986).

158. This can be accomplished by consolidating the "loss" corporation with the "gain" corporation for tax purposes, resulting in the filing of a consolidated income tax return under section 1501 of the Internal Revenue Code.

transaction which meets applicable Internal Revenue Code requirements,¹⁵⁹ which permits the income from the profitable corporation to be offset by the loss corporation's NOLs. The profitable corporation then pays the loss corporation an agreed-upon percentage of the amount saved by the resulting tax deduction.

The 1986 Tax Reform Act contained statutory provisions as well as a legislative history favorable to ANCSA corporations¹⁶⁰ which confirmed that such corporations were permitted to enter into tax sharing arrangements without regard to business purpose requirements, assignment of income doctrine, or any other judicial or statutory impediment.¹⁶¹

159. A typical format of a Native corporation NOL transaction is as follows:

1. A profitable corporation ("Taxpayer") and the Native corporation create a jointly owned subsidiary ("Newco"), at least 80% of whose voting stock is owned by the Native corporation. The Taxpayer owns the equity through preferred stock, which can be converted into controlling common stock if, for any reason, the Native corporation decides to use its voting power to take action deemed inimical to the interests of the Taxpayer.

2. A tax sharing agreement is entered into in which the Native corporation and the Taxpayer agree on the division between them of the cash to be saved by the NOLs of the Native corporation due to the filing of a consolidated tax return.

3. The Taxpayer assigns income to Newco for the period of time in which the Native corporation controls its voting stock.

4. The Native corporation and Newco file a consolidated federal income tax return, in which the Newco income is offset by the Native corporation's losses.

5. The agreed payment is made to the Native corporation with one exception. If there is doubt about the ability of the Native corporation's losses to withstand audit or IRS examination, however, a portion of the payments may be placed in escrow or trust until the IRS has accepted the tax returns, the statute of limitations for challenge to the return has expired, or any challenge has been judicially resolved.

The opportunity for Native corporations to engage in further NOL transactions of this type was severely curtailed in the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 ("the 1988 Act"). Section 5021 of the 1988 Act repealed section 60(b)(5) of the Tax Reform Act of 1986. Certain transitional rules were included to allow some transfers of NOLs under existing agreements and to allow some transactions by Native corporations under the jurisdiction of a district court under title 11 of the United States Code (the Bankruptcy Code) on April 26, 1988. *See supra* note 154. Utilizing this transitional provision, Bering Straits Native Corporation was able to secure bankruptcy court approval of an NOL transaction on January 4, 1989, in conjunction with confirmation of a modified plan of reorganization. *See* Order Approving Agreement by and Between Bering Straits Native Corporation and J.C. Penney Co., *In re* Bering Straits Native Corp., No. 2-86-00002 (Bankr. D. Alaska Jan. 4, 1989).

160. Alaska Senator Ted Stevens stated that the purpose of the clarifying amendment was to increase the Native share of the net tax benefits, thus furthering the policy decision made by Congress in 1984. 132 CONG. REC. S8,176 (daily ed. June 23, 1986).

161. Internal Revenue Code Section 1504(b)(5)(B), as it existed in the 1986 Tax Reform Act, provided:

Except as provided in subparagraph (C), during the period described in subparagraph (A), no provision of the Internal Revenue Code of 1986 (including

When chapter 11 Native corporation debtors entered into a post-petition NOL transaction¹⁶² the threshold question was whether the NOL proceeds were property of the bankruptcy estate. The NOL itself, as it existed on the petition date or at the time of the NOL transaction, did not fit neatly into the bankruptcy definition of property of the estate contained in section 541. But the NOL, like other tax attributes of the pre-petition debtor, did carry over to the debtor-in-possession.¹⁶³ Once the NOL transaction was entered into, the NOL proceeds received by the debtor did fit squarely within section 541(a)(7), which includes as property of the estate “[a]ny interest in property that the estate acquires after the commencement of the case.”¹⁶⁴

A more difficult and interesting question was presented as the secured creditors scrambled to review their security documents in order to determine if the NOL as of the petition date and, hence, the NOL proceeds from the post-petition NOL transaction were subject to their security interest.¹⁶⁵ In the Tigara Corporation bankruptcy, Judge

sections 269 and 482) or principle of law shall apply to deny the benefit or use of losses incurred or credits earned by a corporation described in subparagraph (A) [Alaska Native Corporation] to the affiliated group of which the Native Corporation is the common parent.

Tax Reform Act of 1986, Pub. L. No. 99-514, § 1804(e)(5), 100 Stat. 2801 (emphasis added).

162. Bering Straits Native Corporation, Tigara Corporation, and Haida Corporation all entered into one or more NOL transactions with bankruptcy court approval after the filing of their cases. Bering Straits did not have any creditors with secured claims to “accounts” or “general intangibles” and, so, escaped litigation on whether its NOL proceeds were subject to secured creditors’ claims. Haida and Tigara were both subject to such claims. Haida’s litigation was mooted by the sale of property and payment of claims with the proceeds after confirmation of a plan of reorganization. In Tigara’s case, the bankruptcy court denied the claim of the secured claimant to the NOL proceeds. *In re Bering Straits Native Corp.*, No. 2-86-00002, Orders of May 28, 1986, and Jan. 4, 1989 (Bankr. D. Alaska); *In re Tigara Corp.*, No. 3-86-00707, Orders of Dec. 5, 1986, and July 17, 1987 (Bankr. D. Alaska); *In re Haida Corp.*, No. 5X-85-00005, Orders of Oct. 29, 1986, and Dec. 24, 1986 (Bankr. D. Alaska).

163. 26 U.S.C. §§ 1398, 1399 (1982).

164. 11 U.S.C. § 541(a)(7) (Supp. IV 1986).

165. Bankruptcy limits a pre-petition secured creditor’s rights to property acquired post-petition. Section 552 provides:

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) Except as provided in sections 363, 506(c), 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, rents, or profits

Ross held in an unreported decision¹⁶⁶ that a bank with a security interest in everything except general intangibles did not have a security interest in the NOL and, therefore, not in the NOL proceeds. In dicta, he suggested that the NOL was not "property" within the meaning of the Uniform Commercial Code and that NOLs were not general intangibles or any other types of collateral.¹⁶⁷

Now that NOLs are a thing of the past, the question of what pre-petition security documents are necessary to obtain a security interest in NOL proceeds from a pre-petition NOL transaction will never again arise, as all NOL transactions will be pre-petition with respect to future Native corporation bankruptcies. In order to be secured on the NOL proceeds due from a pre-petition transaction, a creditor need only obtain a security interest in general intangibles or other readily recognizable category of collateral, depending on the exact structure of the transaction.

III. RESOLUTION OF THE BANKRUPTCY CASE

A. Liquidation Under Chapter 7

It is assumed that all voluntary bankruptcy cases by Native corporations will be filed under chapter 11, with the view to reorganization and continuation of the business. It is not to be expected that a Native corporation will voluntarily put itself into a liquidation proceeding under chapter 7 of the Bankruptcy Code. Even if the creditors of a Native corporation succeed in an order for relief after filing an involuntary petition under chapter 7,¹⁶⁸ it is likely that the debtor will exercise its one-time option to convert the chapter 7 case to a case under chapter 11.¹⁶⁹ Whether it has arrived in bankruptcy court voluntarily or involuntarily, the Native corporate debtor will operate in chapter 11 debtor-in-possession status for some time while its management and its creditors attempt to assess the debtor's financial status

of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552 (1982 & Supp. IV 1986).

166. Memorandum Decision for Order Granting Plaintiff's Motion for Summary Judgment, *In Re Tigara Corp.* (Bankr. D. Alaska Nov. 21, 1988).

167. *Id.* at 13. In the Haida Corporation bankruptcy, a creditor claimed a broad-form security interest in all categories of property recognized by Article 9 of the Uniform Commercial Code, including general intangibles. The dispute became moot when Haida Corporation paid all its creditors in full, with interest.

168. 11 U.S.C. § 303 (1982 & Supp. IV 1986).

169. *Id.* § 706(a).

and prospects for becoming profitable and making at least some payments to creditors. The Bankruptcy Code does not set any limit on the time the debtor may remain "in chapter 11," though the court may establish such a limit in a particular case.¹⁷⁰ Eventually, however, unless the case is dismissed, in which case bankruptcy law and procedures no longer apply to the debtor, the case must reach one of two results. Either there will be confirmation of a plan of reorganization under section 1129 of the Bankruptcy Code which may provide either for the liquidation or continuation of the debtor in some form,¹⁷¹ or there will be conversion, or reconversion, of the case to a chapter 7 liquidation proceeding.¹⁷²

Section 1112(b) of the Bankruptcy Code lists a number of non-exclusive causes for conversion of a chapter 11 case to a chapter 7 liquidation.¹⁷³ Among the most frequently encountered causes of conversion is continuing loss to the estate and absence of any reasonable prospect of reorganization. If the Native corporation cannot improve its pre-bankruptcy performance and begin to operate without further losses after filing for relief, its creditors are likely to press for a chapter 7 proceeding just to force the debtor's business to terminate and thereby reduce ongoing losses. The bankruptcy court may give the debtor's management some time in which to reduce costs and look for additional sources of income, but if the losses cannot be arrested, the court is likely to order conversion to avoid shrinkage of assets which might otherwise be available for creditors. Conversion to chapter 7 is also likely, even without ongoing losses, if no plan of reorganization has been confirmed after a reasonable time or if the court does not believe that a plan can be confirmed in the case.¹⁷⁴

In a chapter 7 proceeding, a trustee is appointed whose primary function is to turn the property of the estate into money for distribution to creditors to the extent of their claims. The trustee will have to determine the assets available to the estate.¹⁷⁵ The trustee will be able to administer the leased and developed land and the personal property and income rights otherwise available to the debtor at the time of filing the case and thereafter arising.¹⁷⁶ Additionally, as elaborated upon above, the trustee may have access to the undeveloped land as well, for payment of claims incurred prior to the enactment of the 1991

170. *Id.* § 1112(b)(4).

171. *Id.* §§ 1123(a)(5), 1129(a)(11).

172. *Id.* § 1112(b).

173. *Id.*

174. *Id.* § 1129(b)(5).

175. *See supra* text accompanying notes 69-75.

176. 11 U.S.C. § 541 (1982 & Supp. IV 1986). *See supra* notes 140-52 and accompanying text for the reasons the court may or may not find the section 7(i) or 7(j) income excluded from the bankruptcy estate.

Amendments, depending on the extent to which the protections of section 11 of the Amendments are deemed to apply.¹⁷⁷ The trustee may, but need not, operate the debtor's business and is likely to do so, if feasible, only for a short time in which the possibility of selling the business as a going concern can be explored.¹⁷⁸ After the issues involved in identifying property of the estate have been resolved or settled, the trustee will liquidate and distribute the estate, a process which might endure for years if assets prove difficult to sell or administer.

The debtor will not cease its corporate existence in chapter 7, but it will cease to have any assets, other than the undeveloped land protected by the land bank. In addition, the debtor will be without income with which to operate except to the extent that the court finds, for the reasons outlined above, that the section 7(i) or 7(j) income is excluded from the bankruptcy estate. If this income is not part of the estate, the debtor will be a mere shell and may cease to exist in fact if it is involuntarily dissolved under Alaska law. If the debtor is without employees to file the necessary reports and lacks funds to pay the bi-annual franchise taxes, involuntary dissolution may well result.¹⁷⁹

If, in an effort to keep itself alive, the Native corporation in chapter 7 leases or develops its undeveloped land excluded from the bankruptcy estate under the 1991 Amendments, it may find that it has done so for naught. Once this land is leased or developed, it may no longer be excluded from the estate, and the trustee may demand turnover of that property to the estate so that it can be administered for the benefit of the creditors.¹⁸⁰

177. 43 U.S.C.A. § 1636(d)(1)(B) (1986 & West Supp. 1988).

178. The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate. 11 U.S.C. § 721 (1982).

179. The Alaska Statutes provide for involuntary dissolution of a corporation by the state when, among other things:

- (1) the corporation is delinquent six months in filing its biennial report or in paying a license filing fee or penalty;
- (2) the corporation has failed for 30 days to appoint and maintain a registered agent in this state;
- (3) the corporation has failed for 30 days after change of its registered office or registered agent to file in the office of the commissioner a statement of the change;

...

- (5) a vacancy on the board [of directors] of the corporation is not filled within six months or the next annual meeting, whichever occurs first;

...

- (7) the corporation is 90 days delinquent in filing notice of change of an officer, director, alien affiliate, or five percent shareholder as required by this [statute];

ALASKA STAT. § 10.06.633 (1988).

180. 11 U.S.C. § 542(a) (1982).

Even if the chapter 7 proceeding is terminated because the trustee can find no further assets to administer, the miseries of the debtor will not be ended. In a chapter 7 case, a corporate debtor does not receive a discharge, and unpaid creditors can continue to sue and execute upon the debtor's property, other than perhaps its undeveloped land, until they are paid in full.¹⁸¹

B. Confirmation of a Chapter 11 Plan

1. *Confirmation, Generally.* For the reasons outlined above, most Native corporations forced to seek bankruptcy relief will file under chapter 11. Even if adequate cause exists for conversion to a chapter 7 proceeding, creditors may refrain from asking for such conversion, given the legal uncertainties of chapter 7 liquidation as applied to Native corporations, the practical problems of liquidating a geographically distant enterprise with illiquid assets, and the necessity for compromise. Therefore, Native corporations in bankruptcy must eventually propose a reorganization plan or face a plan proposed by one or more creditors. Confirmation of a non-liquidating plan results in a discharge under section 1141 of the Bankruptcy Code¹⁸² and provides the Native corporate debtor with the one chance to emerge from bankruptcy protection and be assured of an economic future.

A confirmed plan of reorganization under chapter 11 is a court-approved contract between the debtor, its creditors, and its equity security holders (for example, shareholders). A plan organizes and classifies the claims against, and equity interests in, the debtor. The reorganization plan specifies the means by and extent to which the claims of creditors will be satisfied in the future and may, in addition, provide for the creation of new classes of stockholders and reduce or eliminate altogether the rights of existing shareholders. The plan may provide for a sale or liquidation of part or all of the debtor's business or the transfer of the business to a new entity which will take on the responsibility for payment of claims.¹⁸³ While the Bankruptcy Code specifies some provisions which a corporate plan of reorganization must include,¹⁸⁴ there are few prohibited terms, and the debtor and its creditors are encouraged to create and agree upon terms which fit the needs of the business being reorganized.

To be confirmed by the bankruptcy court, a chapter 11 plan must satisfy the tests of section 1129(a) of the Bankruptcy Code.¹⁸⁵ One test is contained in section 1129(a)(7), the so-called "best interests of

181. *Id.* § 727(a)(i).

182. 11 U.S.C. § 1141 (1982 & Supp. IV 1986).

183. *Id.* § 1123(b).

184. *Id.* § 1123(a).

185. *Id.* § 1129(a).

creditors" test, which provides that any creditor which does not accept the plan must receive under the plan as much as that creditor would receive in a chapter 7 liquidation.¹⁸⁶ A second prerequisite for confirmation of a reorganization plan is found in section 1129(a)(8).¹⁸⁷ This section requires that each voting class of creditors accept the plan by one-half in number of, and two-thirds in dollar amount of claims held by, creditors voting on the plan in the class. Both of these tests present unique issues to an ANCSA corporation seeking confirmation of a plan.

2. *"Best Interests of Creditors" Test.* Unanimous acceptance of a plan cannot be anticipated, so the debtor must be prepared to demonstrate that a dissenting creditor is being treated as well as it would be under a chapter 7 liquidation. The debtor will want to guarantee its own future survival; therefore, it cannot commit to the plan all of its revenues into the future, and it may not wish to dedicate any of its section 7(i) or 7(j) income to the plan. Neither will the debtor wish to dedicate any of its undeveloped and unleased land to the plan, as to do so will abandon the automatic land bank protection afforded by the 1991 Amendments. Yet, if all of these assets are excluded from future payments, there may be little left to offer creditors to induce acceptance of the plan. Nor can the debtor demonstrate that the plan is an improvement over a liquidation under which future section 7(i) and 7(j) income might well be available to creditors and the risk of further business losses would be averted.

Despite the debtor's ability to exclude undeveloped, unleased land and, possibly, future section 7(i) and 7(j) income from a liquidation analysis, the debtor may have the unpleasant prospect of offering revenue from these sources to creditors just to ensure the corporate existence. Even if the debtor is willing to make payments out of future business revenues, there must be some assurance that these revenues will exist before the court will find the plan to be feasible under section 1129(a)(11).¹⁸⁸ Given many debtors' poor pre-bankruptcy earnings records, it may be hard to demonstrate feasibility without the assurance of an income source not dependent upon the debtors' own efforts, namely income from leasing of presently undeveloped and unleased land or income from other Native corporations under sections 7(i) and 7(j).

186. *Id.* § 1129(a)(7)(A)(ii).

187. *Id.* § 1129(a)(8).

188. *Id.* § 1129(a)(11).

3. *Cram-Down and the Absolute Priority Rule.* If all classes of shareholders and equity owners do not accept¹⁸⁹ a plan, so that the plan does not comply with section 1129(a)(8) of the Bankruptcy Code, section 1129(b)¹⁹⁰ presents an alternative to these acceptance tests. Under section 1129(b), if the plan proponent requests a "cram-down" of the plan, that is, confirmation despite the rejection of one or more classes, and the court determines that the plan is "fair and equitable" with respect to the dissenting class of claims or interests, the plan can still be confirmed. The "fair and equitable" test incorporates the rule, originally judicially developed, known as the "absolute priority" rule. According to the absolute priority rule, unless the claims of the dissenting class are paid in full, no class of claims or interests junior to the dissenting class can receive or retain under the plan any property on account of such claims or interest. Shareholders' claims are junior to all creditors' claims. The rule has been generally interpreted to mean that a plan cannot be crammed-down on a class of unsecured claims if the shareholders of the debtor are to retain any stock, even if the stock has no equity value due to the debtor's insolvency as of the confirmation of the plan.¹⁹¹

189. For purposes of determining acceptance or rejection of a plan of reorganization, the Bankruptcy Code provides that a class of claims (for example, the class of unsecured creditors) is deemed to have accepted a plan if two-thirds in amount and more than one-half in number of the creditors that vote, vote to approve the plan. 11 U.S.C. § 1126(c) (1982). A class of interests (for example, the common stock shareholders) is deemed, under the Bankruptcy Code, to have accepted a plan if two-thirds of the share that vote, vote in favor of the plan. 11 U.S.C. § 1126(d) (1982 & Supp. IV 1986).

190. 11 U.S.C. § 1129(b) (1982 & Supp. IV 1986).

191. This was confirmed by the United States Supreme Court in *Norwest Bank Worthington v. Ahlers*, — U.S. —, 108 S. Ct. 963 (1988). In *Ahlers*, the debtors, family farmers, proposed a plan of reorganization under which they would retain their farmland and equipment. Their unsecured creditors rejected the plan, which did not propose to pay them in full. Section 1129(b)(2)(B)(ii) of the Bankruptcy Code provides, in such circumstances, that the court may not confirm the plan unless claims and interests junior to the dissenting class (in this case, the Ahlers themselves) will not receive or retain under the plan any property on account of such claim or interest. 11 U.S.C. § 1129(b)(2)(B)(ii) (1982 & Supp. IV 1986). The court of appeals held that future contributions of labor and experience by the Ahlers were sufficient to permit them to retain the farm property notwithstanding the dissent of the unsecured creditors. *Ahlers v. Norwest Bank Worthington*, 794 F.2d 388, 402-03 (8th Cir. 1986). The Supreme Court disagreed, holding that because a promise of future services had no present measurable value and could not be added to the reorganized entity's balance sheet, it was not a substitute for the new "money or money's worth" which would be required to retain an equity interest. The Supreme Court also rejected the contention that because the Ahlers' farm operation was insolvent the retention of an ownership interest in the farm did not constitute the retention of "property." The Court held: "Even where debts far exceed the current value of assets, a debtor who retains his equity interest in the enterprise retains 'property.'" 108 S. Ct. at 969.

In effect, this means in a typical case that the unsecured creditors in a chapter 11 case can require the debtor to liquidate or to propose a plan which: terminates the interests of the existing shareholders; pays to creditors in full (over time); or calls for a new equity investment and the issuance of new stock in consideration for that investment. Rejection of any non-qualifying plan by the unsecured class will eventually lead the court to grant a motion to convert the case to chapter 7.¹⁹² If the unsecured creditors stand fast by the requisite majorities, they can eventually force either a liquidation or a plan which satisfies their demands, probably by proposing to pay their claims in full.

The absolute priority rule, then, prevents a chapter 11 corporate debtor from confirming a plan over creditor objection, if the plan calls for less than full payment to the creditors and also calls for the shareholders to retain their stock in the corporation. The absolute priority rule also gives the creditors the potential to cram down their own plan over the dissent of the shareholders, a plan which may call for the shareholders to lose all their stock in the corporation.

For a regional or village corporation in chapter 11, direct conflicts exist between the result dictated by the absolute priority rule and the purposes of ANCSA. ANCSA stock may not be conveyed to a non-Native except by descent¹⁹³ and may be conveyed to Native or descendants of Natives only in limited circumstances.¹⁹⁴ This stock transfer prohibition presently applies to all ANCSA stock¹⁹⁵ and is contained in section 7(h) of ANCSA:

Except as otherwise provided in this subsection, Settlement Common Stock, inchoate rights thereto, and rights to dividends or distributions declared with respect thereto shall not be —

- (i) sold;
- (ii) pledged;

192. 11 U.S.C. § 1112(b)(5) (1982 & Supp. IV 1986).

193. 43 U.S.C.A. § 1606(h)(2) (1986 & West Supp. 1988).

194. Settlement Common Stock may be transferred to a Native or descendant of a Native only: (1) pursuant to a court decree of separation, divorce, or child support; (2) by a holder who is unable to practice his or her profession because of holding the stock; and (3) as an inter vivos gift from a holder to the holder's child, grandchild, great-grandchild, niece, or nephew. *Id.* § 1606(h)(1)(C).

195. ANCSA, as originally enacted in 1971, provided that these inalienability provisions would expire in 1991. The 1991 Amendments to ANCSA contain extremely complicated provisions dealing with how those inalienability provisions extend past 1991 and how they may be removed. A full description of those provisions is outside the scope of this article, but, in summary, a corporation has four approaches to stock restrictions:

(1) For all corporations, the restrictions continue indefinitely if the corporation takes no action with respect to stock restriction. *Id.* § 1629c(a).

(2) For regional corporations, and for village corporations in the Bristol Bay and Aleut regions, the corporations may elect, through a board of directors' resolution followed by an affirmative shareholder vote, to extend the stock restrictions. If the

- (iii) subjected to a lien or judgment execution;
- (iv) assigned in present or future;
- (v) treated as an asset under —
 - (I) title 11 [of the United States Code] or any successor statute,
 - (II) any other insolvency or moratorium law, or
 - (III) other laws generally affecting creditors' rights; or
- (vi) otherwise alienated.¹⁹⁶

While this language is directed primarily at the shareholders' creditors, as opposed to the corporation's creditors, there is little question that the purpose behind these inalienability provisions was to keep ANCSA corporations in Native control. In light of this overriding purpose and the clear prohibition in subsection (vi) against otherwise alienating the stock, one would expect that a bankruptcy court would interpret the absolute priority rule in a manner which would enable shareholders to keep their stock.¹⁹⁷

If ANCSA permits a Native corporation to obtain confirmation of a plan that calls for shareholders to keep their stock but that does not comply with the absolute priority rule, then it has afforded Native corporate debtors a powerful weapon. The only protection left for unsecured creditors in such a case is the requirement that all creditors who vote against the plan be paid as much as they could receive in a chapter 7 liquidation.¹⁹⁸ Computing the liquidation value of the debtor is difficult for any enterprise, and especially so for a Native corporation because in most cases the land assets are remote and lack an active market, while future section 7(i) or 7(j) income is virtually impossible to quantify with any certainty.¹⁹⁹ Because of these uncertainties, the court may accept a low value for the nonexempt land

vote fails, the stock restrictions expire automatically in 1991. This is the so-called "opt-in" approach. *Id.* § 1629c(d).

(3) Except for corporations that elect the opt-in procedure, stock restrictions terminate only if the corporations affirmatively so vote. This is the "opt-out" approach. *Id.* § 1629c(b).

(4) All corporations can recapitalize their corporations by voting for a package which can include extending the restrictions and also include issuing additional stock or different classes of stock (different stock which may be alienable and have different voting and dividend rights). *Id.* § 1629c(c).

196. *Id.* § 1606(h)(1)(B).

197. A contrary result would negate the effect of other ANCSA provisions. For example, if the creditors could gain control of all the corporation's stock, the creditors could then remove undeveloped land from the automatic land bank.

198. 11 U.S.C. § 1129(a)(7) (1982 & Supp. IV 1986).

199. Much of the land will, moreover, be protected by the automatic land bank and, therefore, be excluded from the calculation. Section 7(i) and 7(j) revenues may or may not be available to pay creditors' claims. *See supra* text accompanying notes 140-52.

and future income assets.²⁰⁰ The debtor can then propose a plan which makes installment payments to creditors equal, in present value, to the low hypothetical chapter 7 liquidation value, thus allowing shareholders to retain their stock and the benefit of any future development or increase in value of corporate assets above the liquidation value.

4. *Other Plan of Reorganization Issues.* A not uncommon feature of a plan of reorganization in a chapter 11 case is for the debtor to issue a new class of stock to be given to the creditors in exchange for their claims. Typically the stock is in the nature of preferred stock and may carry any of a wide range of dividend rights, voting rights, liquidation rights, etc. Despite the stock transfer restrictions that apply to common stock of Native corporations, a plan calling for a new class of stock to be issued to the creditors is possible in Native corporation bankruptcies.

The 1991 Amendments to ANCSA authorize any Native corporation to issue "g(2)" stock, that is, stock issued pursuant to section 7(g)(2) of ANCSA, as amended.²⁰¹ The corporation has wide discretion in defining the rights associated with "g(2)" stock that it issues. If the corporation wishes, the stock can be freely transferable or not, be issued to Natives or non-Natives, and have whatever dividend rights, voting rights, and other rights the corporation designates. The stock can be issued by itself or in connection with an overall recapitalization of the Native corporation which also addresses other stock alienability issues.²⁰² The "g(2)" stock issuance requires an amendment of the articles of incorporation to be approved by a majority of all the outstanding voting stock of the corporation²⁰³ and, for this reason, could only be included in a debtor-sponsored plan.²⁰⁴

200. Because section 7(i) and 7(j) payments are based on the number of shareholders, these payments, even if available in perpetuity to pay creditors' claims, are not likely to be a significant source of repayment of creditors' claims except in the case of the strong and the very largest villages.

201. 43 U.S.C.A. § 1606(g)(2) (1986 & West Supp. 1988).

202. *Id.* § 1629c(c). See also *supra* note 195 and accompanying text.

203. 43 U.S.C.A. §§ 1629b(b), (d), (e) (1986 & West Supp. 1988). This raises a potential issue: if two-thirds of the voting shares, but less than a majority of all shares that have the right to vote, approve a plan calling for issuance of "g(2)" stock, then the Bankruptcy Code standard of shareholder approval will have been met, see 11 U.S.C. § 1126(d) (1982 & Supp. IV 1986), but the ANCSA standard will not, 43 U.S.C.A. 1629b(d) (1986 & West Supp. 1988). This situation could conceivably arise if the debtor's management proposed a plan calling for issuance of "g(2)" stock but was unable to obtain sufficient shareholder support.

204. A creditor plan that called for "g(2)" stock could not be confirmed over the objection of the Native shareholders because the absolute priority rule does not operate to wipe out the shareholders' interests.

In the event that creditors are dissatisfied with a chapter 11 debtor's reorganization efforts, the creditors may file a plan of reorganization of their own.²⁰⁵ As noted above, the automatic land bank, the possible insulation of section 7(i) and 7(j) revenues, and the inability to cancel Native-owned ANCSA stock or to assume complete control of the corporation, will hamper the creditors' ability to confirm a plan to their liking over the debtor's objection. Their solution may be to propose a plan which transfers all nonexempt bankruptcy estate assets to a new corporation owned by the creditors. The stock in this corporation would be distributed to creditors as payment of their claims. While not as drastic as elimination of the Native shareholder interests in full, a plan that would give virtually all the productive assets to the creditors, for good, would deprive the shareholders of much hope for future gain. On the other hand, the confirmation of the plan would make the debtor debt-free of all pre-petition debts, and the debtor would own the undeveloped land and, possibly, also the section 7(i) and 7(j) revenues. Further, such a plan would be consistent with the Bankruptcy Code and not inconsistent with ANCSA.

Should the court be confronted with two confirmable plans, one proposed by creditors and calling for payment out of future earnings and one proposed by shareholder-oriented interests calling for liquidation value payment only, section 1129(c) of the Bankruptcy Code says the court shall consider "preferences of creditors and equity security holders in determining which plan to confirm."²⁰⁶ Where preferences are split by class, as would be expected under the foregoing hypothetical, the court will have to make its own judgment on the weight to be given to Congress' divergent purposes expressed in ANCSA and the Bankruptcy Code.

IV. CONCLUSION

Resolving the conflicts between the Bankruptcy Code and ANCSA is not easy, as neither statute was drafted with a view to harmonizing with the other. The Bankruptcy Code reflects a congressional concern for the protection of the creditors of an insolvent enterprise, to the exclusion, if necessary, of the shareholders. These concerns conflict with the broad goals of ANCSA and its amendments: to satisfy Alaska Native claims with property and the chance of a better economic future, and to preserve land and other cultural

205. 11 U.S.C. §§ 1102, 1121(c) (1982 & Supp. IV 1986). At least one committee of creditors is appointed in every chapter 11 case. Additional committees of creditors and equity holders may also be appointed if appropriate. Committees have broad powers, including the power to propose or participate in the formulation of a plan. *Id.* § 1103(c).

206. 11 U.S.C. § 1129(c) (1982).

attributes of the Native people in perpetuity without jeopardizing them through exposure to the very economic forces from which the hoped-for prosperity can emerge. Indeed, the conflict is inherent in ANCSA itself as the goals of ANCSA are internally inconsistent if the pursuit of economic gain is to be conducted in the economic environment in which the ANCSA corporations were originally intended to operate. ANCSA can instruct the Native corporations to pursue economic growth without jeopardizing the income and lands allocated to Alaska Natives under ANCSA; but legislation cannot compel businesses to prosper, nor can legislation compel prosperity without risk.

These goals of maximizing creditor recovery and preserving the lands and cultural values protected by ANCSA can each be achieved to a degree with Native corporations forced into bankruptcy, but only if the strict interpretations of the two statutes are relaxed.

