

Comments for the Hearing record on:

HR 740 – The *Southeast Alaska Native Land Entitlement Finalization and Jobs Protection Act*

Statement of Matthew D. Kirchhoff

I am a Wildlife Research Biologist with 30 years of work experience in Southeast Alaska, most with the Alaska Department of Fish and Game (now retired). During my career, I studied wildlife habitat relationships in old growth and young-growth forests. I was a member of the interagency viable populations committee that in 1991-92 developed the Wildlife Conservation Strategy and associated old-growth reserve system currently in place on the Tongass. I am familiar with the legislative and political history of the Alaska Native Claims Settlement Act (ANCSA), and am familiar with Sealaska's forest management practices, having previously served on a technical advisory committee to offer peer review of herbicide and thinning treatments for the Corporation's logged lands. My work in Southeast Alaska has taken me to nearly all of the areas under consideration in this bill. I have also examined the proposed selection areas from maps, aerial photography, and U.S. Forest Service GIS layers.

*The Issue.*—Consistent with provisions of ANCSA and the Alaska Land Transfer Acceleration Act, Sealaska Corporation identified priority lands on the Tongass National Forest from which their final entitlement of approximately 65,000 was to be conveyed. These selections were within areas that Sealaska itself helped to identify and supported in testimony to Congress in 1975. Instead of finalizing those selections, Sealaska has directed the Bureau of Land Management (BLM) to not convey its final settlement while the corporation pursues more lucrative public lands via the legislation now under consideration (S 340 and HR 740).

The new land Sealaska seeks is far more valuable economically than the lands the corporation's current entitlement. The new land contains more and higher-quality timber, as well as valuable infrastructure (roads, bridges, culverts, and log-transfer facilities). The exact difference in valuation is unknown, as there has been no appraisal of the lands involved in the proposal. While Sealaska is fully deserving of its legal land entitlement as provided for under existing ANCSA law, the pending legislation expands that entitlement at significant and unjustifiable cost. Moreover, I believe that the Congress has been misinformed by advocates for this proposal.

Two themes pervade the Sealaska testimony, and are echoed by the Alaska delegation: (1) Sealaska was treated unfairly in the 1971 settlement and a remedy is needed, and (2) the legislation provides the public with a net conservation benefit, and is in the public interest.

Neither of these claims is valid, and the testimony below explains why.

### **Was Sealaska treated unfairly in the Alaska Native Claims Settlement Act?**

*Settlement basis.*-- Sealaska has stated that because the Tlingit and Haida Indians once occupied large portions of Southeast Alaska, any settlement that grants a small percentage of the land into Native

ownership is inherently unfair. While there is appeal to that argument, the Alaska Native Claims Settlement Act intentionally avoided a settlement model based on aboriginal use or title.<sup>1</sup> Instead, Congress intentionally followed a less litigious path, granting title to a portion of the lands, and making cash payments to newly established Native corporations to satisfy aboriginal rights to the balance.<sup>2</sup> Natives across Alaska, including those in Southeast Alaska, endorsed the construct and terms of this settlement.

*Acreage Conveyed.*-- Sealaska has argued that because their Corporation received less land than other Regional Native Corporations, the settlement was demonstrably unfair. Section 16 of ANCSA explains that Southeast Alaska would receive less land because the US Government had settled with the Tlingit and Haida of Southeast Alaska three years prior.<sup>3</sup> Sealaska may still argue that the combined settlements are unfair, but the lands conveyed to Sealaska under ANCSA were different from other Corporations for a reason. It was not the result of a Congressional oversight, or slight.

*Constraints on Selection Areas.*— Sealaska has testified that they were prevented from selecting the best timberlands in Southeast Alaska because much of the forest was obligated under two long-term timber contracts. Congress specifically provided that timber contracts would *not* alienate Native land selections<sup>4</sup>. In fact, Sealaska lobbied Congress in 1975 for the right to select its land specifically from within the Village Corporation selection areas; and Sealaska's request was approved by Congress in legislation in 1976. In testimony to Congress, Sealaska argued such selections would help achieve economies of scale with Village Corporation logging operations to make both more efficient and profitable.<sup>5</sup> As a result, within the requested selection areas, Sealaska Corporation was able to select timberlands of greater than average volume and greater profit potential than on the Tongass overall.

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<sup>1</sup> "The pending bill does not purport to determine the number of acres to which the Natives might be able to prove an aboriginal title. If the tests developed in the courts with respect to Indian Tribes were applied in Alaska, the probability is that the acreage would be large—but how large no one knows. A settlement on this basis, by means of litigation if a judicial forum were to be provided, would take many years, would involve great administrative expense, and would involve a Federal liability of an undeterminable amount." (House Interior and Insular Affairs Committee Report to accompany H.R. 10367 (House Report No. 92-523).

<sup>2</sup> "The Committee found no principle in law or history, or in simple fairness, which provides clear guidance as to where the line should be drawn for the purpose of confirming or denying title to public lands in Alaska to the Alaskan Natives. The lands are public lands of the United States. The Natives have a claim to some of the lands. They ask that their claim be settled by conveying to them title to some of the lands, and by paying them for the extinguishment of their claim to the balance...A second factor is the interest of all of the people of the Nation in the wise use of the public lands." (House Interior and Insular Affairs Committee Report to accompany H.R. 10367 (House Report No. 92-523).

<sup>3</sup> SECTION 16. The Tlingit-Haida Settlement. (c) Provides that "funds appropriated by the Act of July 9, 1968 (82 Stat. 307), to pay the judgment of the Court of Claims (in the case of the Tlingit and Haida Indians of Alaska, et al. against the United States) and distributed pursuant to the Act of July 13, 1970 (84 Stat. 430) are in lieu of the additional acreage to be conveyed to qualified villages listed in section 11."

<sup>4</sup> SECTION 15. Timber Sale Contracts. Authorizes the Secretary of Agriculture to modify existing National Forest timber sale contracts that are directly affected by conveyances authorized by this act.

<sup>5</sup> Testimony of John Borbridge, President, Sealaska Corporation: Hearing on S. 131 et al. before the Senate Committee on Interior and Insular Affairs, 94th Cong. 184-85 (1975). "We would greatly prefer to satisfy our 14(h)(8) rights out of lands in the areas that were withdrawn by section 16(a) for the 10 villages in the southeastern region. Basically we are desirous of selecting lands for timber values... areas could be combined with lands conveyed to the Village corporations to form better management and economic units." As reported by Alaska Congressman Don Young, the selection proposal endorsed by Sealaska "embodies a

Land Valuation.— It is the value of the acres conveyed that best speaks to the fairness of the settlement. While Sealaska did not receive as much land as other corporations, the land contained extraordinary natural resources in the form of old-growth timber—a valuable commodity in Pacific Rim markets. In 1983, the appraised value of the timber on their conveyed land was 297 million dollars (674 million in today’s dollars). This one resource, held by one corporation, accounted for 32% of the book value for all known natural resources (including oil and gas) on all Alaska Native Corporations at the time.<sup>6</sup> When ANCSA was passed, Sealaska ranked near the top of the 12 Regional Corporations in terms of booked asset value (land, natural resources, and cash). The Corporation may now feel it deserves more, but the settlement was actually favorable for Sealaska.

Revenue sharing.— In fairness, not all of the timber value on its lands accrued to Sealaska. Under Section 7(i) of ANCSA, 70 percent of the net profit on developed natural resources (timber, minerals, oil) had to be shared equally among the other Regional and Village Corporations.<sup>7</sup> To date, Sealaska has contributed 317 million dollars from logging to other Native Corporations<sup>8</sup>. This speaks to the high value of the timberlands Sealaska received, and a system designed to ensure that corporations with inherently lower value lands received some of the benefit from lands that had high natural resource value (e.g., timber lands owned by Sealaska, lands with oil owned by Arctic Slope Regional Corporation and Cook Inlet Region Inc., or mineral-rich lands owned by Nana Corporation).

Net Operating Loss windfall.— Sealaska received another significant benefit that it was able to capitalize on because of its timber holdings: the sale of Net Operating losses (NOLs).<sup>9</sup> Through special legislation applicable only to Alaska Native Corporations (ANCs), it was possible for ANCs to sell losses during a brief period (1986-88). Three Corporations—Sealaska, Cook Inlet Region Inc., and Doyan—benefited the most, receiving 60% of the 426 million dollars (814 million in today’s dollars) generated by NOL sales.<sup>10</sup>

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compromise negotiated and supported by Sealaska, the State of Alaska, Native villages in the region and various environmental groups.” (Congressional Record, Dec. 16, 1975)

<sup>6</sup> Colt, S. 1991. Financial Performance of Native Regional Corporations. University of Alaska Anchorage, Institute of Social and Economic Research. Volume 28(2). [http://www.iser.uaa.alaska.edu/Publications/8\(a\)/e-book%20layout/C/C.2/colt\\_financial%20performance.pdf](http://www.iser.uaa.alaska.edu/Publications/8(a)/e-book%20layout/C/C.2/colt_financial%20performance.pdf)

<sup>7</sup> This is one of the most unusual provisions ever imposed upon a business organization. A large part of the rationale of Section 7 (i) was based on a sense of fairness. Alaska Native leaders and Congress realized that many of the regional corporations would acquire land with few timber or natural resource values, while a few corporations have rich potentials. Section 7 (i) underscores the unique role Congress originally envisioned for the Native corporations. The Native corporations were not seen merely as profit-making institutions, but also as vehicles to provide for a degree of equity among Alaska Natives. <http://www.alaskool.org/projects/ancsa/annanCSA.htm>

<sup>8</sup> Albert Kookesh, Chair of Sealaska [http://www.sealaska.com/object/io\\_1366159191991.html](http://www.sealaska.com/object/io_1366159191991.html)

<sup>9</sup> Although Sealaska was making profits on its logging operations, the market value of the timber was in decline during the late 1970s and early 1980s. Sealaska successfully argued that they suffered large losses because they were unable to capture full value at the market peak due to delayed conveyance of land. The calculated loss was the difference in stumpage value at market peak, minus the stumpage value when logged. That loss could then be sold to other Corporations that wanted to reduce their own tax liabilities.

<sup>10</sup> Colt, S. 1991. Financial Performance of Native Regional Corporations. University of Alaska Anchorage, Institute of Social and Economic Research. Volume 28(2). [http://www.iser.uaa.alaska.edu/Publications/8\(a\)/e-book%20layout/C/C.2/colt\\_financial%20performance.pdf](http://www.iser.uaa.alaska.edu/Publications/8(a)/e-book%20layout/C/C.2/colt_financial%20performance.pdf)

Unlike the revenues generated from the sale of timber, the > 100 million dollars in revenue generated from sale of NOLs on its timber holdings accrued fully to Sealaska Corporation.

*Fairness.*--In answering the question, "Was ANCSA fair in how Sealaska was treated?" it is clear that Sealaska fared quite well compared to many other Corporations. Sealaska believes it deserves more, just as other Alaska Native Corporations probably believe. However, in 1971 Congress arrived at a negotiated land claims settlement which had strong bipartisan support, and was strongly endorsed by most Native Alaskans. Congress may wish to provide more public land and old-growth timber to Sealaska as a benefit, or as an economic driver in the region. However, they should not act in the belief they are repairing an unjust settlement.

*Precedent.*-- Congress may reevaluate the land claims settlement, and decide that Sealaska Corporation deserves more. If Congress does make that decision, it should be prepared for others to make similar cases, some with much more compelling facts than Sealaska. The most immediate example is a group of five villages that were not qualified under ANCSA for village status, and received no land or money.<sup>11</sup> Legislation has already been introduced by the Alaska delegation to recognize and compensate them with money and land.<sup>12</sup> Other Native Corporations in the state, both Village and Regional, have hundreds of thousands of acres of entitlement, not yet conveyed.<sup>13</sup> Should the Sealaska proposal to reopen and rewrite the most basic terms of ANCSA be approved by Congress, these corporations will no doubt be under pressure from shareholders to avail themselves of this precedent and seek similar favor.

### **Does this legislation provide a net conservation benefit?**

Of the two bills that have been introduced this session of Congress, the Senate version (S 340) includes designation of conservation lands, includes increased buffers on some salmon streams, and designates fewer future sites than the House bill (HR 740). Because the Senate bill is more conservation oriented, I focus on it in the following comments.

*The claims.*-- Sealaska has made the claim that S 340 provides the public with a net conservation gain because they would (a) log fewer old-growth acres under this legislation, and (b) set an additional 150,000 acres aside for conservation. Each of these claims will be addressed in turn comparing the situation under ANCSA (current), and under S 340 (proposed).

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<sup>11</sup> Gorsuch L., S. Colt, C.W. Smythe, B.K. Garber. 1994. A study of five southeast Alaska communities. Report prepared for the USDA Forest Service, DOI Bureau of Land Management and Bureau of Indian Affairs. By Institute of Social and Economic Research, University of Alaska Anchorage, 128 pp. <http://www.iser.uaa.alaska.edu/Publications/StudyOf5-SE-AK-Communities.pdf>

<sup>12</sup> S.1746 and HR 1306. Unrecognized Southeast Alaska Native Communities Recognition and Compensation Act A bill to 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. <http://www.govtrack.us/congress/bills/112/hr1306>

<sup>13</sup> While approximately 96% of settlement lands have already been conveyed, the sheer size of the 44 million acre program means that there remain hundreds of thousands of acres as yet to be finally conveyed by the Bureau of Land Management.

The comparison is between the priority lands Sealaska has identified for selection within the Village Corporation “boxes”, versus the lands they seek for timber development under S 340. The exercise is imprecise because Sealaska has identified 138,830 acres of priority lands in the boxes, of which only half will actually be conveyed. Because the final acreage has not been selected or mapped, I assume for this analysis that the acreage actually selected will be representative of the priority lands as a whole.

*Old Growth Acres Comparison.*-- The acres of each habitat type within the ANCSA priority areas, and each of the legislative proposals, is shown in Table 1. Assuming the same entitlement under either scenario (~ 68,000 acres), the proposed land selection under S 340 would log about 9,000 acres less old growth. This is a positive for wildlife, because old-growth acres have higher habitat value than young growth acres. However, a look at the quality of those acres paints a clearer picture.

**Table 1.** Acreage of different forest types in ANCSA priority selection areas, and in legislative proposals S 340 and HR 740. The big difference is in large-tree forests (highlighted).

<i>Forest Type</i>	<i>ANCSA Priority</i>	<i>ANCSA Selection</i>	<i>S 340 (ac)</i>	<i>HR 740 (ac)</i>
Non-Forest	12,544	6,272	1,148	1,097
Non-Productive Forest	61,061	30,530	6,260	5,833
Young Growth	4,848	2,424	22,117	22,088
Old Growth Size Class 4	29,465	14,732	7,441	7,081
Old Growth Size Class 5	21,517	10,759	11,057	10,868
Old Growth Size Class 6/7	9,171	4,586	20,692	20,290
Total	138,607	67,103	68,715	67,257

*Old-Growth Quality.*— Old growth quality varies widely, both from a timber standpoint and from a wildlife habitat standpoint. The timber yield on a single acre of productive old growth can range from 8,000 board feet per acre to over 200,000 board feet per acre. The large-tree forests were never abundant on the Tongass, and have been heavily targeted for logging over the past century. Today, the large-tree old growth (size class 6/7) occurs on just 3.4% of the Tongass forest<sup>14</sup>. The extremely large trees, once classified as size class 7, are so rare they are no longer tracked by the Forest Service. But they still exist, often in small alluvial and colluvial fans, along salmon streams, or as small inclusions within the large-tree (class 6/7) habitat type.

*Value of Large-tree old growth.*—Size class 6/7 stands are rare and extremely valuable. The heavy emphasis on logging of rare large-tree stands on the Tongass has long been a concern of wildlife biologists.<sup>15</sup> Those concerns were echoed by a Congressionally-appointed blue-ribbon panel of peer

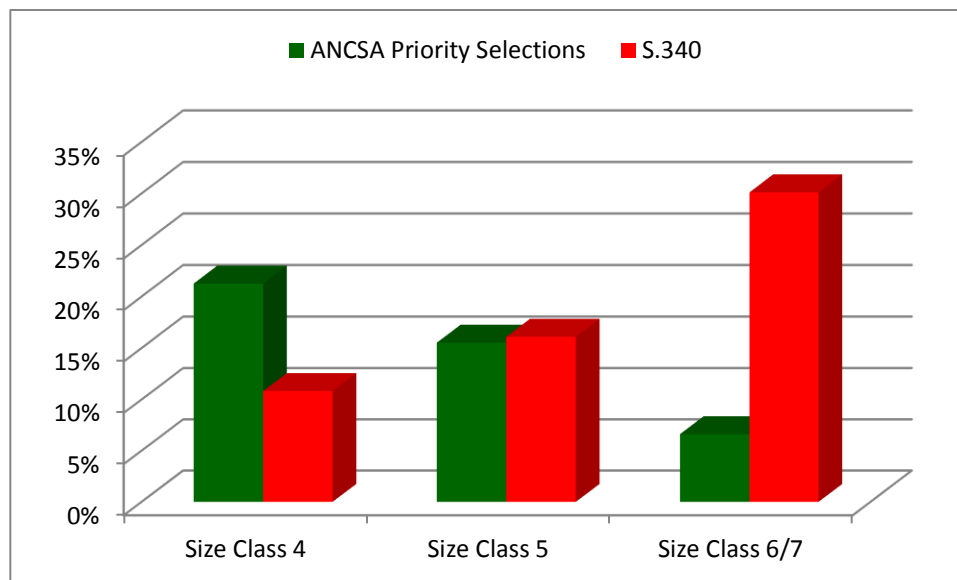
<sup>14</sup> Myers, E.F., N.J. Walker, M.D. Kirchoff, and J. W. Schoen. 2012. High-grading on the Tongass National Forest: Implications of Pending Land Selections on Forest Diversity. Report by Audubon Alaska, Anchorage, AK. [http://ak.audubon.org/sites/default/files/documents/audubon\\_s730-hr1408\\_high-grading\\_white\\_paper\\_-\\_oct2011\\_final.pdf](http://ak.audubon.org/sites/default/files/documents/audubon_s730-hr1408_high-grading_white_paper_-_oct2011_final.pdf)

<sup>15</sup> Wildlife Society News, fall 2012. <http://news.wildlife.org/twp/2012-fall/tws-helps-save-the-tongass/>

reviewers<sup>16</sup> and reflected in a national position statement on management of old-growth forests on the Pacific coast of North America.<sup>17</sup> In the 1990 Tongass Timber Reform Act, Congress acted to ban the disproportionate logging of big-tree stands (known as high-grading).<sup>18</sup> Still, concerns about on-going high-grading on the Forest continue today.<sup>19</sup>

When one examines the distribution of Acres by tree size class in the lands being sought by Sealaska, The Corporation is clearly seeking to move their selections into the rare large-tree old-growth stands (Figure 1). In addition to high-grading big trees on well-drained soil types (including karst), the Corporation is also targeting ancient cedars<sup>20</sup> which are a high-value species.

**Figure 1.** Tree size-class distribution of old-growth to be logged under ANCSA (green) versus S 340 (red). The graph reflects productive old-growth acres, and follows habitat classifications recognized by the US Forest Service (size class 4 = small trees, and size class 6/7 = very large trees).



Young-growth.-- Sealaska has shifted some of their selections (~ 9,000 acres) from old-growth forest to highly productive young-growth forest. The old-growth inclusions in these managed landscapes can be

<sup>16</sup> Joint statement of members of the peer review committee concerning the inadequacy of conservation measures for vertebrate species in the Tongass National Forest. Land Management Plan of Record. <http://tongass-fpadjust.net/Documents/Appeals/NRDC/TLMP%20appeal%20Attachment%20C%20-%20NRDC.pdf>

<sup>17</sup> Final TWS Position Statement Conservation and Management of Old-growth Forest On the Pacific Coast of North America. [http://joomla.wildlife.org/documents/positionstatements/38-final\\_old\\_growth2207.pdf](http://joomla.wildlife.org/documents/positionstatements/38-final_old_growth2207.pdf)

<sup>18</sup> Contractual Modification Requirements of the Tongass Timber Reform Act. United States General Accounting Office. March 1991. <http://www.gao.gov/assets/220/213886.pdf>

<sup>19</sup> Albert, D.M. and J.W. Schoen. *In press*. Use of historical logging patterns to identify disproportionately logged ecosystems within temperate rainforests of Southeast Alaska, *Conservation Biology* xx:xxx.

<sup>20</sup> Carstensen, R. 2013. Sealaska Lands Bill S. 340. Global treasures in the karst & cedar shell game. <http://gsacc.net/wp-content/uploads/2013/05/GSACC-S.340-SEAWEAD-Appraisal.pdf>

quite important for wildlife and biodiversity<sup>21</sup>, and the highly productive second-growth stands on productive soils types are good candidates for restoration.

The United States Forest Service has testified that Sealaska’s young growth selections include some of the very oldest young growth (i.e., closest to the age of commercial harvest), and the USFS had been planning to use in transitioning to a second growth-based industry.<sup>22</sup> If Sealaska receives these trees they will not be available to the USFS to support the Tongass Transition.

*Conservation Value.*--One way of quantifying the conservation value of the acres proposed under ANCSA versus S 340 is to use a conservation score that reflects a broad spectrum of wildlife and habitat resource values. The conservation assessment conducted by The Nature Conservancy and Audubon Alaska assigns an index value to every acre of land based on modeled value to black bears, brown bears, deer, murrelets, five species of salmon, and important habitat types.<sup>23</sup> The models discount value for watersheds with roads. This analysis allows us to reflect the relative conservation value of each legislative option (ANCSA versus S 340 versus HR 740) based on mean conservation score. From this analysis, the conservation values of the S 340 and HR 740 lands are approximately 3 times greater than the ANCSA priority lands (Table 2 and Figure 3). From a conservation standpoint, it would be more desirable for Sealaska to log its current ANCSA entitlement than the new lands it seeks.

**Table 2.** *Acreage broken down by Conservation score (across top) by legislative proposal (down side). Higher scores equate with higher conservation value. The mean conservation score for lands Sealaska seeks for logging (S 340 and HR 740) are nearly 3 times higher than the conservation values for the lands within the current ANCSA selection areas.*

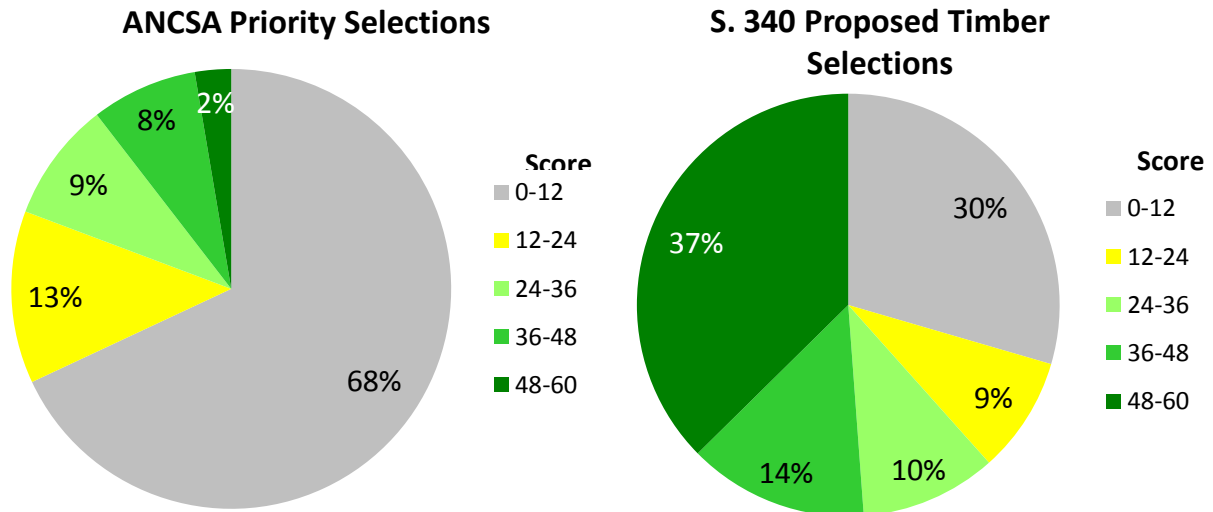
	>=0, <12	>=12, <24	>=24, <36	>=36, <48	>=48, <=60	Total	Mean Score
ANCSA Priority Selections	93,521	17,432	12,116	10,722	3,660	138,607	11.4
HR.740 Timber Selections	20,848	6,266	7,291	9,221	24,986	67,257	28.7
S. 340 Timber Selections	20,357	6,131	7,193	9,512	25,788	68,715	29.6

<sup>21</sup> Houde, I., S. Leech, F.L. Bunnell, T. Spribille, and C. Björk, S. 2007. Old forest remnants contribute to sustaining biodiversity: The case of the Albert River valley. *BC Journal of Ecosystems and Management* 8(3):43–52. [http://www.geobotanik.org/spribille/documente/albert\\_river.pdf](http://www.geobotanik.org/spribille/documente/albert_river.pdf)

<sup>22</sup> Statement of Jim Pena, Associate Deputy Chief of the United States Forest Service: “[M]any of the oldest second-growth stands on the Tongass would be conveyed to Sealaska. That would accelerate Sealaska’s young growth program, but substantially delay the development of the Forest Service’s young growth program on the Tongass....”

<sup>23</sup> Schoen and Dovichin, eds., *A Conservation Assessment and Resource Synthesis for The Coastal Forests & Mountain Ecoregion in Southeast Alaska and the Tongass National Forest*, The Nature Conservancy and Audubon Alaska (March 2007). <http://home.gci.net/~tnc/>

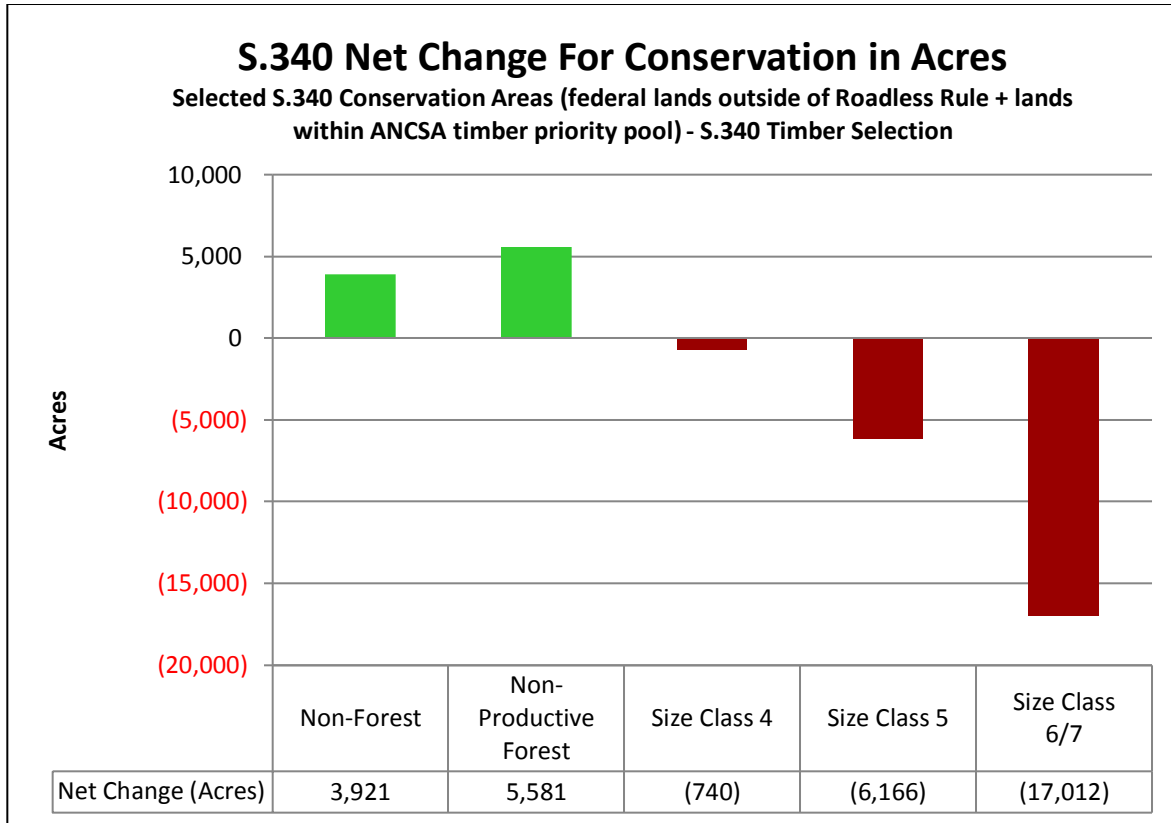
**Figure 3.** Distribution of Conservation scores under the ANCSA land entitlements (left pie) and the proposed S. 340 entitlement (right pie). Darker green colors indicate lands with higher conservation values. Over half of the land in S 340 falls into the top two conservation categories. In contrast, only 10% of the land under current ANCSA selections falls in those categories.



Conservation Additions.-- The additional feature of S 340 that effect any assessment of conservation value is the assignment of 152,047 acres of “conservation” lands in the bill. To properly weight the additive conservation value of these lands we first remove those acres that are already protected under existing rules and legislation (e.g., 2001 roadless rule). Of the 152,047 acres identified in S 340 for conservation additions, 133,279 acres are already off limits to logging under this rule, leaving a net gain of 18,768 acres. When we add these additional conservation acres in, and examine net change by habitat type, we see that the conservation additions increase acreage of non-forest and noncommercial forest types (muskeg, scrub forest), but there is still a significant net loss of the productive old-growth, particularly the larger size-class stands (Figure 4). From this, it is clear the conservation additions proposed in this legislation are either already protected, or would protect non-forest and non-commercial forest habitats that are not at risk to be logged.



**Figure 4.** Net gain (green) and loss (red) of old-growth acres by habitat type under S 340 relative to status quo (ANCSA).



**Summary**

Sealaska Corporation is seeking passage of legislation that would award it new lands outside the areas prescribed in the Alaska Native Claims Settlement Act. The legislative history and proposed land exchange is reviewed with two questions in mind: (1) Was Sealaska Corporation treated equitably under the 1971 Alaska Native Claims Settlement Act, and (2) does the proposed land exchange represent a positive conservation outcome. The evidence suggests the Corporation was treated equitably, and that the proposed legislation would cause significant conservation harm to the Tongass.

Specific findings include:

1. Under the ANCSA, Sealaska Corporation was generously compensated compared with other Regional Native Corporations.
2. Under the ANCSA, Sealaska Corporation received the land selections they requested, including acreage with higher than average timber values, and shared logging infrastructure with Village Corporations
3. Under S 430 and HR 740, Sealaska Corporation would high-grade the most productive forestlands on the Tongass.
4. The large-tree old-growth stands they would log are rare, highly valuable, and have been heavily exploited to date.
5. The legislation would significantly reduce conservation values on public lands in the Tongass.

6. The legislation would set a precedent for other Native Corporations in Alaska to seek additional compensation from Congress.
7. There is no need for the proposed legislation. Sealaska should promptly receive the balance of its entitlement, as filed for in 2008, under the Alaska Land Transfer Acceleration Act.