ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2020
No. 20-5204

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al. [20-5205],

CHEYENNE RIVER SIOUX TRIBE, et al. [20-5209],

UTE TRIBE OF THE UINTAH AND OURAY RESERVATION [20-5204],

Plaintiffs-Appellants,

v.

STEVEN MNUCHIN, SECRETARY, UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-01002) (Hon. Amit P. Mehta)

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GLOSSARY

Term	Definition
A-	Appendix
ADD-	Addendum
AFN	Alaska Federation of Natives
AFN.Br.	Brief of Amicus Curiae Alaska Federation of Natives in Support of Defendant-Appellees
ANCSA	Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629h)
ANCs	Alaska Native regional corporations and Alaska Native village corporations established pursuant to ANCSA, §§ 7-8
ANC.Br.	Brief for Intervenor-Defendant-Appellees Alaska Native Village Corporation Association, Inc., et al.
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
BIA	Bureau of Indian Affairs, United States Department of the Interior
CARES Act	Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020)
CIRI.Br.	Brief of Amicus Curiae Cook Inlet Region, Inc. in Support of Defendant-Appellees
Confederated Tribes	Plaintiffs in Case No. 20-5205: The Confederated Tribes of the Chehalis Reservation, Tulalip Tribes, Houlton Band of Maliseet Indians, Akiak Native Community, Asa'carsarmiut Tribe, Aleut Community of St. Paul Island, Navajo Nation, Quinault Indian Nation, Pueblo of Picuris, Elk Valley Rancheria, California, and San Carlos Apache Tribe
Conf.Tr.Br.	Opening Brief of the Confederated Tribes Appellants

Defendant-Appellees	Defendant-Appellee Secretary and Intervenor-Defendant-Appellees ANCs
Eligibility clause	The clause "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," in the definition of "Indian tribe" at 25 U.S.C. § 5304(e)
IHS	Indian Health Service
Interior	United States Department of the Interior
ISDEAA	Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975)
List Act	Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994)
NCAI.Br.	Brief of Amicus Curiae National Congress of American Indians et al. in Support of Plaintiffs-Appellants for Reversal
Secretary	Defendant-Appellee Steven Mnuchin, Secretary of the United States Department of the Treasury
Sec.Br.	Brief of Defendant-Appellee Steven Mnuchin, Secretary of the United States Department of the Treasury
Title V	Title V of the CARES Act, "Coronavirus Relief Fund," codified at 42 U.S.C. § 801
The Tribes	The Confederated Tribes
Treasury	United States Department of the Treasury

INTRODUCTION

The Secretarial and ANC briefing seeks to direct attention to anything other than the full, plain text of the "Indian tribe" definition. First come claims of history and status. According to the Secretary, ANCs are not groups of Indians at all, and would have been understood from their inception not to satisfy the tribal-eligibility language—which ironically entitles them to ironclad "Indian tribe" status. The ANCs, meanwhile, assert they are quintessential Native entities, but that the same result follows—they are immune from the listing requirement ordained by Congress to avoid ad hoc claims of the sort they advance here.

Next come claims in defiance of text. The Secretary makes hash of the definition by applying the eligibility clause to every listed entity except ANCs. The ANCs, meanwhile, disparage the eligibility language as "implicit" and a "stratagem." But mere labeling does not make it so. The eligibility clause explicitly modifies the entities that come before, including ANCs no less than tribes, bands, Native villages, or other organized groups or communities. All are expressly identified, and all are subject to the express force of the modifier. No textual reason exists for privileging one group over the others.

Finally come claims based on congressional ratification. But reality belies the assertion of a uniform judicial and administrative approach. And the argument fails to grapple with recent decisions of the Supreme Court and this Court

establishing a high bar for ignoring the dictates of plain text based on ensuing inferences, a bar that cannot be cleared here.

ARGUMENT

I. The Secretary's Decision Is Reviewable.

Title V of the CARES Act circumscribes the Secretary's authority, providing for payments not to any Indian organizations but to "Tribal governments," Conf.Tr.Br.5. A-186-89; A-96-98. This Court has clearly deemed compliance with such disbursement restrictions subject to judicial review. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 752 (D.C. Cir. 2002); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1348 (D.C. Cir. 1996).

The Secretary ignores this law, arguing that an intent to preclude review should be inferred. But Congress's express limitation on Secretarial authority weighs heavily against drawing such an inference, *Dart v. United States,* 848 F.2d 217, 223 (D.C. Cir. 1988), and no substantial counterweight exists. Congress can intend the Secretary act both expeditiously *and* within reviewable limits, *Dunlop v. Bachowski*, 421 U.S. 560, 563 n.2, 567-68 (1975) (60-day deadline); *Tex. Mun. Power Agency v. E.P.A.*, 89 F.3d 858, 864-65 (D.C. Cir. 1996) ("short statutory deadlines"); *In re FTC Corp. Patterns Report Litig.*, 432 F. Supp. 274, 289-90 (D.D.C. 1977) (45-day deadline), and both this Court and the District Court expedited review consistent with the fiscal-year appropriation and present

exigencies. *Cf. City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (equitable doctrine protecting against appropriation lapse).

Nor does the absence of a pre-payment publication requirement show an intent to preclude review, *Milk Train*, 310 F.3d at 749, 752 (regulations reviewable where notice-and-comment waived under emergency statute), particularly given the pre-payment tribal consultation requirement, 42 U.S.C. §801(c)(7). That Congress did not require the Secretary to publish the precise manner in which he would comply with the law does not exempt him from compliance.

The Secretary's cases, by contrast, involved abundant indicia of intent to preclude review. *See* A-187-88 (District Court deeming *Morris v. Gressette*, 432 U.S. 491 (1977), and *Dalton v. Specter*, 511 U.S. 462 (1994), "easily distinguishable"); *Am. Bank, N.A. v. Clarke*, 933 F.2d 899, 903 (10th Cir. 1991) (involving a "highly discretionary" statute). APA review accordingly obtains here, and even if it were foreclosed, the Tribes' claims that the Secretary exceeded his statutory authority would still be cognizable. *Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1172-73 (D.C. Cir. 2003).

II. ANCs Are Not Indian Tribes.

1. The Secretary argues that ANCs are not "group[s] of Indians," Sec.Br.23, taking them outside the first clause of the "Indian tribe" definition. This new argument defies text, as Congress explicitly established ANCs as organized

groups of Indians under ANCSA. 43 U.S.C. §1607(a) (requiring that "Native residents of each Native village … organize as a business for profit or nonprofit corporation"), 1606(a), (d) (requiring "Natives having a common heritage" to organize regional corporations). Congress continues to protect Native control of ANCs, *id.* §1629c(a), and not surprisingly the ANCs characterize themselves very differently. ANC.Br.4-5; CIRI.Br.19-20. The Secretary's position also defies context and common sense—ISDEAA sought to advance Indian self-determination, 25 U.S.C. §5302(a), yet under the Secretary's view it vested non-Indian groups with unassailable tribal status and control.

The Secretary's concomitant grammatical argument fares no better. He suggests that "including" is a term of enlargement, Sec.Br. 29, such that ANCs could appear in the definition's second clause but not be subsumed by the first. But he nowhere acknowledges this Circuit's recognition, consistent with ordinary usage, that "[w]hatever follows the word 'including' is a subset of whatever comes before[.]" *Epsilon Elecs., Inc. v. Treasury*, 857 F.3d 913, 921 (D.C. Cir. 2017); *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006) (same). Departure from ordinary meaning would turn "on context," *New York v. DOJ*, 951 F.3d 84, 102 (2d Cir. 2020), and the Secretary does not dispute here that Native villages, which appear alongside ANCs, are a subset of the

first clause. A-198-99. Unless "including" can simultaneously mean two things, it retains its ordinary sense, and ANCs are subject to the eligibility limitation.

2. Defendant-Appellees concur in their principal submission that, because Congress expressly named ANCs in the Indian tribe definition, "that decision must be given effect, full stop." ANC.Br.13. But "a basic rule of statutory construction is to '[r]ead on,'" *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020), and the eligibility clause immediately follows the ANC reference. That clause is hardly "subtl[e] and implicit[]," ANC.Br.15—it "plainly modifies each of the nouns that precedes it, including ANCs." A-192; Conf.Tr.Br. 12-15. Under the contrary logic, neither ANCs nor any "Indian tribe, band, nation, or other organized group or community" would be subject to the eligibility language because Congress expressly referenced them all, thus stripping the clause of its force. There is nothing "'harmon[ious],'" Secr.Br.24, or "straightforward," ANC.Br.11, about such a conclusion.

3. The Secretary's charge that the Tribes rely unduly upon grammar is curious. Sec.Br.30. This Court seeks to accord text its "most natural reading," *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 311 (D.C. Cir. 2014); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 733 (D.C. Cir. 2005) (Roberts, J.), and while no one principle can be applied rigidly, grammar is critical to arriving at such constructions. *E.g.*, *In re Fed. Bureau of Prisons*, 955 F.3d 106, 122 (D.C.

Cir. 2020) (Katsas, J., concurring) (rejecting interpretation that "runs contrary to established rules of grammar"); *U.S. Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1135 (D.C. Cir. 2017). The Secretary finds no refuge in *Payless Shoesource, Inc., v. Travelers Cos., Inc.*, 585 F.3d 1366, 1370-71 (10th Cir. 2009), where then-Judge Gorsuch concluded, based largely on grammatical indicia, that a modifying clause applied to all clauses preceding it, as here. In advocating that the eligibility clause neither extends back to all entities preceding it, nor applies only to ANCs as the last antecedent, but instead extends to all entities *except* ANCs (including Native villages in the same clause), the Government commits the same sin as it did in *Cyan, Inc. v. Beaver County Employees Retirement Fund,* 138 S.Ct. 1061, 1077 (2018) ("The Government is choosing … which words to qualify … based only on what best serves its argument.").

What makes the Secretary's position even more remarkable is that it directly contradicts Treasury's 2015 regulations, implementing the "Indian tribe" definition (almost identical to ISDEAA's) in the Community Development Banking and Financial Institutions Act, 12 U.S.C. §4702(12). The regulations provide:

> Indian Tribe means any Indian Tribe, band, pueblo, nation, or other organized group or community, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to [ANCSA]. *Each* such Indian Tribe *must* be recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians[.]

12 C.F.R. §1805.104 (emphases added). Treasury clearly recognized what it refuses to acknowledge today: under the plain language of the definition the eligibility clause applies to ANCs.[1]

4. To buttress their counter-textual arguments, Defendant-Appellees argue the rule against surplusage, without countering the Tribes' points as to why the rule neither applies nor controls here. Conf.Tr.Br.26-28. Ignoring the admonition that "'we do not resort to legislative history to cloud a statutory text that is clear,'" *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 339 (D.C. Cir. 2020), they further argue that ANCs' late addition to the definition renders them immune from the eligibility clause. But that argument underscores the "perils of substituting stories for statutes." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020). When Congress wrote ANCs into the statute, it placed them immediately before the eligibility clause—a strange choice had it meant to exempt them from its force and put them on a different footing than the other listed entities.

5. Nor does the history evidence that Congress believed ANCs could never satisfy the eligibility requirement. Sec.Br.25. ANCSA recognized neither ANCs nor Native villages as eligible for Indian programs generally. Congress instead debated the "automatic termination of BIA services" in Alaska altogether,

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[1] The Secretary does not account for these regulations in making his *Skidmore* deference argument, and that argument additionally fails for the reasons stated in the Tribes' opening brief. Conf.Tr.Br.29-31.

but ultimately required "a study of all Federal programs primarily designed to benefit Native people and to report back … recommendations for the[ir] future management and operation," 43 U.S.C. §1601(c)—a study submitted after ISDEAA was enacted. Op.Sol.M-36975, 105-06&n.265 (1993). ANCSA's Joint Conference Statement stated candidly that Congress was "reserving" many issues of village and corporation status, declaring that "among individual members of the House and the Senate, there are, of course, wide differences of opinions on specific issues," including "some of the institutions established[.]" S.Rep.No.92-581, 34 (1971). It was not until 1988 that Congress amended ANCSA to provide: "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans," 43 U.S.C. §1626(d). Pub.L.No.100-241, §15.[2]

The only categorical understanding of Alaska Native communities in 1975 was uncertainty. For example, in 1973, Chairman Meeds of the House Subcommittee on Indian Affairs noted that BIA was "beginning its investigation" into its "relationship to Alaskan Natives" and acknowledged AFN's concern that the Indian Financing Act, 25 U.S.C. §1452(c), was limited to entities "recognized as receiving services from the [BIA]," the identity of which AFN noted was "an open question." ADD-1.5. Meeds's views are significant—in May 1974 he

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[2] The ANCs and their amici submit—repeatedly and erroneously—that this amendment was part of ANCSA in 1971. ANC.Br.38; AFN.Br.4,10-11; CIRI.Br.9,18-19.

participated in the only discussion in ISDEAA's legislative history regarding the inclusion of corporations (nonprofit or profitmaking), a colloquy Defendant-Appellees do not mention and that lends no support to their claim that Congress exempted ANCs from the eligibility clause. ADD-2.11-12.

Only in 1978 did Interior explain that "'corporations or groups of any character, formed in recent times,'" were ineligible for tribal status. Conf.Tr.Br.24-25n.4.[3] Previously, recognition was not simply based on historical precedent, Sec.Br.25-26, but was ad hoc and did not *per se* exclude ANCs. Cohen's Handbook 271 (1942) (criteria including "[t]hat the group has been treated as having collective rights in tribal lands or funds"). Even for Native villages, questions persisted about their recognition status until 1993. NCAI.Br.18-19,21-23.

6. The ANCs take a different tack, arguing they satisfy the eligibility clause because they participate in certain Indian programs. The Secretary rightly disagrees. Sec.Br.24n.6. First, the ANC argument is circular, and the same rationale would apply to *any* Indian group receiving *any* services by virtue of Indian status, including *non*-federally recognized tribes and bands. Federal officials could grant and revoke, at their whim, program eligibility, and with it,

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[3] The Secretary dismisses the ANCs' 1977 letters as "opaque," Sec.Br.26n.8, but the ANCs do not dispute they were pursuing recognition. Interior's regulations, of course, remain subject to amendment. *E.g.*, 85 Fed.Reg. 37–01 (2020).

tribal status. In 1994 Congress prohibited such ad hoc treatment of Indian entities. Pub.L.No.103-263, §5(b). The List Act sought to eliminate the BIA's distinction between "created" and "historic" tribes—decidedly opposite the ANCs' claim that the Act "draw[s] distinctions among tribes based on their historical treatment," ANC.Br.24—and other "capricious[] and improper[]" BIA action. H.R.Rep.No.103-781, *3 (1994).

Second, the clause is a term of art defined by reference to the List Act. Conf.Tr.Br.17-18. The ANCs protest that the Act was enacted after ISDEAA, ANC.Br.21, but nowhere explain why that bears on what is a clear congressional mandate: Interior must list every Indian entity satisfying the clause. 25 U.S.C. §5131. The Act ensures equal agency treatment across federal statutes, Pub.L.No.103-454, §103(7)-(8) (1994), and has governed eligibility determinations since its passage, Conf.Tr.Br.17n.3; 2 C.F.R. §§200.1, 200.54; 45 C.F.R. §75.2. The minor textual differences identified by the ANCs do not change that the statutes are in pari materia. Both "Indian tribe" definitions account for Alaska Native entities—ISDEAA through the "including" clause, Conf.Tr.Br.13, and the List Act through the placement of "or Alaska Native" before the string of parallel nouns, 25 U.S.C. §5130(2). And while ISDEAA's definition identifies no "particular government official," ANC.Br.19, Interior's implementing regulation does, 25 C.F.R. §275.2(f) ("by the U.S. Government through the Secretary").

7. No matter, the ANCs say, the term-of-art clause does not apply because they were recognized under ANCSA, not the List Act. But there is no "List Act recognition process," and there are no "List Act criteria." ANC.Br.24-25. The *only* thing the Act mandates is Interior's annual publication of the tribes satisfying the eligibility clause, 25 U.S.C. §5131, whether they are "recognized by Act of Congress; by the administrative procedures [promulgated in 1978 and] set forth in [25 C.F.R. Part 83] …; or by a decision of a United States court[.]" §103(3); *see also Mackinac Tribe v. Jewell*, 829 F.3d 754, 755 (D.C. Cir. 2016).

There should be no mistaking the radical nature of the ANCs' request: They ask the Court to erase the clause's term-of-art status, to deem them eligible, and to effectively amend Interior's list of recognized entities. That is the role of the political branches, not the courts. *James v. HHS*, 824 F.2d 1132, 1136-37 (D.C. Cir. 1987).

III. Congress Did Not Ratify a Counter-Textual Definition.

1. The Secretary's ratification argument misapprehends both predicate and law. There exists no well-settled, counter-textual interpretation of the definition for Congress to have ratified. The posited judicial predicate consists of one flawed decision. On the administrative side, the lack of a uniform interpretation favoring the Secretary is underscored by: Treasury's own 2015 regulations, 12 C.F.R. §1805.104; the novel claim before this Court that ANCs are

not Indian groups; the perfunctory Soller memorandum on which so much freight is placed espousing a position regarding Native villages that the Secretary now disavows, Conf.Tr.Br.29-30; and the fact that the 1981 IHS guidance simply states that *if* a Native village has no government, an ANC may authorize an ISDEAA contract *on behalf of* the village, 46 Fed.Reg. 27,178-02 (1981).

2. *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir.1987), provides no basis for ratification. "[W]hile we presume that Congress knows of 'well-settled judicial construction,' … a lone appellate case hardly counts." *United States v. Garcia Sota*, 948 F.3d 356, 360 (D.C. Cir. 2020); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 625 (D.C. Cir. 2017) (two decisions insufficient). Nothing indicates that the CARES (or any prior) Congress was aware of *Bowen*. And the characterization of two ANCs as "federally recognized Indian tribes" in *American Federation of Government Employees v. United States*, 330 F.3d 513, 516 (D.C. Cir. 2003), is not just "slightly-imprecise dictum," Sec.Br.35, but is flatly wrong and supplies nothing to ratify.

3. The Secretary's agency-based argument ignores controlling Circuit law. Current doctrine reinforces the primacy of text. Hence, "[e]ven an agency's consistent and longstanding interpretation, if contrary to statute, can be overruled." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 349 (D.C. Cir. 2019);

Citizens for Responsibility & Ethics in Wash. v. FEC, 904 F.3d 1014 (D.C. Cir. 2018).

This principle maintains its force when Congress has reenacted or incorporated the relevant statutory language. *E.g.*, *Brown v. Gardner*, 513 U.S. 115, 121 (1994) ("There is an obvious trump to the reenactment argument, however, in the rule that '[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.'"); *U.S. Ass'n of Reptile Keepers*, 852 F.3d at 1141-42. Only where it is clear that Congress was aware of and intended to ratify a uniform, well-settled interpretation can ratification be said to have occurred. *Inner City Broad. Corp. v. Sanders*, 733 F.2d 154, 160 (D.C. Cir. 1984). The Secretary does not meet this standard.

4. The Secretary argues that, in amending ISDEAA, Congress has not acted "to override" his proffered interpretation. Sec.Br.35-36. But recent precedent places little if any weight on congressional silence. *Alexander v. Sandoval,* 532 U.S. 275, 292 (2001) ("[the] argumen[t] deserve[s] little weight in the interpretive process'"). No evidence indicates that *any* Congress which amended ISDEAA was aware of his interpretation. To the contrary, amendment history suggests the clear understanding that in Alaska "Indian tribe" status is the province of Native villages *alone*. H.R.Rep.No.106-477, *62 (1999) (ISDEAA "gave Indian tribes and Alaska Native villages the right to assume responsibility

for … federal programs”); S.Rep.No.100-274, *22 (1987) (“[T]he authority for a tribal organization to enter into a self-determination contract … is a resolution of the governing body of an Indian tribe or Alaska Native village.”).

While the Secretary cites isolated statements from a single Senator in 1976 and one 1986 Committee report for a failed bill, Sec.Br.38, these fall far short of the mark. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169-70 (2001) (“Failed legislative proposals are ‘a particularly dangerous ground on which to rest an interpretation[.]’”); *SEC v. Sloan*, 436 U.S. 103, 119-22 (1978) (referencing Committee Report in stating that “[w]e are extremely hesitant to presume general congressional awareness … based only upon a few isolated statements in the thousands of pages of legislative documents.”).

5. The Secretary’s argument that ratification occurred when Congress enacted a “new definitions section” in 1988, Sec.Br.26, fares no better. Congress merely added new definitions and renumbered existing ones, S.Rep.No.100-274, 67-68 (1987), while expressing an understanding contrary to the Secretary’s present position. *Id.* 22. Moreover, this is not “the [‘Indian tribe’] definition applicable today.” Sec.Br.36. In 1990, Congress added the comma immediately preceding the eligibility clause, clarifying its application to all listed entities. Pub.L.No.101-301, §2(a)(1). Had Congress intended to sanction an interpretation contrary to the statute’s natural reading, this “technical amendment” was a strange

way to do it.

6. Nor is Congress presumed to have "adopt[ed]" the Secretary's interpretation because it has employed the ISDEAA definition elsewhere. Sec.Br.37. An ANC itself acknowledges that Congress has used the definition in circumstances "clearly limited to … recognized sovereign tribes," CIRI.Br.29n.11, so why an inference would be drawn in favor of the Secretary's interpretation is unclear. *Compare Bragdon v. Abbott*, 524 U.S. 624 (1998) (relying on numerous regulations and interpretation documents, court opinions, and legislative history statements indicating affirmative approval of interpretation).

7. Finally, while the Secretary identifies a few statutes he claims "signal" prior Congresses understood ANCs to be tribes, Sec.Br.38-39; *see also* ANC.Br.26-27, there exists far more noise than signal, and no indication the CARES Congress paid heed to anything other than the text it used. The cited statutes beg important questions by implicating, for example, different entities, Sec.Br.38 (Tribal Energy Act incorporating definition of "Native Corporation," 25 U.S.C. §3501(6), which includes Urban and Group Corporations, 43 U.S.C. §1602(m)), and ANCs' role as "tribal organizations," ANC.Br.26 (biomass project open to "Indian tribes" and "tribal organizations," Pub.L.No.15-325, §202(c) (2018)).

Congress, meanwhile, has sent strong signals in the Tribes' direction. It has, for example, enacted language placing ANCs separate and apart from the eligibility clause, which is the formulation Defendant-Appellees argue for, *see* Conf.Tr.Br.20, but not the one Congress employed. *E.g.*, 40 U.S.C. § 502(c)(3)(B) (defining "tribal government" as (i) the governing body of any Indian tribe … or other organized group or community located in the continental United States (excluding the State of Alaska) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and (ii) any Alaska Native regional or village corporation established pursuant to [ANCSA]"); 44 U.S.C. §3601. Moreover, in the 2014 Water Resources Reform and Development Act, Congress used the ISDEAA definition, Pub.L.No.113-121, §2105, but in 2016 amended the statute to read: "The Secretary may provide technical assistance to non-Federal public entities, including Indian tribes (as defined in [ISDEAA]) and a Native village, Regional Corporation, or Village Corporation (as those terms are defined in [ANCSA])," 33 U.S.C. §2243(a). Pub.L.No.114-322, §1202(c)(1). Had Congress understood ANCs to qualify under ISDEAA, this would have been unnecessary. All of which confirms the wisdom of this Court's admonition: "Courts must give effect to the clear meaning of statutes as written[.]" *Carlson*, 938 F.3d at 349.

DATED this 26th day of August, 2020.

Respectfully submitted,

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I hereby certify under penalty of perjury that on this 26th day of August, 2020, in accordance with Circuit Rule 25(c), I caused the foregoing brief together with statutory addenda to be filed with this Court's ECF system.

/s/ Riyaz A. Kanji

ADDENDUM 1

GAO: 25, 77, 105

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INDIAN FINANCING ACT OF 1973

1102

HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

(not printed)

ON

H.R. 6371, H.R. 6493, H.R. 9843, H.R. 10562 and S. 1341

TO PROVIDE FOR FINANCING THE ECONOMIC DEVELOPMENT OF INDIANS AND INDIAN ORGANIZATIONS, AND FOR OTHER PURPOSES

HEARING HELD IN WASHINGTON, D.C.

OCTOBER 12, 1973

Serial No. 93–32

Printed for the use of the Committee on Interior and Insular Affairs

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NOTE.—The chairman of the full committee is an ex officio voting member of this subcommittee. The first listed minority member is counterpart to the subcommittee chairman.

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Mr. PADDOCK. The possibility in the comparison that we made in the report was the difference between section 211 and section 212, under the guaranteed loans there was secretarial discretion to assist the borrower in every way possible. That secretarial discretion is not present in 212. And it is up—in section 212 it is up to the banks to attempt to gain back their funding or their loan in every way possible. The implication is that the banker then could force the borrower out of business. The implication is not so in the previous section. It does not state that specifically.

Mr. LUJAN. You just are comparing the two sections and saying one is harsher than the other without necessarily telling us we should change it so that you will never have to foreclose on business.

Thank you.

Mr. MEEDS. Thank you very much, gentlemen. We appreciate your testimony and good luck in your contracting association. That sounds like a very fine venture. You are absolutely right, there is a lot of need for building in Alaska, not just in southeast Alaska.

Our next and last witness is Willie Hensley, who is the president of the Alaska Federation of Natives.

Willie, it is a pleasure to have you before the comittee. We look forward to your testimony.

STATEMENT OF WILLIE HENSLEY, PRESIDENT, ALASKA FEDERATION OF NATIVES

Mr. MEEDS. I see you have a prepared statement.

Mr. HENSLEY. Yes, Mr. Chairman.

Mr. MEEDS. You may read it into the record or summarize it.

Mr. HENSLEY. I think I could just summarize my statement.

Mr. MEEDS. Without objection, your prepared statement will be made a part of the record at this point.

Mr. HENSLEY. Yes. Mr. Chairman, I really have not had that much opportunity really to review this legislation, but what I would like to do is simply let the committee know that the federation very much supports the legislation that is pending before the committee concerning loans, loan guaranties, interest, subsidies, and the grant programs.

There is one other provision that concerns me about the legislation. That is the applicability of the pending bills to the Alaska Natives.

We want to make certain that any legislation that is adopted by the Congress will clearly apply to the Alaska Natives.

There are some variations in the definitions, Mr. Chairman. In H.R. 6371 and 10562, it specifically includes natives as defined in the Native Claims Settlement Act and the word "reservation" also applies to regional and village corporation land, and also the definition of tribe as applies to native villages and native groups is a little bit ambiguous as it applies to Alaska Natives.

We very much endorse the definitions contained in the House version of the legislation, that is, H.R. 6371. And, Mr. Chairman, we very much hope that this legislation would not discriminate against Alaskan Natives because of the fact that we were successful in pursuing a settlement act and in fact it was passed by the Congress.

Mr. Chairman, that is the extent of my remarks except to indicate that on the whole, I think most Alaskan Natives have not really been—have not really utilized the Indian revolving loan fund as it has been

utilized in the lower 48. I think with the exclusion of southeast Alaska who did utilize funds for canneries and various fishing ventures, during the time that the revolving fund has been available we really did not have the institutions in western Alaska to fully utilize the capital that was made available through the loan fund. And consequently, we are just really beginning to get into economic activity in Alaska to any extent. In fact, it is just barely beginning.

Mr. MEEDS. The fact is, too, that the Department or the Bureau is just now beginning its investigation which should result in recommendations under the Alaska Native Land Claims Act to survey the question of Bureau of Indian Affairs relationship to Alaskan Natives.

Mr. HENSLEY. Yes; well, that, Mr. Chairman, is also one aspect of the legislation that concerns us, the applicability of the pending legislation to those that receive services from the Federal Government, and we feel that that should not necessarily be a condition of obtaining loans and grants under the program.

It is true that the Department is proceeding to investigate all of the programs that apply to Alaskan Natives and I am sure that under the Indian revolving loan fund you will find that in most instances, particularly in western Alaska, it has not really been utilized to any extent.

Mr. MEEDS. So where the bill provides services only to Indians for Alaskan Natives, if it does, and I am trying to find out, who are recognized as receiving services from the Bureau, you feel that should be changed.

Mr. HENSLEY. Well, you see, this is right now kind of an open question. There is no question that we presently receive services from the Bureau of Indian Affairs, Mr. Chairman. And it has been stated by Assistant Secretary Lynn, who is head of the Alaska task force that that study that is to be accomplished is not looked upon as a termination study.

However, we do not really know what the recommendations to the Congress are going to be by the Department and we feel that in no way could we remotely provide the services that the Federal Government is providing to Alaskan Natives, particularly in health and education.

Mr. MEEDS. Your problem is really taken care of, though, in H.R. 6371, where "Indian" is defined to, among other things——

Mr. HENSLEY. Mr. Chairman, that language is in—6371 is acceptable. In fact, that, I think is the best language for the definition of "Indian" of the various pieces of legislation that we have seen.

Mr. MEEDS. Right. OK. Thank you very much, Mr. Hensley.

The gentleman from New Mexico.

Mr. LUJAN. Are you already organized pretty far along with the various corporations?

Mr. HENSLEY. Mr. Chairman, as you know, the legislation—it has been about a year and a half since the act was signed. All of the 12 regional corporations have been organized. Many of the village corporations are in the process of being organized. Many of them are incorporated. As you know, we had over 200 corporations to put together under that act.

Mr. LUJAN. Talking basically about the regions.

Mr. HENSLEY. Yes; the regions are organized. They have been primarily engaged in enrollment and in land selections. Many of them

are analyzing the land for selection purposes and are primarily engaged in that now.

Some of them are involved in attempting to take a look at future economic possibilities that the act provides for.

Mr. LUJAN. Have much of the funds been disbursed?

Mr. HENSLEY. Only for organizational purposes. The funds that have been appropriated by Congress are in the Treasury. They have been invested in certificates of deposit until the enrollment is complete, which is going to be in mid-December.

Mr. LUJAN. Would you not find it advantageous to be able to make some of those loans out of corporation funds in order to generate some income?

Mr. HENSLEY. Mr. Chairman, I feel that more than likely these corporations will probably set up some sort of loan programs, but at this stage none of these, of course, have been put together except in southeast where they did have capital. But I think the possibilities that are offered under this program as it applies to the Alaskan Natives, it will enhance our ability to have additional capital. We have virtually had no capital in rural Alaska.

Mr. LUJAN. You might end up in competition with BIA as money lenders.

Mr. HENSLEY. It is a likely possibility. If the terms are——

Mr. LUJAN. If you have to compete you will have to reduce your interest rates because someone might say I can get a better deal out of the BIA than I can get out of the corporations. It might be putting you at a disadvantage then.

Mr. HENSLEY. We will have to take a closer look at this legislation.

Mr. LUJAN. But certainly, it would be an advantage to the individuals to have the alternative.

Thank you.

Mr. MEEDS. Thank you very much, Mr. Hensley.

[Mr. Hensley's statement follows:]

STATEMENT OF STATE SEN. WILLIE HENSLEY, PRESIDENT, ALASKA FEDERATION OF NATIVES, INC.

Mr. Chairman and members of the Committee. I appreciate this opportunity to appear today and testify on the Indian Financing Act of 1973, H.R. 6371, 10562 and S. 1341. I am here to express two simple positions on behalf of the Alaska Native people. First, we enthusiastically support the proposal reflected in the pending bills to establish a loan, loan guarantee and interest subsidy fund to benefit American Indian and Native people in exercising "responsibility for the utilization and management of their own resources" and obtaining "a standard of living from their own productive efforts" comparable to that of non-Native people. Second, we urge that any legislation adopted by Congress clearly and unequivocally provide that the benefits of the Act are available to Alaska Natives and the various business corporations created under the Alaska Native Claims Settlement Act.

I will not today go into the different pending bills in detail nor will I comment on some of the differences among those bills. However, I do want to comment on one specific provision of utmost importance to the Alaska Native people—the definition of "Indian" "tribe" and "reservation" in the pending bills. These terms are all defined in Section 3 of the pending bills. However, from our standpoint there is an important difference in the specific definitions in these bills. H.R. 6371 and 10562 specifically include Natives "as defined in the Alaska Native Claims Settlement Act" in the definition of "Indian", includes regional and village corporations in the definition of "reservation", and include Alaska

Native villages and Native groups in the definition of "tribe". S. 1341 is, on the other hand, rather ambiguous in its application of Alaska Native groups. We strongly endorse the definitions contained in the House version of the legislation.

However, both the House and Senate versions condition benefits to Alaska Natives under the Indian Financing Act to continued eligibility for services from the Bureau of Indian Affairs. We do not believe the benefits of this Act should be tied to continued BIA services. We believe the loan, interest subsidy and grant provisions of this Act should continue to be available to Alaska Natives regardless of any possible change in BIA services.

The most important point I wish to make here today is that Congress should in no way discriminate against the Alaska Natives because we were successful in obtaining passage of the Alaska Native Claims Settlement Act. Many other Indian and Native groups have obtained settlements of their original land claims. Benefits under the Indian Financing Act should not depend on whether a particular tribe or group has obtained such a settlement, nor on the "generosity" of the particular settlement involved. Rather, all Indian and Native people should be treated equally; all should be eligible to share in the benefits of this Act.

Discrimination against the Alaska Natives is totally unnecessary to carry out the purposes of the Indian Financing Act. All versions of the pending bills require Indian groups to exhaust their own and other available commercial financial resources before seeking benefits under the Indian Financing Act. Consequently, if and when Alaska Native individuals or Native groups are found eligible for specific loans, grants, guarantees or interest subsidies under the Act, it will only occur in circumstances where the proceeds and benefits of the Alaska Native Claims Settlement Act are insufficient to provide financial resources through normal commercial channels. In such circumstances the Alaska Native will be in no way different from any other applicant for benefits under the Indian Financing Act.

Mr. Chairman, the Alaska Federation of Natives has had only a limited opportunity to study these proposals. It is quite possible that upon further study and review we might wish to suggest specific amendatory language for inclusion in the ultimate legislation. I hope the Committee will permit me to submit such proposals in writing in the near future.

Thank you.

Mr. MEEDS. The hearings are now adjourned.

[Whereupon, at 12:25 o'clock p.m., the hearings were adjourned.]

[Supplemental information submitted for the record follows:]

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., November 26, 1973.

Hon. LEE METCALF,
U.S. Senate,
Washington, D.C.

DEAR SENATOR METCALF: The copy of your recent letter to Mr. James Baker, Chairman of the Blackfeet Tribal Business Council, which you sent to Chairman Haley has been referred to me.

The Indian Affairs Subcommittee has held hearings on and completed mark-up of H.R. 6371, an Indian Financing bill. In our deliberations, we did consider the Senate bill. A copy of the Committee Print of H.R. 6371 is enclosed for your information.

The Full Interior Committee is expected to consider the Financing bill as soon as the land use bill, now under consideration, is reported.

With kind regards, I am

Sincerely yours,

LLOYD MEEDS,
Chairman, Indian Affairs Subcommittee.

Enclosure.

RESOLUTION NO. 37-73

Whereas, The Blackfeet Tribal Business Council has been informed of a proposed funding source known as the Indian Financing Act of 1973, and

ADDENDUM 2

GAO: 1, 5, 14, 21, 30, 31, 32, 33, 69, 160

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

LDS - 2167

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 1017 and Related Bills

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RALPH S. REGULA, Ohio
CRAIG HOSMER, California
SAM STEIGER, Arizona
MANUEL LUJAN, JR., New Mexico
JOHN N. HAPPY CAMP, Oklahoma
DAVID TOWELL, Nevada
DON YOUNG, Alaska

FRANK DUCHENEAUX, *Consultant*
MICHAEL D. JACKSON, *Minority Consultant*

NOTE.—The chairman of the full committee is an ex officio voting member of this subcommittee. The first listed minority member is counterpart to the subcommittee chairman.

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we are at the point where we are at the loggerheads with some very strong political Indian groups that are crying that we are exceeding or overstepping ourselves as far as tribal sovereignty is concerned.

Mr. MEEDS. The gentleman from Ohio.

Mr. REGULA. No questions.

Mr. MEEDS. Our next witness is Mr. Raymond Paddock.

Mr. Paddock, delighted to have you here. Please come forward and present your testimony. If you are accompanied by somebody, would you please introduce them to us?

STATEMENT OF RAYMOND PADDOCK, EXECUTIVE DIRECTOR, CENTRAL COUNCIL OF THE TLINGIT AND HAIDA INDIANS OF ALASKA; ACCOMPANIED BY JOSEPH WILSON, NATIVE AGENCY DIRECTOR, SOUTHEAST ALASKA AGENCY, CENTRAL COUNCIL OF THE TLINGIT AND HAIDA INDIANS OF ALASKA; AND DR. WILLIAM CARMACK OF OKLAHOMA

Mr. PADDOCK. Mr. Chairman, I am accompanied by Joe Wilson, who is director of our Southeast Native Agency and Dr. William Carmack of Oklahoma. I would like to make my apologies for President Clarence Jackson, who could not be here to present the testimony.

Mr . Jackson is a fisherman and he had to be at the opening of the fishing in Alaska right now.

I would also like to make apologies to the committee for not having enough copies of our testimony. We are not prepared to present our testimony today on such short notice and the testimony will be delivered before the end of the day to the committee.

Mr. Chairman, basically we are here because we are the result of an experiment by the Bureau of Indian Affairs begun 3 years ago. We have a contract to direct our own Native agency for the Bureau and I believe it is one of three in the Nation. Ours differs in that we have hired our own Native agency director and have hired our own staff and in effect we are an experiment in self-determination.

My name is Raymond Paddock. I am executive director of the Central Council of the Tlingit and Haida Indians of Alaska. I have with me Mr. Joseph Wilson, who is the Native agency director of the Southeast Alaska Agency of the Bureau of Indian Affairs, and Dr. William Carmack of Oklahoma, who serves as a consultant to the central council and who has been a member of the evaluation team which has twice assessed the effectiveness of the council's administration of the Southeast Alaska Indian Agency under its contract with the BIA.

I am here today to offer testimony on behalf of the Tlingit-Haida Central Council in support of S. 1017, the Indian Self-Determination and Education Assistance Act. Although each title of the act is important and should be of considerable benefit to Indian and Alaskan Native groups, I wish to focus my testimony on title I, the Indian Self-Determination Act. The members of the Tlingit-Haida Central Council feel that we are in a unique position to comment on this legislation inasmuch as we have been involved in the administration of our own Southeast Alaska Agency of the Bureau of Indian Affairs for a 3-year period. We have effected this involvement through contracts and continuing program agreements with the Bureau. In spite of

some difficulties and shortcomings in our arrangement, we are convinced that the contracting device does indeed offer to the tribe an opportunity for self-determination not available when BIA programs and services are administered in the conventional way.

The central issue involved is not the nature of Federal services provided to Native groups, or even the amount of Federal expenditures on these services. It is, rather, the question of control of priorities and planning in the process of providing these services. For many decades, the Federal Government has provided to Indian tribes and communities an array of services hoped and intended to meet their often rather special needs. Traditionally these services have been provided for the Native groups by Federal administrators. The purpose of this legislation, as has been the aim of the central council's experiment in contracting with the Bureau for the past 3 years, is to insure the continuing provision of these services and the continuing observance of the Federal trust responsibility in an improved environment where the tribes and communities can become involved in the processes of identifying program priorities and of actually conductng the programs funded by the Federal Government for their benefit.

On balance, we feel that our experiment has been successful, although, as Mr. Wilson will point out shortly, it has not been free of difficulties. One of the important aspects of the proposed legislation is the initiative it extends to Indian tribes to take over programs of their own choosing. The concept of contracting for services is not new. For many years the Bureau of Indian Affairs and other Federal agencies have contracted hundreds of programs to local groups. The important new aspect of this legislation, however, is that under it these contracts no longer will be subject entirely to the sufferance of the Federal Government, but can be initiated by the tribes and Native villages. There is provision for the Government to refuse to enter into a contract, but, if it does, it must detail its reasons for refusal and take steps to prepare the communities and tribes for contracting. Further, this legislation, for the first time in the history of Indian affairs, will mandate contracting as a national policy rather than leaving the decision of whether to use it to the vagaries of the attitudes from time to time of individual officers and agencies administering Indian programs. The provisions of this act are applicable equally to the Secretary of the Interior, who is administratively responsible for the Bureau of Indian Affairs, and to the Secretary of Health, Education, and Welfare, who is administratively responsible for the Indian Health Service. Although several other Cabinet officers administer specific Indian programs, these two operate the most important by far to the Indian communities. Thus, the opportunity this legislation will afford the tribes to coordinate the administration of the major programs should go far to secure a unity and integrity in their conduct and results not previously experienced.

I would like to highlight an anomaly that, in my view, has caused years of delay in implementing the concept of local control of federally funded Indian programs. Typically, Native tribes and communities have not had among their number persons trained in operating sophisticated educational, medical, social, and economic programs. Thus, the position of Government administrators has been essentially that while they might wish to surrender control of services and programs to local

Indian communities; they feel that there are no Native individuals within those communities capable of discharging the required level of administrative responsibility.

Here is the paradox! For many years, the Federal Government has funded programs in non-Indian communities across the Nation, such as housing construction, hospital construction, airport construction and the like. In addition, Federal impact funds have been channeled into local schools near military bases. Most of these programs have been administered by local government officials and entities, but not necessarily managed and operated by residents of the community. A typical small community in the United States might have a mayor and a city council who are ultimately responsible for the administration of local programs. But these officers and agencies frequently reach out for personnel to actually manage the provision of community services; thus, a fire chief, a chief of police, a superintendent of schools, and the like will be appointed by and responsible to a local elected body. But such administrators often do not come from the community they serve.

It is not born and raised in the community. What is important is that they understand as administrators of local services that they are responsible to the community. Indeed, if their performance is not sensitive to community needs, they can be replaced by the local governing body. Why then do we require that Native communities grow their own professional expertise? Hopefully, that is being done and, increasingly, will continue to be done. But, in the meantime, must Indian communities stand aside and submit to external control of services simply on the ground that presently they do not number among their citizens people who have graduate degrees in education, previous experience in law enforcement administration, and the like. This legislation will empower Native communities to perform in much the same way as other American communities have performed in the past. We will have within an elected governmental entity the power to administer federally funded programs. Of course, we will be obliged to account for our stewardship both as to handling of funds and quality of services. To acquit our responsibilities, we will select from among our own members or from outside, the kinds of people who can be most effective in the actual provision of the services for which we are responsible. As I have indicated, this is not a new concept. It is the modus operandi of local governments throughout the United States, except in Native communities. I believe that the power to contract with the Government to administer ourselves Federal programs for our benefit is the key finally to achieving the often stated national goal of Indian self-determination.

Mr. Wilson, who is responsible for the administration of the Southeast Alaska Agency, has served as the administrator of the kind of program this act envisions for the past 3 years. He will comment more specifically upon the provisions of the legislation.

Mr. MEEDS. Very well. We will wait until you both finish your testimony. Do you have a statement here you want to read or to summarize?

Mr. WILSON. I would like to read it, Mr. Chairman.

Mr. MEEDS. All right. Please proceed.

Mr. WILSON. It is my pleasure to come before your committee. I did appear before your committee once before when you held hearings in Juneau, Alaska, in August of 1973.

My name is Joseph Wilson. As an officer and employee of the Central Council of the Tlingit and Haida Indians of Alaska, I serve as the Native agency director of the Southeast Alaska Agency of the Bureau of Indian Affairs. For approximately 3 years, I have served as principal administrator of the Southeast Alaska Agency under a contract between the central council and the Bureau of Indian Affairs.

I have reviewed the Indian Self-Determination Act, title I of S. 1017, in the light of our experience in implementing the kind of contractual relationship this bill would further authorize. I fully concur with Mr. Paddock that, although our relationship with the BIA under our contract has been at times difficult and cumbersome, we feel the arrangement has been markedly successful in terms of the people we serve. There is a level of commitment and interest on the part of the Indian people under their own administration that was not achieved when these programs were administered directly by the Bureau of Indian Affairs. Further, we have been able to shape and mold the programs of the Agency to the real needs of our people much more subtly and effectively than was the Bureau under conventional administration. I woud like to submit for the record a copy of our recent semiannual report which details the accomplishments of the programs we administer.

Mr. Chairman, I have two copies here that I would like to present to you at this time.

I would like to specifically call to the attention of the committee the section on education of the young. This has been one of our highest priorities in Alaska, and one of the most difficult programs to handle effectively. We are proud of the program innovations effected under our management contract and suggest that they serve as an example of the kind of program improvements that are possible when Indians are given the ability to administer their own affairs. I would now comment briefly on seven specific provisions of the act.

I am pleased to notice that provision has been made in the bill for advance payment for administrative services. Unfortunately, the Juneau area office of the Bureau of Indian Affairs was not in a position to advance administrative expenses under our contract. Indeed, 17 months elapsed between the time we commenced our administration of the BIA Agency and our first reimbursement from the Bureau. During that period, the central council had to borrow from a local bank approximately $100,000 to fund administration of this contract. When we were finally paid by the Bureau, the interest on this debt was disallowed. Happily, we were in a financial position to operate for 1½ years without reimbursement. Obviously, small Native communities or Indian tribes without financial resources could not participate in this kind of contract arrangement. Advanced funding in those cases will spell the difference between taking advantage of the concept of self-determination or not.

I also appreciate the provision in the bill for contracts ranging from 1 to 3 years in duration, assuming annual funding. Unfortunately, for most of the 3-year period that we have engaged in the administration of our own agency we have been operating under short-term extensions of our original 1 year contract with the Bureau, rather than under a firm contract. First, after we received our original contract, authority for contracting was questioned by the Bureau and numerous other

procedural details seemed to make it impossible for the Juneau area office to come forward with a specific binding annual contract.

On two occasions a review team representing both the central council and the BIA has convened to evaluate the Agency and its performance. One of the recurring problems the team found was the failure of the BIA to be ready at the proper time with a specific contract. Instead a series of delays have resulted in a kind of ongoing agreement in which authority is not really transferred on a firm basis, and personnel are not certain whether they work for the central council or the BIA. This has resulted, as one would expect, in morale problems and considable confusion among employees. This bill, had it been the law 3 years, ago, would have been enormously helpful in this area.

I am pleased that this act provides for retrocession of the administration of programs by a tribe to the Bureau. I support the provision not because I think tribes will find themselves unable to handle their new administrative responsibilities, but because it will provide them with a weapon against possible funding discrimination on the part of the Bureau. When funds are in short supply, it might be tempting for an area office of the Bureau to adequately fund those programs and agencies under its own supervision and skimp on those contracted to tribes. If this should happen frequently enough to establish a pattern, a tribe would have recourse to recall the Federal administration and rectify these inequities.

It occurs to me, however, that the use of the term "retrocession" and the phraseology of the proviso in section 106(d) is awkward and may be confusing. Ordinarily, the right of a party to abrogate a contract is spoken of as a right to rescind or cancel, not as a right to "retrocede" the contract.

I take it that the provision is intended to give a tribe the right to cancel a contract in whole or in part on 120 days notice, in which event the Agency with whom it was made would be required to resume the administration of all programs and the provisions of all services that were covered by the contract on a nondiscriminatory basis.

I believe it might be more artfully drafted to express this intent.

One of the most difficult and confusing aspects of our experience in contracting has been the realtionship between the Native agency administration and the BIA personnel retained in the various branches. This bill clearly spells out for the first time the rights and privileges of a Federal civil servant who finds his position contracted to tribal administration. In essence he has a 2-year period and, at the request of both parties, an additional 2-year period to either serve out his tenure, decide whether he wishes to transfer to another Federal position, or become an employee of the contracting tribe. Had we been able to offer this kind of opportunity and option to Federal employees at our Agency, we would have reduced dramatically the morale problems we have experienced. We have chosen not to replace all BIA personnel with our own employees. As Mr. Paddock indicated, we do not feel it is necessary that services be performed solely by Tlingit-Indians or by employees of the central council.

We know that there are many dedicated effective employees of the Bureau of Indian Affairs, and it has been our policy to encourage them to stay on in their positions under our administration. We do not feel

it is critical that they come from our communities, but we do know it is critical that they understand that they work for our communities. On balance, we are pleased with their services and commitment. From time to time as positions become vacant by resignation, retirement, or transfer of incumbents, we may refill them with local people, but only if we can find local people with the necessary experience and competence. In the meantime, we enjoy a good working relationship with the personnel we inherited from the Bureau at the time we commenced operations under the Agency management contract.

In passing, I would note that this legislation specifically protects Native groups against any erosion of the trust responsibility. Self-management has been delayed in years past because groups have feared that any initiative on their part to administer federally funded programs might be a step toward termination. Fortunately, the language of this bill speaks to this point very directly and reassuringly. Tribal administration of federally funded services must not lead to a reduction in Federal trust responsibility.

The detailed time table specified in this legislation for its implementation is salutory. As I indicated earlier, we have had serious problems with the Juneau area office in connection with the preparation of contracts on time. In fact, 18 months ago, the contract review committee recommended that a firm contract be negotiated by January of 1973. The area office was not able to accomplish this and suggested as an alternative July 1, 1973. The central council agreed to this date but it was not met. Finally, the review team, about 18 months later, noted that there still was no contract and no reasonable expectation that one would be ready even by July 1, 1974. This act will serve to stimulate the Bureau to regularize and expedite its contract processes so that this kind of delay and confusion can be avoided.

I wish, finally, to commend the provisions of this act which require consultation with Indian organizations prior to the promulgation of rules and regulations. We are vastly better prepared than we were a decade or two ago to meaningfully participate in and contribute to the process of rulemaking. Most Native groups now have among their number, or available to them, professional people such as attorneys, accountants and the like. All too often the kind of consultation called for in this legislation has resulted simply in powerless and rather vacuous advisory boards. We trust the recent experience of the Department of the Interior, in connection with the drafting of land selection regulations under the Alaska Native Claim Settlement Act, has convinced it that the Native people will no longer be shunted aside in the process of preparing administrative rules to implement legislation designed for their benefit.

In summary, based on 3 years of contracting experience, we are convinced that the devices provided by this legislation are well designed to bring real self-determination and local control to Native communities. We look forward under this legislation to a far smoother and more effective relationship with the Bureau and with our own constituents than has been possible without it. For these reasons, we strongly endorse the Indian Self-Determination Act.

Mr. MEEDS. Fine, thank you gentlemen.

Mr. Wilson, would you describe some of the types of programs in which the Tlingit-Haida Central Council is presently administering?

Mr. WILSON. Under this contract?

Mr. MEEDS. Yes.

Mr. WILSON. We provide the social services program. Also, we provide the adult vocational training, the direct employment and housing improvement, and we administer one day school in our Agency and one field office.

Mr. MEEDS. What kinds of social services are you involved in?

Mr. WILSON. We are involved in the general assistance program and also we provide emergency assistance to the aged and also we provide temporary foster home placement of children.

Mr. MEEDS. And you would conclude on balance, that while there have been some problems, you have been relatively able to handle those?

Mr. WILSON. Yes.

Mr. MEEDS. Mr. Paddock, do you have a copy of the bill?

Mr. PADDOCK. Yes.

Mr. MEEDS. Would you turn to page 4, section 4(b), the definition for "Indian tribe" and it means "Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States."

And I would ask if it is your feeling that Tlingit-Haida Central Council would fit under that description?

Mr. PADDOCK. We do have one small problem with that. Under the Alaska Native Claims Settlement Act, there were also 12 regional corporations named.

Now the Agency that administers this contract is a regional corporation. And I believe this would be clarified if regional corporations were entered under section 4(b).

Mr. MEEDS. Actually, if we were to put right after "Native villages" if we were to put "or Native regional corporations" that would take care of that problem.

Was your organization authorized by the Settlement Act? Wasn't it in existence prior to the Settlement Act?

Mr. PADDOCK. Yes, it was.

Mr. MEEDS. Was it not specifically excluded?

Mr. PADDOCK. All of the regional corporations named in the Settlement Act were nonprofit corporations, Mr. Chairman. There have since been named 12 other profitmaking corporations so there are now 24 Native corporations in Alaska.

Mr. MEEDS. Counsel reminded me of that.

Mr. PADDOCK. The profitmaking corporations do not deal in human services.

Mr. MEEDS. What we are going to have to do is include those regional corporations and other organizations as chartered by regional corporations, or how do you think we should take care of that?

Mr. PADDOCK. Well, in our case it wouldn't be a problem because we are federally recognized as a tribe in existence before the act. However, in the others there may be some clarification needed for their

benefit. I would think that the nonprofit corporations in the other 11 regions would be the ones interested in this bill.

Mr. MEEDS. OK, thank you very much. We appreciate your testimony.

The gentleman from Ohio.

Mr. REGULA. Mr. Paddock, in what way do you think the services performed by your group have been an improvement as compared to the BIA process?

Mr. PADDOCK. Well, I think there has been a distinct improvement. When we went after this contract, we went after it because we wanted it and we are administering it with a great deal of enthusiasm. Let me give you one example. When the BIA had the contract they were about 130 of our kids in college. With our own administration we now have this year 440 in college.

When the BIA, when the Bureau of Indian Affairs had it, the dropout rate was about 30 percent. We've got that down to about 7 percent I believe.

Mr. REGULA. How many students are in the program?

Mr. PADDOCK. In higher education?

Mr. REGULA. Well, don't you have elementary and secondary too?

Mr. PADDOCK. Maybe Mr. Wilson could answer that. In higher education we have 440.

Mr. REGULA. But how many do you have under your total direction?

Mr. WILSON. As I mentioned before, we administer one BIA operated base school in our agency and they have an enrollment of not more than 20 students. It is an elementary school. We also process applications for students that attend BIA boarding schools that are not under our agency operation but are almost a separate agency organized in the Bureau of Indian Affairs. We process probably not more than 60 applications of that nature to various BIA boarding schools, primarily the boarding school located at Sitka Alaska; the Rangle Institute located at Rangle, Alaska; and we send still a few students to Chemawa Indian School.

Mr. REGULA. Do you operate a high school?

Mr. WILSON. We do not operate a high school.

Mr. PADDOCK. There is a BIA high school but it is not part of our agency.

Mr. REGULA. What does your agency do with the college students?

Mr. PADDOCK. With the college students? We fund them. We help them. We also counsel the precollege students to encourage them to enter into college then we provide the funding to get them through college.

Mr. REGULA. In reality then you are not operating a school system from kindergarten through 12?

Mr. PADDOCK. No we are not.

Mr. REGULA. Your experience is simply limited to funding students in a college of their choice.

Mr. PADDOCK. That is right.

Mr. REGULA. What is your budget for these services?

Mr. WILSON. OK. I think if you can refer to the report that I gave to you, it describes the number of students we had in the program,

when we first took the administration of the grant in aid program over, and so on. In 1971 the numbers of students that were in the program at that time were 156 and it just increased up to the present time where we have approximately 420 students in the program. Next year we anticipate over 550 students in the program.

Mr. REGULA. What is the administrative cost of your operation? You show us here the total expenditure, which I assume is for the grants and aid to the students——

Mr. WILSON. Yes.

Mr. REGULA [continuing]. But how much does it cost to operate your program and get these grants and aids out?

Mr. WILSON. OK. I think I mentioned in that report that contract that we have with the Bureau to administer this program is for $30,000. It provides for one full time education coordinator to head up the program and one secretary. We have a dire need, as I mentioned in my report, with the increased number of students, to add an additional position as a counselor.

Mr. REGULA. Well, neither of you are involved in that role in working directly with the agency?

Mr. WILSON. I am the Native agency secretary of the Southeast Alaska Agency. When we entered into the contract with the Bureau to administer the agency program I replaced the traditional BIA superintendent.

Mr. REGULA. That is all.

Mr. MEEDS. Thank you very much, gentlemen. We appreciate your testimony.

Our next witness is Dr. Myron Dickey, Utah State University, Logan, Utah.

Dr. Dickey, please come forward.

STATEMENT OF DR. MYRON DICKEY, UTAH STATE UNIVERSITY, LOGAN, UTAH

Dr. DICKEY. Mr. Chairman, and others, it is a pleasure and honor for me to be here with you today. I am only going to take 5 minutes or less and probably not that.

Mr. MEEDS. Evidently you operate under the rules of the House. The rules of the House limit it to 5 minutes.

Dr. DICKEY. Yes. Due to the fact I was unable to prepare a prepared statement for you, I will submit one after these hearings.

Mr. MEEDS. Without objection, it will be entered at this point in the record.

[The statement of Dr. Myron Dickey was not received by the subcommittee when these hearings were printed. If received at a later date it will be placed in the file.]

Dr. DICKEY. I am neither an Indian expert nor an expert Indian although I am part Cherokee. My major qualification for being on this witness list is that I am greatly concerned about how much this bill can help the Indian people in this country. So If I can give you the benefit of our experience in Utah State University in Indian programs, and thereby help the bill, I think my trip to Washington will be worthwhile.