WRITTEN TESTIMONY OF THE
REPRESENTATIVES OF THE
SOUTHEAST ALASKA LANDLESS NATIVE COMMUNITIES

prepared for the

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON PUBLIC LANDS, FORESTS, AND MINING

regarding

S. 4889, the Alaska Native Claims Settlement Act Fulfillment Act of 2020

December 2, 2020

Chairman Lee, Ranking Member Wyden, and Members of the Subcommittee:

We appreciate the opportunity to submit testimony regarding S. 4889, the Alaska Native Claims Settlement Act Fulfillment Act of 2020, which was considered during the Subcommittee's November 18, 2020 legislative hearing on multiple bills.

Our testimony focuses on Section 7 of S. 4889, which redresses the omission of the Southeast Alaska Native communities of Haines, Ketchikan, Petersburg, Tenakee, and Wrangell from the Alaska Native Claims Settlement Act of 1971 (ANCSA) by authorizing the Alaska Natives enrolled to those communities under ANCSA to form Urban Native Corporations and to receive certain settlement land pursuant to ANCSA. The omission of these Native communities is an inequity that has had long term, negative impacts on these communities and the Alaska Natives enrolled to these communities. This inequity will continue without an Act of Congress. For that reason, we humbly ask for your due consideration and support.

Executive Summary and Responses to Concerns Raised by Members of the Subcommittee

In ANCSA, Southeast Alaska Was Treated Differently Due to a Previous, Partial Settlement of Land Claims; As A Result, the Landless Communities Were Unable to Appeal Their Exclusion

As Congress developed ANCSA in the late 1960s, it recognized that it had previously authorized a partial settlement of aboriginal land claims for Alaska Native groups in Southeast Alaska. Specifically, in 1935, Congress had authorized the Tlingit and Haida Indians to sue the federal government for land that was taken without compensation, and in 1968, the U.S. Court of Claims authorized a payment of $7.5 million to settle Tlingit and Haida land claims.

In 1971, just three years after the Tlingit and Haida Settlement, Congress enacted ANCSA, authorizing almost $1 billion and 44 million acres to settle the aboriginal land claims of all Alaska

Natives. As Congress developed ANCSA, Congress determined that the Tlingit and Haida settlement had failed to cover all of the claims of the Tlingit and Haida Indians, and so the Southeast Alaska region was included in ANCSA.

Although Southeast Alaska was included in ANCSA, the settlement for the Southeast region was very limited. Each of 12 villages received only one township of land rather than—as in other regions of Alaska—multiple townships based on population size. ANCSA returned roughly 12 percent of the lands in Alaska to the Native peoples of the state; the Native people of Southeast Alaska, by comparison, received less than 3 percent of their original homelands under ANCSA. Remarkably, Alaska Natives in Southeast Alaska—who made up 22 percent of the Alaska Native population in 1971—received less than 1½ percent of the land settlement. This was our reward for having the audacity to be the first to pursue our aboriginal land claims.

To add insult to injury, Congress in Section 11 of ANCSA, which lists villages outside of the Southeast Alaska region, included a provision that allowed unlisted villages to appeal their status. Section 16 of ANCSA, which lists villages in the Southeast Alaska region, does not include similar appeal language. When ANCSA passed, five Alaska Native villages were left out of the settlement: Wrangell, Petersburg, Ketchikan, Tenakee and Haines. No reason was given for their exclusion although, as detailed below, opposition from the Forest Service and the non-Native timber industry appears to have played a dominant role. Three of the five communities appealed their status, but because Congress failed to establish a right of appeal for Southeast villages, their appeals were rejected outright. Thus, for almost 50 years, the five Landless villages have sought the equitable redress of their exclusion from the 1971 aboriginal land claims settlement.

<u>The Five Landless Communities Did Not Meet the Technical Criteria for *Village* Corporations as A Direct Result of the influx of Non-Native Settlers into the Five Communities; However, Congress Included Similarly Situated Native Communities in ANCSA</u>

During the November 18, 2020 hearing, **Senator Heinrich** asked whether the five Landless communities met "the legal qualifications of population" for villages listed in ANCSA in 1971. We appreciate Senator Heinrich's question because it raises important issues of law and equity that underlie this legislation.

The Tlingit and Haida people have been fighting to establish a legal right to own a fraction of their traditional homelands for more than a century. In the 1940s, the Tlingit leader and attorney William Paul won a short-lived legal victory in the Ninth Circuit Court of Appeals in *Miller v. United States*, 159 F. 2d 997 (9th Cir. 1947), which ruled that Native lands could not be seized by the government without the consent of the Tlingit landowners and without paying just compensation. To reverse this decision, Congress passed a Joint Resolution authorizing the Secretary of Agriculture to sell timber and land within the Tongass, "notwithstanding any claim of possessory rights" based upon "aboriginal occupancy or title." This action ultimately resulted in the *Tee-Hit-Ton Indians v. United States* decision, in which the U.S. Supreme Court held that Indian land rights are subject to the doctrines of discovery and conquest, and "conquest gives a title which the Courts of the Conqueror cannot deny." 348 U.S. 272, 280 (1955). **The Court concluded that Indians do not have 5th Amendment rights to aboriginal property. Instead, the Congress, in its sole discretion, would decide if there was to be any compensation**

whatsoever for lands stolen. And so, here we are. We start at a clear disadvantage. We have been told that we have no 5th Amendment rights to aboriginal property, and Congress, without explanation, excluded our communities from the 1971 settlement of land claims in ANCSA.

As a technical matter, like many other Native communities listed in ANCSA, the five Landless communities met most, but not all, of the nominal requirements set forth in ANCSA for *village* corporations; that is, in fact, why this legislation establishes five *urban* corporations. **As we detail below, the reason that the five Landless communities did not meet this technical requirement for *village* corporations was due to the influx of white settlers into the five Landless communities, an experience over which our people had no control.**

Villages in ANCSA generally were required to have a majority-Native population in order to establish village corporations. But unlike most regions of Alaska, a large population of white settlers had moved into the Southeast region by the early twentieth century to exploit the rich natural resources of what is now the Tongass National Forest—gold, timber, and salmon. It is our hope that our historical reality—the arrival of non-Native settlers in our region and their settlement in our communities—will not be held against us.

Fortunately, Congress *has* recognized and addressed this issue of non-Native settlement for other, similarly situated Native communities in Alaska. In ANCSA itself, the general criteria for villages—that a community must have a majority-Native population—did not prevent Congress from extending recognition to other traditional villages (in fact, *every* other traditional Alaska Native village of which we are aware) that technically did not meet the population criteria used to define villages under ANCSA, including at least two villages in Southeast Alaska (Saxman and Kasaan) in which village corporations were established and four urbanized villages (Kenai, Sitka, Juneau and Kodiak) in which urban corporations were established.

The fact that non-Natives made their homes in the five Landless Native communities in the early twentieth century should not be held against these communities; in fact, the opposite should be true. The five Landless communities have long, rich indigenous histories and our communities should have an opportunity to be recognized and to receive a sliver of our original homelands. Recognizing our five Landless communities would not open the door to similar efforts elsewhere in Alaska. We are not aware of even a single community elsewhere in the State of Alaska that finds itself in the same position. As detailed below, other Alaska Native communities like Nome also experienced a large influx of non-Natives in the early twentieth century yet were listed in ANCSA and were authorized to establish village or urban corporations. Southeast Alaska was different, and the inequities that resulted are redressed in this legislation.

<u>They're Going to Clear Cut the Tongass!</u>

In the late 1960s, the then-powerful non-Native timber industry held significant political sway within the Southeast Alaska region; a pulp mill and sawmills were located within four of the five communities. Congress did not explain why it chose to exclude *these* five communities, and we can only wonder whether it was politically expedient to be silent as to the true reason: timber.

Opponents of our land claims have always objected to our claims based on their own parochial views of natural resource development. For decades, the Forest Service and the timber industry

actively fought indigenous land claims in the Tongass over fears that Native peoples would *not* develop timber or support the timber industry. We document some of this history below. Some environmental groups today oppose our legislation over fears that we *would*, as owners of the land, have the *right* to develop timber resources. We are certain that you will find their testimony to this effect in the hearing record. Truly, we are damned if we do, and we are damned if we don't. **But ultimately, for our people, what these arguments really boil down to is this: "We don't trust those people to make responsible decisions about their land."** These sentiments are the epitome of degrading and paternalistic thoughts towards Native people that should no longer be tolerated.

In this context, some of the opponents of the Landless claims have raised the specter of the so-called "Sealaska land bill," which was enacted by Congress in 2014. The Sealaska land bill identified specific lands within the Tongass for conveyance to Sealaska Corporation, the regional Alaska Native corporation for Southeast Alaska, to complete its 1971 entitlement under ANCSA. Sealaska has harvested some timber on some of its lands over the course of several decades, and this was largely the basis (for some) for opposing that legislation. What these groups probably will not tell you is that Sealaska entered into one of the largest forest carbon-sequestration contracts in U.S. history after it received its final entitlement lands in 2014. The reality is that Sealaska and other Alaska Native corporations in Southeast Alaska are working with local communities and even conservation groups to build and support environmentally responsible businesses in the Tongass. In short, we no longer live in the 1970s, and it is unfair for those who opposed timber development in the Tongass during that era to continually deploy the specter of decades-old logging politics and practices as a reason to oppose indigenous rights.

The legislation before this Subcommittee would convey 115,200 acres in total to the five Landless communities (one township, or 23,040 acres each) in Southeast Alaska, a region that comprises 21.9 million acres of federal land (of 22.9 million acres total in the regional land base). This legislation returns ½ of 1 percent of that land to Native ownership.

One organization has submitted testimony articulating their concern that the legislation would convey 4,800 acres of the so-called TU-77 watersheds in Southeast Alaska to the new Native corporations. The TU-77 comprise 1.9 million acres of watersheds in the Tongass National Forest. It is remarkable, frankly, that our proposed selection overlaps just .25 percent of these massive TU-77 areas that have been earmarked for conservation in the Tongass. It is even more remarkable given the fact that 80 percent of the Tongass is already effectively set aside for conservation, over 6.6 million acres of which has been set aside into permanent conservation status through direct acts of Congress and 7 million additional acres insulated from development through administrative land planning. The fact that the Tongass is "public" does not mean that those who advocate to set aside more of it do not have their own parochial interests in its use. The reality is that our Native land selections must come from the "scraps" left over after every other stakeholder interest in the Forest has selected or set aside land to serve their own interests.

<u>The ISER Report to Congress—The Point of the Report Is the Truth of Our History</u>

In 1993, Congress instructed the Secretary of the Interior to investigate the exclusion of the Landless communities from ANCSA. In turn, the U.S. Forest Service (USFS), the Bureau of Land Management (BLM), and the Bureau of Indian Affairs (BIA) contracted with the University of

Alaska's Institute of Social Economic Research (ISER) to investigate why the Landless communities were excluded from ANCSA. This research materialized into a lengthy report titled, "A Study of Five Southeast Alaska Communities" ("ISER Report"), which was to be used by Congress to help determine "whether the exclusion of the five [Landless] study communities was intentional or inadvertent." The ISER Report provides a detailed overview of "how the historical circumstances and conditions of the study communities compare with those of the Southeast communities that were recognized under ANCSA."

The ISER Report does not draw any specific conclusions about the validity or invalidity of claims that the Landless communities met (or did not meet) the general criteria for inclusion in ANCSA. The ISER Report does demonstrate, however, that all five of the Landless communities share the same litany of cultural, historical, and social characteristics that define traditional Alaska Native villages. These characteristics are addressed in more detail below.

The Native Village of Tenakee

Somewhat remarkably, at least one individual has submitted testimony suggesting that the village of Tenakee "was never a Native village." As detailed by the ISER Report, Tenakee has a long history as a Native village. But the reality is that the Native population in Tenakee has largely been displaced by a non-Native population, and so our testimony must address this history.

During the period leading up to ANCSA, the federal government recognized Tenakee as a Native place. Tenakee was identified as an "Indian settlement" in a 1935 executive order *excluding Tenakee from the Tongass National Forest* and, in 1965, the federal government rejected a non-Native application for a trade and manufacturing site at the Indian village in Tenakee in recognition of the "possessory rights to this tract" and use and occupancy of the site by the Native people of Tenakee.

Unlike the four large Landless communities, the1970 Census showed that Tenakee had fewer than 25 Native residents in 1970. However, 64 Native individuals enrolled to Tenakee, and Tenakee in 1970 shared many similarities with the Southeast village of Kasaan, which, unlike Tenakee, was listed in ANCSA. Kasaan, which had only 8 Native residents according to the 1970 Census, was ultimately able to demonstrate that it *did in fact meet the requirements* for a listed village. This may reflect the fact, as acknowledged in the ISER Report, that the 1970 Census likely undercounted the Alaska Native population. The Census did not take into account Alaska Native movement between Native villages, which was common at the time. The residents of Tenakee did not have an opportunity to make the same showing that Kasaan was successfully able to make because Tenakee was not listed in ANCSA.

The similarities between Tenakee and Kasaan are compelling. Kasaan, like Tenakee, experienced an out-migration of Native residents due to impacts of unregulated, non-Native fishing. **But, as detailed in the ISER Report, Kasaan repopulated and revitalized as a Native community after it was given the opportunity to incorporate under ANCSA.**

The Bottom Line: "Technicalities" Do Not Erase the Native-ness of Our Five Communities

In failing to list these communities, Congress precluded 4,400 Alaska Natives from five traditional Native communities in Southeast Alaska from forming Alaska Native corporations with land in and around their communities and pursuing the economic, social, and cultural benefits of operating an Alaska Native corporation in each of their respective communities.

As noted above, none of the five Landless communities met all the requirements under ANCSA to incorporate as village corporations. And, as discussed below, it is impossible to articulate whether the five Landless communities "met" the requirements for incorporation as urban corporations because, in fact, ANCSA did not establish any specific requirements for urban corporations; the point of the urban corporation model was to provide a solution for communities that did not meet ANCSA's definition of a village due to the size of the village's non-Native population. However, like the Alaska Native populations in the four towns that were authorized to incorporate urban corporations, the five Landless villages "originally were Native villages, but [came to be] ... composed predominantly of non-Natives."

As you review testimony submitted by a few of our detractors, you will note that most objections to legislation introduced on behalf of our communities focus not on the right of the Landless communities to establish Native corporations but instead arise from a generalized fear about what we might do with the land conveyed to our people. Specifically, you will see concerns about timber development. This may be unavoidable given the fact that our homeland is a forest. In any event, these fears are unfounded and inappropriate. First, given the modern timber economy in our region, the threat of mass timber harvesting is, as a practical matter, an empty fear. No one has engaged in large-scale timber harvesting in our region in decades, and we challenge anyone to demonstrate otherwise. Second, as noted above, we no longer live in the clear-cut-the-forest economy of the 1970s, and it is unfair for those who opposed timber development in the Tongass during that era to continually raise the specter of logging 40-50 years later. Third, the only federal land available for conveyance to the five Landless communities comes from the Tongass National Forest, and any perceived threat to the integrity of the Tongass tends to spur both local and national resistance. We understand that political reality, and we recognize that your constituents will raise these concerns. But the fact is that these lands were taken from our people; we do not recognize generalized fear about the capacity of Native landowners to make decisions for ourselves to be valid grounds for precluding Native ownership of aboriginal homelands, and neither should the Members of this Subcommittee.

Congress has significant discretion to settle aboriginal claims, and Native American claims have often been settled by Congress not only out of legal obligation but as a result of "moral and political persuasion." Congress acted both in ANCSA and—on numerous occasions—after ANCSA to extend the benefits of the Settlement to Alaska Native communities that had been impacted by non-Native settlement.

Congress in 1971 and in the years following took steps to extend the benefits of the settlement to identifiable Alaska Native groups where equity demanded it. In ANCSA itself, four "urban" communities were authorized to incorporate despite the fact that they did not meet ANCSA's definition of a Native village or group. Similarly, although the Governor of Alaska specifically objected to the establishment of a Native corporation for Nome, Congress authorized Nome to

incorporate as a village corporation. After ANCSA was enacted, in 1980, Congress authorized seven additional communities in the Koniag region to incorporate as villages under ANCSA.

Congress provided no reason to exclude the five Landless villages in 1971. Congress has taken steps to resolve other inequities under ANCSA, and the entire Alaska Native community recognizes that the Landless claims still need to be resolved. No other Native communities in Alaska find themselves in the same unique position. We believe it is clear that our villages were left out due to the political influence of the timber industry in the 1960s, and the notion that some groups would prefer to see us left out of ANCSA today out of fear that an Urban Corporation might harvest some amount of timber reeks of irony and paternalism.

Every other Native community in Alaska that experienced an influx of non-Native settlers, like the five Landless communities, was authorized by Congress to have a village or an urban corporation under ANCSA. This is the truth, and Congress should consider this truth when others throw technicalities in front of our pleas for justice. The five Landless villages should be allowed to fully participate in the United States' settlement of aboriginal land claims in Alaska.

Other Questions Raised by Members of the Subcommittee

During the November 18 hearing, Senator Heinrich asked whether the mineral rights associated with lands conveyed to the Urban Corporations would be retained by the Government or would be conveyed to Sealaska Corporation, the regional Native corporation for Southeast Alaska.

Under the terms of ANCSA, regional Alaska Native corporations receive the subsurface estate under the surface estate conveyed to a village or urban corporation, subject to valid existing rights, including valid mining claims. This legislation applies all of the usual rules and legal requirements of ANCSA to the proposed establishment of the five new Native corporations. Although Sealaska has not actually developed any subsurface minerals in Southeast Alaska over the last 49 years—other than some minor quarrying activity—it is worth noting that, under the terms of ANCSA, 70 percent of any revenues generated by a regional corporation from the development of subsurface revenues must be shared with the entire Alaska Native community through the other Regional Corporations. In any event, the fact that Sealaska would receive the subsurface estate only reflects a reality that the entire Native population of Southeast Alaska was given short shrift in the context of ANCSA as Sealaska's ownership in Southeast Alaska is minimal.

During the November 18 hearing, Senator Heinrich also asked whether any of the proposed Landless selections would be located within Misty Fjords National Monument. None of the proposed selections are located within National Monuments, National Parks, Wilderness Areas or so-called "LUD II" conservation areas, which are special conservation areas within the Tongass set aside by Congress. This is not to say, however, that Alaska's indigenous people do not have legitimate aboriginal ties to Misty Fjords. Conservation areas in Alaska—and for that matter, throughout the United States—were largely set aside without regard to indigenous rights.

Issues Raised by the U.S. Forest Service

The U.S. Forest Service (USFS) in testimony submitted to this Subcommittee identified a number of technical issues they would like to see resolved. We note that USFS did not propose solutions

to the technical issues raised in their testimony, and for this reason we commit to work with USFS to resolve issues to the greatest extent possible.

The USFS notes that, "although the total acreage proposed for transfer to new urban corporations is a small portion of the National Forest System lands within southeast Alaska, due to the high value of these lands for forest management activities and public use, the Forest Service anticipates that these selections could adversely impact the implementation and viability of the 2016 Forest Plan broadly across program areas."

The challenge we face is that—in the words of Senator Lisa Murkowski—every acre of the Tongass is precious to someone. In working to identify parcels of land for conveyance to the five Landless communities, we truly do find that every acre of land proposed for conveyance has been classified by the USFS or categorized by third party groups for one public use or another.

USFS notes that the "proposed selection acreage will decrease the Tongass National Forest land base suitable for timber by nearly 37,000 acres, or 10 percent." First, it is notable that only 370,000 acres of the 17 million-acre Forest is categorized as suitable for timber development, signifying that the vast majority of the Forest has been set aside for non-timber uses. Second, it is remarkable, frankly, that the 115,200 acres identified for selection by the Landless communities overlaps only 37,000 acres of the Tongass land base identified as suitable for timber. Clearly, we are under pressure to avoid selections in many other areas, including all conservation areas, that are *not* classified as suitable for timber development.

USFS notes that the Landless selections include about 40,500 acres of land designated by the 2016 Forest Plan as Old Growth Habitat, 21,200 acres of land designated as Scenic Viewshed, and 2,850 acres designated as Semi-Remote Recreation. It is important to note that this is acreage allocated to specific land use designations, or LUDs, in the Tongass Forest Plan. It is important to view these numbers in context. For example, 2,008,582 acres are set aside under the 2016 Forest Plan within the Semi-Remote Recreation LUD alone. About 5 million acres of the Tongass are considered "productive old-growth"—which is a subset of total old growth—of which 4.5 million acres are set aside in conservation areas.

The USFS also notes the following selections in roadless areas:

> The selections include nearly 9,000 acres that are subject to the 2020 Alaska Roadless Rule direction to modify the timber land suitability and become available for timber harvesting. These 9,000 acres may be considered a nearly 50 percent addition to the estimated 18,650 acres that were projected to be harvested in roadless areas under the Alaska Roadless Rule.

It is unclear whether the inclusion of these roadless areas are of concern to the USFS. As a matter of public policy, it seems reasonable to include both roadless and roaded areas of our homeland within the acreage designated for settlement of our land claims. The USFS notes that it recently identified certain roadless areas within the Tongass to be suitable for timber harvesting. This decision was the subject of public debate. However, the potential selection of roadless areas by the Landless communities does not suggest that the Landless communities will deem such areas to be suitable for timber harvest. The fact that Indian tribes and Alaska Native corporations have

an interest in economic development—among many other interests in the management of Native lands—does not mean that Indian tribes or Alaska Native corporations will deem resource development to be appropriate within a given area. We hope that is not the presumption here with regard to the five Landless communities. Moreover, the inclusion of this small amount of roadless acreage is entirely reasonable given that 9.6 million acres of the 16.8 million-acre Tongass are inventoried roadless.

The USFS also notes that the proposed selections would impact three timber harvest projects currently in planning, including 17 percent of the Central Tongass Project, 5.2 percent of the South Revilla Project and 2.5 percent of the Twin Mountain II Project. The USFS notes that these are "not large percentages of the overall projects," but suggests that "the inclusion of selections within the three project areas is likely to impact the Forest Service's ability to complete a timely review under the National Environmental Policy Act, issue decisions on schedule, and offer timber in fiscal years 2021 and 2022." It is unclear whether or how the Landless communities can possibly avoid impacting proposed project areas, with are sub-regional in scope. The Landless communities are effectively left to choose from the scraps to begin with—approximately 6 million acres of the Tongass is set aside within Wilderness LUDs, and approximately 7.5 million acres of the Tongass is within Natural Setting LUDs, leaving just 3.36 million acres within development LUDs (including scenic viewsheds). Municipalities have already selected much of the land near the Landless communities themselves. Focusing largely on selections within the development LUDs—as we have been pressed to do—the Landless communities generally have sought to identify large, contiguous blocks located within reasonable proximity to the Landless communities, which necessarily results in overlap with multiple land use designations and selections within timber harvest projects that span sub-regions of the Tongass.

Finally, the USFS indicates that it "anticipates the proposed conveyance of the lands will affect the Tongass National Forest's delivery of its recreation program," including "13 developed recreation sites (3 camping sites, 7 public use cabins, 1 picnic site, 1 shelter, 1 trailhead), 3.5 miles of hiking trail, 26.5 miles of designated Off Highway Vehicle trails, 90.9 miles of open roads, and an estimated 12 marine access facilities." USFS has also "identified that outfitter/guide activity is [currently] authorized under special use permits within or adjacent to more than half of the selected parcels."

We would like to work with the USFS to see if we can resolve issues involving specific recreational sites. However, with regard to roads and trails, and with regard to public access, the USFS is aware that any conveyances of land to the Urban Corporations "shall be" subject to the reservation of public easements under Section 17(b) of ANCSA. Under Section 17(b), the Bureau of Land Management (BLM) is required to "identify public easements across lands selected" by Alaska Native corporations, including lands which are reasonably necessary to guarantee "a full right of public use and access for recreation [including camping], hunting, transportation, utilities, docks, and such other public uses ..." BLM must "consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements." 17(b) easements are reserved and managed by the Federal Government. The rights are reserved when the BLM conveys land to an Alaska Native corporation under ANCSA.

Further, this legislation, unlike ANCSA, preserves public access to all of the lands conveyed to the new Urban Corporations, guaranteeing in perpetuity that the land shall "remain open and available to subsistence uses, noncommercial recreational hunting and fishing, and other noncommercial recreational uses by the public." The legislation preserves all existing special use permits and provides for the issuance of an additional 10-year special use permit to each permit holder. The legislation also preserves the right of the USFS and its designees to continue to use the roads and other transportation facilities conveyed with the land to the Urban Corporations. By our count, *eight pages* of the legislation are devoted to preserving public access and access to roads, trails, and other facilities by the USFS and others.

Again, it is impossible for the Landless communities to pursue conveyances without overlapping areas currently in use by members of the public. It is *for this reason* that the legislation has been amended to guarantee public access on roads and trails, guarantee access to the land for recreational uses and subsistence hunting and fishing, and preserve and extend all existing special use permits. All of this is in addition to the existing process—under Section 17(b) of ANCSA—that provides for the reservation of public easements on the land. It is unclear why the USFS does not mention or discuss the several pages of language in the legislation detailing these guarantees of public access. In our view, the legislation could not be clearer that public access will be maintained. But we are willing to work with the USFS on these issues.

Background: The Tlingit and Haida Settlement, ANCSA, and the Landless Villages

In order to properly introduce the "Landless" legislation, we must first provide an overview of the Tlingit and Haida Settlement, the mechanics of ANCSA, and a brief historical description of the five Landless Alaska Native communities in Southeast Alaska.

The Tlingit and Haida Settlement

Congress has significant discretion to settle aboriginal claims, and Native American claims have often been settled by Congress not out of legal obligation but as a result of "moral and political persuasion."[1]

ANCSA was the second of two agreements to settle aboriginal land claims authorized by Congress for Alaska Natives. The first of the two major settlements was the Tlingit and Haida Settlement.[2] This settlement was achieved through a lawsuit brought by the communities of the Tlingit and Haida Indians against the federal government.[3] The lawsuit was made possible through the enactment of the Jurisdictional Act of June 19, 1935, which authorized Tlingit and Haida Indians to sue the federal government for land that was taken or used by the United States without providing compensation.[4] The Act also authorized a community settlement, which would have provided "'all persons of Tlingit or Haida blood, living in or belonging to any local community of these tribes' [] in Southeast Alaska" a share of the judgment.[5] Administration of a subsequent

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[1] ISER Report at 1-2 (citing LUCY KRAMER COHEN, ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3-7, 12-13 (1982)).
[2] ISER Report at 3.
[3] *Id.* at 25; *see also Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778, 781 (Ct. Cl. 1968).
[4] ISER Report at 25; *see also* Jurisdictional Act of June 19, 1935, ch. 275, 49 Stat. 388 (1935).
[5] ISER Report at 25.

settlement was to be administered by the Tlingit and Haida Central Council ("Central Council"), which was recognized as the beneficiary entity of the settlement and the regional tribal organization.[6] The Central Council worked to create a roll of tribal membership through input from "tribal communities," which would be sent to the Secretary of the Interior for approval.[7]

The Tlingit and Haida lawsuit was not organized and filed until the 1950s. In 1959 the U.S. Court of Claims held that the Tlingit and Haida Indians established aboriginal title to the land in Southeast Alaska and were entitled to compensation from the United States.[8] In 1968, after almost a decade of litigation and work from the Central Council and communities, the Court of Claims valued the loss of Tlingit and Haida lands at $7,546,053.80 and held that the claimants were to receive compensation in that amount.[9] The payment was ultimately distributed to the Tlingit and Haida Indians pursuant to the Act of July 13, 1970.[10]

ANCSA

In 1971, just a few years after the Tlingit and Haida Settlement, Congress passed ANCSA[11] to settle the aboriginal claims of all Alaska Native groups that arose from the United States' acquisition of Alaska from Russia. ANCSA extinguished all Alaska Native aboriginal land claims and created a corporate structure for governing the assets awarded to the communities that were eligible for benefits under ANCSA.[12] In total, ANCSA awarded almost $1 billion and 44 million acres of land to Alaska Native communities.[13]

ANCSA dictated a very different structure for distributing the settlement award as compared to the payment associated with the Tlingit and Haida Settlement and the treaty and reservation structure common in the lower 48 states. Rather than dividing the land into reservations to be held "in trust" for Native communities by the federal government, or appointing a tribal council to divide a monetary award, Congress in ANCSA relied on modern business structures to manage settlement assets.[14] Specifically, ANCSA divided Alaska into twelve regions, directing Alaska Natives from each of those regions to establish regional corporations. A thirteenth regional corporation was established for Alaska Natives who had left Alaska before ANCSA's passage.

ANCSA also created village and group corporations as well as four urban corporations. These smaller, community-oriented corporations are organized under State law either as for-profit or nonprofit corporations "to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of" a Native village, Native group, or the Native residents of an urban community, respectively.[15]

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[6] *Id.* at 25, 31.
[7] *Id.* at 31.
[8] *Id.* at 25.
[9] *Id.* at 34.
[10] Pub. L. No. 91-355, 84 Stat. 431 (July 13, 1970).
[11] Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629h (2018).
[12] ISER Report at 5.
[13] *Id.* at vii.
[14] *Id.* at 16.
[15] 43 U.S.C. §§ 1602(j), (n), (o).

Alaska Native individuals were to benefit from ANCSA by becoming shareholders in their respective regional corporation and the village, group, or urban corporation established for their community. **ANCSA established a process by which every Alaska Native individual would enroll to the community in which he or she resided on the date of the 1970 Census enumeration *or to the community where they or their families had traditionally lived.***[16]

In the decades that have passed since ANCSA was enacted, Congress has sought to significantly strengthen the role of Alaska Native corporations as Native-serving institutions. For example, ANCSA as enacted provided for the alienation of stock from Native ownership 20 years after enactment, a policy reflective of the United States' allotment era policies of distributing tribal assets to individual Indians, the ownership of which would become alienable within, in many cases, 20 years. But the Indian status of Alaska Native corporations was not frozen in time in 1971, just as the Indian status of tribes was not frozen in time during the allotment era or the termination era, or through the passage and implementation of ANCSA. In 1988, Congress enacted the so-called 1991 amendments, reversing course and establishing that Native corporation stock could not be alienated unless Alaska Native stockholders so choose.

Congress has amended ANCSA numerous times to grant Native corporations new rights, duties, and preferences, many of which overlap with rights, duties, and preferences granted to sovereign tribes. For example, though a non-Native can inherit stock from a Native spouse or parent, Congress required that only Alaska Natives have the power to vote as stockholders. Congress has exempted Native corporations from certain employment restrictions contained in Title VII of the Civil Rights Act to protect shareholder hiring. 43 U.S.C. § 1626(g). Congress has enacted laws protecting undeveloped ANCSA lands from taxation and involuntary alienation, 43 U.S.C. § 1636(d). Congress has required federal agencies to consult with Alaska Native Corporations "on the same basis as" federally-recognized Tribes. Pub. L. No. 108-447, 118 Stat. 2809, 3267 (2005) (amending Pub. L. No. 108-199, 118 Stat. 3, 452 (2005).). These are actions taken to ensure that the actions of Congress, though ANCSA and its amendments, serve the long-term interests of the Alaska Native owners of Native corporations because of their status as Indians. These actions reflect the fact that ANCSA, and the dozens of statutes that amend ANCSA, are part of the framework of "Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs."[17]

Village Corporations

For an Alaska Native community to incorporate as a village corporation, the community had to qualify as a "Native village," which ANCSA defined as a village listed in Sections 11 or 16 of ANCSA or any other village that met certain minimum requirements.[18] As discussed below, Section 11 of ANCSA included a provision that generally allowed any unlisted village an opportunity to demonstrate that it met the eligibility criteria for forming a village corporation.

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[16] ISER Report at xiii.

[17] Pub. L. 100–241, §2, 101 Stat. 1788 (1988).

[18] 43 U.S.C. § 1602(c) ("Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of this Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;").

For all regions of Alaska other than the Southeast Alaska region, villages presumed to be eligible to establish village corporations were listed in Section 11 of ANCSA.[19] Village corporations established for villages listed in Section 11 were authorized to receive up to seven townships of land based on the size of the village population.

Because the Tlingit and Haida Indians had received a partial settlement of aboriginal land claims in 1968, albeit only through a cash settlement and no land, Southeast Alaska was treated differently. Ten Native communities presumed to be eligible to establish village corporations were listed in Section 16 of ANCSA.[20] Village corporations established for villages listed in Section 16 were limited to selecting just one township of land each, despite the large Native populations of many of the Southeast villages.

Under ANCSA, in order for any listed or unlisted village to qualify to establish a village corporation, the Secretary of the Interior was required to make a determination that the village was "composed of" at least 25 Native individuals on the date of the 1970 Census.[21] No reason was given by Congress for establishing the minimum village Native population to be 25.[22] Additionally, the village could not be modern and urban in character, nor could a majority of residents be non-Native.[23] The BLM promulgated regulations to implement these criteria at 43 C.F.R. § 2651.2(b):

> (1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.
>
> (2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style, and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time: Provided, That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years.
>
> (3) The village must not be modern and urban in character. A village will be considered to be of modern and urban character if the Secretary determines that it possessed all the following attributes as of April 1, 1970:
>
> > (i) Population over 600.
> >
> > (ii) A centralized water system and sewage system that serves a majority of the residents.

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[19] 43 U.S.C. § 1610(b)(1).
[20] 43 U.S.C. § 1615(a).
[21] 43 U.S.C. § 1610(b)(2).
[22] ISER Report at 11.
[23] 43 U.S.C. § 1610(b)(2)(B). Note that Alaska Natives made up just 27 percent of Saxman's population and 27 percent of Kasaan's population, so, clearly exceptions were made, at least in the case of Southeast Alaska. ISER Report at xii.

> (iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.
>
> (iv) Organized police and fire protection.
>
> (v) Resident medical and dental services, other than those provided by Indian Health Service.
>
> (vi) Improved streets and sidewalks maintained on a year-round basis.
>
> (4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in Sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

As noted above, ANCSA included a provision that gave unlisted villages a chance to demonstrate that they met the eligibility criteria for forming village corporations. Specifically, Section 11 of ANCSA, which lists villages outside of the Southeast Alaska region, included a provision that allowed any village not listed in Section 11 an opportunity to qualify as a Native village if the Secretary made a determination, within two and a half years, that the village met all of the criteria applicable to Native villages, as detailed above.[24]

Critically, however, Section 16 of ANCSA, which lists villages in the Southeast Alaska region, did not include language authorizing the Secretary to reconsider the status of unlisted villages in the Southeast region. Three of the Landless communities—Tenakee, Ketchikan, and Haines—appealed their unlisted status to the Alaska Native Claims Appeal Board ("ANCAB"). The ANCAB denied all three appeals, finding that Congress' failure to provide an explicit right of appeal to unlisted Southeast Alaska villages was apparently intentional (but unexplained) and foreclosed the opportunity to pursue such an appeal with the Secretary of the Interior.[25] In sum, no due process was provided to unlisted Alaska Native villages.

Group Corporations

Under ANCSA, a "Native group" is defined as "any tribe, band, clan, village, community or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality."[26] Native groups were authorized to incorporate group corporations,[27] and Native group corporations were entitled to receive up to 23,040 acres of land surrounding the group's locality.[28]

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[24] 43 U.S.C. § 1610(b)(3).
[25] *Id.* at xii (citing *In Re: Appeal of Ketchikan Indian Corp.*, 2 A.N.C.A.B. 169, 171 (Dec. 5, 1977)).
[26] 43 U.S.C. § 1602(d) (emphasis added).
[27] *Id.* § 1602(n).
[28] *Id.* § 1613(h)(2).

At least one early version of legislation that ultimately became ANCSA defined Native "groups" more expansively.[29] For example, Governor Wally Hickel established a Task Force—a committee comprised of State officials, representatives of the Alaska Federation of Natives, and other representative leaders of the Native community—to develop legislation that was eventually introduced in the U.S. Senate as S. 2906.[30] That bill called for the enrollment of every Native to one Native group, with each Native group to determine its own membership and enrollment. Alaska Natives under this model could have enrolled to the villages where they currently lived, or to the villages where they or their ancestors had come from. Native groups that failed to enroll at least 25 Natives would have their members enrolled to another group.[31] According to the ISER Report, nothing in the legislative history of S. 2906 indicates why the 25 person population figure was used, and the definition of Native group in S. 2906 did not include a population requirement.[32] The ISER Report explains:

> Natives did not need to constitute a majority of a Native village or exhibit current aboriginal use and occupancy of land under S. 2906 to participate in its proposed settlement. Two sections of the bill proposed exceptions that persist in subsequent settlement proposals. First, villages which were relatively new or which had relocated in recorded history could still file a claim based upon aboriginal use and occupancy during such period (S. 2906 § 504). Second, Native villages which had been abandoned involuntarily or which had been absorbed by non-Native communities could also file claims based on aboriginal use and occupancy before their involuntary abandonment or absorption (S. 2906 §505). These exceptions broke from an early tendency in the claims commission bills (e.g. 1964) to tie Native group land entitlements to present use by a Native community and a traditional use or need standard. The official Governor's Task Force commentary explains these exceptions:
>
> > Section 504. Claims of New Villages
> >
> > Native villages which have relocated or been reestablished during the last 100 years as a result of volcanic explosion, flood, loss of game, and other reasons. This section permits these villages to participate in the settlement.
> >
> > Section 505. Claims of Abandoned Villages
> >
> > This section provides for situations such as Kenai, where the native village has been absorbed, and villages which have been involuntarily abandoned. In the latter case, only a few native group corporations based upon abandoned villages are expected, as most members of these villages have formed or have affiliations with other groups (Alaska Native Land Claims: Hearings on 2906 at 108).

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[29] ISER Report at 13.
[30] *Id.*
[31] *Id.*
[32] *Id.*

> Despite the disavowal of the requirement of present aboriginal use and occupancy and the need for a majority Native population, the exceptions tend to prove the rule—only current Native aboriginal land use (that is, subsistence lifestyles exhibited by a predominantly Native community) would assure an entitlement under the Governor's Task Force proposal. The exceptions (relocated villages and the original urban corporation provision) were tightened or eliminated in subsequent acts.[33]

The ISER Report provides little additional information about Congressional objectives in allowing the establishment of group corporations, and our own research indicates that relatively little information regarding the establishment in practice of group corporations is available.

While ANCSA itself says little about the creation of group corporations, the BLM promulgated regulations to facilitate the incorporation of and distribution of land to group corporations. The BLM defined "Native group" to mean "any tribe, band, clan, village, community or village association of Native composed of less than 25, but more than 3 Natives, who comprise a majority of the residents of a locality and who have incorporated under the laws of the State of Alaska."[34] The regulations specify the eligibility requirements for Native group incorporation and the application process.[35] Additionally, the regulations specify that Native groups are allowed to select 320 acres for each Native member of a group, or 7,680 acres for each Native group, whichever is less.[36]

Urban Corporations

Four Alaska Native communities were incorporated as "urban" corporations: Juneau and Sitka in Southeast Alaska, and Kenai and Kodiak in Southcentral Alaska.[37] Section 14(h)(3) of ANCSA provided each corporation with an entitlement to 23,040 acres of land.[38] **Urban corporations do not have a specific population requirement for incorporation, as compared to Native villages, which had to be composed of 25 or more Alaska Native residents to incorporate a village corporation.** Also, although there were exceptions, Native villages generally were not able to incorporate a village corporation or a group corporation if the majority of the residents of the village were non-Native in 1970. Although we do not have data for Kenai and Kodiak, Sitka and Juneau both had large Alaska Native enrollment populations (at 1,863 and 2,722, respectively); however, the Native population did not comprise a majority of the residents of these communities (at 23 percent and 20 percent, respectively).[39]

The term "urban"—at least, in relation to the designation by Congress of four urban corporations—is not defined in ANCSA.[40] ANCSA describes the four communities that incorporated urban

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[33] *Id.* at 14.
[34] 43 C.F.R. § 2653.0-5 (2020).
[35] *Id.* § 2653.6(a).
[36] *Id.* § 2653.6(b).
[37] ISER Report at 17.
[38] 43 U.S.C. § 1613(h)(3).
[39] ISER Report at xiii.
[40] Congress did not define "urban community" in ANCSA, though it did define the term "urban corporation." *Id.* § 1602(o) ("'Urban Corporation' means an Alaska Native Urban Corporation organized under the laws of the State of

corporations as communities that were "originally Native villages, but [came to be] ... composed primarily of non-Natives."[41] Thus, the inclusion of the four urban corporations in ANCSA allowed for the inclusion of Native communities that did not meet the standard eligibility requirements for village or group corporations under ANCSA. However, the four communities authorized to form urban corporations were not the only Native communities that technically did not meet the eligibility requirements for village corporations under ANCSA. For example, Alaska Natives made up just 27 percent of Saxman's population and 27 percent of Kasaan's population, both of which were listed villages, bucking the general rule that Native villages were not able incorporate a village corporation or a group corporation if the majority of the residents of the village were non-Native in 1970. These exceptions to the general eligibility criteria enabled Congress to fulfill the equitable objectives of ANCSA as a settlement of aboriginal land claims. In fact, these exceptions appear to be the rule in ANCSA; we are not aware of any other traditional Alaska Native villages that became predominantly non-Native but were excluded by Congress from ANCSA, or later amendments to ANCSA. Only the Landless communities are left.

While there is no legislative definition of "urban community," the legislative history indicates that the term stemmed from an understanding that many Native people had to abandon their aboriginal village and relocate, or that their village may have been absorbed into a larger non-Native community.[42] The allowance for urban corporations evolved from the question of how to allow Native groups located in urban areas—meaning those not in small, rural Native villages—to participate in ANCSA.[43]

The Landless Communities and ANCSA

Alaska Natives residing in Alaska were to be enrolled by the BIA to their community of permanent residence as of April 1, 1970.[44] Applicants were asked to specify a permanent place of residence as of that date and were given a copy of regulations that defined "permanent residence" for the purpose of enrollment. **An Alaska Native individual did not have to be physically living in his or her permanent residence on April 1, 1970, as long as he or she "continued to intend" to make his or her home at that place.** The relevant regulations provided:

> "Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of the applicant on April 1, 1970, even though he was not

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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 members of an urban community of Natives in accordance with the terms of this chapter.").

[41] ISER Report at xi (quoting 43 U.S.C. § 1613(h)(3)).

[42] ISER Report at 18 (citing the Governor's Task Force commentary using Kenai as an example of a native village being absorbed).

[43] ISER Report at xi, 18.

[44] 25 C.F.R. § 43h.4(a) (1981) ("Permanent residents of Alaska: A Native permanently residing in Alaska on April 1, 1970, shall be enrolled in the region and village or other place in which he or she was a permanent resident on that date.")

> actually living there on that date, if he continued to intend that place to be his home.[45]

In Southeast Alaska, the BIA contracted with the Central Council to conduct the enrollment.[46] The Central Council hired an enrollment coordinator for the region and hired and trained enumerators throughout Southeast Alaska to help local residents complete enrollment applications.[47] The authors of the ISER Report interviewed seven individuals who were involved in the enumeration process, along with several individual shareholders.[48] The enumerators reported that some applicants from the Landless communities were aware that their communities were not eligible for certification, and others were not; however, based on these limited interviews, "those who were unaware of the community eligibility issue appear to have been the largest group."[49]

Nearly 3,500 Natives—or 22 percent of total enrollment in the Southeast Alaska region—enrolled to the five Landless communities.[50] The Landless and their descendants have now grown to a population of 4,400, although, unfortunately, approximately one half of the original Landless shareholder population has now passed away waiting for the resolution of their land claims.

After ANCSA passed, as discussed above, three of the Landless communities appealed their unlisted status to the ANCAB, only to be denied in 1974 and 1977 for lack of an appeals process for Southeast villages in Section 16 of ANCSA.[51]

In 1976, Congress amended ANCSA to reopen enrollment for one year, which appeared to provide an opportunity to those Landless enrollees who might wish to change their place of enrollment to do so.[52] In fact, when the amendment was first passed, Sealaska Corporation informed its shareholders that redetermination of residency would be available to Southeast communities, including the Landless communities.[53] However, seven years later, a 1983 opinion of the Solicitor of the Department of the Interior held that the amendment did not apply to those enrolled to the five Landless communities.[54] Attorneys were unsuccessful in challenging that opinion.[55] The Solicitor's opinion found that the legislative history demonstrated that Congress enacted the amendment to address nine places in the Koniag region where 25 or more Alaska Natives had enrolled, but for which during eligibility proceedings had been found to lack 25 Native residents. The Solicitor did not view the Landless communities as similarly situated. Importantly, Congress ultimately decided that seven of the nine Koniag communities, as well as two other Native communities, should be dealt with legislatively through provisions of the Alaska National Interest Lands and Conservation Act of 1980 (ANILCA); Congress directed that eight of the Native

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[45] 25 C.F.R. § 43h.1(k) (1981).
[46] ISER Report at 79.
[47] *Id.*
[48] *Id.* at 82.
[49] *Id.*
[50] *Id.* at xiv.
[51] *See id.* at 17 (citing *In Re: Village of Tenakee*, VE # 74-60, 2 AN CAB 173, 177, Sept. 9, 1974; identical opinion *In Re: Village of Haines*, VE # 7 4-85, Sept. 9, 197 4; acc'd, *In Re: Appeal of Ketchikan Indian Corp.*, 2 ANCAB 169, Dec. 5, 1977).
[52] Pub. L. No. 94-204 § 1(c), 89 Stat. 1145-46 (1976).
[53] ISER Report at 88.
[54] *See* ISER Report at 89.
[55] *Id.*

communities were to be treated as Native villages (and were authorized to incorporate as village corporations), and the ninth was to be treated as a Native group.[56]

Thus, after more than a decade of legislation and subsequent amendments, confusion about enrollment and re-enrollment, and appeals to the Department of the Interior, residents of the five Landless communities were finally left with the reality that Congress had granted other similarly situated Alaska Native communities the right to incorporate under ANCSA, while the five Landless communities were left with no recourse but to turn to Congress.

The Landless communities have, since the 1970s, advocated first for an administrative solution and then, for a legislative solution that would allow Alaska Native enrollees to the Landless communities to receive the full benefits shared by other Alaska Native villages under ANCSA. This would include the right of each community to establish a Native corporation, the right to enroll Alaska Natives from each of the communities as shareholders of their respective corporations, and the right of each corporation to receive one township of land near their community. As a result of lobbying efforts that started in the 1980s, Congress in 1993 instructed the Secretary of the Interior to investigate the exclusion of the Landless communities from ANCSA.[57] The ISER Report, produced as a result of this directive, was to be used by Congress "to help determine whether the [Landless] study communities were intentionally or inadvertently denied recognition under ANCSA."[58]

History and Characteristics of the Five Landless Villages

In general, Southeast Alaska Native communities faced significant obstacles to participate in ANCSA.[59] By the time the Tongass National Forest was created, in 1907, the Tlingit and Haida people had been marginalized. As white settlers and commercial interests moved into the Alaska territory, they utilized the resources as they found them, often taking over key areas for cannery sites, fish traps, logging, and mining.[60] The Act of 1884, which created civil government in the territory, also extended the first land laws to the region, and in combination with legislation in 1903, settlers were given the ability to claim areas for canneries, mining claims, townsites, and homesteads, and to obtain legal title to such tracts. **Since Alaska Natives were not recognized as citizens, they did not have corresponding rights to protect their interests.**[61]

For decades prior to the passage of ANCSA, the Forest Service opposed the recognition of traditional Indian use and aboriginal title in the Tongass National Forest. **As late as 1954, the Forest Service formally recommended that all Indian claims to the Tongass be extinguished because of continuing uncertainty affecting the timber industry in Southeast Alaska.**[62]

In the 1940s, the Tlingit leader and attorney William Paul won a short-lived legal victory in the Ninth Circuit Court of Appeals in *Miller v. United States*, 159 F. 2d 997 (9th Cir. 1947), which

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[56] *Id.* at 90.
[57] *Id.* at i.
[58] *Id.* at i.
[59] ISER Report at 16.
[60] Robert Baker, Charles Smythe and Henry Dethloff, A New Frontier: Managing the National Forests in Alaska, 1970-1995 17 (1995).
[61] *Id.* at 18.
[62] *Id.* At 31 (citations omitted).

ruled that Native lands could not be seized by the government without the consent of the Tlingit landowners and without paying just compensation. To reverse this decision, Congress passed a Joint Resolution authorizing the Secretary of Agriculture to sell timber and land within the Tongass, "notwithstanding any claim of possessory rights" based upon "aboriginal occupancy or title." This action ultimately resulted in the *Tee-Hit-Ton Indians v. United States* decision, in which the U.S. Supreme Court held that Indian land rights are subject to the doctrines of discovery and conquest, and "conquest gives a title which the Courts of the Conqueror cannot deny." 348 U.S. 272, 280 (1955). **The Court concluded that Indians do not have 5th Amendment rights to aboriginal property. Instead, the Congress, in its sole discretion, would decide if there was to be any compensation whatsoever for lands stolen.**

The Tlingit and Haida Settlement of 1968 injected additional uncertainty into the claims of the Tlingit, Haida and Tsimshian people, and an early ANCSA bill excluded Southeast Native communities entirely.[63] Once the case was made that the Tlingit and Haida Settlement had not extinguished all Native claims in Southeast Alaska, Congress decided to include the Southeast region in ANCSA.[64] Still, while ANCSA established a process through which Alaska Natives would ultimately take title to roughly 12 percent of their original homeland in Alaska, the Alaska Native communities in Southeast received less than 3 percent of their own homelands.

All four of the larger Landless communities share multiple characteristics that arguably made our communities good candidates to incorporate either village or urban corporations under ANCSA—namely the relatively large size of our Alaska Native populations, our participation in the land claims effort, and the strong history of each community as an Alaska Native community. The ISER Report considers a number of measures to compare the histories of Native use and occupancy in the Landless (unlisted) communities and the listed communities (those that incorporated village corporations or urban corporations) in Southeast Alaska:

- *Enrollment Populations:*
    - When comparing the three larger Landless communities (Ketchikan, Wrangell, and Petersburg) and the two Southeast urban communities listed in ANCSA (Juneau and Sitka), the percentage of Native enrollees who resided in the communities where they enrolled was similar.[65] The proportion of enrollees who lived in the communities varied from 64 to 77 percent.
    - Among the small and medium communities listed in ANCSA, between 14 and 79 percent of enrollees lived in the communities where they enrolled.[66] The Landless community of Haines fell into that range, with 51 percent of those who enrolled to Haines also living there.[67]

- *Native Population as a Percentage of Total Community Population:*
    - In the 1970 Census, Alaska Natives made up close to the same percentage of the total population in Ketchikan (15 percent) and Wrangell (19 percent) as in

[63] ISER Report at 16.
[64] *Id.*
[65] *Id.* at 43.
[66] *Id.*
[67] *Id.*

Juneau (20 percent), for which an urban corporation was established.[68] Petersburg's Native population (12 percent) was smaller.[69]

- In the 1970 Census, Alaska Natives made up 24 percent of Haines's population, which was similar to Saxman (27 percent) and Kasaan (27 percent), for which village corporations were established.

- *Indian Settlements, Land Reserves, Land Possessions:*
  - One or more areas in all of the Landless communities were considered to be Indian villages or Indian towns; this was also true of Juneau, Sitka, and other smaller ANCSA communities.[70] Ketchikan and Petersburg were summer villages before white settlers arrived, while Haines and Tenakee were winter villages before white settlers arrived.[71] Wrangell was a summer village and then became the primary village of the Stikine kwan in 1836.[72] That was also true in the ANCSA-listed urban communities of Juneau and Sitka and in a number of smaller ANCSA-listed communities.[73]
  - Federal land reservations were set aside for Native communities at Haines and Ketchikan in the early 1900s, as well as for the ANCSA-listed communities of Hydaburg, Klawock, and Klukwan.[74]
  - Tenakee, Kasaan, and Craig were excluded from the Tongass National Forest.[75]
  - Haines, Ketchikan, Wrangell, and Petersburg had Indian possession lands identified when townsites were first established. In this respect, the Landless communities differed from Juneau (which had no Indian possession lands in the original townsite), Sitka (which had Indian possession lands totaling less than an acre), and Craig (which had no record of Indian possession lands in the original townsite).[76] There is no record of Indian possession lands in the Tenakee townsite, but an area outside the townsite was excluded from the Tongass National Forest because it was occupied as an Indian village.[77]
  - School reserves for federal Indian schools were also set aside in many Southeast communities, including the Landless communities of Petersburg, Wrangell, and Haines.[78]

- *Government Schools for Indians*
  - Federal Indian schools operated in Haines, Ketchikan, Petersburg, and Wrangell during the period between 1881 and 1948, and all twelve ANCSA-listed Southeast communities had federal government schools.[79]

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[68] *Id.* at 40.
[69] *Id.*
[70] *Id.* at xv-xvi, 62-64.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] ISER Report at xv-xvi, 62-64.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at xvi, 64-65.

- *Churches and Missions Serving Indians:*
  - The first churches to organize in all five of the Landless communities were Native churches—that is, churches that were either started as missions for Alaska Natives, or churches that were established by the Alaska Native community. The establishment of Native churches was common among ANCSA-listed communities as well.[80]

- *Participation in Native Organizations*
  - All five of the Landless communities had local camps of the Alaska Native Brotherhood and Sisterhood beginning in the 1920s, as did the ANCSA-listed communities.[81]
  - Ketchikan, Petersburg, Wrangell, and Haines belonged to the Tlingit and Haida Central Council as of 1971, as did the ANCSA-listed communities, as well as Metlakatla; Seattle, Washington; and Oakland, California.
  - All four of the larger Landless communities formed Indian Reorganization Act (IRA) organizations in the 1930s and 1940s, as did the ANCSA-listed communities.[82]

Although the four larger Landless communities were majority non-Native, and therefore technically did not meet the population requirements to establish *village* corporations, we have noted above that Saxman and Kasaan, too, had populations that were majority non-Native.

As discussed above, all four of the larger Landless communities share multiple characteristics that arguably made our communities good candidates to incorporate village corporations under ANCSA. However, given the size and the predominately non-Native populations in these communities, one might reasonably argue—based solely on these statistics—that the four larger Landless communities were more appropriately situated to establish urban Native corporations. The four larger Landless communities are good examples of the Native communities identified by Governor Hickel's Task Force; i.e., communities that had been absorbed by the time of ANCSA, through no fault of their own, into larger, non-Native communities—a problem for which the establishment of urban corporations provided an equitable, if only partial, solution in ANCSA.

Like Ketchikan, Petersburg, Wrangell, and Haines, Tenakee shares many of the historical characteristics typical of Southeast Alaska Native communities that were listed in ANCSA.

First, the village of Tenakee is, without doubt, historically a Native village.[83] Located at the Tenakee hot springs, Tenakee was a winter village that existed before white settlers came to the area in 1900.[84] Tenakee is similar to the ANCSA-listed communities of Juneau, Sitka, Craig, and Kasaan in this regard.[85] In 1891, the U.S. Coast Pilot reported that Tenakee was a "small Native village . . . constantly used by the Indians in their journeys from Chatham Strait to Port

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[80] ISER Report at xvi, 65-66.
[81] *Id.* at xvi, 66-67.
[82] *Id.*
[83] *Id.* at 55.
[84] *Id.* at 55, 59.
[85] *Id.* at 68.

Frederick."[86] In 1901, the historic use of the village was also accounted by the owner of a saltery in the area who reported that there was a local clan leader who asserted ownership of the fishing sites in Tenakee Inlet.[87] Tenakee's Native population grew in the 1920s and 1930s when Alaska Natives from nearby villages moved to take advantage of jobs at Tenakee's two canneries.[88] After ANCSA was enacted, 64 Alaska Native individuals enrolled to the village of Tenakee.[89]

For decades, Tenakee was recognized as a Native community by the federal government. The village was formally recognized in 1935 as an "Indian settlement" in an executive order by President Franklin Roosevelt that operated to exclude the Tenakee Indian village from the Tongass National Forest.[90] As late as 1965, the BLM rejected a non-Native application for a trade and manufacturing site at the Indian village.[91] In rejecting the application, the BLM noted that the "possessory rights to this tract are claimed and that the lands have been used and occupied by these Indian people for many years."[92] The communities of Haines, Ketchikan, Craig, and Kasaan also had established land reservations or exclusions, like Tenakee.[93]

Second, all of our communities, including Tenakee, had local camps of the Alaska Native Brotherhood and Sisterhood beginning in the 1920s, as did other ANCSA-listed communities.[94]

Third, all of our communities had churches or missions serving Alaska Natives, and all had active Salvation Army posts similar to Juneau, Sitka, Kake, Angoon, and other villages.[95]

Fourth, all of our communities had Native cemeteries, graves, or totems, as did Juneau, Sitka, Craig, and Kasaan.[96]

Although all five of our communities were part of the Tlingit and Haida Central Council at some point, Tenakee did not belong to the Central Council when ANCSA was passed in 1971.[97] During the 1950s, Haines, Tenakee, and Kasaan all became inactive, at least for some time, as individual communities. The ISER Report notes that, "Members of those communities participated through other communities."[98]

At seven percent of the population (and just six individuals), according to the 1970 Census, Tenakee did not have a significant Native population—at least, on paper—when ANCSA passed, which distinguishes Tenakee from the four larger Landless communities.[99] However, the ISER report concedes that the 1970 Census may have undercounted the Native population in many

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[86] *Id.* at 55-56.
[87] ISER Report at 56.
[88] *Id.*
[89] *Id.* at 80.
[90] *Id.* at 56.
[91] *Id.* (emphasis added).
[92] *Id.*
[93] *Id.* at 61-62.
[94] ISER Report at 66.
[95] *Id.* at 65-66.
[96] *Id.* at 68.
[97] *Id.* at 69.
[98] *Id.*
[99] *Id.* at xii.

Alaska Native communities,[100] and Tenakee—like Kasaan, which was included in ANCSA—faced a unique socio-economic situation that deserves special attention.

The 1970 Census shows that, of the ANCSA-listed Native communities and the five Landless communities, the only communities that did not meet the minimum population threshold were Tenakee and Kasaan.[101] The 1970 Census reported that Tenakee had a total population of 86 people, of whom only six were Alaska Native.[102] However, 64 Alaska Native individuals enrolled to Tenakee. Kasaan, which was listed under ANCSA, had a population of 30 according to the 1970 Census, of whom only eight were Alaska Native. Kasaan, however, was able to overcome a challenge to its eligibility status. We discuss the case of Kasaan—and its relevance to Tenakee—in more detail below.

The equitable claim for Tenakee is straightforward. First, the Alaska Natives who enrolled to Tenakee qualify broadly as a distinct Alaska Native group that sought for decades to settle aboriginal land claims associated with the group's traditional occupation of the village.

Congress has previously authorized identifiable Native "groups" to pursue claims against the federal government, and Congress considered a similar approach in the context of Alaska Native land claims. As noted in the ISER Report:

> Senator Gruening of Alaska introduced one of the first Native claims bills on February 1, 1968. That bill authorized Alaska "native groups" to incorporate under state or federal law, select lands, and receive royalties derived from Outer Continental Shelf development as compensation for their claims, based on aboriginal use and occupancy of Alaska lands. . . . S. 2906 [legislation introduced by Governor Wally Hickel's Task Force, discussed above] borrowed elements of its definition for "native group" from S. 1964, the first bill prepared for the first session of the 90th Congress by the Secretary of the Interior. That bill provided jurisdiction in the Court of Claims to compensate Alaska Natives for losses of aboriginal or "Indian title" lands. . . . Congress had done the same for southern Indian tribes in the Indian Claims Commission Act (25 U.S.C. §§ 70 to 70v-2, 1983). The Indian Claims Commission provided groups not generally regarded as Indian tribes an opportunity to assert their claims against the federal government. The act allowed the commission to hear claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States of Alaska" (25 U.S.C. § 70a; emphasis added). The commission later clarified its position noting that so long as a "group can be identified and it has a common claim, it is ... an 'identifiable group of American Indians'" (Loyal Creek Band or Group of Creek Indians, 1 Indian Cl. Comm'n 122, 129, 1949).[103]

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[100] *Id.* at 41.
[101] *Id.* at 40.
[102] ISER Report at 40. Of the four larger Landless communities, Haines had the smallest Alaska Native population with just over 100 residents. *Id.*
[103] ISER Report at 8.

The 64 Alaska Native individuals who enrolled to Tenakee are, if anything, an "identifiable group" with a "common claim" to lands that were, for decades, recognized by the United States as lands "used and occupied" by the Tenakee people. A Tlingit village was located at the Tenakee hot springs when white settlers arrived around 1900. As the ISER Report notes:

> The village and the surrounding area, including Tenakee Inlet, were owned and occupied by members of the Wooshkeetan clan. . . . In 1935, the federal government issued an executive land order that recognized the Native community at Tenakee as "an Indian settlement" and excluded it from the national forest. . . . Native rights to the village tract were reaffirmed in 1965, when the BLM turned down a non-Native application for a trade and manufacturing site there, noting that "possessory rights to this tract are claimed and that the lands have been used and occupied by these Indian people for many years."[104]

Second, given the clear, documented evidence that the Tenakee enrollees are an identifiable group with a common claim to land, Congress should treat this identifiable group of enrollees in an equitable manner, i.e., in a manner that reflects Congress' treatment of other identifiable Alaska Native groups under ANCSA and subsequent legislation.

Although ANCSA designated villages with 25 or more residents as the principal claimants and beneficiaries of ANCSA, Congress in 1971 and in the years following took steps to extend the benefits of the Settlement to other identifiable groups, including the four Alaska Native "urban" communities that were "originally Native villages, but [came to be] ... composed primarily of non-Natives," and—in the context of group corporations—smaller groups of between 3 and 25 individuals. Although Governor Hickel objected to the incorporation of Alaska Native communities in Kenai or Nome, Congress nevertheless authorized Kenai to incorporate as an urban corporation and Nome to incorporate as a village corporation.[105] As noted above, when it enacted ANILCA in 1980, Congress deemed seven additional communities in the Koniag region to be eligible villages under ANCSA, terminated an eligibility review for an eighth village, and authorized a ninth community to establish a Native group corporation. There is no reason Tenakee should not be treated equally.

Third, in the context of Congress' unique approach to Southeast Alaska, Congress should consider its own approach, in 1971, to the village of Kasaan, a Southeast Alaska village that was listed under ANCSA but had to confirm its eligibility to receive benefits.

Historically, Tenakee and Kasaan share important characteristics in that they both: (1) were settled prior to the arrival of whites; (2) occupied an area in the early towns; (3) were excluded from the Tongass National Forest, with land reserved for Native use; (4) had Alaska Native Brotherhood/Sisterhood organizations; and (5) had Native cemeteries, graves, or totems near their villages.[106]

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[104] *Id.* at 56.
[105] *Id.* at 15.
[106] *Id.* at 68.

Kasaan, unlike Tenakee, was listed as a village by Congress in Section 16 of ANCSA. For villages listed in Section 11 or 16 of ANCSA, like Kasaan, a majority of the residents had to be Native only if the determination was made that the village was modern and urban in character.[107]

Kasaan's status as a Native village was nevertheless challenged by the U.S. Forest Service and at least two other groups. On appeal, Kasaan was able to demonstrate that it met the requirements for a listed village, including that at least 25 of the Alaska Native individuals who enrolled to Kasaan could be considered permanent residents of the community as of April 1, 1970, and that at least 13 persons who enrolled to Kasaan used the village during 1970 as a place where they actually lived for a period of time. In ruling for Kasaan, the ANCAB made these observations:

> In determining the "permanent residence" of a Native enrolled under the Act, it is necessary, as it is in determining "home" and "domicile," to consider the physical characteristics of the dwelling place, the time spent therein, the things done therein, the intention when absent to return to that place, other dwelling places of the individual, and similar factors concerning them. As demonstrated above, it is also necessary to recognize the mobility of the Native life style necessitated by economic and educational pressures. It is impossible to ignore the impact of the cash economy upon a traditional subsistence existence. The fact that education and employment can be acquired in many instances only without the village dictates the emphasis upon the intent to return to the Native home when absent from that place contained in the definition of "permanent residence."
>
> The majority of Natives enrolled to Kasaan who testified at the hearing were born and raised in Kasaan, moved to Ketchikan, and returned to Kasaan seasonally to live according to their Native family life style. The obvious lack of employment and educational opportunity in Kasaan has forced people away from the village. But a majority of Natives enrolled to Kasaan who testified at the hearing have indicated by word and by their frequent contact with the village a genuine and continuing intent to return to that place they consider home. These Natives have been forced to leave the village at some time in their lives. But they have always returned and lived in the village on a frequent and continuous basis. Such objective evidence of their intent must be given appropriate consideration. A majority of these individuals and those related to them must be considered "permanent residents" of the village of Kasaan.
>
> Based on the foregoing, the Board finds that the Native village of Kasaan did have 25 or more Native residents on April 1, 1970. Although the question of whether or not 13 Natives enrolled to Kasaan who were residents thereof used the village as a place where they actually lived for a period of time was not in issue in this appeal, the Board further finds that 13 Native residents of Kasaan did use the village during 1970 as a place where they actually lived for a period of time.[108]

Unfortunately for Tenakee, it was not listed in Section 16 of ANCSA, and it did not have the right to appeal its unlisted status (as discussed above).

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[107] 43 C.F.R. § 2651.2(b)(4) (2020).

[108] *U.S. Forest Serv. v. Village of Kasaan*, A.N.C.A.B. VE# 74-17, VE# 74-18 (June 14, 1974) (emphasis added).

If Tenakee had been listed, it would have had an opportunity to defend its status as a village pursuant to the same regulatory criteria that applied to Kasaan. With 64 enrollees, Tenakee more than met the requirement of 25 Alaska Natives enrollees. Tenakee was not modern or urban in character; therefore, Tenakee would not have had to establish that a majority of its residents were Native. Under 43 C.F.R. § 2651.2(b), Tenakee would have had to establish "an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style, and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time." We note that just eight individuals were identified as residents of Kasaan in the 1970 Census, and yet Kasaan was easily able to demonstrate that at least 13 persons who enrolled to Kasaan used the village during 1970 as a place where they actually lived for a period of time; Tenakee never had an opportunity to demonstrate that this standard was met. We do not have good population data for Tenakee in the years preceding 1970, but we do know that, as late as 1965, BLM rejected a non-Native application for a trade and manufacturing site at the Indian village of Tenakee on the basis that the "possessory rights to this tract are claimed and that the lands have been used and occupied by these Indian people for many years."

Fourth, and finally, ANCSA's implementing regulations established that "[t]hat no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years."[109]

Tenakee, like Kasaan, saw its population decline starting in the 1950s due to the decline of commercial fisheries.[110] The ISER Report explains why this was so:

> There was continued population movement to the new white towns at a more gradual rate in subsequent years, but there was an acceleration of migration after 1950, prompted by the crash in the fish stocks, which many Indians depended on.[111]

In the 1950s, Alaska salmon runs were declared a federal disaster. According to the State of Alaska, several reasons were likely to blame:

> Lax federal management and a lack of basic research into salmon runs were surely factors. Federal law required half of all runs escape upriver to spawn the next generation, but nobody really counted. Wartime demand for protein resulted in an overharvest of Alaska's salmon runs which steepened the decline. Long-term fluctuations in climate, later known as the Pacific inter-Decadal Oscillation, also undoubtedly played a role.[112]

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[109] 43 C.F.R. § 2651.2(b)(2).
[110] ISER Report at 55, 64. The ISER Report indicates that there were only a "handful of people" remaining in Kasaan after its cannery closed in 1953.
[111] *Id.* at 47.
[112] Alaska Department of Fish and Game, Sustaining Alaska's Fisheries: Fifty Years of Statehood, Starbound (1949-1959) 1 (Jan. 2009).

Whether "an act of God" (i.e., the impact of climate fluctuations on the fisheries) or "an act [or lack thereof] of . . . government authority" (i.e., lax federal management and resultant overfishing, and the need to supply the wartime demand for protein), or both, Tenakee's Native residents appear to have left the village as a result of outside forces that began to impact Tenakee 20 years before ANCSA was enacted. We do not have specific population numbers for the Alaska Native residents of Tenakee during the period prior to the 1970 Census, so we do not know whether Tenakee would have been able to demonstrate that it met the threshold population requirement but became "temporarily unoccupied in 1970 *because of an act of God or government authority occurring within the preceding 10 years*." It certainly appears that this may have been the case.

ANCSA's implementing regulations, which appear to apply to situations like that faced by Tenakee; Congress's treatment of the village of Kasaan; and Congress's efforts to extend the benefits of ANCSA to multiple other Alaska Native groups, all reflect a broader effort on the part of the Federal Government to preserve the aboriginal rights of defined Alaska Native groups. The socio-economic pressures that forced Tenakee's Native residents to leave the village might have been truly temporary if the Native community had simply been afforded the same opportunity as Kasaan. In fact, the ISER Report points out that Kasaan *repopulated after it was listed* as a Native village under ANCSA because people's confidence was "restored in the community."[113]

Conclusions

It is impossible to demonstrate to this Subcommittee that the five Landless communities "met" the requirements of ANCSA for incorporation as urban corporations because ANCSA did not establish any requirements at all for urban corporations. However, like the Alaska Native populations in the four towns that did incorporate urban corporations, the five Landless villages all "originally were Native villages, but [came to be] ... composed predominantly of non-Natives."

All five of the Landless communities have well-documented histories as Native villages. Tenakee, certainly, was smaller, but like the four larger Landless communities, Tenakee has a long and well-documented history as a Native village. The federal government recognized Tenakee as a Native place, identifying Tenakee as an "Indian settlement" in a 1935 executive order excluding Tenakee from the Tongass National Forest and rejecting a non-Native application for a trade and manufacturing site at the Indian village in Tenakee in 1965 in recognition of the "possessory rights to this tract" and use and occupancy of the site by the Native people of Tenakee.[114] The 64 Alaska Native individuals who enrolled to Tenakee are in fact an "identifiable group" with a "common claim" to lands that were, for decades, recognized by the United States as lands "used an occupied" by this Native community.

Congress has significant discretion to settle aboriginal claims, and Congress has amended ANCSA on numerous occasions to extend the benefits of the Settlement to Native communities that were wrongly and unjustifiably excluded. The five Landless Alaska Native communities should be authorized to incorporate urban Alaska Native corporations based on the structure and objectives of ANCSA, and the inequitable and discriminatory history that resulted in their exclusion.

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[113] ISER Report at 64.
[114] *Id.* at 56.