

**STATEMENT OF
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**COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
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SARAH LUKIN TESTIMONY

Cama'i (hello) Chairman Barrasso and Ranking Member Carper, and distinguished Members of this Committee. My name is Sarah Lukin. *Quyanaa* (thank you) for allowing me the opportunity to provide an Alaska Native Corporation perspective on the status of contaminated sites on land conveyed to Alaska Native Corporations. I have a short statement to read and would like to submit my longer, written testimony for the record.

I. INTRODUCTION

I am Alutiiq from the Native Village of Port Lions on Kodiak Island, a remote community of 200 people in the Gulf of Alaska. I am a shareholder and member of the Board of Directors of Afognak Native Corporation, my Alaska Native village corporation, and a shareholder of Koniag Incorporated, my Alaska Native regional corporation, each of which were created and mandated by Congress through the passage of the Alaska Native Claims Settlement Act in 1971. I am an enrolled Tribal Member of the Native Village of Afognak and Native Village of Port Lions.

I am here before your Committee on behalf of Afognak Native Corporation and Alaska Native Village Corporation Association.

Afognak Native Corporation is a member of the Alaska Native Village Corporation Association (ANVCA). ANVCA is a statewide non-profit organization dedicated to furthering the collective interests of Alaska Native village corporations through sharing best practices and advocating on policy and regulatory issues affecting village corporations and rural Alaska.

II. ALASKA NATIVE CORPORATIONS

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA). ANCSA, P.L. 92-203, was signed into law by President Richard Nixon on December 18, 1971. Through ANCSA, the Federal government agreed to convey to 12 Alaska Native regional corporations and more than 200 village corporations 44 million acres of land and \$962.5 million in settlement of aboriginal land claims of Alaska Native people. Alaska Native people gave up 88 percent of our traditional lands through this settlement. Congress directed the Department of the Interior (DOI) to oversee the transfer of Federal lands to Alaska Native Corporations. The congressionally-created Alaska Native Corporations hold fee simple title to surface and subsurface ANCSA land across Alaska and today are the largest private landowners in the State.

Alaska Native people became “shareholders” in a regional corporation and village corporation, based on cultural and family ties. Under the terms of ANCSA, Alaska Native Corporations are mandated to provide for the economic, social, and cultural well-being of our shareholders in perpetuity. Today, Alaska Native Corporations serve over 130,000 Alaska Native shareholders.

III. STATUS OF ANCSA CONTAMINATED LANDS

During the 1990s, the Alaska Native community raised significant concerns that the DOI was conveying contaminated land to Alaska Native Corporations. Congress heard the community's concerns and took action through Section 326 of Public Law 101-512 *Department of the Interior and Related Agencies Appropriations Act, 1991*, which required the Secretary of Interior to report to Congress on contaminated lands conveyed through ANCSA. The Bureau of Land Management (BLM) conducted a mail-out survey of ANCs and other interested parties, and documented 22 responses.¹ It is unclear what, if anything, was done with this information.

Later, in 1995, Congress directed the Secretary of the Interior to prepare a report on the extent of contamination on lands conveyed pursuant to ANCSA. In December of 1998, the DOI submitted a report to Congress entitled *Hazardous Substance Contamination of Alaska Native Claims Settlement Act Lands in Alaska*. In that report, the DOI provided a summary of military land uses in Alaska, noting:

World War II, the Japanese invasion of the Aleutians, and the Cold War had profound influence on military activities in Alaska...The Federal government spent over \$1.25 billion in Alaska between 1941 and 1945 in military activities and the construction of installations and facilities for the defense of the nation and in support of offensive operations...The end of the Cold War and the accompanying military drawdown has resulted in an increase in the number of closed and abandoned Alaskan military facilities.²

The DOI report acknowledged conveying approximately 650 contaminated sites to Alaska Native Corporations with various types of hazardous waste and toxic materials that pose significant health risk to humans, animals and the environment, including arsenic, unexploded ordinances, and PCBs, among others. 189 of the contaminated sites identified in the report were classified as Formerly Used Defense Sites (FUDS).³ Many of these sites also include petroleum contamination.

Importantly, the DOI report discussed ANCs concerns that they may be held responsible for the cleanup of prior contamination of ANCSA lands as the current landowners under existing Federal and State environmental laws. Under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 1980 (CERCLA), the current owner may be held liable for response costs or natural resource damages without regard to fault. The DOI report asserted that ANCs would not be held liable under the Environmental Protection Agency's (EPAs) "Policy Towards Landowners and Transferees of Federal Facilities" (published June 13, 1997), which states EPA does not intend to enforce Section 107(a) of CERCLA. The DOI report emphasized:

¹ U.S. Department of the Interior, *Hazardous Substance Contamination of Alaska Native Claims Settlement Act*

² Ibid, page 11.

³ See Table 2 Summary of Potentially Contaminated ANCSA lands. Ibid, page 18. NOTE: data represents estimates of known and potential sites are based on an analysis of the inventory databases discussed herein. Duplicate sites may exist.

...EPA will not take enforcement action against a person or entity, or its transferees or successors to require the performance of response action or payment of response costs incurred to respond to contamination existing as of the date that person or entity acquires the property from the United States. EPA is also aware that even preliminary assessment and evaluation can be burdensome and expensive to a landowner, and will not seek to impose these costs against ANCSA landowners relative to contamination or potential contamination that was on their property at the time of conveyance....Many land transfers under ANCSA were finalized before CERCLA was enacted and the statutory covenants were required. However, EPA applies this policy to transferees and successors that acquired property from the United States in this type of situation in which the property transferred before CERCLA was enacted.⁴

Recognizing the unjustness of conveying contaminated lands to ANCs in settlement of aboriginal rights to land, the DOI recommended "...an approach to fully identify contaminated sites and cleanup needs on ANCSA lands,"⁵ with six specific recommendations in their 1998 report. The recommendations included:

1. establish a forum of ANCSA landowners and Federal, State, local and Tribal agencies to exchange information and set priorities
2. create and maintain a comprehensive inventory of contaminated sites
3. apply EPA policies not to impose landowner liability to ANCs for prior contamination
4. within 30 months DOI to report back to Congress on sites that were identified but not covered by existing cleanup programs
5. revise relevant policies covering existing cleanup programs to address the remediation of petroleum, asbestos, and the removal of unsafe structures and debris, among others
6. develop a process to train and enable local residents to better participate in cleanup efforts⁶

The DOI stated it would "coordinate the implementation of these recommendations, although other agencies such as the EPA and the Corps of Engineers may take the lead in certain aspects of the recommendations."⁷ Largely, nothing happened.

More than a decade later, in 2012, ANVCA selected the contamination of ANCSA lands issue as a top priority. ANVCA began educating members of Congress, the State Legislature, and Federal agencies about this issue, urging the cleanup of ANCSA contaminated sites. Today, ANVCA enjoys broad support to address cleanup of ANCSA lands, including from the Alaska Federation

⁴ Ibid, page 26. See also Appendix B of this testimony, EPAs "Policy Towards Landowners and Transferees of Federal Facilities" (June 13, 1997).

⁵ Ibid, page 2.

⁶ See Section 7.0 Recommended Remedies for more information. Ibid, page 35-38.

⁷ Ibid, page 2.

of Natives, ANCSA Regional Association, Alaska State Legislature and Alaska Governor William Walker.⁸

In December 2014, Congress through Public Law 113-235 requested the following information from the BLM:

1. A comprehensive inventory of contaminated sites conveyed through ANCSA, including sites identified subsequent to the 1998 report
2. An updated status on the six recommendations listed in the 1998 report
3. A detailed plan on how the DOI intends to complete cleanup of each contaminated site

In June 2016, the BLM submitted the 2016 Update to the DOI 1998 Report to Congress. The 2016 update discussed the contaminated sites inventory prepared by the BLM (with input from Federal, State and local entities and Alaska Native stakeholders). The inventory identified 537 sites that require remediation.⁹ Of the identified sites, the majority are Department of Defense sites (162 sites, 120 of which are FUDS).¹⁰ 94 of the contaminated sites are not in a cleanup program and are classified by the BLM as “orphan” sites (notably the report states an additional 104 sites still require further verification and may be added later to the Orphan Site Database).¹¹ 92.5 percent of the 94 “orphan” sites are within 2 miles of Alaska villages, places where our Native people engage in subsistence activities, obtain our drinking water, and let our children play. An additional 242 sites identified in the report have land use controls in place,¹² limiting use and development of the land.¹³

The 2016 report acknowledged that because BLM lacks authority to compel cleanup of contaminated ANCSA lands subsequent to transfer, no action has been taken on the following three steps identified in the 1998 report:

1. applying EPA policies on liability of landowners to ANCSA landowners
2. modifying policies, where needed, to address contaminants and structures that may affect public health and safety on ANCSA lands
3. developing a process to train and enable local residents to better participate in cleanup efforts¹⁴

⁸ See Appendix A of this testimony, *ANCSA Contaminated Lands Timeline*.

⁹ See Figure 4: Total number of active contaminated sites conveyed to an ANCSA corporation identified from 4 State and Federal databases. Bureau of Land Management, *2016 Update to the U.S. Department of Interior 1998 Report to Congress on Hazardous Substance Contamination of Alaska Native Claims Settlement Act Lands in Alaska*, Report to Congress (Anchorage, Alaska, 2016), page 18.

¹⁰ *Ibid*, page 18 and 44.

¹¹ *Ibid*, page 20.

¹² See Figure 2: Current clean-up status of conveyed contaminated sites, as of September 9, 2015 from ADEC data. *Ibid*, page 14.

¹³ NOTE: the 2016 report defines Land Use Controls as “Administrative or legal controls established to limit land use activities to prevent exposure to contaminants remaining at a site and/or to protect the integrity of a response action.” *Ibid*, page 4.

¹⁴ *Ibid*, page 8.

The 2016 report included three recommended next steps:

1. the Alaska Department of Environmental Conservation (ADEC) should finalize the comprehensive inventory and implement a remedial action process;
2. establishment of a formal contaminated lands working group; and
3. initiation of a site cleanup process.

In stark contrast to the DOI's willingness in 1998 to take a leadership role to facilitate the cleanup of ANCSA contaminated lands, the 2016 update proposes that ADEC and EPA oversee cleanup of the sites. It also states that:

The BLM does not have the authority to provide liability relief under CERCLA for potentially responsible parties at sites not under the BLM's jurisdiction, custody, or control; that authority rests with EPA or Federal courts in accordance with the provisions of Section 107 of CERCLA, 42 U.S.C. 9607.¹⁵

This represents an ongoing struggle for ANCs – a lack of a lead coordinating agency that will effectively coordinate other agencies and assist ANCs with significant issues including protection from legal liability issues under CERCLA.

IV. THE SUCCESSES AND FAILURES OF ANCSA FUDS CLEANUP

The Afognak Lake and River area on Afognak Island have been used by the *Ag'uanermiut* (People of Afognak) for thousands of years. The lake and river are a critical spawning area for salmon, which serves as a primary subsistence resource for the *Ag'uanermiut*. In 2003 my Tribe, Native Village of Afognak (NVA), and my village corporation, Afognak Native Corporation, joined forces to clean up an old World War II-era Navy base located beside Afognak Lake and River. The Afognak Island Coastal Defense Site had been used in the 1940s by the U.S. Navy as a radio transmission site, emergency seaplane site, administration offices and recreation center for Navy personnel.

Through funding from the Department of Defense's FUDS Native American Lands Environmental Mitigation Program (NALEMP), Afognak Native Corporation and NVA spent six years and \$3.3 million cleaning up the contaminated site. In addition to providing my Tribe and village corporation with business capacity building, the project offered our tribal members and Native shareholders job training and much needed employment opportunities. The project to remove toxic materials included five large buildings, seven small structures, two additional building foundations, two affiliated landfills, drums, asbestos, debris, contaminated soil, and other materials. In 2009, the remediation was successfully completed.

¹⁵ Ibid, page 23.

In stark contrast, the Natives of Kodiak, Inc. (NOK) have spent the last twenty-five (25) years advocating for the proper cleanup of a contaminated site “Buskin Beach property” on their ANCSA land. The Buskin Beach property was the central headquarters of the U.S. Army’s Fort Greely during World War II and was used as an asphalt and metal disposal area, underground storage tank site and grease pit. In 1992, the U.S. Army Corps of Engineers (USACOE) began cleanup of the site. By 2005, after years of a cleanup effort under FUDS and the Native American Lands Environmental Mitigation Program (NALEMP), the USACOE stopped all remediation efforts, focusing instead on “long-term monitoring” of the contamination and recommending institutional controls.

Since the early 1990s NOK has attempted, and failed, to develop the property because millions of dollars in utilities infrastructure must be installed to make the land useable and provide drinking water. In fact, beginning in the late 1990s, NOK sent several letters to the USACOE contending the slow cleanup efforts were stalling all development on their property and financially impacting their corporation.

Today, twenty-five (25) years after beginning cleanup efforts, NOK refuses to accept “institutional controls” and “long-term monitoring” of the contamination and continues to advocate for their right to drinkable water and land free of contamination.

V. RECOMMENDATIONS

There are 537 sites with pre-existing contamination on land conveyed to ANCs and additional sites on land pending conveyance. These sites were contaminated under ownership and/or responsibility of the Federal government and then transferred to Native ownership. ANVCA urges Congress and Federal agencies to:

A. Prioritize cleanup of ANCSA land

Forty-five (45) years after our aboriginal land settlement with the Federal government, it is time for the cleanup of ANCSA contaminated sites to be prioritized by the Federal government.

B. Protect ANCs from legal liability

Provide ANCs protection from legal liability for the prior contamination of ANCSA lands under Section 107(a) of CERCLA.

C. Address US sovereign immunity and petroleum cleanup

Many ANCSA contaminated sites include significant petroleum contamination, which is not covered under CERCLA. Other laws must therefore be used to compel cleanup of petroleum contamination.¹⁶ State of Alaska statutes extend to petroleum; however, the Federal government

¹⁶ See 42 U.S.C. § 9601(14).

generally can assert sovereign immunity against the application of State laws. A waiver of sovereign immunity is necessary to cover petroleum products and, potentially, to encompass debris and other solid wastes disposed of on ANCSA lands during the period of federal agency ownership.

D. Identify a lead coordinating agency

ANVCA believes that identifying a lead agency responsible for coordinating ANCSA cleanup efforts would expedite cleanup efforts. This recommendation is generally consistent with the BLM 2016 Report recommendation. The lead coordinating agency would be responsible for organizing a formal ANCSA contaminated lands working group, made up of applicable Federal and State agencies and ANCs. The working group would identify the responsible party, assess the contaminated lands, and develop plans for cleanup of the 94 orphan sites on ANCSA land. The working group would also identify the sites posing the greatest health risks for humans and expedite the remediation of those sites. We recommend the ANC community have a significant role in determining which agency would be best suited in this role. We further recommend Congress require the lead coordinating agency to submit an annual report on the status of ANCSA cleanup efforts to Congress to ensure progress is consistently made in ANCSA remediation efforts so this effort maintains Congressional visibility/priority of ANCSA contaminated land cleanup.

E. Provide ANCs and Tribes a preference for cleanup of ANCSA lands

With 537 contaminated sites on ANCSA land, and 92.5 percent of orphan sites located within 2 miles of Alaska villages, ANVCA recommends providing ANCs a preference in contracting with the Federal government to cleanup their lands. This would offer ANCs the opportunity to build business capacity and provide much needed jobs in their local communities while reducing expenses required to house contractors and convey a workforce into and out of the sites.

VI. CONCLUSION

The Federal government conveyed contaminated land to ANCs in return for the extinguishment of certain aboriginal rights to land. Under Federal and State law, ANCs face potential legal exposure for the remediation of those lands. In addition, some of those contaminated lands pose significant health risk to humans, animals and the environment. It is unacceptable that forty-five (45) years after the passage of ANCSA and the extinguishment of certain aboriginal land claims, Alaska Native Corporations continue to face legal exposure for contaminated lands conveyed to them by the Federal government and that many of those sites still do not have a clearly identified responsible party, assessment, or plan for cleanup.

Quyanaasinaq (thank you very much) for the opportunity to bring awareness to this critical issue facing Alaska Native people, rural villages, and Alaska Native Corporations.

LIST OF APPENDICES

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Appendix B: EPAs “Policy Towards Landowners and Transferees of Federal Facilities” (June 13, 1997)..... page 12

Appendix C: U.S. Department of the Interior, *Hazardous Substance Contamination of Alaska Native Claims Settlement Act Lands in Alaska*, Report to Congress (1998)..... page 24

Appendix D: Bureau of Land Management, *2016 Update to the U.S. Department of Interior 1998 Report to Congress on Hazardous Substance Contamination of Alaska Native Claims Settlement Act Lands in Alaska*, Report to Congress (Anchorage, Alaska, 2016)..... page 70