

# A TRIBAL ADVOCATE'S CRITIQUE OF PROPOSED ANCSA AMENDMENTS: PERPETUATING A BROKEN CORPORATE ASSIMILATIONIST POLICY

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## INTRODUCTION

On March 26, 2015, Alaska Senators Murkowski and Sullivan introduced S.872, the Unrecognized Southeast Alaska Native Communities Recognition and Compensation Act.<sup>1</sup> On July 14, 2016, those Alaska Senators introduced S. 3273, the Alaska Native Claims Settle Act Improvement Act.<sup>2</sup> These bills have a common objective: to “recognize” an undetermined number of individual Alaska Native residents, or their heirs, in Ketchikan, Wrangell, Petersburg, Haines, and Tenakee and allow them to organize as urban corporations under the Alaska Native Claims Settlement Act (ANCSA).<sup>3</sup> Once incorporated, the Secretary of the Interior would offer each of these five newly-minted

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1. The Act was introduced on March 26, 2015 “[t]o provide for the recognition of certain Native communities and the settlement of certain claims under the Alaska Native Claims Settlement Act, and for other purposes.” S. 872, 114th Cong. (2015). On May 15, 2015, Alaska Representative Don Young introduced a companion bill. H.R. 2386, 114th Cong. (2015).

2. S. 3273, 114th Cong. (2016). S. 3273 followed introduction of S. 3004 on May 26th, 2016 by the same Alaska Senators. S. 3004, 114th Cong. (2016). Because all of S. 872 and parts of S. 3273 and S. 3004 relate to amending ANCSA, these three bills are sometimes referred to below as “ANCSA corporate legislation.”

3. S. 872; S. 3004 § 10; S. 3273 § 10.

corporations 23,040 acres of land (a township each, or 115,200 acres total) as compensation for the extinguishment of their aboriginal claims.<sup>4</sup> Ostensibly, the creation of these five corporations, and conveyance of a township each rectifies these communities' exclusion from ANCSA forty-five years ago.<sup>5</sup> The proposed methodology for that "recognition" – perpetuation of a failed engrafted corporate model on Alaska villages – is an assimilationist approach. Rather, in recognition of the serious limitations of the ANCSA corporate model, tribal, subsistence, and Native cultural advocates should seek to amend this legislation to provide that land for each of these omitted villages be conveyed to the Secretary of the Interior and held in trust for the four Alaska Tribes and the traditional Tenakee Clan. Alternatively, one corporation could be created for all five communities with one township conveyed by the Secretary of the Interior in Trust for the Tribes and the Clan. The bottom line: this legislation, as introduced, is fundamentally flawed and should be opposed by Alaska Tribal advocates and all others who depend on the truly renewable resources of the Tongass National Forest.

#### ALASKA TRIBAL STATUS: GOVERNMENT-TO-GOVERNMENT

Alaska Natives have inhabited present-day Alaska for many thousands of years. Their status as "tribes" was formally acknowledged beginning with Article III of the 1867 Treaty of Cession, through which the United States of America "acquired" Russia's interest in Alaska.<sup>6</sup> That Treaty divided the population of Alaska into two categories, "inhabitants" and "uncivilized native tribes."<sup>7</sup> The "inhabitants" were to be admitted to United States citizenship or permitted to return to Russia.<sup>8</sup> The "uncivilized native tribes," meanwhile, were summarily excluded as citizens and "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."<sup>9</sup> The unchallenged interpretation of this provision through present is that the treaty applies the whole body of federal Indian and statutory law to Alaska tribes.<sup>10</sup>

In 1993 – 126 years after the Treaty of Cession and twenty-two years after ANCSA's passage – buoyed by an exhaustive solicitor's opinion, the

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4. *Id.*

5. ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 (2012) *et seq.*).

6. Treaty of Cession, U.S.-Russ., art. III, Mar. 30, 1867, 15 Stat. 539.

7. *Id.*

8. *Id.*

9. *Id.*

10. *In re* Naturalization of Minook, 2 Alaska 200, 220–21 (D. Alaska 1904).

Department of the Interior published a list of the federally recognized Alaska tribes.<sup>11</sup> The next year, Congress enacted the Federally Recognized Tribe List Act of 1994.<sup>12</sup> This statute directed the Department of the Interior annually to publish the list of recognized tribes; it has done so since that year.<sup>13</sup> By January 2015, the list included 235 Alaska Native tribes. Among those listed are the Ketchikan Indian Corporation, Wrangell Cooperative Association, Petersburg Indian Association, and Chilkoot Indian Association (Haines).<sup>14</sup> Tenakee has not been and is not now on that list since it has not met the criteria for inclusion.<sup>15</sup> However, Tenakee is the customary and traditional use area for the Wooshikitaan Clan.<sup>16</sup>

The Tribe List Act specifically prohibited the Department of the Interior from removing any tribe from the list absent an act of Congress.<sup>17</sup> Both the federal<sup>18</sup> and state courts<sup>19</sup> have held this list dispositive. Alaska's executive branch has followed the lead of the courts.<sup>20</sup> Given recognition of the Alaska Native tribes by the federal and Alaska state courts, as well as the federal and state executive branches and Congress, tribal status in Alaska is well established. Indeed, Alaska Natives have the same status as tribes elsewhere in the country. And they have since

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11. Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368–69 (Oct. 21, 1993). Publication of the list was based on then-Solicitor Sansonetti's conclusion that Alaska villages are tribes. *Id.* at 54,365 (citing Op. Sol. M-36, 975 at 58–59 (Jan. 11, 1993)).

12. Pub. L. No. 103-454, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a).

13. *Id.*

14. Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1943 (Jan. 14, 2015) ("The listed Indian entities are acknowledged to have the immunities and privileges available to federally recognized Indian tribes by virtue of their government-to-government relationship with the United States."). The Tenakee has no listed tribe. *See id.* at 1946–48 (listing other tribes).

15. *See id.* (omitting the Tenakee tribe from the list).

16. Interview with John Martin, Sr., Tenakee-born Tlingit Elder, in Anchorage, Alaska (Dec. 2013).

17. § 103(4), 108 Stat. at 4971.

18. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779–80 (1991) (adjudicating the interests of Alaska "tribes" prior to publication of the 1993 list); *Inupiat Community of the Arctic Slope v. United States*, 680 F.2d 122, 124 (Ct. Cls. 1982), *cert. denied*, 459 U.S. 969 (1982); *Cogo v. Central Council of Tlingit & Haida Indians*, 465 F. Supp. 1286, 1291 (D. Alaska 1979) (recognizing the United States holds and protects property in trust for Indian tribes).

19. *John v. Baker*, 982 P.2d 738, 751 n.75 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000) ("In view of the 1993 recognition by Secretary Deer of the tribal status of Alaska's Native villages . . . the existence of their sovereignty is not in issue. They have the same sovereign powers as recognized tribes in other states.").

20. Admin. Order No. 186 (State of Alaska Office of the Governor Sept. 29, 2000), <http://www.gov.state.ak.us/admin-orders/186.html>.

begun to exercise those government-to-government powers in ways Alaska's Congressional delegation has yet to fully understand.

**ANCSA'S CORPORATE MODEL IS INIMICAL TO ALASKA TRIBES  
AND SHOULD NOT BE PERPETUATED BY NEW ANCSA  
LEGISLATION**

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA) to extinguish Alaska aboriginal title to Alaska lands in consideration for title to some forty-four million acres of land and almost \$1 billion.<sup>21</sup> Alaska Natives "supported ANCSA as a formal recognition of their longstanding use and occupancy of the land. They thought it would safeguard their traditional subsistence-based economy by securing title to that land for generations."<sup>22</sup> The corporate model chosen by Congress to implement the landholding portion of the settlement doomed that fundamental hope:

[C]ongress did not convey the land to tribal entities. When Congress enacted ANCSA, it considered tribal governments to be an impediment to assimilation. Instead, the law required the Natives to set up village and regional corporations to obtain title to the land. The land that ANCSA conveyed does not belong to Alaska Natives, it belongs to these corporations. Hence, the Native corporations are the most visible structures established under this legislation. But these corporate structures put the land at risk. For Native land is now a corporate asset. Alaska Natives fear that, through corporate failure, corporate takeovers, and taxation, they could lose their land.<sup>23</sup>

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21. 43 U.S.C. § 1605 (2012). ANCSA revoked all of the existing Native reserves except one, Annette Island, 43 U.S.C. § 1618(a) (2012), repealed the authority for new Native allotment applications, 43 U.S.C. § 1617(d) (2012), and declared a broad policy to settle land claims. 43 U.S.C. § 1601(d) (2012).

22. Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1331 (1992) [hereinafter Hirschfield, *Tribal Sovereignty*]; see also THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION vii-viii (1985) [hereinafter BERGER, VILLAGE JOURNEY].

23. BERGER, VILLAGE JOURNEY, *supra* note 22, at 6. British Columbia Supreme Court Justice Thomas R. Berger was appointed in 1983 by the Inuit Circumpolar Conference to conduct the Alaska Native Review Commission "to review the Alaska Native Claims Settlement Act of 1971." *Id.* at vii. This task took Justice Berger to Native villages all over Alaska "to hear the evidence of Alaska Natives - Eskimos, Indians, and Aleuts." *Id.* VILLAGE JOURNEY is a must read for any policy maker serious about meaningfully addressing the economic, social, and cultural issues still faced by Alaska Natives.

Any policy maker serious about protecting Alaska aboriginal peoples' ties to the land and its renewable resources should also heed the Alaska Native Review Commission's prescient findings. Among those findings, made after holding extensive field hearings all over Alaska from 1983 to 1985, close in time to ANCSA's enactment, are:

In 1971, Alaska Natives believed that, if they owned their own land, they could protect the traditional economy and a village way of life. Subsistence is at the core of village life, and land is the core of subsistence. You cannot protect the one unless you protect the other. [ANCSA] has protected neither. One of the ironies of ANCSA is that, in Alaska, where the Native peoples live closer to the land and sea, with greater opportunities for self-sufficiency than Natives of any other state, they have no clearly defined tribal rights, no rights as Native peoples to fish or wildlife. Elsewhere in the United States and Canada, Native communities enjoy special rights. ANCSA extinguished aboriginal hunting and fishing rights throughout Alaska.<sup>24</sup>

It is remarkable how little ANCSA assimilationist policy has changed on the federal level in the thirty years since the publication of *Village Journey*. This seminal work's findings surprise no one—then or now.

A 1985 Department of the Interior study on the effects of ANCSA's implementation observed:

[O]ne must bear in mind the limitations of the corporate form of organization as a means of delivering benefits. Corporations can transfer money directly to the shareholders either by giving them jobs or by paying them dividends. ANCSA corporations have only been able to employ a small fraction of Natives, and most corporations have been unable to pay significant dividends.<sup>25</sup>

More recently, in 2013, the Indian Law and Order Commission, formed by Congress to investigate criminal jurisdiction in Indian country, shed light on the deplorable public safety conditions in Alaska Native communities, and recommended remedying those conditions.<sup>26</sup> Here, the Commission report acknowledged that "a number of strong arguments can be made that [Alaska fee] land may be taken into trust and treated as

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24. *Id.* at 60.

25. Hirschfield, *Tribal Sovereignty*, *supra* note 22, at 1338 (internal citations omitted).

26. INDIAN LAW AND ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 33-61 (2013) [hereinafter INDIAN LAW AND ORDER COMM'N, ROADMAP].

Indian country” and “[n]othing in ANCSA expressly barred the treatment of former [Alaska] reservation and other Tribal fee lands as Indian country.”<sup>27</sup> The Commission recommended allowing these lands to be placed in trust for Alaska Natives,<sup>28</sup> a recommendation endorsed by the Secretarial Commission on Indian Trust Administration and Reform, established by former Secretary of the Interior Ken Salazar.<sup>29</sup>

With these policy recommendations for reform, spanning thirty years, one may reasonably ask why Alaska Senators Murkowski and Sullivan and Representative Young would propose any ANCSA amendments that utilize the ill-considered and wholly ineffective corporate model.<sup>30</sup> Unless an Alaska Native is directly employed by a profit-making ANCSA corporation, or receives occasional dividends, the corporate model does not benefit him or her. It provides no cultural, traditional, or subsistence protective benefits. The failed corporate model is designed primarily to promote commercial activities on land owned by state-chartered corporations wholly divorced from traditional Native land use. As history in the Tongass has shown, this profit focus results in intense clearcut logging of many Southeast Alaska village core subsistence use areas that village residents depend on for personal and cultural sustenance.<sup>31</sup>

#### PENDING ANCSA CORPORATE LEGISLATION PERPETUATES ANCSA’S FUNDAMENTAL FLAWS

S. 872’s stated purposes (similarly indicated in S. 3004 and S. 3273) are to “redress the omission of the communities [of Ketchikan, Wrangell, Petersburg, Haines, and Tenakee] . . . from eligibility by authorizing the Native people enrolled in [those] communities to form Urban Corporations . . . under [ANCSA] . . . and to receive certain settlement land pursuant to that act.”<sup>32</sup> To achieve these purposes, the Secretary of

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27. *Id.* at 45, 52.

28. *Id.* at 51–55.

29. U.S. DEP’T. OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 66 (2013).

30. In an e-mail to Julie Koehler, Senator Murkowski advised that pursuant to S. 872, “[t]he land would be used to help the corporations make money to aid their shareholders.” E-mail from Lisa Murkowski, U.S. Senator, Alaska, to Julie Koehler, Southeast Alaska Conservation Council (Dec. 7, 2015, 10:03 AM) (on file with author). In other words, more of the same.

31. *See, e.g.,* Hanlon v. Barton, 740 F. Supp. 1446 (D. Alaska 1988), consolidated with City of Tenakee Springs v. Clough, 750 F. Supp. 1406 (D. Alaska 1988), *rev’d on other grounds*, 915 F.2d 1308 (9th Cir. 1990) (litigating the effects of industrial scale timber activities in the Tongass National Forest).

32. S. 872, 114th Cong. § 2(b) (2015); *see also* S. 3004, 114th Cong. § 10 (2016); S. 3273, 114th Cong. § 10 (2016).

the Interior is directed to enroll each individual Native in the newly-created urban corporations, to issue shares of stock, and to offer as compensation each of these urban corporations 23,040 acres of land, which “shall give preference to land with commercial purposes and may include subsistence and cultural sites, aquaculture sites, hydroelectric sites, tideland, surplus Federal property and eco-tourism sites.”<sup>33</sup> Lest there be any doubt about the importance and protection of traditional subsistence areas for these five communities relative to those for commercial purposes, the use of “shall” in the commercial context and “may” in non-commercial contexts dispels that doubt. Ironically, over thirty years after Justice Berger documented the fundamentally flawed corporate model as protective of Alaska Natives’ subsistence uses, S. 872 contains this same corporate overlay.

The 23,040 acres to each urban corporation would be comprised of “local” public lands, which, as now drafted, could come from any lands, no matter their importance for subsistence, cultural, or traditional uses.<sup>34</sup> The bill provides that “[t]he Secretary shall offer as compensation under this subsection local areas of historical, cultural, traditional and economic importance to Alaska Natives from the Villages of Haines, Ketchikan, Petersburg, Tenakee, or Wrangell.”<sup>35</sup> And the Secretary “shall give preference to land with commercial purposes” in making these land selections and withdrawals.<sup>36</sup>

Read together, these mandatory provisions *require* the Secretary to focus on lands historically, culturally, traditionally, and economically important to these five Native villages, which *shall* be used for commercial purposes. As the Southeast Native villages of Hoonah, Hydaburg, Craig, Kake, Klawock, Yakutat, and Kasaan can attest, this mandate inevitably will result in clearcut logging in these five rural communities, with irreversible losses to the subsistence, cultural, and traditional uses long predating those selections and industrial scale logging.

As written, S. 872 and Section 10 of S. 3273 provide no protections for lands set aside by Congress in the Alaska National Interest Lands Conservation Act (ANILCA).<sup>37</sup> Nor do they protect *any* of the 732,463

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33. S. 872 § 6(a)(2)(B)(i), (ii) (emphasis added); *see also* S. 3004 § 10(e); S. 3273 § 10(e).

34. S. 872 § 6(a)(2)(A); *see also* S. 3004 § 10(e); S. 3273 § 10(e).

35. S. 872 § 6(a)(2)(A); *see also* S. 3004 § 10(e); S. 3273 § 10(e).

36. S. 872 § 6(a)(2)(B)(i) (emphasis added); *see also* S. 3004 § 10(e); S. 3273 § 10(e).

37. *See* S. 872, 114th Cong. (2015); ANILCA, 16 U.S.C. § 3101(b) (1980) (“It is the intent of Congress in this Act . . . to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas [and] to preserve in their natural state extensive unaltered

acres of legislated Land Use Designation (LUD) IIs and the 300,473 acres of wilderness created in the 1990 Tongass Timber Reform Act (TTRA).<sup>38</sup> Enacting legislation such as S. 872, S. 3004, and S. 3273 would likely lead to up to 115,200 acres of new clearcuts in the Tongass National Forest and hardly serves either of these important purposes. Ironically, TTRA passed the U.S. Senate 99-0, including aye votes from Senators Stevens and Murkowski.<sup>39</sup> These 732,463 acres of legislated LUD IIs and 300,473 acres of wilderness include lands with great importance to Native and other communities in the Tongass National Forest for protection of salmon watersheds, fishing, hunting, subsistence, berry picking, and cultural and historical recreational values.<sup>40</sup> Notably, these LUD II-protected areas had broad support from small Native and non-Native communities throughout the Tongass who recognized the importance of permanently protecting these special areas. S. 872, S. 3004, and S. 3273 undermine ANILCA's and the TTRA's fundamentally important land use protections in one fell swoop. The sound public policy in the TTRA is now threatened by the corporate greed driving S. 872.

In 2014 the Sealaska Lands Entitlement Act was signed into law, ostensibly to finalize the land conveyances for the nearly 20,000 Native shareholders of Sealaska, including shareholders in all five communities targeted in S. 872 and Section 10 of S. 3273.<sup>41</sup> It also established 152,067 acres of additional legislative LUD IIs in the Tongass.<sup>42</sup> Now, S. 872, S. 3004, and S. 3273 threaten those additional LUD II areas.

It is difficult to imagine how legislation enacted just a few years ago to finalize land conveyances to 20,000 Native shareholders of Sealaska and to protect over 150,000 acres used by many of those shareholders could so blithely be jeopardized under the guise of recognizing five communities some forty-five years after ANCSA's enactment.

S. 872, S. 3004, and S. 3273 also provide that the urban corporations would receive the surface estates on the selected lands, with Sealaska to

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arctic tundra, boreal forest and coastal rainforest ecosystems . . .").

38. See S. 872; S. 3004 § 10; S. 3273 § 10; see also Tongass Timber Reform Act, Pub. L. No. 101-626, §§ 201-202, 104 Stat. 4426, 4428-30 (1990) (codified as amended at 16 U.S.C. § 539 (1994)) (adding acreage to LUD II and wilderness designations).

39. Bart Koehler, *25th Anniversary of the Tongass Timber Reform Act*, SOUTHEAST ALASKA CONSERVATION COUNCIL (Nov. 28, 2015), [http://www.seacc.org/25th\\_anniversary\\_of\\_the\\_tongass\\_timber\\_reform\\_act](http://www.seacc.org/25th_anniversary_of_the_tongass_timber_reform_act).

40. Pub. L. No. 101-626, 104 Stat. 4426 (1990) (codified as amended at 16 U.S.C. § 539 (1994)).

41. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 § 3002 (2014).

42. *Id.* § 3002(f).



receive the subsurface estates.<sup>43</sup> At least one commentator has criticized this split estate component of ANCSA:

Although severance of ownership between surface and subsurface estates is not unusual in Alaska, and villages must consent to subsurface development within their boundaries, this division of title raises problems of accountability. Thus, while village corporations are established as autonomous entities, the powers granted to the regions can put serious limitations on their independence.<sup>44</sup>

And this and other commentators have characterized this "Village consent" provision as illusory:

[G]iven the conflict in the Act between the role of the villages in protecting subsistence interests for small groups of Natives and the role of the regions in further resource development for the benefit of Native Alaskans as a whole, some commentators believe it unlikely that villages would be able to exercise absolute veto power over regional subsurface development plans. "[T]he Village Corporation cannot veto exploration which would not affect subsistence values or subsistence sites, nor can it demand compensation except as a substitute for the value of the surface estate lost."<sup>45</sup>

This plethora of fundamental problems—mandatory selection of subsistence, cultural, or traditional use areas for commercial development; lack of control over subsurface mining, drilling, and other subsurface activities; and perpetuation of the fatally flawed ANCSA corporate model—should doom S. 872, S. 3004, and S. 3273 from a Tribal perspective. Washington policy makers seem to have learned nothing from ANCSA's failed corporate model. By contrast Alaska tribes have learned that ANCSA's focus on commercialization of traditional Tribal lands is the very definition of assimilation. Indeed, and ironically, it is assimilation by slow, sure demise of truly renewable resources from the land. And, as Justice Berger learned over thirty years ago from his field hearings, it is the land that sustains Alaska Natives, not money from industrial-scale clearcutting or an occasional dividend.

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43. S. 872; S. 3004 § 10; S. 3273 § 10.

44. Hirschfield, *Tribal Sovereignty*, *supra* note 22, at 1337 (quoting 43 U.S.C. § 1613(f) (1988)).

45. *Id.* at 1337 n.45 (citing Monroe E. Price, *Region-Village Relations under the Alaska Native Claims Settlement Act*, 5 UCLA ALASKA L. REV. 237, 254 (1976)).

## ALTERNATE PROPOSALS TO PENDING ANCSA CORPORATE LEGISLATION

S. 872, S. 3004, and S. 3273 are not the only means to “redress the omission” of the five Southeast Alaska communities and to account for the intense commercial development of 115,200 acres of fundamentally important Native-use lands. Certain viable alternatives should instead be meaningfully pursued.

### A. Convey Withdrawn Lands in Trust for The Four Alaska Indian Tribes and Traditional Tenakee Clan

At the time of ANCSA’s 1971 passage, Alaska tribal status was not nearly as certain as it is today. Following the Federally Recognized Tribe List Act of 1994, annual publication of the list of federally recognized Tribes, and the Alaska Supreme Court’s decision in *John v. Baker*,<sup>46</sup> Alaska tribal status is now certain. It is also now certain that the Secretary of the Interior may take lands in trust for Alaska tribes under Section 5 of the Indian Reorganization Act (IRA) as amended.<sup>47</sup>

Due in part to a Federal District Court’s decision in *Akiachak Native Community v. Salazar*,<sup>48</sup> the 2013 Indian Law and Order Commission’s Report,<sup>49</sup> and the Report of the Commission on Indian Trust and Administration Reform,<sup>50</sup> the Department of the Interior published a final rule relating to land acquisitions in Alaska on December 23, 2014.<sup>51</sup> Accordingly, the Department may take lands in Alaska in trust for Alaska tribes under Section 5 of the IRA.

This is a significant development. In response to comments that removal of the “Alaska exception” would be contrary to ANCSA, the Department stated “[i]t is important to remember that Alaska Native land and history did not commence with ANCSA, and that ANCSA did not terminate Alaska Native tribal governments . . . [ANCSA] did not repeal the Secretary’s authority to take land into trust in Alaska under the

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46. 30 P.3d 68 (Alaska 2001).

47. Act of May 1, 1936, Pub. L. No. 74-538, 49 Stat. 1250 § 1 (codified at 25 U.S.C. § 5119).

48. 935 F. Supp. 2d 195 (D.D.C. 2013) (successfully challenging the Department’s “Alaska exception” to taking lands in trust under Section 5 of the IRA).

49. INDIAN LAW AND ORDER COMM’N, ROADMAP, *supra* note 26 (intending to make Alaska Native communities and lands safer).

50. U.S. DEP’T. OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM, *supra* note 29, at 66 (recommending ANCSA amendments to allow taking of lands into trust).

51. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,888-97 (Dep’t of the Interior Dec. 23, 2014) (codified at 25 C.F.R. Part 151).

IRA.”<sup>52</sup> Moreover, the Department found that taking land in trust for Alaska Native tribes would:

Allow Alaska Native tribes to regulate and protect their traditional land bases in Alaska and potentially obtain tax income to support the exercise of essential governmental functions, such as providing infrastructure and human services; [i]mprove Alaska Native tribes’ ability to maintain their cultural integrity, including language preservation, religion, traditional Native foods, and other aspects of tribal identity and sovereignty; [p]romote and strengthen tribal self governance and determination, which are closely associated with sovereignty over and management of tribal lands; [a]llow tribal members, rather than corporate shareholders, to guide development to take more useful forms and improve standards of living for all tribal members; [a]dvance the policy goals established by Congress in the IRA, eight decades ago, of protecting tribal lands and advancing tribal self-determination.<sup>53</sup>

For all these reasons, and more, S. 872 and Section 10 of S. 3273 should be amended to instruct the Secretary to take withdrawn lands in trust for the tribes in Ketchikan, Wrangell, Petersburg, Haines and the traditional Tenakee Clan.

**B. Alternatively, Create One New Southeast Urban Corporation, and Convey Withdrawn Lands in Trust for The Four Alaska Indian Tribes And Traditional Tenakee Clan**

Alternatively, S. 872, S. 3004, and S. 3273 could be amended to provide for the creation of a single urban corporation for all five of the omitted villages. A township of land could then be conveyed to the Secretary of the Interior under Section 5 of the IRA, as amended, to be held in trust for the four Tribes in Ketchikan, Wrangell, Petersburg, and Haines, and for the traditional Tenakee Clan.

**C. Preserve Wilderness, National Monuments, and Legislated LUD II Areas Established in ANILCA, TTRA, and the Sealaska Act.**

Minimally, S. 872, S. 3004, and S. 3273 should be amended to prevent the Secretary of the Interior from offering any lands previously designated by Congress as Wilderness, National Monuments, or

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52. *Id.* at 76,890.

53. *Id.* at 76,891.

legislated LUD II Management Areas in the 1980 ANILCA, TTRA, and the Sealaska Act. These areas are simply too important to be jeopardized for the corporate bottom line.

### CONCLUSION

From a traditional Alaska Native tribal perspective, the pending Senate ANCSA corporate legislation perpetuates the assimilationist policy embodied in ANCSA. Although, as detailed above, Alaska Tribes have made much progress on the state and federal levels since the passage of ANCSA in 1971, key policy makers continue to fail to heed the 1985 findings of a respected jurist and two Commissions, one established by Congress and reporting to it and the President, as well as a former Secretary of the Interior. One can only wonder what is driving the quest to privatize over 115,000 acres of land, presumably in the Tongass National Forest. One thing is certain: if Alaska's Senators and its Representative are serious about recognizing and honoring the five villages omitted in ANCSA, they now have the tools to do so in a manner that genuinely works for those villages. The only question is whether, armed with this knowledge and the experience of ANCSA's failures over the past forty-five years and counting, they have the political will finally to do right by Alaska Natives on the Natives' terms. Only time will tell.