

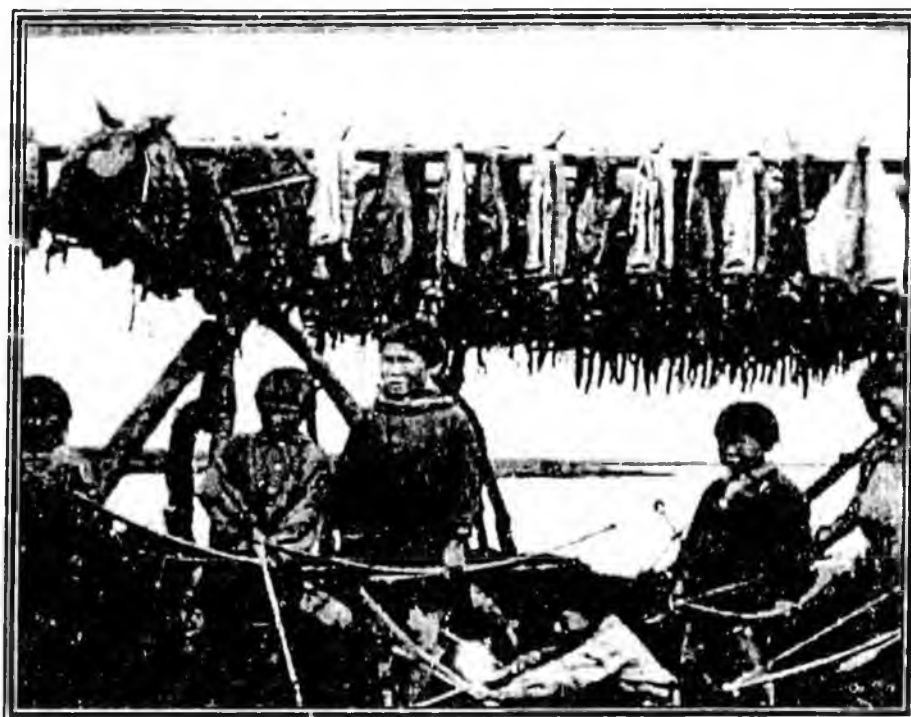
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VOLUME I

A REPORT CONCERNING ALASKA NATIVE ALLOTMENTS AND ALASKA NATIVE VIETNAM VETERAN ALLOTMENTS



This young but accomplished Yup'ik hunter was photographed in 1924 holding a goose he speared on the Kashunuk Slough near the Village of Marshall, Alaska.

Prepared for the Honorable John Coghill Jr. in support of the Alaska Legislature's Joint Resolution to encourage the United States Congress to amend the Alaska Native Vietnam Veterans Allotment Act and to reopen and approve previously rejected allotments in the Tongass National Forest.

SUBMITTED BY

ALASKA LEGAL SERVICES CORPORATION
NATIVE ALLOTMENT PROGRAM
1016 WEST SIXTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
(907) 272-9431

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ALASKA NATIVE ALLOTMENT AND ALASKA LAND OWNERSHIP FACT SHEET #1

This fact sheet provides information about land ownership in Alaska. BLM's statistics used in this report are difficult if not impossible to convert into a total of allotment applications or a total of allotment acres. This is true because BLM records its Native allotments information by the number of parcels in each allotment application, not by the number of allotment applications or the number of acres in each claim. However, on average, there are 1.6 parcels for each allotment.¹ There is no accurate method to determine how many acres each parcel or each application represents because many allotment applications claimed far less than 160 acres of land.² Thus, BLM's record keeping practices do not allow a determination of the exact number of acres involved in some of the information reported below.

Federal Government records show:

- Since 1906, 15,000 allotment parcels have been filed with BLM.³
- In 1955, only 79 allotments had been certified and 64 allotments were pending.⁴
- In 1970, only 245 parcels had been approved.⁵
- In 1971 with the imminent repeal of allotments, 10,000 applications were filed for 15,000 parcels.⁶
- In 1991 8,013 allotment parcels were pending; 4,352 parcels were certified; 2,662 parcels were rejected and closed.⁷
- In February 1999, there were 4,482 allotment parcels pending; 9,010 parcels certified, and 2,475 parcels rejected and closed.⁸
- A March 1999 BLM document shows that within the Tongass National Forest there were only 509 Native allotment applications filed, 61 parcels pending; 49 parcels certified; and

¹ A Report Concerning Open Season for Certain Native Alaska Veterans for Allotments, Prepared for Congress by the Department of the Interior in Response to Section 106 of Public Law 104-42, p. 6 (June 1997). A copy of this report is attached hereto as Attachment # 1.

² Testimony during a U.S. Senate markup session indicates it had information that 12,000 allotment parcels equaled 800,000 acres. Markup session on Alaska National Interest Lands bills, Senate Energy and Natural Resources Committee, July 11, 1978, reprinted in XXIX Alaska Department of Fish and Game, Public Law 96-487, Alaska National Interest Lands Conservation Act: Legislative History 334 (1981). See also, *Dividing Alaska, 1867-2000: Changing Land Ownership and Management*, University of Alaska, Institute of Social and Economic Research, Volume XXXII, No. 1, at 9 November 2000 (reporting that the total acreage of all Native allotments in Alaska is 850,000 acres). This report is attached hereto as Attachment #2.

³ Attachment # 3.

⁴ H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956). Attached hereto as Attachment #4.

⁵ DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 110 (2d ed. 2002) (citing Bureau of Indian Affairs 1956-1993 Annual Caseloads Report, Summary of Native Allotment Numbers (Juneau 1994)). Relevant portions of this book are attached hereto as Attachment #5.

⁶ Attachment #3.

⁷ Attachment #3.

⁸ Attachment #6.

399 allotments rejected and closed.⁹ Of the 399 allotments rejected, 301 were allotments closed under the decision in *Shields v. United States*.¹⁰ In contrast, non-Natives have received 622 homesites, 280 homesteads, and 65 trade and manufacturing sites granted within the Tongass National Forest.¹¹

- In January 2002, BLM's records show 3,345 allotment parcels were pending; 10,119 parcels certified; and 2,514 parcels rejected and closed.¹²
- In November 2002, BLM's records show 743 Veteran allotment applications were filed for 992 parcels; 0 parcels certified; and 176 parcels rejected and closed.¹³

Alaska Department of Natural Resources (DNR) records show:

- In 1867, upon the sale of Alaska to the United States, the federal government owned 375 million acres of land in the Alaska Territory.¹⁴
- In 1903, the federal homestead laws were extended to Alaska.¹⁵
- In 1959, upon statehood, the federal government granted the State of Alaska 28% of federal land in the state consisting of about 105 million acres.¹⁶
- In 1971, The Alaska Native Claims Settlement Act granted 44 million acres to Alaska's Village and Native Corporations.¹⁷
- In 2002, the DNR calculated that the federal government owned 60% (or 222 million acres) of the land in Alaska; with 19.8 million acres in National Forests; 48.3 acres in National Parks; but less than 1% of the total land was in private ownership which includes Native allotments.¹⁸

Other records show:

- In 1960, the Alaska Native population in Alaska was estimated to be 42,522 (18.8% of the population).¹⁹

⁹ Attachment #7.

¹⁰ 698 F.2d 987 (9th Cir. 1983). A copy of this decision is attached hereto as Attachment #8. It is also important to note that large portions of the Tongass National Forest were withdrawn before the Alaska Native Allotment Act was enacted in 1906.

¹¹ Attachment #9.

¹² Attachment #10.

¹³ Attachment #11.

¹⁴ Attachment #2 (*Dividing Alaska, 1867-2000: Changing Land Ownership and Management*, University of Alaska, Institute of Social and Economic Research, Volume XXXII, No. 1, November 2000).

¹⁵ *Id.*, at 4.

¹⁶ *Id.*, at 1.

¹⁷ *Id.*, at 1.

¹⁸ This fact sheet is attached hereto as Attachment #12 and is available at the following website: http://www.dnr.state.ak.us/mlw/factsht/land_own.pdf. See also, Page 6 of the University of Alaska report that is cited in footnote 14 above.

¹⁹ Alaska Federation of Natives, *Our Choices, Our Future: Analysis of the Status of Alaska Natives Report*, at 32 (2004). A copy of this report is attached hereto as Attachment #13.

- In 1970, when the Allotment Act of 1906 was about to be repealed, there were about 57,000 Alaska Natives living in Alaska.²⁰
- In 1980, there were reported to be 75,000 Alaska Native people living in Alaska.²¹
- In 2000, the Alaska Native population in Alaska was 119,241 (19% of the population).²²

²⁰ The estimate is based on the fact that Alaska Natives have consistently represented 19% of the total population of Alaska and in 1970 the total population in Alaska was 301,000.

²¹ Attachment #13 at 30 (*Our Choices, Our Future: Analysis of the Status of Alaska Natives Report*).

²² Attachment #13, at pages 5, 30.

B

TESTIMONY OF
Edward K. Thomas, President
Central Council
Tlingit and Haida Indian Tribes of Alaska

U. S. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON PUBLIC LANDS AND FORESTS
HEARING ON S. 1466
(THE ALASKA LAND TRANSFER ACCELERATION ACT OF 2003)
FEBRUARY 12, 2004

INTRODUCTION

Mr. Chairman and Honorable members of the Senate Subcommittee on Public Lands and Forests of the Committee on Energy and Natural Resources:

My name is Edward Thomas. I am the elected President of the Central Council of the Tlingit and Haida Indian Tribes of Alaska, a federally recognized Indian Tribe with 24,000 Tribal citizens. Southeast Alaska is the ancestral homelands of the Tlingit and Haida people. In addition to speaking on behalf of the Central Council today, I am also here to speak on behalf of a Working Group, which I formed in August 2003 to specifically address S. 1466. That group represents about 190 Tribal entities.

I am honored to be here today to speak to this Committee about S. 1466 and its adverse impacts on the Native people of Alaska. I will first summarize the land transfer problems that S. 1466 attempts to address. Second, I will identify the provisions of S. 1466 that adversely impact Native allotments. Third, I will summarize and discuss the technical amendments to S. 1466 I am submitting to the Committee today.

BACKGROUND OF S. 1466

S. 1466 does not change all of the reasons why the transfer of land in Alaska has taken so long. Thus, it is certain that S. 1466 will not bring about the finalization of the transfers of land to Native allotment applicants, Native Corporations, and the State of Alaska by the year 2009. Instead, S. 1466 offers false hopes that the transfer of land will be completed in 2009. That goal is impossible under S. 1466. However, the goal is possible if the Committee adopts the technical amendments to S. 1466 that I submit to you today. Before I discuss those amendments, I want to explain what is wrong with S. 1466.

The overall goal of S. 1466 is to ensure that the State of Alaska and Native Corporations obtain patents to land that each has selected. In order for that to occur, Bureau of Land Management (BLM) must complete and finalize all pending Native allotments. In other words, pending Native allotments are holding up the finalization of land transfers to the State and Corporations. To remedy that problem, S. 1466 streamlines the government's processing of allotment applications but in doing so it eliminates existing property rights of Native allotment applicants. This is justified according to a BLM Memo,¹ because Native allotment applicants (or heirs) are the cause of the delays in finalizing Native allotments. It is not true that Native allotment applicants (or heirs) are the cause of the delay. Instead, the cause is the inefficient and lengthy processes used by BLM, the Office of Hearings and Appeals (OHA), and the Interior Board of Land Appeals (IBLA).

¹ Memorandum from BLM, Alaska State Director to Assistant Secretary, Land and Minerals Management (May 7, 2003).

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The length of time BLM takes to process allotment applications is caused by numerous factors including:

- Many approved applications sit idle for years awaiting surveys.
- Many applications sit idle for years awaiting a hearing because allotment hearings are routinely only conducted in the summer months thereby severely limiting the total number of allotment hearings scheduled each year. Further, there were only a few allotment hearings in the summer of 2003 because the Office of Hearings and Appeals ran out of money. By the time hearings finally occur, many applicants and their witnesses are deceased.
- Many applications sit idle for years waiting to be processed after favorable hearing decisions or favorable appeal decisions. Only minor ministerial tasks need to be done in these cases.
- Many applications sit idle for years waiting for an appeal decision from the IBLA. Five years is the average length of time it takes the IBLA to issue a decision.
- Many applications could now be final under the legislative approval provisions of ANILCA but the State of Alaska protested over 6,000 allotments, thus adding years to the process.

It is important to understand that the delay in processing Native allotment applications has hurt allotment applicants far more than the delay has hurt either the State or Native Corporations. This is true because in many old cases, the applicants and their witnesses have died during the thirty and more years it has taken the government to process the applications which resulted in the rejection of allotments. We can expect this injustice to only increase as time goes on. I am here today to speak for all the applicants and their heirs who continue to wait for the government to make good on its promise to convey title to land for their allotments.

OVERVIEW OF NATIVE ALLOTMENTS IN ALASKA

Before I discuss the reasons why I oppose specific provisions of S. 1466, a brief discussion of the Alaska Native Allotment Act, may be helpful. In 1906, Congress enacted the Alaska Native Allotment Act because Native people in Alaska were starving to death due to the encroachment of lands necessary for subsistence.² Prior to 1906, Alaska Natives could not get title to land they used to obtain the necessary resources for food, shelter and clothing. Congress intended that the Secretary would convey allotments to Alaska Native people to preserve their subsistence traditions, not destroy them. Protecting traditional uses of land and resources remains equally important today.

The legislative history of the Allotment Act establishes that prior to the passage of the Act, non-native encroachment on Native lands caused widespread devastation which

² Report on Conditions in Alaska, by James W. Witten, Special Inspector, General Land Office (1903).

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the federal government failed to prevent even though it had a duty to protect Native use and occupancy.³ The government's failure resulted in the starvation of Native men, women, and children throughout Alaska. This was such an acute problem that President Roosevelt sent a special investigator to Alaska in 1903 in an attempt to alleviate the suffering and death, caused by the inability of Native people to access and harvest traditional resources.⁴

It must be remembered that by 1903, the Alaskan "gold rush" had been underway for almost ten years. Congress knew that the heavy traffic through Alaska to the goldfields greatly affected the traditional land uses and possessory rights of Alaska's Native people. There was also substantial traffic from the salmon canneries, oil production, copper mining and commercial logging. These were all activities that took a heavy toll on the same resources that provided food, shelter and clothing to Native Alaskans. History tells us that non-native encroachment on their lands caused widespread devastation resulting in the starvation of Native men, women, and children. Congress recognizing its duty to protect the use and occupancy of lands by Native people in Alaska decided it must take action. The action was the Alaska Native Allotment Act that carved out allotments of 160 acres of land so that crucial subsistence activities could continue undisturbed for generation after generation.

Unfortunately, the government agencies responsible for carrying out the allotment program did not agree that conveyance of allotments was necessary. Consequently, in the first fifty-four years of the Alaska Native Allotment Act only 78 allotments were granted, and as of 1970, only 245 allotments had been conveyed to Native people.⁵

The Alaska Native Allotment Act was repealed in 1971 by the passage of the Alaska Native Claims Settlement Act (ANCSA).⁶ After 1971 only applications that were then pending were processed. In 1970, the government finally implemented a program to let Alaska Natives know about the opportunity to get title to allotments of land. This program had government employees visiting villages throughout the state helping Alaska Natives to file allotment applications. Because of these efforts, approximately 10,000 allotment applications were filed before the 1971 deadline. However, the delay in finalizing allotments has never been too many applications filed but rather the process used for allotment applications is lengthy and costly.

In 1980, Congress again tried to provide finality to Native allotments by the passage of Section 905, of the Alaska National Interest Lands Conservation Act

³ *Pence v. Kleppe*, 529 F.2d 135, 141 (9th Cir. 1976).

⁴ *Report*, James W. Witten, at 32-33.

⁵ DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 110 (2d ed. 2002) (citing Bureau of Indian Affairs 1956-1993 Annual Caseloads Report, Summary of Native Allotment Number; (Juneau 1994)).

⁶ 43 U.S.C. 1617.

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(ANILCA).⁷ Section 905 was designed to remove many of the administrative barriers to obtaining an allotment by authorizing the Secretary of Interior to "legislatively" approve some, but certainly not all, of the pending allotments. Legislative approval eliminated the need for costly and lengthy administrative hearings. The will of Congress was thwarted when the State of Alaska protested more than 6,000 applications as a way to prevent legislative approval.

It is unknown how many allotments have been legislatively approved. Allotments not legislatively approved, require proof that the applicant's use of the land was substantially continuous for more than 5 years, potentially exclusive of others. There are approximately 4,000 pending allotment parcels requiring adjudication today.⁸ Many of the pending allotments require hearings on one or more of the following three issues: 1) whether the application was filed on time but later lost by the government; 2) whether the legal description on the application is erroneous and should be amended; and 3) whether the applicant's use of the land meets the legal requirements for obtaining an allotment.

Some of these very old cases in need of hearings are further complicated and could be unfairly denied because many of the applicants and first hand witnesses have died. All applications are now over 30 years old and some much older ranging up to 90 years old.⁹

The age of these claims is far more acute for the applicants or their heirs because in many of the old cases, the applicants and their first hand witnesses are deceased. Many of these old claims require a hearing where the applicants' heirs, many who are the grandchildren of the applicants, must prove by a preponderance of the evidence that the applicant's use of the land was substantially continuous for more than 5 years potentially exclusive of others. One example is the case of Harry McKinley who filed his allotment application in 1909, and died in 1927. Finally, in 2002, over 90 years after Mr. McKinley filed his application and 75 years after he died, the Department scheduled an evidentiary hearing on the issue of Mr. McKinley's use and occupancy. It then took until the IBLA where it will likely remain for another 5 years. Mr. McKinley is not an isolated case.

Another example is the case of Setuck Harry who filed his application in 1911 and died in the early 1940's. An evidentiary hearing was held to determine the correct

⁷ 43 U.S.C. 1634.

⁸ There are approximately 2,800 applications, but each application may have up to four parcels. 1.6 is the average number of parcels in an application. A Report Concerning Open Season for Certain Native Alaska Veterans for Allotments, Prepared for Congress by the Department of the Interior in Response to Section 106 of Public Law 104-42, p. 6 (June 1997).

⁹ See the pending applications of Chetah Ka (A-000438) filed in 1919, Paul Brown (A-000439) filed in 1909; Harry McKinley (A-000441) filed in 1909; Setuck Harry (A-001489) filed in 1911; John Ketch Koostien (A-001499) filed in 1912; James Rudolph (A-001745) filed in 1915; William Jackson (A-001747) filed in 1915; Jack Yaquam (A-001787) filed 1915 Jack Moore (A-002492) filed in 1915; and David Lawrence (A-002494) filed in 1915.

location of the allotment and the decision issued in 2000 was favorable to the heirs and so was the IBLA's 2001 decision. Since that 2001 decision, BLM has accomplished little work; the final approval of that allotment has not yet been issued. In the meantime, the U.S. Forest Service permits fishing camps on this allotment and has even allowed fuel to be stored on that land.

Another example is the case of Luke Thomas who filed his application in 1915. His application was determined to be valid in 1991. Because Mr. Thomas' allotment land was mistakenly conveyed to the State, this is a "title recovery" case which simply means the State must reconvey the land to BLM. Since BLM's 1991 validity decision, there has been no action by the BLM to recover this land except a mere request letter sent to the State in 1992.

Another case is that of Chetah Ka who filed his application in 1911, and died in 1919. On February 8, 2002, the BLM requested an evidentiary hearing to be scheduled on the issue of Mr. Ka's use of the claimed land. It has been 93 years since Mr. Ka filed his application but his heirs have still not been afforded a hearing on Mr. Ka's use of the land.

There are many other similar examples of cases that have been delayed by a process that has failed. There is no one reason that explains the length of time it takes an allotment to be finalized. When compared to homestead claims in Alaska, it is clear the amount of evidence the government requires to prove allotment claims are valid is a major factor in causing the delays because today there are no outstanding homestead claims because the government required minimal proof for those claims.

SECTIONS 301, 302, 305 AND 501 ELIMINATE IMPORTANT STATUTORY AND CONSTITUTIONAL RIGHTS OF NATIVE ALLOTMENT APPLICANTS

Sections 301 and 302 allow the government to exercise its discretion to avoid its obligation to recover the land when the allotment is valid and the land was erroneously conveyed. Although, Section 301 allows the State or Corporation to offer the applicant land in a different location from the allotment land, if the applicant does not consent, this Section authorizes the Secretary to survey the land as it is now described in BLM's records. This provision will authorize surveying land that may not correctly describe the allotment land. An unknown number of allotments are incorrectly described in BLM's records. In most cases these errors are the fault of the government, not the fault of the applicant.¹⁰ Further, these sections do not eliminate BLM's lengthy adjudication of allotments because these sections apply only to "valid" allotments. The phrase valid allotment denotes the final determination BLM issues after its adjudication of the applicant's use and occupancy. In hundreds of allotment applications filed over 30 years

¹⁰ *Mary Olympic v. United States*, 615 F.Supp. 990, 994 (D. Alaska 1985).

ago, a final validity decision has still not been made. Thus, Sections 301 and 302 do nothing to speed up BLM's adjudication process.

Section 305 eliminates the existing right of Native allotment applicants to amend an allotment description. Amendments of allotments arose from the recognition by Congress that a significant percentage of allotment applications contained errors that were not the fault of the applicants.¹¹ In most cases it was the BIA that identified the location of the allotment and provided BLM with many erroneous legal descriptions. Congress intervened with Section 905(c) of ANILCA allowing the correction of erroneous legal descriptions.

The right to amend allotment descriptions under ANILCA is allowed only in very limited situations; it is allowed only in situations where it is proven that the land described in the application is not the land that the applicant originally intended to apply for as the allotment. The purpose of Section 905(c) is to correct mistakes in the allotment applications that the government made when it collected the applications during 1970-1971.

If the right to amend is eliminated as contemplated by S. 1466, some applicants will lose their allotments because they will not be able to prove use and occupancy of land they did not originally intend to apply for. It is also possible that even if they receive land they did not intend to apply for, valuable improvements on the land they did intend to apply for would be lost.

Sections 305 (f)(1) and (f)(3) eliminate the right of allotment applicants to reinstate their closed cases. Under current federal court decisions, applicants (or heirs) have the right to get closed allotment cases reinstated if BLM closed the case without an opportunity for a hearing because such a closure was in violation of due process.¹² Before these federal court decisions, allotment applications were routinely rejected and closed whenever it believed there was insufficient evidence to prove the applicant's qualifying use of the land claimed for an allotment. The number of closed cases that should be reopened is unknown but we suspect it is a substantial number.

Eliminating the right to reinstate allotment cases closed in violation of the applicants' due process rights compounds the original violation and will only lead to future litigation. Although, the U.S. Supreme Court has repeatedly held that while Congress has plenary authority over Indian affairs, which would include Native allotment matters, it must comply with guarantees of the U.S. Constitution,¹³ such as the due

¹¹ S. Rep. No. 413, 96th Cong. 2d Sess. 237-38, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5181-82.

¹² *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976); *Pence v. Andrus*, 586 F.2d 733 (9th Cir. 1978).

¹³ *United States v. Sioux Nation of Indians*, 448 U.S. 371, (1980). See also, *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977).

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process clause and the just compensation clause.¹⁴ Congress should delete Sections 305 (f)(1) and (f)(3) from S. 1466 and instead, direct BLM to reinstate those unlawfully closed cases.

Section 305(f)(2) severely limits the right of allotment applicants to file reconstructed applications in cases where the government lost the original applications. This problem arose during 1970-71, when the government went to villages in Alaska and filled out by hand numerous allotment applications from information provided by the applicants. These applications were then sent to California where specific legal descriptions were created for each allotment. The applications were typed and sent back to Alaska. This process caused the loss of more than 500 applications. Still today, there are applicants wondering when they will get allotment certificates, not knowing their applications were lost. Under current rulings of the IBLA, applicants (or heirs) have the right to file reconstructed applications where the government lost their original application.

Unfortunately, Section 305 (f)(2) eliminates this right and in addition allows BLM to reject previously filed reconstructed applications unless the BLM's file already contains the information that would meet the long list of evidentiary requirements as set forth in Section 305 (f)(2). This Section effectively creates a new and extremely harsh standard far exceeding the evidence the IBLA now requires to prove the government lost an application.¹⁵ It will be impossible for many applicants to meet this new standard because they will be required to remember details of events surrounding the filing of their applications which occurred over thirty years ago.

Moreover, it likely violates due process to authorize BLM to close cases that do not meet the higher evidentiary standard when notice of the new standard has never been provided to applicants. Even if notice of the new standard was provided, it is likely a due process violation to allow BLM to close such cases without a hearing on the factual issues.

Section 305(f)(3) eliminates the right of allotment applicants to request reinstatement of relinquished allotment land even if the relinquishment is invalid. The right to reinstate an allotment on the grounds that a relinquishment is invalid is addressed in Section 905 of ANILCA.¹⁶ Invalid relinquishments according to the IBLA are those

¹⁴ See, *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Antelope*, 430 U.S. 641 (1977); *Hodel v. Irving*, 481 U.S. 704 (1987).

¹⁵ *Alice Breaux v. United States*, 159 IBLA 310 (2003) (holding that the IBLA will set aside BLM's rejection of a reconstructed allotment if the Board decides there is a question of fact whether the application was timely filed and BLM has not provided the applicant with a hearing required by the due process clause).

¹⁶ 43 U.S.C. 1634(a)(6).

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that were unknowing or involuntary.¹⁷ One example of an invalid relinquishment is found in the case of Willie Arkanakyak, an Alaska Native who neither spoke nor read English.¹⁸ Evidence introduced in the hearing established that a BIA employee found Mr. Arkanakyak intoxicated in a bar and caused him to sign a relinquishment of his allotment.

Section 501 creates new procedures for allotment hearings and appeals, sacrificing the right of Native allotment applicants to have fair and impartial hearings and appeals. Further, the new procedures add time and cost to the existing hearings and appeals process. It is also certain that the new procedures will not meet due process.

Currently, applicants (or heirs) have a right to a fair hearing to determine certain factual issues in their allotment cases. The hearings are conducted by impartial administrative law judges under rules proscribed by federal regulations. These hearings meet due process guarantees.¹⁹ Unless the new hearing procedures are identical to the existing procedures, it is likely that due process requirements will not be met.

Applicants presently have a right to appeal agency decisions to the IBLA under rules proscribed by federal regulations. Unless the appeals process contemplated by Section 501 is identical to the existing appeals process, it is unlikely that due process will be met.

The hearings and appeals process are unquestionably slow causing years to the finalization of many allotment cases. However, that does not justify eliminating the rights of Native allotment applicants to fair and impartial hearings and appeals. Instead, this Committee should examine why OHA and IBLA have failed to hold hearings and issue decisions on a timely basis. Lack of resources is one major reason for this failure. For example, the OHA generally schedules allotment hearings only in the summer months which drastically reduce the total number of hearings that occur each year. Obviously, scheduling year-round hearings would solve part of the problem. In addition, although only 15 hearings were scheduled for the summer of 2003, OHA cancelled 10 because it ran out of money.

¹⁷ *Matilda Johnson*, 129 IBLA 82 (1994).

¹⁸ *Estate of Willie Arkanakyak*, IBLA 93-113 (March 8, 2001).

¹⁹ *Pence v. Andrus*, 586 F.2d 733 (9th Cir. 1978).

TECHNICAL AMENDMENTS TO S. 1466

The proposed amendments to S. 1466 will afford Native allotment applicants due process and will facilitate the transfer of land selected by the State and Native Corporations. Numerous provisions in S. 1466 add substantial time and costs to the finalization of land transfers, contrary to the specific purpose of this legislation. I am certain that the goal of finalizing the transfer of land in Alaska by 2009 will never be reached if S. 1466 is enacted as it is now written. I offer this Committee technical amendments to S. 1466 that assures the 2009 goal will be reached and the rights of Native people in Alaska will be protected.

Summary of Technical Amendments

Legislative Approval: Section 305 is amended to provide legislative approval of all pending applications with mediation required for settlements where the State or Corporations have a valid interest in the land. This provision will substantially reduce the delays that are inherent in BLM's existing process.

Title Recovery: Section 302 is amended to substantially shorten the title recovery process by providing for legislative approval of all pending applications where the land has been erroneously conveyed to the State or Native Corporation. In hundreds of allotment cases, the title recovery process has taken over 30 years and is still not finalized. Without legislative approval of these cases, it will be impossible to finalize the hundreds of pending title recovery allotment cases by 2009. Section 302 also makes it clear that if alternative land is offered to the applicant by the State or Corporation and the applicant refuses it, the BLM is not authorized to force the applicant to accept but instead, must carry out its duty to recover the land in accordance with the decision in *Aguilar v. United States*.²⁰

Reconstructed/Reinstated/Amended Applications: Section 310 is amended to reaffirm the existing right to reconstruct lost applications and to reinstate improperly closed applications and provides a fair timeline for the finalization of cases. Section 310 requires BLM to identify all allotment applications that were or may have been improperly closed and to notify each applicant. The applicants will have three years after such notice to request reconstruction, reinstatement or amendment of their allotment applications. BLM's report identifying improperly closed allotment cases with subsequent notice to applicants and a 3-year deadline to request reinstatement will substantially reduce the likelihood that the protected property rights of Alaska Natives will be sacrificed in a rush to finalize the land transfers to the State and Corporations.

²⁰ 474 F.Supp. 840 (D. Alaska 1979) (holding that BLM had a trust obligation to recover allotment land it had erroneously conveyed to the State of Alaska).

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Hearings and Appeals Process: Section 501 is amended to provide two options that will ensure that allotment hearings and appeals will be completed in a fair and timely manner. The first option authorizes compacting/contracting allotment hearings and appeals to the Tribes in Alaska. The second option increases the resources of OHA making it possible for the opening of an office in Alaska where administrative law judges would be permanently assigned to conduct year round allotment and probate hearings for cases where a Tribe elects not to provide such service.

Vietnam Veterans Allotments: Section 307 adds a new section to S. 1466 which amends 43 U.S.C. 1629g allowing allotment applications to be filed for 160 acres of vacant federal land by Alaska Natives veterans (or heirs) who honorably served during the Vietnam era.

Southeast Alaska Allotments: Section 308 adds a new section to S. 1466 which allows reinstatement of applications that were closed under the *Shields*²¹ case adjusting the unfair balance in the geographic distribution of allotments because the land in all of Southeast Alaska was withdrawn by 1909.

Compacting or Contracting the Department's Responsibilities to Tribes: Section 309 adds a new section to S. 1466 which allows Tribes to assume many of the allotment responsibilities of the Department of the Interior including the adjudication, hearings, and appeals of allotments and probate work. This provision will cut years from the current processing of allotments.

Analysis of Technical Amendments to S. 1466

The amendments to S. 1466 will protect the rights that Native allotment applicants currently enjoy under due process safeguards, administrative and federal case law, ANILCA, and the Alaska Native Allotment Act. The amendments will also ensure that Congress meets its trust responsibility to Alaska Native allotment applicants.

Legislative Approval: Legislative approval for all pending allotments including those allotments reinstated under the technical amendments will greatly reduce the time it takes to now finalize allotments. Without legislative approval, it will be impossible for allotments and other land transfers to be finalized by 2009. Although, the legislative approval provisions under ANILCA²² were intended to achieve this exact result, it failed to do so because the state exercised its veto power in at least 60 percent of the allotment applications, forcing hundreds of cases into BLM's lengthy adjudication process. The allotments that have been legislatively approved prove that this procedure saves time and money. The finalization of land transfers will not happen by 2009 without the expansion of legislative approval because it is simply impossible for the Department to adjudicate and hold hearings for the current number of pending applications.

²¹ *Shields v. United States*, 698 F.2d 987 (9th Cir. 1983).

²² 43 U.S.C. Section 1634(a)(1)(A).

Title Recovery: Amending Section 301 reduces delays. This amendment will eliminate the obstacles to the finalization of land transfers in title recovery cases. This is important because about one-third of the remaining allotment cases are title recovery cases. Title recovery cases are those where the allotment lands were erroneously conveyed by BLM to the State or Native Corporations. In these cases, BLM first determines if the allotment is valid, which means BLM determines if the case file contains sufficient evidence of the applicant's use of the claimed land. If so, BLM sends a letter requesting the land be reconveyed but in many cases, years have elapsed since the letters requesting reconveyance were sent and no action has been taken since. Moreover, years are added to title recovery cases because many cases require hearings under existing law.

- Recovery of land required: The amendments reflect the government's obligation to recover the land when the allotment is valid and the land was erroneously conveyed.²³ To provide additional discretion to not recover allotment lands will only create more obstacles because even if the government exercises its Section 301 discretion and fails to recover the allotment land, a cloud will remain on the title. In addition, an allotment applicant could still initiate litigation to recover title.
- Valid existing rights: Currently, allotments that are legislatively approved are subject to valid existing rights if such rights were initiated prior to the commencement of use of the allotment. Allotments are not subject to existing rights if the existing rights were initiated after use of the allotment began. On the other hand, such rights are routinely reserved in Settlement Agreements that allotment applicants must sign before the State or Corporations will agree to reconvey the land. There are many unreconveyed allotment cases that have sat idle because of the interests in the allotment claimed by the State or Corporations. Section 301 does nothing to eliminate the current stand off.
- Settlement Agreements: Before the State or Corporations agree to reconvey allotment land, it requires applicants to sign settlement agreements. Many of these agreements unfairly reserve interests in the allotment. These reserved interests were not initiated first and therefore are not interests that could legally be justified. In some cases, the reconveyance documents reserve even more interests to the State or Corporations. The State interprets Title 38 of the Alaska Revised Statutes as requiring reservations of certain interests even when those interests are legally unjustified under federal law.
- Legislative approval: Legislative approval will remove many of the delaying obstacles from the title recovery cases. There are numerous allotment applications which now require lengthy and costly adjudication only because ANILCA 43 U.S.C. § 1634 (a)(4) requires it for lands conveyed to the State and

²³ See, *Aguilar v. United States*, 474 F.Supp. 840 (D. Alaska 1979).

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lands selected or tentatively approved to the State or Corporations. Excluding title recovery cases from the legislative approval provisions of ANILCA has been ineffective, causing only delay, inaction, and even defiance in some cases where the State and Corporations have overtly refused to reconvey.

- **Alternative dispute resolution (ADR):** Continuing to require lengthy allotment hearings will not allow the goal of finalization for land transfer to be reached for many years. However, if ADR was part of the title recovery process prior to legislative approval, in many cases the valid interests of the State or Corporation could be settled. ADR could eliminate time and costs in title recovery cases.
- **Direct conveyance from the Corporation to the applicant:** Allowing Native Corporations to directly reconvey the allotment land to the applicant will save time and money. It will also allow the Corporation and the applicant more flexibility in resolving land conflicts because the amendment allows the applicant to accept substituted land and/or cash compensation in lieu of the allotment.

Reinstatement of Unlawfully Closed Applications: The amendment provides for reinstatement of unlawfully closed cases in a timely and fair manner. By federal court decision, a due process hearing on factual issues is required before an allotment case can be closed.²⁴ Yet there are cases that were closed without a hearing and remain closed today. Those cases must be reinstated. Further, unlawfully closed cases also include cases where the land was relinquished but the relinquishment was not knowing or voluntary. In other words, some relinquishments occurred under questionable circumstances. There are other cases where BIA and others made errors in filling out legal descriptions which had the effect of reducing the total acreage of an allotment. Questionable cases must be reinstated even if only for the purpose of investigation. However, BLM's policy as stated in its manual is that it will not reinstate an unlawfully closed application on its own initiative but instead requires a request from the applicant.²⁵ Therefore, the first step in fixing the reinstatement problem is a mandate to BLM to provide a report of allotment applications that were or may have been unlawfully closed.

The amendment requires BLM to provide to the public within 6 months from the enactment of S. 1466, a list of all allotment cases that were closed without notice and hearing. The amendment provides a 3-year deadline from the date of BLM's published list of closed cases to file with BLM a request for reinstatement. Once the three year deadline lapses, BLM will have a finite number of cases to accept or deny reinstatement and if other provisions of S. 1466 are amended these reinstated cases should be final by 2009 or before.

Reconstruction of Lost Applications: The amendment to Section 305 allows the reconstruction of lost applications within a time frame that ensures the 2009 goal will be met. It is obvious that land transfers may never be final if the right to reconstruct lost

²⁴ See, *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

²⁵ BLM's Native Allotment Manual, Section 7(a)(2) of Chapter II (1991).

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applications does not end, but it is unfair to abruptly end the reconstruction of lost applications without any prior notice to allotment applicants who may not know that their applications were lost. Thus, sufficient time with notice must be given to allow Alaska Natives who may have lost applications needing reconstruction. The amendment provides a 3-year deadline for submitting reconstructed applications. BLM is required to provide notice of the 3-year deadline to the Bureau of Indian Affairs, Tribes, and others serving Alaska Natives. The 3-year deadline begins to run from the date BLM first provides notice of the 3-year deadline.

Hearings and Appeals: Section 501 is amended to resolve the problem of the delays at the hearing and appeal levels. The amendment also prevents unnecessary duplication and excessive costs that now occur and are certain to occur in the future under the new hearing and appeal procedures contemplated by S. 1466.

Although the current hearings and appeals system adds years to many allotment cases, the resolution of this problem should not unfairly deprive allotment applicants' access to impartial hearings and appeals decided by an appeals Board that has the expertise to decide allotment issues such as the IBLA. It could take a new appeals body years to gain the expertise necessary to issue competent appeal decisions.

Many Tribes in Alaska are capable and eager to assume the Department's allotment hearings and appeals responsibility by compacting or contracting in accordance with the Indian Education and Self-Determination Act of 1975.²⁶ The amendment provides for compacting/contracting that would distribute among numerous Tribes the hearings and appeals burden that the Department has failed to meet. Moreover, the hearings would take place year round and be conducted by Tribal Judges who already have knowledge of the allotment applicant's culture and subsistence practices. In the compacts/contracts, participating Tribes could agree to adopt as Tribal law the federal regulations governing hearings and appeals.

The current resources of the Department's Office of Hearings and Appeals including the IBLA must be increased and the work expanded. The amendment provides that the resources of OHA would be increased in order to open an office in Alaska where administrative law judges would be permanently assigned and conduct year round allotment and probate hearings for cases where Tribes elect not to provide such service. In addition additional funding is appropriated to the IBLA with a directive that it be used to increase its staff for allotment cases where Tribes elects not to provide such service.

Compacting or Contracting the Department's Responsibilities to Tribes: The amendment allows Tribes to assume many of the allotment responsibilities of the Department including BLM's adjudication process, hearings, appeals and probate work. Contracting or compacting such responsibilities to the Tribes will be consistent with aims of the Self Determination Act and the trust responsibilities of Congress and the Department. Having the Tribes assume the work will also remove many of the delays to

²⁶ Pub. L. No. 93-638, 25 U.S.C. § 450 et. seq.

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the finalization of land transfers because the burden of allotment work will be distributed among many Tribal entities. The Department of the Interior has had over thirty years to finalize allotments as that work is not even close to completion. It is time to give the Tribes the opportunity to do so.

Amending the Vietnam Veterans Allotment Act: 43 U.S.C. § 1629g is amended to provide that Alaska Natives who honorably served during the Vietnam era be eligible for allotments of 160 acres of vacant federal land. The goal of this amendment is to help make it possible for all Alaska Natives who honorably served in the military during the Vietnam War to receive allotments of land in Alaska. The numerous restrictions in the current Act have defeated many of the applications filed and even discouraged many from applying. For example, as of December 1, 2003, BLM has rejected about 47 percent of the applications filed under the Veterans Allotment Act.²⁷

There are three major reasons why the current Veterans Allotment Act needs to be amended. First, is the lack of federal land that is available for veteran allotments; existing law severely limits what type of land can be available for allotments. Presently, land available for veteran allotments must be:

- non-mineral, without gas, coal, or oil,
- not valuable for minerals, sand or gravel,
- without campsites,
- not selected by the State of Alaska or a Native Corporation,
- not designated as wilderness,
- not acquired federal lands,
- not contain a building or structure,
- not withdrawn or reserved for national defense,
- not a National Forest,
- not BLM land with conservation system unit sites, (unless the manager consents),
- not land claimed for mining,
- not homesites, or trade and manufacturing sites or headquarters site,
- not a reindeer site, and
- not a cemetery site.

Further, these restrictions make it impossible for veterans in Southeast Alaska to apply because as shown above, land in a national forest is not available to veterans and most of Southeast Alaska is the Tongass National Forest. This restriction prevents many deserving veterans in southeast Alaska from obtaining allotments. The amendment makes vacant federal land available for veteran allotments.

Second, the current law does not allow for the legislative approval of veteran allotment applications. The amendment provides legislative approval instead of the use

²⁷ Written communication from John M. Tomas, Jr., BLM's Native Veteran Allotment Coordinator, to Carol Yeatman, Supervising Attorney, Alaska Legal Services Corporation, Native Allotment Program, dated December 1, 2003.

and occupancy requirements veterans must now meet. This provision is similar to the legislative approval provision Congress made available to applicants of allotments who applied under the Alaska Native Allotment Act. Legislative approval will save time and money because it will eliminate the costly and lengthy administrative adjudication of the applicant's use and occupancy.

The third reason the law needs to be changed is that current law is unfair to many deserving veterans that do not qualify even though they honorably served their country during the Vietnam era. Many Alaska Native veterans who served during the Vietnam era do not qualify for an allotment under the military service time restrictions in the current law. Only veterans who served from January 1, 1969 to December 31, 1971 are now eligible to apply for an allotment. However, the Vietnam era covered a much longer time span. The "Vietnam era" is legally defined as beginning August 5, 1964 and ending May 7, 1975. Veterans that served during the "Vietnam era" from August 5, 1964 to December 31, 1968, and from January 1, 1972 to May 7, 1975 are excluded from getting an allotment under current law. There are approximately 1,700 Alaska Native Vietnam veterans that will get a chance to apply for an allotment if this provision is enacted into law. Those 1,700 veterans are now excluded simply because they bravely served their country a little too early or a little too late.

Reinstatement of Allotments Closed Under the *Shields* Decision: The amendment provides for reinstatement of applications that were closed under the decision in *Shields v. United States*²⁸ by allowing ancestral use of certain allotments to meet the use and occupancy requirements. Although this provision expands the current reinstatement policy of the Department, this amendment provides basic justice. Because most of the land throughout Southeast Alaska was withdrawn by 1909 and the federal government did not inform Native people about the Allotment Act, few Alaska Natives in Southeast Alaska received allotments. Reinstatement of the applications rejected under the *Shields* decision adjusts this unfair distribution of land.

The *Shields* decision answered the question of whether Congress intended to require allotment applicants to prove they personally "used" the land claimed in cases where the land had been withdrawn for the Tongass National Forest before the applicant's birth or if proof that the applicant's ancestors used the land was sufficient. The argument that ancestral use met the "use" requirement was valid because the word "use" was not defined in the Allotment Act or in its legislative history. Unfortunately when a term or word used in a federal statute is not defined by Congress, the courts allow the agencies to interpret the word. That is exactly what happened with the word "use." The Department of the Interior interpreted the word "use" to mean personal rather than ancestral use and the courts deferred to that interpretation. This amendment will not change the language of the Allotment Act but instead will allow Congress to define "use" in a manner that merely differs from the Department of the Interior's definition.

²⁸ 698 F.2d 987 (9th Cir. 1983).

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CLOSING

Congress enacted the Alaska Native Allotment Act in 1906 so that Alaska Natives would obtain title to land and resources that had fed, clothed and sheltered them for thousands of years. Many Alaska Natives still wait for that promised title. I urge this Committee to amend S. 1466 and in doing so, to protect the rights of Native allotment applicants while eliminating many of the factors that now delay finalizing allotment cases.

Respectfully submitted,

Edward K. Thomas, President

Attachment: Technical Amendments

**Technical Amendments to the Alaska Land Transfer Acceleration Act
(S. 1466)**

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

Section 2. Definitions is amended by:

(1) striking after 'In this Act: (1) and (2)' and inserting '(7) and (8).'

(2) inserting after 'In this Act:' '(1) ANCESTOR- The term 'ancestor' means any person to whom the applicant can show lineal or clan relation,' and

(3) inserting '(2) APPLICANT- The term 'applicant' means the applicant or the heir or heirs of the applicant if the applicant is deceased,' and

(4) inserting '(3) INDIAN PROBATE- The term 'Indian probate' means the probate of the estate of an Alaska Native who held an interest in trust property prior to death,' and

(5) inserting '(4) INDIAN TRIBE- The term 'Indian tribe' shall have the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (codified at 25 U.S.C. §450b(e)), ' and

(6) inserting '(5) LAND TRANSFER DECISION - The term 'land transfer decision' means any decision of the Bureau of Land Management relating to federal land entitlement within the State,' and

(7) inserting '(6) MAJOR INTEREST - The term 'major interest' means a present permitted, licensed, or other authorized interest in the land within an allotment.'

(8) inserting '(9) TRIBAL ORGANIZATION- The term 'Tribal organization' shall have the meaning given that term in section 4(l) of the Indian Self-Determination and Education Assistance Act (codified at 25 U.S.C. §450b(l)).'

(9) adding the following after 'Sec. 2. Definitions:' 'Section 3. Savings Provision- If any provision of this Act, as enacted, is declared unconstitutional or is held invalid, the validity of the remainder of this Act shall not be affected.'

(10) adding the following after 'Sec. 3. Savings Provision:' 'Section 4. Attorney's Fees-A court has discretion to award to a prevailing party, other than the United

States, attorney's fees and other expenses, in addition to any costs incurred by that party, in any civil action including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action.'

(11) adding the following after 'Sec. 4. Attorney's Fees:' 'every civil action against any party including the United States for the recovery of land for an approved or valid allotment shall be barred unless the complaint is filed within 10 years after the allotment applicant receives a written decision from the Department of the Interior that the United States government declines to prosecute to recover the land.

Title III—Native Allotments

SECTION 301. TITLE AFFIRMATION

Section 301 of S. 1466 is amended by:

(1) in section 301(d) striking all of subsections (1) and (2) and inserting the following:

'(1) IN GENERAL-The Secretary shall correct a conveyance to a Native Corporation or to the State for land that is described in a valid allotment application to exclude the described allotment land.

(2)(A) ATTESTATION-Before correcting the conveyance, the Secretary shall request the Native Corporation or the State to attest that it has not:

(i) granted any third party rights or taken any other action that would affect the ability of the United States to convey full title under the Act of May 17, 1906 (34 Stat. 197, chapter 2469);

(ii) caused or allowed to be caused any disturbance of the surface or subsurface of the land; and

(iii) stored or allowed the deposits of hazardous waste on the land.

(B) FAILURE TO ATTEST- If the Native Corporation or the State fail to attest as described in subsection (A) of this Section, the Secretary shall timely perform a hazardous materials inspection prior to the correction of the conveyance.'

(2) in subsection (d)(3) after 'acceptable written,' striking 'concurrence' and inserting 'attestation.'

(3) striking subsection (d)(4) and inserting '(4) The only document of reconveyance that is necessary from the State or a Native Corporation to use the procedures authorized by this subsection is the attestation described in paragraph 2A.'

SECTION 302. TITLE RECOVERY OF NATIVE ALLOTMENTS

Section 302 of S. 1466 is amended by:

- (1) in subsection (a) after 'established by the Secretary, all' striking 'or any part.'
- (2) striking subsection (b) and inserting 'The United States shall accept the deed after the United States legislatively approves the allotment under Section 305 of this Act.'
- (3) in subsection (c) adding at the end 'with the informed consent of the allotment applicant.'
- (4) in subsection (d) after 'the Secretary shall provide the applicant or the' striking 'personal representative' and inserting 'heir(s).'
- (5) in subsection (d) adding to the end the following: 'and if applicant's acceptance is not forthcoming, and the land is alternate land as described in subsection (c) of this Section, the United States shall not accept the deed.'
- (6) in subsection (e) after 'the Secretary' striking 'may' and inserting 'shall.'
- (7) striking subsection (f) and inserting the following:

'(f) RECOVERY OF TITLE-If the Native Corporation or the State fails to reconvey the allotment land, the Secretary shall file an action in court to recover title.'
- (8) redesignating subsections (g), (h), and (i), as subsections (h), (i), (j) respectively.
- (9) insert the following as subsection (g):

(g) DIRECT CONVEYANCE OF TITLE TO APPLICANT-The State of Alaska and Native Corporations in Alaska may directly convey surveyed lands described in an allotment application or alternative lands that have been mutually agreed upon to Native allotment applicants or their heirs and thereafter in accordance with 25 C.F.R. § 151.14, the Secretary shall formally accept such conveyance documents in trust for said individual(s), and shall issue to the applicant or heirs a certificate of allotment
- (10) in subsection (j) after 'The United States' inserting 'and the applicant.'

SECTION 303. NATIVE ALLOTMENT RELOCATION ON LAND SELECTED BY OR CONVEYED TO A NATIVE CORPORATION

Section 303 of S. 1466 is amended by:

(1) in subsection (c) (2) after 'the allotment applicant and the' striking 'Native Corporation' and inserting 'applicant's Tribe,' and after 'first refusal allowing the' striking 'Native Corporation' and inserting 'Tribe.'

(2) striking subsection (e)(3).

SECTION 304. COMPENSATORY ACRES

Section 304 of S. 1466 is amended by:

(1) striking subsection (b).

SECTION 305. NATIVE ALLOTMENT DEADLINES

Section 305 of S. 1466 is amended by:

(1) in the title of this section, striking "NATIVE ALLOTMENT DEADLINES" and inserting "NATIVE ALLOTMENT APPROVAL."

(2) striking Section 305 and inserting the following: "Section 905 of the Alaska National Interest Lands Conservation Act (43 U.S.C. § 1634) is amended by striking subsections (a) through (f) and inserting the following:

(a) **Legislative Approval.** Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971 or are reinstated under this Act are hereby approved. Subsection (b) in this Act shall apply, if a Native Corporation, the State of Alaska, or other party has a major interest within a Native allotment. Where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, or Sections 302 or 303 of this Act, these allotments are approved pursuant to this section effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefore."

(b) **Mediation.** A Native Corporation, the State or any party with a major interest in the land described in an allotment application may file a motion with the Secretary requesting alternative dispute resolution, for the purpose of achieving a mutually agreeable settlement in the approval of the allotment application. The Secretary shall select a neutral individual to

mediate the controversy and develop mediation procedures pursuant to the Administrative Dispute Resolution Act of November 15, 1990 (104 Stat. 273, as amended). A neutral individual who is acceptable to the parties and who serves at the will of the parties will conduct the mediation informally as a conference or series of conferences. If the neutral individual determines that mediation efforts are unsuccessful, the mediation will terminate and legislative approval of the allotment application shall proceed in the usual manner."

SECTION 307. AMENDMENTS TO SECTION 41 OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.

Section 307 of S. 1466 is amended by:

(1) striking Section 307 and inserting the following:

"Section 41 of the Alaska Native Claims Settlement Act (43 U.S.C. 1629g) is amended as follows:

Paragraphs (1) and (2) of subsection (a) are amended to read as follows: "(1) The period for filing allotments under this Act shall end 3 years after the Secretary issues final regulations under section 3 of the Alaska Native Veterans Land Allotment Equity Act. A person described in paragraph (1) or (2) of subsection (b) shall be eligible for an allotment of not more than two parcels of Federal land totaling 160 acres or less.

"(2)(A) Allotments may be selected from the following:

(i) Vacant lands that are owned by the United States;

"(ii) Lands that have been selected or conveyed to the State of Alaska if the State voluntarily relinquishes or conveys to the United States the land for the allotment.

"(iii) Lands that have been selected or conveyed to a Native Corporation if the Native Corporation voluntarily relinquishes or conveys to the United States the land for the allotment.

"(B) A Native Corporation may select an equal amount of acres of appropriate Federal land within the State of Alaska to replace lands voluntarily relinquished or conveyed by that Native Corporation under subparagraph (A)(iii).

"(C) For security reasons, allotments may not be selected from--

(i) lands within the right-of-way granted for the TransAlaska Pipeline; or

"(ii) the inner or outer corridor of that right-of-way withdrawal."

(2) Subsection (a)(3) is repealed.

(3) In subsection (b)(1), striking "A person" and insert "Except as provided in paragraph (3), a person".

(4) Subsection (b)(1)(B) is amended to read as follows:

'(B) is a veteran who served during the period between August 5, 1964, and May 7, 1975, including such dates.'

(5) Subsection (b)(2) is amended to read as follows:

'(2) If an individual who would otherwise have been eligible for an allotment dies before applying for the allotment, an heir on behalf of the estate of the deceased veteran may apply for and receive the allotment.'

(6) In subsection (b)(3), insert before the period the following: ', except for an heir who applies and receives an allotment on behalf of the estate of a deceased veteran pursuant to paragraph (2)'

(7) Subsection (e) is amended to read as follows:

'(e) REGULATIONS- All regulations in effect immediately before the enactment of subsection (f) that were promulgated under the authority of this section shall be repealed in accordance with section 552(a)(1)(E) of the Administrative Procedure Act (5 U.S.C. 552(a)(1)(E))'.

(8) Add at the end the following new subsections:

'(f) APPROVAL OF ALLOTMENTS- (1) Subject to valid existing rights, and except as otherwise provided in this subsection, not later than January 31, 2007, the Secretary shall approve an application for allotments filed in accordance with subsection (a) and issue a certificate of allotment which shall be subject to the same terms, conditions, restrictions, and protections provided for such allotments.

'(2) Upon receipt of an allotment application, but in any event not later than October 31, 2005, the Secretary shall notify any person or entity having an interest in land potentially adverse to the applicant of their right to initiate a private contest or file a protest under existing Federal regulations.

'(3) Not later than January 31, 2007, the Secretary shall -

'(A) if no contest or protest is timely filed, approve the application pursuant to paragraph (1); or

'(B) if a contest or protest is timely filed, stay the issuance of the certificate of allotment until the contest or protest has been decided.

'(g) RESELECTION- A person who made an allotment selection under this section before the date of the enactment of Alaska Native Veterans Land Allotment Equity Act may withdraw that selection and reselect lands under this section if the lands originally selected were not conveyed to that person before the date of the enactment of Alaska Native Veterans Land Allotment Equity Act.'

SEC. 3. REGULATIONS.

Not later than 1 year after the date of the enactment of this Act, the Secretary of the Interior shall issue final regulations to implement the amendments made by this Act.

SECTION 308. CLARIFICATION REGARDING OCCUPANCY OF NATIVE ALLOTMENTS IN NATIONAL FORESTS

S.1466 is amended by adding Sec. 308 as a new section as follows:

'Section 18 of the Alaska Native Claims Settlement Act (43 U.S.C. 1617) is amended by:

inserting after the period (.) at the end of paragraph (a) 'Allotment applications pending before the Department of Interior on December 18, 1971, which were closed by the Department of Interior pursuant to Shields v. United States, 698 F.2d 987 (9th Cir. 1983), cert. denied, 104 S. Ct. 73 (1983), shall be reopened and the Department of Interior shall interpret the word "occupancy" in Sec. 2 of the Alaska Native Allotment Act (70 Stat. 954, 48 U.S.C. 357a) to mean occupancy of the applicant or the applicant's "ancestors" as that term is defined in Section 1(a)(2) of this Act.'

SECTION 309. SELF-GOVERNANCE AND CONTRACTING FOR PARTICULAR DEPARTMENT OF INTERIOR PROGRAMS IN ALASKA

S.1466 is amended by adding Sec. 309 as a new section and by inserting the following:

'Section 18 of the Alaska Native Claims Settlement Act (43 U.S.C. 1617) (as amended by section 303) is amended by adding at the end the following:

(f) CONTRACTING AND COMPACTING FOR NATIVE ALLOTMENT AND INDIAN PROBATE PROGRAMS IN ALASKA -

(1) IN GENERAL- Upon request of an Indian Tribe or tribal organization, the Secretary shall negotiate and enter into contracts, compacts, or funding agreements under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) for the Indian Tribe or tribal organization to administer programs, services, functions, and activities, or portions thereof, currently administered by the Department, related to Native allotments and Indian probates. Such assumption of programs shall be made pursuant to section 102(a) of the Indian Self-Determination and Education Assistance Act (P.L. 93-638, 25 U.S.C. §450f(a)(1)(E), or Section 403 of the Indian Self-Determination Act Amendments of 1994 (P.L. 103-413, 25 U.S.C. 458cc), as appropriate.

(2) ELIGIBILITY OF TRIBES- To be eligible to contract, compact, or enter into funding agreements to assume responsibilities for Native allotments and Indian probates, an Indian tribe or tribal organization, shall--

• request participation by resolution or other official action of the governing body of the Indian Tribe or tribal organization;

(b) demonstrate financial and management stability and capability, as evidenced by the Indian tribe or tribal organization having no unresolved significant and material audit exceptions for the previous 3 fiscal years; and

(c) pledge to administer programs, services, functions, and activities related to the adjudication of Native allotments and Indian probates at least at the same level of service as was previously provided by the Secretary or Secretary's representative and to practice utmost good faith in upholding its responsibility to provide such services.

(3) AVAILABLE PROGRAMS- The Secretary shall allow an Indian Tribe or tribal organization to contract, compact or enter into a funding agreement for any of the following programs --

(a) All programs currently administered by the Bureau of Indian Affairs related to assistance to Alaska Natives for Native allotments applications, adjudication and rights protection within the State; and

(b) All programs currently administered by the Bureau of Land Management related to Native allotments within the State; and

(c) All programs currently administered by the Department of Interior's Office of Hearing and Appeals related to hearings, appeals and other review functions of the Secretary for Native allotments and Indian probates within the State.

(4) PRIORITY- If, more than one eligible Indian tribe or tribal organization have overlapping requests to compact or contract for the same programs, services, functions, and activities, or portions thereof, the Secretary may require such Indian tribes or tribal organizations to agree regarding which Indian tribe or tribal organization shall have the ability to contract or to submit a joint request prior to entering into negotiations.

(5) CONTRACT ADMINISTRATION-

(a) INCLUSION OF CERTAIN TERMS- At the request of the contracting Indian tribe or tribal organization, the benefits, privileges, terms, and conditions of agreements entered into pursuant to titles I and IV of the Indian Self-Determination and Education Assistance Act may be included in a contract entered into under this Act. If any provisions of the Indian Self-Determination and Education Assistance Act are incorporated, they shall have the same force and effect as if set out in full in this Act and shall apply notwithstanding any other

provision of law. The parties may include such other terms and conditions as are mutually agreed to and not otherwise contrary to law.

(b) **AUDIT-** Contracts entered into under this Act shall provide for a single-agency audit report to be filed as required by chapter 75 of title 31, United States Code.

(c) **TRANSFER OF EMPLOYEES-** Any career Federal employee employed at the time of the transfer of an operation or program to an Indian tribe or tribal organization shall not be separated from Federal service by reason of such transfer. Intergovernmental personnel actions may be used to transfer supervision of such employees to the contracting Indian tribe or tribal organization. Such transferred employees shall be given priority placement for any available position within their respective agency, notwithstanding any priority reemployment lists, directives, rules, regulations, or other orders from the Department of the Interior, the Office of Management and Budget, or other Federal agencies.

(6) **AVAILABLE FUNDING; PAYMENT-** Under the terms of a contract negotiated pursuant to subsection (f), the Secretary shall provide each Indian tribe or tribal organization funds in an amount not less than the Secretary would have otherwise provided for the operation of the government programs, services, functions, and activities. Contracts entered into under this Act shall provide for advance payments to the tribal organizations in the form of annual or semiannual installments.

(7) **TIMING; CONTRACT AUTHORIZATION PERIOD-** Contracts entered into pursuant to this Act are authorized to remain in effect for 5 consecutive fiscal years, starting from the fiscal year the participating Indian tribe or tribal organization first entered into its contract under this Act with options for renewal.

(8) **REPORT ON NON-BIA PROGRAMS-** Programs listed under subsection (3)(b) and (3)(c) of this section shall be included in the Secretary's listing and targets publication as required under 25 U.S.C. §458ee(c).

SECTION 310. NATIVE ALLOTMENT DEADLINES

Section 18 of the Alaska Native Claims Settlement Act (43 U.S.C. 1617) is amended by adding at the end the following:

- (1) **IN GENERAL** - An applicant for a Native allotment filed under the Act of May 17, 1906 (34 Stat. 197, chapter 2469) or filed under section 41 of this Act shall be entitled to have the Secretary accept a reinstatement of a

- (2) previously closed Native allotment application or to accept a reconstructed copy of an application claimed to have been timely filed with an agency of the Department of the Interior, only if the applicant filed a request for reinstatement or acceptance of a reconstructed application with the Alaska State Office, Bureau of Land Management within 3 years from the date of enactment of this subsection.

SECTION 501. ALASKA LAND CLAIMS HEARINGS AND APPEALS

Section 501 of S. 1466 is amended by:

- (1) striking the title of this section 'ALASKA LAND CLAIMS HEARINGS AND APPEALS' and inserting 'ALASKA OFFICE OF HEARINGS AND APPEALS'

- (2) in subsection (a) striking 'a hearings and appeals process to decide appeals from land transfer decision issued by the Secretary in the State' and inserting 'an Alaska Office of Hearings and Appeals to decide matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary regarding land transfer decisions and Indian probates in Alaska'

- (3) in subsection (b)(1) striking 'may' and inserting 'shall,' and

- (4) in subsection (b)(1) striking 'or other officers,' and insert 'hold hearings and' in between 'to' and 'hear appeals,' and

- (5) in subsection (b)(1) striking 'for a specified term, as determined by the Secretary,' and

- (6) in subsection (b)(2) striking 'and other officers,' and inserting at the end 'as such powers relate to land transfer decisions and Indian probates within Alaska.'

- (7) in subsection (c) of Section 501,

- (a) striking subsection (1) and inserting, '(1) IN GENERAL- Existing regulations published at 43 C.F.R. Part 4 shall apply to the Alaska Office of Hearings and Appeals.'

SECTION 701. AUTHORIZATION OF APPROPRIATIONS

Section 701 of S. 1466 is amended by:

inserting after the period in subsection (a), 'Indian Tribes, and Tribal Organizations shall receive the same level of increase in funding to sums appropriated to the Department of Interior to carry out the purposes of this Act.'

1

A REPORT CONCERNING OPEN SEASON FOR CERTAIN NATIVE ALASKA VETERANS FOR ALLOTMENTS

**Prepared for Congress
by the Department of the Interior**

**In Response to
Section 106 of Public Law 104-42**

JUNE 1997

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I. Statutory Basis for Report

On November 2, 1995, President Clinton signed Public Law 104-42, an Act Amending Various Provisions of the Alaska Native Claims Settlement Act (ANCSA). Section 106, entitled "REPORT CONCERNING OPEN SEASON FOR CERTAIN NATIVE ALASKA VETERANS FOR ALLOTMENTS," requires

(a) In General--No later than 9 months after the date of enactment of this Act, the Secretary of the Interior, in consultation with the Secretary of Agriculture, the State of

Alaska and appropriate Native corporations and organizations, shall submit to the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report which shall include, but not be limited to, the following:

- (1) The number of Vietnam Era veterans, as defined in section 101 of title 38, United States Code, who were eligible for but did not apply for an allotment of not to exceed 160 acres under the Act of May 17, 1906 (chapter 2469, 34 Stat. 197), as the Act was in effect before December 18, 1971.
- (2) An assessment of the potential impacts of additional allotments on conservation system units as that term is defined in section 102(4) of the Alaska National Interest Lands Act (94 Stat. 2375)
- (3) Recommendations for any additional legislation that the Secretary concludes is necessary.

Background information and a statement of the possible need for legislation was contained in House Report 104-73, a report of the House Committee on Resources which accompanied H.R. 402, the bill that eventually became P.L. 104-42. The Committee report specifically addressed the fact that many Alaska Natives were serving in the Armed Services during the period immediately prior to the repeal of the Alaska Native Allotment Act in 1971 and may have missed their opportunity to apply for Native allotments as a consequence of their military service. At the time P.L. 104-42 was passed, the Vietnam Era was defined in Section 101 of Title 38 U.S.C. as beginning August 5, 1964, and ending May 7, 1975.

II. Summary of Findings

Because of significant anomalies in computer records and other data available for this report, statistics reflect estimates and ranges rather than precise numbers. Where appropriate, we explain our rationale for using a given set of data.

Using the Bureau of Indian Affairs (BIA) list of all Alaska Natives enrolled in ANCSA Corporations, this report finds that there were approximately 2,290 eligible enrolled Alaska Native Vietnam Era veterans who did not apply for allotments. Based on unsolicited information from individuals during preparation of this report and other data, there may be several hundred additional individuals who were not enrolled but otherwise eligible for an allotment during the Vietnam Era.

The report also calculated that during the period of January 1, 1970 to December 18, 1971, when a major effort was undertaken to encourage Natives to perfect their allotment applications before the Alaska Native Allotment Act was repealed in 1971, over 600 Alaska Natives who had served in active military service for more than one year during the period did not apply for allotments.

Depending on final eligibility criteria, we estimate that the number of Alaska Native Vietnam Era veterans who did not apply for allotments could range from about 500 to about 2,800.

Using this range, the report finds that an open season could result in allotment applications on from 40,000 to 448,000 acres of Alaska lands.

Using this range, the costs to the Federal government of implementing an open season program could be from \$18 million to \$186 million. Costs are discussed throughout the report in the sections on potential impacts to each Department of the Interior bureau. See Table 8, page 39, for a consolidated estimate of minimum and maximum ranges of possible total costs

The Department understands that Congress may choose to develop a renewed allotment program for Alaska Native Vietnam veterans, or some portion of them according to criteria it may choose, because it determines that some such veterans were or may have been prevented from applying for an allotment by reason of service and that is the fairest way to deal with the issue. Congress may also consider that such a partial renewal of the allotment program could create new inequities both internal and external to the Native community, could result in high costs both in cash and in land that would be transferred from Federal ownership, and could potentially delay settlements in process or disrupt settled arrangements and uses of land.

III. A History of the Alaska Native Allotment Act

The Alaska Native Allotment Act, as amended, 43 U.S.C. Sections 270-1 through 270-3 (1970), gave the Secretary of the Interior authority to convey not more than 160 acres of "vacant, unappropriated, and unreserved nonmineral land in Alaska" to "any Indian, Aleut, or Eskimo of full or mixed blood who resided in and was a [N]ative of Alaska." Following the amendment of the Allotment Act in 1956, land valuable for coal, oil or gas could be conveyed as long as those valuable minerals were reserved to the United States. In addition, an applicant was required to provide satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. The implementing regulation, 43 C.F.R. section 2561.0-5(a), provided that:

The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

While the five-year requirement was initially interpreted to require that all five years of use and occupancy had to be completed while the land was available for entry, this interpretation was later changed to only require that qualifying use and occupancy began while the land was available for entry. To be eligible for a Native allotment, an applicant had to meet all of the statutory and regulatory requirements pertaining to the qualifications of an applicant, land status, and satisfactory proof of use and occupancy.

By 1970, only about 2,400 applications had been filed under the Act, and only about 245 allotments

had been approved. Beginning in June 1970 the Bureau of Indian Affairs (BIA), the Rural Alaska Community Action Program (RurAL CAP), and the Alaska Legal Services Corporation (ALSC), anticipating that the Alaska Native Allotment Act would soon be repealed, initiated an effort to assist Alaska Natives in filing allotment applications.

The Alaska Native Allotment Act was repealed with the passage of the Alaska Native Claims Settlement Act (ANCSA) on December 18, 1971. By the time the Allotment Act was repealed, approximately 10,000 applications had been filed for more than 15,000 parcels of land, primarily through the efforts of BIA, RurAL CAP, and ALSC to locate and assist applicants.

On December 2, 1980, the Alaska National Interest Lands Conservation Act (ANILCA) was passed which had a significant impact on the Alaska Native allotment program. Section 905 of ANILCA was designed to eliminate many of the obstacles to processing and conveyance of Native allotments by allowing a legislative approval of those applications pending before the Department on or before December 18, 1971, when the Allotment Act was repealed. There were a number of significant exceptions to this legislative approval. Although some applications have been approved and conveyed under the provisions of Sec. 905 of ANILCA, a great many fall within the excepted categories and must be fully adjudicated under the criteria of the Alaska Native Allotment Act.

In an attempt to break loose this backlog of unapproved allotments, Secretary Babbitt has recently asked for public comments on a proposal to legislatively approve all allotments for which protests have been withdrawn. Although an allotment may not exceed 160 acres, many applications have been filed for multiple, noncontiguous parcels, including applications for two 80-acre tracts or four 40-acre tracts. However, 1.6 is the average number of parcels in an application. The current count of parcels claimed since 1906 is nearly 16,000, of which 6,000 have not yet been conveyed or rejected. Survey is required for 4,000 of the 6,000. (See page 22 for more on impacts on workload.) Public land entry statutes have been generally construed to authorize only one parcel per entry unless expressly provided otherwise. From 1906 to 1964, Alaska Native allotments were confined to one parcel. By regulation, multiple parcels were permitted from 1964 through 1971.

IV. Processes Used to Gather Data for This Report

A data file of all Alaska Natives enrolled in ANCSA corporations was obtained from the BIA. This file includes over 103,000 records. The Veterans Administration (VA) has a data file of all veterans who served in the Vietnam Era, August 5, 1964, to May 7, 1975. This file contains over 40,000,000 records. These two files were analyzed by the VA to develop a list of enrolled Alaska Natives who served in the Armed Services during that period. The resulting list was then compared to BIA and Bureau of Land Management (BLM) allotment application lists to determine which of these Vietnam Era veterans have already applied for an allotment.

ANCSA enrollment files were used as the primary source of reliable data to determine the scope of the issue. The ANCSA enrollment files, although representing a large majority of Alaska Natives, do not reflect the total number of Alaska Natives who might be eligible for an allotment. The enrollment process required by ANCSA enrolled only individuals with one-fourth or more of Native blood. The Alaska Native Allotment Act only required individuals to be Alaska Native. We did receive unsolicited phone calls or correspondence from over 200 individuals who may be Alaska Natives

160 acres
93,000 acres

Use and occupancy
Native log & village selection
including to pass

Vacant federal land on
Corp or State willing to give up

743

1906 act
by 1955

What % of Vet
Non-Native
applied for allotment

1978 estimated 60,000
8,000 applicants

135=

Legislative approval
provision
State veto power - 6,000 applicants
reduces time 6 mo vs 20 years

48% - ~~all~~ transferred fed lands to
all private is as Native Allotments

who were not enrolled as shareholders of Alaska Native corporations.

Notably, of the approximately 10,000 applications for allotments received prior to repeal of the Act, 8,420 were enrolled. Roughly 16 percent of the total were unenrolled; or, put another way, unenrolled applicants numbered just under 20 percent of enrolled applicants. During the data gathering we also found that there are enrolled individuals who do not appear on the master enrollment list for a variety of reasons, so the computerized enrollment records are themselves incomplete.

Because of our lack of reliable data as to the number of unenrolled Native veterans or enrolled but unlisted veterans, precise numbers would be possible only after a formal allotment application procedure. For these and other reasons, the numbers of veterans reflected in this report are intended to be indicators, not absolutes.

See Appendix A for complete details of the data gathering process. See Appendices B and C for actual enrollment data by region and village.

V. Numbers of Native Veterans Who Did Not Apply for an Allotment

Because of statistically significant anomalies in computer records and other data available for this report, statistics reflect trends and ranges rather than precise numbers. Our primary data source for Alaska Natives was the BIA's computerized ANCSA enrollment record. We analyzed the basic data of enrolled Vietnam Era veterans who did not apply for an allotment to cover a variety of time periods as reflected below. The first period is the total designated time for the Vietnam Era. The second period is the Vietnam Era from August 5, 1964 through December 18, 1971, the passage of ANCSA which repealed the Alaska Native Allotment Act. The third period, January 1970 through December 1971, is when the major effort was undertaken by the BIA and others to accelerate application filings. The fourth through sixth periods are subsets of the third period to determine how many veterans may have had time to apply during the third period, because they were not in active military service over the entire period. Overall, 179 of 2,469 enrolled Alaska Native Vietnam Era veterans applied for allotments. The numbers of deceased (from the VA records) are shown for = 737. information (these numbers are included in the totals).

To account for the significant numbers of veterans not enrolled or not listed, adding 20 percent (see Section IV) to the number of *enrolled* veterans who did not apply (number 1 below) equals about 2,750. To account for possible additional unforeseen applicants, we have adapted a figure of 2,800 as the top estimate of possible applicants.

Total Alaska Native Enrolled Veterans Who Did Not Apply For An Allotment

Service Period

No. Who Did Not Apply

No. Deceased

1.	8/64-5/75 (total Era)	2290	264
2.	8/64-12/71	1601	225
3.	1/70-12/71	1036	121
4.	>1 year served (70/71)	632	68
5.	<1 year served (70/71)	404	53
6.	<6 months served (70/71)	203	23

VI. Outreach and Consultation

Section 106 requires consultation with the Secretary of Agriculture, the State of Alaska, and appropriate Native corporations and organizations. Our consultation efforts were directed towards gathering viewpoints and concerns of what should be included in the report.

In early December 1995, at a meeting of realty service providers, the legislation was discussed. The "realty service providers" are 25 tribal realty offices, operating under P.L. 93-638 contracts or compacts and BIA realty offices. A format was developed to use in documenting contacts made by individuals to record anecdotal and other information.

On January 12, 1996, a status report on the implementation of 1995 ANCSA amendments was sent to all ANCSA Corporations and Alaska tribes by the Office of the Secretary. As a result of this report, and subsequent outreach by ANCSA Corporations and realty service providers, individuals began to contact the BLM and realty service providers. These contacts were made by telephone, in person, and by letter. When contacted, basic information was obtained from the individual, such as name, address, date of birth, social security number, dates of service, probable location of land, etc.

Meetings were held with some ANCSA Corporations, the Alaska Federation of Natives (AFN), the Alaska Inter-Tribal Council (AITC), and realty service providers on July 9 and 10, 1996. Appendix D contains the notes from these meetings. Common concerns expressed were that:

- Legislation would be drafted in such a way that few veterans would be eligible
- There would be insufficient funding to properly implement the program, especially for cadastral surveys.
- The high cost of the program would be used as a reason to *not* enact enabling legislation.
- People want to avoid the lengthy adjudication process of Native allotments. One suggestion was to include the same opportunity for legislative approval of the applications, absent legal defects and certain type of conflicts. It was also recommended that there be no opportunity given for blanket protests.
- The interests of deceased Native veterans should be protected.
- What Federal lands would be available? Much of the land surrounding Native villages is not owned by the Federal government. The possibility of voluntary reconveyances from ANCSA Corporations to the BLM was raised as a solution. The acreage would then be credited back to

the corporation.

Most groups wanted the opportunity to review this report. The AFN Land Managers Committee will want to discuss the potential impacts on Interim Conveyed lands. The realty service providers recommended a statewide meeting of realty service providers, AFN, AITC, and ANCSA Corporations to review and discuss the report.

Comments received from the Alaska Region of the U. S. Forest Service conclude that there would be no impacts to the National Forest System lands in Alaska attributable to Section 106. This is based on the assumption that the Native veterans would not be eligible to apply for allotments within the Chugach and Tongass National Forests because of the early withdrawal dates of the forests from land entry.

Our consultation with the State of Alaska was through the Governor's Office in Washington. The State wished to express no position at this time on this issue.

This report has not been circulated for comment prior to submitting it to Congress. However, affected interests will be provided a copy at the same time the report is delivered to Congress.

VII. Potential Impacts on Conservation System Units (CSUs) and on Bureau Operations

A. Introduction

In analyzing potential impacts, we determined the following to be reasonable assumptions to guide our preparation of the report:

1. Only Alaska Native Vietnam veterans enrolled to a *village* are used in the analysis to assess the potential impacts of new Native allotments on CSUs. We have no data on which to base estimates of where veterans enrolled to a *region* might apply for an allotment within the region. There are significant numbers of veterans enrolled only for a Region (see Appendix B). Also, there are significant numbers of veterans not enrolled. Therefore impacts on CSUs are underestimated and cannot reflect regional enrollees or unenrolled applicants for whom impacts are difficult to appraise.
2. For the purposes of this impact analysis we assume new allotment selections would be within a 25-mile radius of the enrollment village of eligible veterans. The decision to use a 25-mile radius was based on an analysis of existing Native allotment applications and certificates on the Yukon Delta, Kodiak, and Yukon Flats refuges which found that over 90 percent of allotments were within 25 miles of a village recognized by ANCSA. We are unable to do a geographic analysis of impacts of new applications by eligible veterans enrolled in the 13th Region or at large in the other Regions.
3. Applicants from villages located within or adjacent to a CSU with little other Federal land within 25 miles would select an allotment in that CSU.
4. The duty station(s) of the veteran during the Era could have impacted their ability to apply. Duty in Alaska, in the continental U.S., in the Vietnam theater, or elsewhere

overseas each provides different opportunities and limits. For the purpose of this report, however, we make no distinctions based on duty stations.

5. If Alaska Native Vietnam Era veterans are authorized to apply for land allotments, it will be because they were unable to apply for a Native Allotment prior to the repeal of the Native Allotment Act by ANCSA December 18, 1971 because of their period of service.

The report will focus on two time periods; August 5, 1964, to May 8, 1975, and January 1, 1970 to December 18, 1971. The first period reflects the statutory period of the Vietnam Era which is required by P.L. 104-42. The second period coincides with the period when a major effort was made by the BIA and others to publicize the allotment program and assist Natives in completing their applications. December 18, 1971, is the date of repeal of the 1906 Native Allotment Act by the passage of ANCSA. For purposes of the second time period, veterans on active duty prior to 1970 are presumed to have had the same opportunity as other Alaska Natives to apply prior to the deadline; and veterans entering service after December 18, 1971, are presumed not eligible for an allotment because they did not apply before the repeal of the Allotment Act, and their service had no bearing on their opportunity to apply.

6. At a minimum, land available for new applicants must currently be Federally owned and must have been otherwise unappropriated and unreserved Federal land available to the applicant before December 18, 1971 at the time of the beginning of their use and occupancy.

7. For the purpose of impact analysis was assumed that applicants may select up to a total of 160 acres, comprised of one parcel. (See Item 8 of Legislative Considerations, page 37.)

The assessment of the potential impacts of additional allotments on CSUs is discussed below by each Department of Interior bureau that could be impacted.

B. Bureau of Indian Affairs

The Bureau of Indian Affairs has the responsibility for assisting Native allotment applicants perfect title to their claims. This responsibility is handled directly through agency realty staff and through P.L. 93-638 contracts and compacts. There are a total of 25 realty service providers in Alaska. This responsibility has been funded through the tribal priority allocation and nonrecurring funds. Depending upon the application criteria, this portion of the program will cost a minimum of \$1,200,000 annually above available budgets for a limited duration of 2-3 years.

Once allotments are certificated, then the full range of real estate management activities begins in meeting the BIA's trust management responsibilities. Included are functions of writing wills, probates, processing rights-of-way, land sales, gift deeds, leases and permits, HUD leases, and so forth. We estimate BIA's responsibilities for managing additional allotments will cost a minimum of \$400,000 annually above current budgets, but could be from \$1-2 million. (See Table 8, page 39.) Additional realty services must be supported by field activities such as appraisals, archeological clearances, trespass abatement and so forth, for which we can not estimate costs at this time. BIA's current trust fund management accounting problems will be exacerbated by increasing the numbers of allotments and future fractionated ownership.

C. Fish and Wildlife Service

Currently, Native allotments occur on all 16 National Wildlife Refuges in Alaska with approximately 3,800 either conveyed or pending within refuge boundaries. The passage of legislation authorizing new allotments for Alaska Native veterans could add to this number by more from 15-30 percent, with the potential to affect from 64,000 to 110,000 acres of refuge lands.

Existing allotments and conveyed Native corporation lands limit the amount of available lands around many Native villages. In addition, lands within several Alaska Refuges, which were created by Executive Order prior to 1971, were not available for selection as Native allotments depending on the withdrawal date and the initial time of use by the applicant.

The following discussion centers on the availability of lands within refuges for selection and the potential impacts to fish and wildlife resources.

Number and distribution of potential applicants: A total of 76 villages with potential Vietnam Era, veteran Native allotment applicants are found within the boundaries of the 16 Alaska Refuges. There are an additional 83 villages within 25 miles of refuge boundaries with potential applicants.

For purposes of this report we discuss two likely scenarios for the volume of new applications. Scenario 1 assumes a new application opening that encompasses all Vietnam Era veterans (1964-1975). Such an opening could allow about 1,111 applications distributed throughout the sixteen Wildlife Refuges with the potential to affect from 64,064 to 110,784 acres of refuge lands.

Scenario 2 assumes an opening restricted to veterans on active duty for at least a year during the period from January 1, 1970, to December 18, 1971. This time period coincides with a major effort by RuralCap and others to publicize the repeal of the Allotment Act by the passage of ANCSA and to help Natives perfect their claims for an allotment. Under Scenario 2, an estimated 463 new allotment applications could be filed with the potential to affect from 26,720 to 46,720 acres of refuge lands. Tables 1 and 2 list the maximum number of potential applicants in and within 25 miles of a refuge, and total acres affected in each refuge, using Scenarios 1 and 2, respectively.

The selection of multiple parcel allotments would extend the impacts on refuges because applicants could select small parcels in several areas. From 1964 to 1971, regulations allowed the selection of several noncontiguous parcels and this option was chosen by a number of applicants. In one case on Kodiak Refuge an applicant obtained three coastal parcels of land. Two of these parcels are 30 miles apart. Smaller parcels are easier to sell or develop on the open real estate market and would probably be preferred by applicants today.

Table 1 Potential Number of Village-Enrolled Vietnam Veteran Native Allotment Applicants Who Served between 1964 and 1975 and the Estimated Amount of Refuge Land Affected if Legislation Allowing New Applications for These Alaska Native Veterans were Enacted.

	Villages within Refuge with potential applicants	Max. No. of Native Vietnam veterans from these villages	Affected acres: 160 acres X Max. No. of Vietnam veterans	Additional villages within 25 miles of refuge with potential applicants	Max. No. of Native Vietnam Veterans from these villages	Range of additional affected acres: 160 acres X 10 and 60 percent ¹
REFUGE						
Alaska Maritime ²	12	32	2,720 ³	26	303	4,848-29,088
Alaska Peninsula/	5	22	3,520	9	33	528-3,168
Becharof						
Arctic	2	4	640	1	2	32-192
Innoko	0	0	0	6	26	416-2,496
Izenhek	0	0	0	1	8	128-768
Kanuti	0	0	0	3	5	80-480
Kenai	1	4	0 ³	11	156	0 ³
Kodiak	5	15	2,400	5	65	1,040-6,240
Koyukuk/	1	3	480	3	21	336-2,016
Nowitna						
Selawik	3	23	3,680	3	57	912-5,472
Tetlin	1	7	1,120	1	1	16-96
Togiak	5	19	3,040	4	30	480-2,880
Yukon Delta	37	220	33,600 ³	8	26	416-2,496
Yukon Flats	4	22	3,520	2	7	112-672
TOTAL	76	371	54,720	83	740	9,344-56,064

¹ Estimates of 10 and 60 percent were used for the minimum and maximum affected area calculations, respectively, when the enrollment village was located outside of the refuge.

² All offshore rocks, spires, and islets may not be accounted for in the total affected area for Alaska Maritime Refuge.

³ The affected acreage from potential allotments within old refuges is not included in these figures.

Table 2 Potential Number of Village-Enrolled Vietnam Veteran Native Allotment Applicants Who Served for One Year or More between January 1, 1970, and December 18, 1971, and the Estimated Amount of Refuge Land Affected if Legislation Allowing New Applications for These Alaska Native Veterans were Enacted.

REFUGE	Villages within Refuge with potential applicants	Max. No. of Native Vietnam veterans from these villages	Affected acres: 160 acres X Max. No. of Vietnam veterans	Additional villages within 25 miles of refuge with potential applicants	Max. No. of Native Vietnam veterans from these villages	Range of additional affected acres: 160 acres X 10 and 60 percent ¹
Alaska Maritime ²	7	13	960 ³	20	106	1,696-10,176
Alaska Peninsula/ Becharof	4	9	1,440			
				8	15	240-1,440
Arctic	1	1	160	1	1	16-96
Innoko	0	0	0	6	16	256-1,536
Izembek	0	0	0	1	3	48-288
Kanuti	0	0	0	3	4	64-384
Kenai	1	1	0 ³	8	60	0 ³
Kodiak	4	8	1,280	4	35	560-3,360
Koyukuk/	1	3	480	3	16	256-1,536
Nowitna						
Selawik	3	11	1,760	1	26	416-2,496
Tetlin	1	4	640	0	0	0
Togiak	3	3	480	3	14	224-1,344
Yukon Delta	28	83	12,800 ³	7	13	208-1,248
Yukon Flats	3	17	2,720	1	1	16-96
TOTAL	56	153	22,720	66	310	4,000-24,000

¹ Estimates of 10 and 60 percent were used for the minimum and maximum affected area calculations, respectively, when the enrollment village was located outside of the refuge.

² All offshore rocks, spires, and islets may not be accounted for in the total affected area for Alaska Maritime Refuge.

³ The affected acreage from potential allotments within old refuges is not included in these figures

Impacts on natural values: Allotments are traditionally located at sites on coastlines and inland waterways which offer the best subsistence resources with easy access from rural villages. New applications would presumably follow this same pattern. However, conflicts with conveyed land may lead to the selection of alternative sites. These sites may be a further distance from villages than is normally traveled for subsistence purposes. Private land could be created in largely untouched wildlands. Future activities that occur on these remote sites could adversely affect existing natural values.

Subdivision and Commercial Activities: The majority of existing Native allotments on Alaska Refuges are used by the original allottees or their heirs for subsistence or recreational purposes. At this time these uses are largely compatible with the purposes of each refuge and conflicts are few. However, the passage of time and a changing lifestyle has brought new demands to a few of Alaska's remotest places. Private lands, such as Native allotments, surrounded by public land and near prime

fishing and hunting locations are being sought out for sale and development. Exclusive use of the best resource locations is very attractive to potential buyers. Many original allottees are elderly and no longer use the allotments. The heirs to allotments often live away from the region. New allotments would be highly susceptible to development pressure. It is also well known that the Federal government is actively acquiring inholdings on a willing seller basis on some refuges.

Case Studies: Yukon Delta and Kodiak National Wildlife Refuges

To gain a better understanding of potential impacts to individual refuges, we analyzed the effect of a new application opening on two of Alaska's refuges. In the following case studies, the total acreage affected under the two scenarios is identified, and the potential impacts on natural resources are discussed.

Yukon Delta Refuge

The Yukon Delta National Wildlife Refuge is the largest refuge in Alaska and has the most Native villages within its boundary, consequently, additional allotments could have a significant impact on refuge resources and management. Under Scenario 1 (1964-1975), about 246 potential applicants could each select a 160 acre allotment within the boundaries of the refuge (Table 3, page 16). An estimated 34,016 to 36,096 acres of refuge lands could be selected. The potential impact of selections by the 15 veterans that enrolled to Calista Regional Corporation could not be assessed because the veterans did not identify a home village. However, if we assume that all 15 potential applicants selected allotments within the Refuge, an additional 2,400 acres of refuge lands could be affected.

Under Scenario 2, veterans who served for at least 1 year during the time period from January 1, 1970, to December 18, 1971, a maximum of 96 applicants could select allotments within the Refuge (Table 3). This is approximately 39 percent of the total number of Native Vietnam Era veterans that could select an allotment within the Refuge. Approximately 13,008 to 14,048 acres of refuge lands could be affected (Table 3). The potential effect of selections by the 4 veterans that enrolled to Calista Regional Corporation could not be assessed because the veterans did not identify a home village. However, if we assume that all 4 applicants selected allotments within the Refuge, an additional 640 acres of refuge lands would be impacted.

Table 3 Effect of Proposed Vietnam Veterans Native Allotment Act on Alaska Refuges Using the Number of Village-Enrolled Native Vietnam Veterans on Active Duty during 1964-1975 and the Number that Served for at Least One Year between January 1, 1970 and December 18, 1971.

REFUGE	Number of villages with potential applicants		Maximum number of potential applicants		Estimated affected acreage		Date of withdrawal of refuge from availability	Resour manage may be native
	1964-1975	1970-1971	1964-1975	1970-1971	1964-1975	1970-1971		
Alaska	38	27	335	119	7,568- 31,808	2,656- 1942--	portion	None. The

Maritime

						11,136 of refuge ³	available allotments
						1971-- remainder of refuge	Seabird ar mammal t
Alaska Peninsula/	14	12	55	24	4,048- 6,688	1,680- 2,880 1971-- entire refuge	Caribou, t anadromo
Becharof Arctic	3	2	6	2	672-832	176-256 1971-- entire refuge ⁴	Caribou c: Wildernes
Innoko	6	6	26	16	416- 2,496	256- 1,536 1971-- entire refuge	Waterfow anadromo
Izembek	1	1	8	3	128-768	48-288 1960-- entire refuge	Waterfow nesting ha
Kanuti	3	3	5	4	80-480	64-384 1971-- entire refuge	Waterfow
Kenai	12	9	160	61	0	0 1941-- entire refuge	Fire mana None. The available l allotments
Kodiak	10	8	80	43	3,440- 8,640	1,840- 4,640 1958-- One mile shoreline buffer area ⁵	Anadrome and browr
Koyukuk/	4	4	24	19	816- 2,496	736- 2,016 1971-- entire refuge	Current ac - reacquis: parcels in Moose hal managemt
Nowitna Selawik	6	4	80	37	4,592- 9,152	2,176- 4,256 1971-- entire refuge	Caribou a: habitat
Tetlin	2	1	8	4	1,136- 1,216	640 1971-- entire refuge	Fire mana
Togiak	9	6	49	17	3,520- 5,920	704- 1,824 1969-- Cape Newenham Refuge	Anadrome brown bea marine ma
						1971-- remainder of refuge	Sport fish: commerci
Yukon	45	35	246	96	34,016-36,096	13,008- 1971--	Arctic nes

Delta

14,048 remainder of
refuge
1960--
Clarence
Rhode Unit
other water
mammals,
fish resour
listed thre
eider habi

1929--
Nunivak Island
and

1937-- Hazen
Bay

								None. The available l allotments
Yukon Flat	6	4	29	18	3,632- 4,192	2,736- 2,816	1971-- entire refuge	Waterfow
								Fire mana
TOTAL	159	122	1,111	463	64,064- 110,784	26,720- 46,720		

¹ This is a limited review of management and resource issues that could potentially be effected.

² The affected acreage includes duplicate counts because two refuges fell within the same 25-mile buffer area around a village. Extent and location of duplicate counts are shown in Tables 1 and 2.

³ This includes the Bering Sea Unit, Pribilof Unit, St. Lazaria Island, Tuxedni, and Bogoslof all reserved in 1906; Forrester Island, Hazy Islands, Chamisso Island reserved in 1912; the Aleutian Islands reserved in 1913; Unalaska Island reserved in 1941 and the Semidi Islands reserved in 1942.

⁴ Lands within Arctic Refuge previously owned by the U.S. Navy were reserved in 1960.

⁵ All Refuge lands interior of the 1-mile shoreline buffer zone were reserved in 1941. The Ban Island Unit of the Refuge, previously the Afognak Island Forest and Fish Culture Reserve was reserved in 1894.

We calculated the average land status within the 25-mile radius area around each village with potential applicants in and within 25 miles of the refuge boundary (Table 4). Of the approximately 14,430,600 acres of lands within the buffer area, approximately 9,694,500 (67 percent) acres are either Federal lands or selected lands and would be available for selection by potential

applicants. The 25-mile radius area around the villages would appear to be sufficient to meet the needs of the potential applicants with the possible exception of Bethel and adjacent villages. However, there are also areas of Federal lands not open to selection (Table 4). Nunivak Island and Hazen Bay were reserved in 1929 and 1937, respectively. The potential applicants who enrolled in the village of Mekoryuk on Nunivak Island would not be able to select an allotment on the island.

The villages with potential applicants that served during 1964-1975 and 1970-1971 are located along the Refuge's coastline and the Yukon and Kuskokwim rivers. These areas contain high value fish and wildlife habitats. The numerous drainages of the Refuge provide spawning and rearing habitat and serve as migration corridors for all five species of Pacific salmon. The coastal plain provides high value nesting, molting and staging habitat for waterfowl and nesting habitat for shorebirds. The coastal areas of the Refuge are considered important nesting areas for tundra swans, spectacled eiders, Pacific brant, emperor geese, and cackling Canada geese. Increased development and human activity in these coastal areas could threaten the critical waterfowl habitat of the Yukon-Kuskokwim Delta.

Selection of allotments away from villages (beyond the 25-mile radius) and deep within the Refuge could also affect refuge resources and management. A new allotment in an undeveloped part of the refuge could have a greater impact on resources and management than an additional allotment in an area with existing developments.

Table 4 Land Status within 25-Mile Radius Buffer Areas around Home Villages of Enrolled Native Vietnam Era Veterans on the Yukon Delta National Wildlife Refuge (Active Duty, 1964-1975).

	Acres within 25-mile buffer around home villages	Percent of total buffered area	Notes
Native Conveyed	4,201,900		Includes certificated allotments
State Conveyed	59,000		
Other Private Conveyed	4,700		
Total Conveyed	4,265,600	30	
Non-FWS Federal Withdrawal	4,900		Mostly military lands, some small FAA
Refuge lands in buffer, but not available because of withdrawal date, i.e., Hazen Bay and Nunivak Island	6,900		Hazen Bay Refuge was withdrawn in 1937.
	458,700		Nunivak Island Refuge was withdrawn in 1929.
Federal lands not available	470,500	3	
Native Selected	2,727,700		Includes allotment applications.
State Selected	10,000		
Other Selected	100		
Total Selected	2,737,800	19	
Refuge lands within buffer	6,956,700	48	Includes the Clarence Rhode

Refuge which was withdrawn
in 1960.

Kodiak Refuge

There are approximately 80 conveyed or selected Native allotments currently within Kodiak Refuge. These parcels are generally located along coastline and inland waterways and contain prime fish and wildlife habitats. Spawning streams for five species of Pacific salmon, important feeding grounds for bald eagles, and high concentrations of coastal brown bears are found on or near many allotments. Salmon stocks produced in part on these properties are the mainstay of one of the largest commercial fisheries in the world.

Several Native allotments within the Refuge have been offered on the real estate market in recent years. The parcels have been subdivided or offered in their entirety for hunting and/or fishing lodges and other developments which threaten the long-term health of this unique ecosystem. Brown bear-human conflicts are on the rise with new cabins appearing every summer. Cabin and lodge construction directly on an archaeological site is common.

Because of this threat to the integrity of the Kodiak Refuge, Congress has appropriated \$4.5 million from the Land and Water Conservation Fund to buy small parcels from willing sellers. The Fish and Wildlife Service has also received \$3 million from the *Exxon Valdez* Oil Spill settlement accounts for this purpose. The bulk of this money has been spent to acquire Native allotments. If Scenario 1 is implemented, about 80 Vietnam Era veteran applicants could select allotments on the Refuge (Table 3). All potential applicants enrolled in villages on the Kodiak Archipelago would be able to select lands within the Refuge because of the overlap of the 25-mile radius areas with Refuge lands. An estimated range of 3,440 to 8,640 acres of refuge lands could be affected. The potential effect of selections by the 21 veterans that enrolled to Koniag Incorporated could not be assessed because the veterans did not identify a home village. However, if we assume that all 21 applicants selected allotments within the Refuge, an additional 3,360 acres of Refuge lands could be impacted.

Under Scenario 2, veterans who served for at least a year during the time period from January 1, 1970, to December 18, 1971, 43 potential applicants could select allotments within the Refuge. This is approximately 54 percent of the total number of Native Vietnam Era veterans that could potentially select an allotment within the Refuge. Approximately 1,840 to 4,640 acres of refuge lands could be affected (Table 3). The potential effect of selections by the 5 veterans that enrolled to Koniag Incorporated could not be assessed because the veterans did not identify a home village. However, if we assume that all 5 applicants selected allotments within the Refuge, an additional 800 acres of Refuge lands could be impacted.

If use and occupancy requirements are not applied in some manner in new legislation, the Federal government may find itself bidding for land that it just recently bought from another allottee.

Not all new applicants would be interested in immediately selling their land holdings. However, the active real estate market on Kodiak Island, including private and government sales, assures that some applicants would select lands in areas with the highest economic value. At current land values, up to \$14 million would be required to buy back 80 full allotments under Scenario 1.

The 25-mile radius area around the villages would appear to be sufficient to meet the needs of the

potential applicants under the two scenarios; however, there are areas of Federal lands not open to selection within the Refuge. The Ban Island Unit of the Refuge, previously the Afognak Island Forest and Fish Culture Reserve, was reserved in 1892 and all Refuge lands on Kodiak Island with the exception of a one-mile shoreline buffer were reserved in 1941. In addition, lands recently acquired with *Exxon Valdez* Oil Spill funds from Kodiak Island Native Corporations would not be available for new selections because of the terms of the purchase contracts.

Potential Impacts Outside of Refuge Boundaries:

The Service is responsible for managing populations of migratory birds, marine mammals and endangered species. This regulatory trust extends throughout the range of these animals on public

and private lands. New Native allotments patented within sensitive fish and wildlife habitats throughout the State may have a significant impact on these trust species.

Potential Cost to the Fish and Wildlife Service

Under Scenario 2 (the 1970-1971 limited period), the addition of 463 new Native Allotments within the refuge boundaries would lead to increased land management costs. The potential impacts to adjoining refuge lands and the increase in trespass and access issues could cost up to \$250,000. The cost of wild fire suppression would increase on many interior refuges where fire is an important component of the ecology. Fires are generally allowed to burn naturally if life or private property is not endangered. Under Scenario 2, there is the potential for 63 new allotments in fire-prone areas. The potential cost of increased fire suppression could exceed \$1.5 million. The total cost of updating the Service's computerized land status database is projected to be approximately \$40,000.

In some cases it might be necessary for the Service to acquire new Native Allotments in order to protect the integrity of surrounding refuge lands. Allotments located near fish and wildlife concentration areas would be the most susceptible to development pressure. Acquisitions would be evaluated on an individual basis and limited to willing sellers. However, if the Service were to acquire 50 percent of the new allotments possible under Scenario 2, the estimated fair market value could exceed \$26 million. This does not include transfer costs or other buy-out costs.

Under Scenario 1, with 1,100 possible applications as opposed to 463, costs would be commensurately greater.

Impacts on Refuges Would Be Reduced by Offering Lands outside CSUs or a Cash Settlement:

Impacts on refuges would be reduced by offering either an allotment on other available lands or a cash settlement as an alternative to an allotment that would have been inside the boundary of an existing Refuge. Because of the location of other lands in relation to applicant residences (Table 9 in Appendix E, page 67), it is anticipated that many potential allottees would select the cash settlement.

The cost of a cash settlement could be substantial. For example, under Scenario 2, the cost could range from 8 to 12 million dollars (Table 11 in Appendix E, page 70), if all veterans who are enrolled in villages located more than 25 miles from available BLM lands decided to choose a cash settlement equivalent to \$400 per acre. If the cash settlement was based on fair market value rather than a predetermined sum, the cost could range from 9 to more than 26 million dollars (Table 12 in Appendix E, page 72).

Summary of Refuge Impacts

An opening restricted to veterans on active duty for at least one year between January 1, 1970, and December 18, 1971, could account for 463 new allotment applications with the potential to affect 26,720 to 46,720 acres of refuge lands (Table 5, page 23).

This time period was critical in the accelerated effort to inform Natives of the pending repeal of the Alaska Native Allotment Act. Allotments selected by veterans enrolled to a Region could also affect refuge lands; however, potential impacts could not be assessed because veterans did not identify a home village. However, if we assume that a percentage of those enrollees similar to the percentage of Federal lands in Alaska Refuges (35 percent) selected allotments in refuges, an additional 32,872 and 9,016 acres of refuge lands could potentially be affected by potential applicants on active duty during 1964-1975 and 1970-1971.

Allotments are traditionally located at sites on coastlines and inland waterways with easy access from rural villages and which offer the best subsistence resources. The majority of existing Native allotments on Alaska Refuges are used by the original allottees or their heirs for subsistence or recreational purposes. At this time these uses are largely compatible with the purposes of each refuge and conflicts are few. However, the passage of time and a changing lifestyle have brought new demands to a few of Alaska's remotest places. Private lands, such as Native allotments, surrounded by public land and near prime fishing and hunting locations are being sought out for sale and development. New allotments would be highly susceptible to development pressure and could potentially affect refuge management and resources.

Table 5 Effects of Proposed Vietnam Veterans Native Allotment Act on Alaska Refuges
Using the Number of Enrolled (Village and Region) Native Vietnam Veterans on Active Duty during 1964-1975 and the Number That Served at Least One Year between January 1, 1970 and December 18, 1971.

16 National Wildlife Refuges	Number of villages in or within 25 miles of a refuge with potential applicants		Maximum number of potential applicants enrolled to a Village		Number of potential applicants enrolled to a Region ¹		Estimated affected acreage of new Native allotments on refuges (Village enrollees only)	
	1964- 1975	1970- 1971	1964- 1975	1970- 1971	1964- 1975	1970- 1971	1964- 1975	1970- 1971
TOTAL	159	122	1,111	463	587 ²	161 ²	64,064- 110,784 ³	26,720- 46,720 ³

¹ The effect of allotment selections by veterans enrolled to a Region was not determined because we could not identify an area of potential impact.

² These totals include 217 and 53 veterans enrolled to the 13th Landless Region during 1964-1975 and 1970-1971, respectively.

³ An additional 32,872 and 9,016 acres of refuge lands could potentially be effected by potential applicants on active duty during 1964-1975 and 1970-1971 if veterans enrolled to Regions are included.

D. National Park Service

Number of Potential Veteran Native Allotments

There are currently Native allotments within all 16 CSUs managed as national park system units in Alaska except Sitka National Historical Park. In four of these units there are no pending allotment applications; all the allotments have either been approved (awaiting survey) or have been conveyed. There are pending allotment applications in the remaining 11 units as well as approved and conveyed allotments.

Enactment of legislation to allow certain Vietnam Era veterans a second opportunity to file Native allotment applications would result in varying levels of impact on these conservation system units depending on the criteria established by Congress.

While the assumptions listed earlier in this report were used in arriving at a projected number of allotment applications within National Park Service (NPS) units, it will be discussed later that other important factors need to be taken into account that could alter the number considerably. As shown in the following Table 6, using the stated assumptions, 115 new applications are projected to be filed within national park system units if considering the entire Vietnam Era, between August 5, 1964 and May 7, 1975. Using one or more years of active service between January 1, 1970 and December 18, 1971 as the eligibility period, 26 new applications are projected.

As mentioned earlier, other factors could alter the number of applications dramatically. It is assumed that the applicants would apply for allotments within the twenty-five mile radius of the applicant's enrollment village. For most units of the national park system, this would probably be 85-90 percent accurate. However, Lake Clark National Park and Preserve could very well be an exception. Currently, there are 112 allotment parcels within this unit. Of these, only 70 applicants are from Nondalton and Iliamna, the two villages in the vicinity of the park; this is only 62 percent of the total number. The rest are from the Anchorage area, Kenai Peninsula and other more remote villages. Therefore, it is highly likely that some of the Cook Inlet regional enrollees (47), the at-large veterans (217) and the Anchorage and Kenai area enrollees (148) would file applications for allotments in Lake Clark NP&P, especially since the Anchorage and Kenai Peninsula areas are generally lacking in available lands. Based on these figures, it is estimated that approximately 11 veterans could be expected to apply in the first column above rather than only 3. In the second column, approximately eight veterans could be expected to apply.

While not as significant, other units would also be impacted by the at-large and regional enrollment numbers.

Potential Impacts of Additional Allotments on National Park System Units

The Alaska National Interest Lands Conservation Act (ANILCA) established or expanded 14 of the 16 national park units in Alaska to maintain and protect lands and waters that contain nationally significant natural, scenic, archaeological, geological, scientific, wilderness, cultural, recreational and wildlife values.

Table 6 The Number of Projected Applications in Each National Park System Unit.

<u>National Park Unit</u>	<u>Service Period</u>	<u>Service Period</u>
	8/5/64-5/7/75	1/1/70-12/18/71
	Number of Potential	(w/1 yr. of Service)
	<u>Applicants/Acreage</u>	Number of Potential
		<u>Applicants/Acreage</u>

Alagnak WR	0	0	0	0
Aniakchak NM&P	1	160	0	0
Bering Land Bridge NP	6	960	3	480
Cape Krusenstern NM	24	3,840	5	800
Denali NP&P	1	160	0	0
Gates of the Arctic NP&P	3	480	1	160
Glacier Bay NP&P	12	0*	3	0*
Katmai NP&P	5	800	2	320
Kenai Fjords NP	4	640	1	160
Klondike Gold Rush NHP	4	640	1	160
Kobuk Valley NP	2	320	0	0
Lake Clark NP&P	3	480	0	0
Noatak NP	22	3,520	4	640
Sitka NHP	7	0*	1	0*
Wrangell-St. Elias NP&P	20	3,200	5	800
Yukon-Charley Rivers NP	1	160	0	0
Totals:	115	15,360	26	3,520

* While potential applicants are listed for these two park units, because of their early withdrawal dates, it is not anticipated that these allotments would be approved.

Currently, there are 717 Native allotment parcels within the boundaries of national park system units in Alaska. Using the figures in column one of the table above, there would be approximately a 16 percent increase in the total. Using the 1970-1971 time frame, there would be an 4 percent increase. There will be certain units more affected than others. For instance, in Kenai Fjords and Klondike Gold Rush, the number of allotments could double. Although the numbers are small, so are the sizes of both of these units and the impact would be just as great as a large increase in larger units. Wrangell-St. Elias, the largest park unit, currently has 41 allotments, as does Noatak. Both of these units would see an increase by approximately 50 percent using column one figures of the above table or 10-12 percent using column two. Cape Krusenstern has one of the highest projected numbers of applications with 24, a 24 percent increase.

Personal use of Native allotments for residence and subsistence has been largely compatible with park, preserve and monument purposes and management objectives. At this time, most of the allotments within the boundaries of parks are still held by the original owners. However, as the allotments are passed on to subsequent generations or sold to other individuals, it is anticipated that more will be developed for commercial use. Abrupt changes in type and intensity of land use can diminish or significantly impair park resources and public use of parks.

Additional Native allotment claims within park system units would increase the acreage subject to development that could diminish or impair park resources and public use and enjoyment. This generally occurs as a result of intensified use through residential subdivision and commercial activity.

Residential Subdivision

The possibility of subdivision of tracts into multiple ownerships for residential purposes is of particular concern. Forty to one hundred sixty-acre tracts may be divided into smaller acre lots with individual residences on each. Subdivisions are a particular threat in areas with high resource or recreation values. They can impair the scenic quality and wilderness character of surrounding Federal lands. Construction of access roads, airstrips and other surface disturbance can accelerate erosion, and increase runoff and sediment loads in adjacent water bodies. Development of small tracts threatens the long-term protection and possible interpretation of significant cultural sites. Waste generated by residents can contaminate groundwater and create a need for landfills to accommodate refuse. Concentrated human habitation can result in increased hunting, changes in wildlife distribution and changes in migration patterns. Human presence may attract and habituate bears to humans and human refuse, thus increasing the possibility of human-bear confrontations.

Commercial Activity

Isolated parcels in remote areas may be developed for camps and lodges. Some developments may have primary emphasis on fishing and hunting, resulting in increased harvests of fish and wildlife and direct impacts on subsistence activities. Commercial activity can concentrate client use, causing impacts to vegetation and soils, cultural resources, opportunities for solitude and the enjoyment of scenic vistas. Additionally, timber may be harvested and gravel may be extracted from conveyed allotments.

Native allotments are generally located in the more usable, accessible and resource rich lands in any given area. New allotments would displace existing public use from many of these locations. Additionally, it can be expected that some new applicants would apply for locations in park system units with the greatest potential for commercial development.

Impacts on Selected National Park System Units

Cape Krusenstern National Monument

Cape Krusenstern National Monument has one of the highest projected numbers of new applications (24 additional allotments using the entire Vietnam Era or 5 using the 1970-71 time frame). It can be expected that any new applications in this unit will occur along the resource rich coastline, where internationally recognized cultural sites are located. Approximately 85 percent of the 102 applications

already filed are along the coast. Any further conveyances along the shoreline will severely diminish the Park Service's ability to manage the monument for the purposes for which it was established, which include protection and interpretation of a series of archeological sites depicting every known cultural period in arctic Alaska, providing scientific study of the process of human population of the area from the Asian Continent, and preserving and interpreting evidence of prehistoric and historic Native cultures.

Klondike Gold Rush National Historical Park

The two units not established or expanded by ANILCA are Klondike Gold Rush National Historical Park and Sitka National Historical Park. Klondike Gold Rush encompasses the Chilkoot Trail. Currently there are four allotments conveyed along this trail corridor. One allotment has been sold to a helicopter company. The owners of another have indicated their desire to harvest the timber. The NPS actively sought to acquire three of the allotments but negotiations were unsuccessful. Private ownership along the trail can threaten the historic and cultural resources and destroy the scenic value and recreational use. The projected number of allotment applications would double the allotments along the trail to eight. This impact is significant given the narrow width of the trail corridor and the fact that a significant amount of the State land within the corridor will soon be conveyed to the City of Skagway. The NPS expends approximately \$100,000 per year maintaining the trail and improving various sites along the trail. The impact would be less if the 1970-1971 period is used.

Lake Clark National Park and Preserve

While the above table shows few new applications in Lake Clark National Park and Preserve, the numbers could be high based on the number of Cook Inlet Region, Inc. (CIRI) regional, at-large and other veterans from south central Alaska, and past trends. If 11 new allotments are filed in this unit, the current number would be increased by 10 percent. The majority of the current allotments are concentrated around Lake Clark itself and other high public use areas. It is anticipated that these same areas would be impacted with new applications.

Potential Costs to the National Park Service

The major costs to the NPS and the public of additional allotments, would be for acquisition of allotment parcels to assure park protection and public use. Should all 96 potential allotments be acquired (the 115 total less the Glacier Bay and Sitka allotments), the total cost in 1996 dollars is, using a variety of regionally based fair market values, projected to be in excess of \$18,000,000. The total cost of \$4,000,000 would be needed for the 22 allotments (the 26 total less the Glacier Bay and Sitka allotments) in the more restrictive category. These estimates include the purchase price, the costs to obtain appraisals, preliminary title reports, and employees' time to process the acquisitions.

E. Bureau of Land Management

The BLM administers eight Conservation System Units (CSUs) in Alaska designated by ANILCA; the Steese National Conservation Area, the White Mountain National Recreation Area, and six components of the Wild and Scenic Rivers System. Other significant congressionally designated management units include the Utility Corridor, the National Petroleum Reserve-Alaska (NPR-A), and the Iditarod National Historic Trail.

The following are some of the potential impacts of additional Native allotment applications.

1. Resource Issues

- a. Inholdings that are later developed for commercial purposes could impact access and areas set aside for recreation, preservation of cultural resources, hunting, fishing, and other public uses.
- b. There is a potential for private land ownership within sensitive areas that are being managed to preserve their resource values.

2. Management Issues

- a. Potential impacts on administrative sites where BLM has expended funds for development and maintenance, including a wide range of sites that are maintained for recreational, cultural, educational, administrative, and other purposes. These sites include, but are not limited to, BLM campgrounds such as Paxson Lake and Scourdough, the Tangle Lakes Archaeological District and the Mesa archaeological site, BLM facilities located along the Dalton Highway, and many others. Potential issues include access, costs of relocating sites if necessary, protection of recreational and cultural resources, etc.
- b. Increased BLM workload in adjudication, survey, and field examination of Native allotment parcels. The current pending workload of 6,000 parcels, 4,000 of which still require field survey or platting, could be increased by 500 to 2,800 applications if applicants are restricted to single 160-acre parcels. New cases would have to be merged with existing workload, which is addressed geographically. Geographic distribution of workload may necessitate processing new veteran applications ahead of existing applications filed many years ago, which raises questions about equitable treatment of existing applications.
- c. If future legislation requires compliance with use and occupancy criteria similar to those of the Alaska Native Allotment Act, the logic follows that lands no longer in Federal ownership could be applied for by individuals showing prior rights to the land. If recovery of title from private landowners becomes necessary, the administrative burden increases dramatically with the introduction of fact finding hearings to ensure the due process rights of the parties involved, complicated negotiations of title recovery agreements, and the many steps involved in the normal acquisition of title by the United States, including additional field examination requirements and title clearances. It appears reasonable to assume that many veterans would claim land in the vicinity of villages that has already been conveyed to ANCSA corporations. Although it is possible that these corporations might be willing to reconvey title to the United States so that a conveyance could be made to a Native veteran applicant, it is unclear at this time whether the ANCSA corporations favor this approach or not. State ownership may be similarly impacted.
- d. It will be necessary to freeze conveyance actions during the veteran filing period so

that we can retain lands in Federal ownership until we know what lands will be applied for by individual Native veteran applicants. The application process and selection of alternate lands could also impact the processing of applications for withdrawal of lands for the particular uses of other Federal agencies, the issuance of leases and permits, and other land management actions.

3. Client Issues and Potential Impacts on Other Land Transfer Clients if Additional Allotments were Allowed for Native Veterans:

a. If veterans were allowed to claim lands already selected by the State of Alaska or by an ANCSA corporation, it might become necessary to suspend new land title transfers to those entities until the period established for filing of veteran applications ends. New inholdings hinder resolution of land patterns and finalizing of land entitlements to ANCSA and State clients.

b. If use and occupancy criteria are incorporated into enabling legislation, and veterans are allowed to claim conveyed lands, land ownership statewide could become increasingly complicated until the lengthy and uncertain process of proving prior rights is concluded. Title recovery opportunities appear to be limited to willingness of land owners to return title. Substantial acreage has been conveyed in the vicinity of Native villages where veterans are likely to apply for lands.

c. There are 28 currently identified villages that do not have enough validly selected acreage to satisfy their ANCSA entitlements. If additional Native allotments were to be claimed by Vietnam Era veterans within areas already selected by these 28 villages, the selected acreage available for conveyance under ANCSA would decrease accordingly and the underselection problem would become more acute. In addition, some villages which currently have adequate validly selected acreage could become underselected if allotment parcels are claimed nearby. This will, in some cases, further impact existing CSUs.

4. Potential Costs to the Government if Eligible Veterans Were to be Allowed to Apply for Allotments:

The three major categories of costs associated with BLM's processing of Native allotment applications are in the areas of survey adjudication and field examination.

Very few Native allotment applications describe lands previously surveyed under the rectangular net survey system. Special surveys are normally required to delineate boundaries for conveyance of allotments and to meet the legal requirements for survey of adjoining lands to be conveyed to the State and to ANCSA corporations. These special surveys are usually performed under contract and reviewed and approved by BLM, at no cost to the applicant. Costs of individual surveys vary according to such factors as remoteness of a site, terrain, concentration of parcels in one area, etc.

For more than a decade BLM has processed allotment applications according to the Patent Plan Process, a methodology for prioritizing the adjudication, examination, and survey of parcels in logical geographic groups to allow for maximum efficiency and optimum use of resources. Many of the remaining 6,000 Native allotment parcels are within established geographic *windows* and many are already scheduled for survey in the next few years.

Adjudicative costs of processing Native allotment applications are difficult to estimate because there are numerous variables to be considered. The majority of the routine applications have long been completed. An application on complex land status requires more time to process than a singular client's application. Land status may be extremely complex, involving conflicting claims to the same land; additional evidence may need to be gathered to support an applicant's claim in cases where the applicant is deceased and witnesses are scarce; and land descriptions may change or locations may be redescribed following survey.

Costs associated with field examination and survey of Native allotment applications are tied to factors such as remoteness, terrain, and proximity to other parcels. If parcels can be addressed in groups, the cost per parcel is less than it would be if a single isolated parcel required field work. Most of the pending allotment parcels have already been field examined, so it is not likely that additional parcels would fit easily into future field schedules, particularly not as logical geographic groupings. As is the case with survey, the cost of examining isolated parcels could be expected to be higher than the average. Given that any future legislation to allow Native veterans to apply for allotments would necessarily be based on commonality of military service rather than on any geographic commonality, it is reasonable to assume that most claimed parcels would not occur in groups. As a result, the cost of field examination and survey would likely be higher than the average. Although the timing might be right for some veterans' parcels to be added to prioritized work groups, it is likely that a majority of the parcels would be in geographic areas where adjudication, land examination, and survey have already occurred.

It is also important to reiterate that any new program to allow applications for any category of individuals would invariably impact the processing of current workload for individuals and State and ANCSA entities, most of which have already been pending for many years. Additional Native allotments would necessarily slow a process that has been increasingly subject in recent years to declining budgets, decreased staffing, and aging individual applicants.

Estimated Costs:

(See Table 8, page 39.) The average cost to process a single routine Native allotment parcel to conveyance is nearly \$17,500, including adjudication, survey, and field examination costs. As noted above, for geographic and other reasons, costs related to this group would likely be higher than the average. If conflicts between allotment applicants occur, the added effort to resolve these conflicts will cause the average parcel cost to exceed \$20,000. If legislation is passed which allows application on lands no longer in Federal ownership, and title recovery from a landowner is required because the applicant shows proof of a prior right, the average parcel cost for uncontested recovery could rise to at least \$27,000.

Under Scenario 2, possible costs for processing 632 applicants, the number of applicants estimated for the 1970-1971 period:

Approximate estimated cost of processing 632 parcels at \$17,500 per parcel:	\$11.0 million
Approximate <u>additional</u> cost of processing 632 parcels if one-half (50 percent) require conflict resolution:	\$0.8 million

Approximate additional cost of processing 632 parcels
if one-half (50 percent) require title recovery

\$3.2 million

Total estimated cost of processing 632 parcels with both additions:

\$15 million

5. Assessment of Potential Impacts by Individual CSUs

Table 7 on this page summarizes the potential impacts on CSUs managed by BLM. Although the 25-mile buffers used for this impact study did not reveal any potential Native veteran applicants in the vicinity of White Mountain National Recreation Area, Steese National Conservation Area, or Beaver Creek Wild and Scenic River, it should be noted that impacts to those units could still occur if Native veterans were to apply for lands outside the 25-mile zone or if any of the individuals enrolled to a regional corporation but not to a particular village were to apply in these areas. Many of the lands in these units were not withdrawn until 1970 or later, and it would have been possible for a Native Vietnam Era veteran to begin use and occupancy before that time.

The potential for the greatest impacts of additional Native allotments appears to be along the Unalakleet Wild and Scenic River corridor. Most of the land immediately surrounding the village of Unalakleet, within the 25-mile radius circle used for this study, has been conveyed to the ANCSEA village corporation. The lands on both sides of the river for a distance of approximately 20 miles from the village are in private ownership, and many private parcels are conveyed to individual Natives. Based on the land ownership patterns in the Unalakleet area and on traditional concentrations of allotments along the river, it is not unreasonable to anticipate that additional veterans' allotments could impact the Wild and Scenic River portions of the Unalakleet within the 25-mile radius of the village.

Table 7 Potential Impacts of CSUs Managed by BLM

[WSR=Wild and Scenic River; NRA=National Recreation Area; NCA=National Conservation Area]

Unit Designation	Number of Potential Applicants 1964-1975	Number of Applicants 1970-1971
Delta WSR	5 (800 acres)	3 (480 acres)
Gulkana WSR	5 (800 acres)	3 (480 acres)
Fortymile WSR	4 (640 acres)	2 (320 acres)
Unalakleet WSR	35 (5,600 acres)	7 (1,120 acres)
Birch Creek WSR	1 (160 acres)	None
Beaver Creek WSR	None	None
White Mountain NRA	None	None
Steese NCA	None	None

Iditarod National Historic Trail

Currently, when an allotment is adjudicated under the criteria of the Alaska Native Allotment Act, the

conveyance of the allotment is made subject to the Trail if use and occupancy does not predate its establishment. The United States Army began brushing the Iditarod Trail in 1908, and it would not be possible for an eligible Native Vietnam Era veteran to predate this activity. As long as future allotment conveyances are made subject to the Iditarod Trail, the management issues that BLM currently faces would not be significantly impacted.

National Petroleum Reserve-Alaska (NPR-A)

The Naval Petroleum Reserves Production Act of 1976 authorized the Secretary of the Interior to assume control of the former Naval Petroleum Reserve No. 4, which was established February 27, 1923, and to regulate these lands in a manner consistent with the total energy needs of the Nation and for other purposes. These other purposes include protection of the environmental, fish and wildlife, subsistence, historical, and scenic values of the lands.

There are 48 Alaska Native Vietnam Era veterans enrolled to the four ANCSA villages within the exterior boundaries of NPR-A (Wainwright: 4; Atkasuk: 1; Barrow: 41; Nuiqsut: 2). Of these, 9 served in the Armed Forces for at least one year during the period January 1, 1970 through December 18, 1971, the crucial period prior to the repeal of the 1906 Allotment Act (Barrow: 8; Nuiqsut: 1).

Utility Corridor

The Trans-Alaska Pipeline Utility Corridor was withdrawn by Public Land Order (PLO) 5150 on December 30, 1971, to protect the route of the Trans-Alaska Pipeline. The primary function of the Corridor is the transportation of energy resources; therefore, actions or activities potentially adverse to existing and future energy transportation systems are avoided. The PLO withdrew the corridor from mineral leasing and location, settlement, and State and Native selections.

Although there are a number of Native villages along the Utility Corridor route, the numbers of Native Vietnam Era veterans enrolled to those villages do not appear to be substantial, either for the period January 1, 1970 through December 18, 1971, or for the entire Vietnam Era between 1964 and 1975. Nonetheless, it is BLM's position that land disposals should only be considered when found to be in the national interest. If this is not done, new landowners would be in a position to charge or collect rents for use of the land for pipeline or other related purposes.

F. Forest Service

The number of Vietnam Era veterans identified in each of the regional corporations from the BIA ANCSA Enrollment, with apparent addresses within the Chugach and Tongass National Forests, totals 578. There are 498 veterans within the Tongass NF that are members of the Sealaska Corporation; 60 veterans within the Chugach NF are members of the Chugach Alaska Corporation; and 20 are members of Koniag, Inc.

Section 106(a)(1) of P.L. 104-42 requires we identify the veterans who were eligible but did not apply for allotments under the Native Allotment Act of May 17, 1906, as the Act was in effect before December 18, 1971. Of the total 578 veterans identified as eligible under Section 191 of Title 38, U.S.C., within Chugach, Sealaska, or Koniag regional boundaries, we do not anticipate any will be eligible for allotments on National Forest land. One hundred fifty-four of the 632 enrolled veterans who served more than one year during the period January 1, 1970-December 18, 1971 were enrolled from southeast Alaska.

The Alaska Native Allotment Act restricts allotments to vacant, unappropriated, and unreserved lands. Occupancy of allotments on national forest lands must have commenced prior to establishment of the particular forest. Since the impacted forests were withdrawn for the most part in 1902 and 1907, the five years of continuous use and occupancy required by the Native Allotment Act would have had to begin prior to those dates. At a minimum to then qualify, the Vietnam Veteran would have to be over 60 years of age at the time of service. We do not believe that any of the veterans identified would have been that old or could have met the pre-forest occupancy requirements. It is possible that some of the veterans identified within the three corporations may have had some occupancy on lands that are public domain land within the national forest boundaries which might qualify them as an applicant. However, the probability for this is very low.

For the above reasons, there would be no impact to the National Forest System lands in Alaska if the requirements of the Alaska Native Allotment Act were applied today.

VIII. Legislative Considerations

We offer the following considerations which should be specifically addressed by the Congress in determining whether or what form of legislation should be provided to renew opportunity for Alaska Native Vietnam Era veterans to apply for a land allotment.

1. Congress may choose to develop a renewed allotment program for Alaska Native Vietnam veterans or some portion of them according to criteria it may choose, because it determines that some such veterans were or may have been prevented from applying for an allotment by reason of service, and that is the fairest way to deal with the issue. Or Congress may choose not to develop such a partial renewal of the allotment program because of inequities it may create both internal and external to the Native community, because of its potentially high cost in cash and in land that would be transferred from Federal ownership, or because of potential delay of settlements in process or disruption of already settled arrangements and uses of land.

2. Should Congress decide to renew this program, costs are difficult to project at this point because of a wide variety of variables including the unknown number of potentially eligible individuals. Note Table 8 on page 39 for examples of possible scenarios and ranges of costs. Use of alternative compensation could reduce the acreage of land transferred, and could significantly reduce cash costs.

Any program which the Congress may adopt could have Paygo consequences requiring offsets in other existing discretionary appropriations of the Department and its land managing agencies, possibly leading to curtailment or displacement of other land programs. This concern is significant given the recently completed Balanced Budget Agreement.

3. Eligibility could be reserved to those Alaska Native veterans who served more than one year of active duty during the period of January 1, 1970 to December 18, 1971.

This period could be chosen to meet the purpose of section 106 (as explained in the Committee reports underlying section 106 of P.L. 104-42) as a restoration of an opportunity missed due to active military service.

By existing statute, the Vietnam Era period is defined as August 5, 1964-May 8, 1975. The Alaska Native Allotment Act was repealed by ANCSA on December 18, 1971, which means that *anyone* applying for an allotment after that date would have been rejected for failure to file a timely application. Veterans applying between August 5, 1964, and December 18, 1971, would have been eligible if they met all the other criteria for an allotment. Because of their military service, some veterans may have missed an opportunity to apply for an allotment during the period of January 1, 1970-December 18, 1971, when the BIA and other entities were making a major effort to assist Alaska Natives with the filing of applications for Native allotments. Those who returned from service prior to that time would not have missed the opportunity because of service.

We are aware that P.L. 104-275 recently revised the definition for the Vietnam Era for certain purposes. However, the changes are not applicable to this process.

4. Heirs of those veterans who died on active duty during the 1970-1971 period and those eligible veterans who died after 1971 could be eligible to apply for an allotment in the veteran's name.

Under the Alaska Native Allotment Act, applications had to be based on the personal use of the applicant; heirs could not file applications for ancestors and could not get an allotment of their own based on ancestral use. However, if a timely allotment application was filed by an individual, heirs of the applicant could provide evidence in support of the application and receive title to the approved allotment. Since it is not an existing right, should Congress choose this option, legislation specifically allowing heirs to apply would be necessary.

Heirs could be allowed to apply where deceased veterans would have been eligible under new legislation. In the intervening 25 years, heirs of veteran allottees could have received title to an allotment (or a portion thereof) through the probate process. Heirs should be required to file one joint application in order to be sure that multiple applications are not filed for a common ancestor. There has been a great deal of difficulty in the contiguous 48 states in dealing with fractionated heirships in the management of trust funds and fractionated interests. A joint application requirement would reduce this potential burden. Of course, selecting a time frame larger than the 1970-1971 time band suggested above would complicate dealing with heirs. Also, since an Alaska Native allotment is restricted property, a Department of the Interior probate would be necessary. Therefore, if a position in support of heirs is chosen, any legislation should direct the Department to conduct such probates prior to conveyance of an allotment to heirs in order to insure that the allotment is conveyed to the proper heir(s). It is understood that any such legislation would have to be consistent with any amendments to the Indian Land Consolidation Act, 25 U.S.C. 2201 *et. seq.*

5. Lands available for allotment applications could be restricted to vacant and unappropriated Federal lands outside the boundaries of lands reserved for special purposes or uses, such as CSUs, NPR-A, National Forests, Department of Defense installations, administrative sites, sites with federal improvements and lands described in pending Native allotment applications. In addition, to be consistent with the Allotment Act, the applied-for land would have to have been available for entry and application prior to repeal of the Allotment Act and at the time use and

occupancy began. Valid existing third party rights, including rights-of-way granted after the applicant began use and occupancy, would be protected by conveying the allotments subject to such rights.

This option would prohibit any new allotment application on land that was within the boundaries of currently existing federal reserves, such as CSUs, NPR-A and National Forests and would maintain the requirement that the land be otherwise vacant and unappropriated. Applicants under legislation allowing veterans to file allotment applications currently hold no vested rights in land. Therefore, if the reservation or appropriation exists before the date of application, the land would be considered legally unavailable. The passage of ANILCA after repeal of the Allotment Act defined the public interest in the conservation system units in Alaska and established the intent and legal framework to avoid any additional private lands within their boundaries.

Also, like prior Native allotment applications, if it is known or believed that the land applied for is valuable for oil, gas or coal, those minerals will be reserved to the United States in the conveyance of the Native allotment.

Lands subject to valid existing third party rights, that are less than full fee interests, should be protected. These rights were created at a time when there was no right to file new allotment applications. Making the conveyance of allotments subject to such rights, allows an allotment applicant to obtain title to the land while protecting valid third party rights. Since these third party rights were validly created, protection may be necessary to avoid claims for just compensation for a taking, as well as to avoid unnecessary litigation over conflicting claims to the land.

6. The applicant could select alternative compensation in the form of other available land or a cash payment, if an allotment would be inside the boundary of an existing CSU or NPR-A or for land otherwise unavailable at the time of application. The Secretary of the Interior could be vested with broad discretion that is not reviewable by any court to decide that land is unavailable for an allotment or alternative allotment application because the land is needed for a current or reasonably foreseeable future public purpose or contains essential habitat or resources that the Secretary determines in his should be retained in federal ownership.

Alternative compensation could be in the form of an allotment up to 160 acres from land available elsewhere in the state, or a \$50,000 tax-free cash payment. Legislation could provide that an applicant receiving cash would be allowed to reinvest that money in other lands and that, at the option of the allotment applicant, the land so purchased would receive the same restricted status as a Native allotment. The \$50,000 figure (about \$312 an acre) is proposed as a reasonable and manageable figure. (Potentially costly nonetheless. See costs, page 40.) Another alternative would be to establish cash values based on fair market values of lands in each area. This would provide a dollar equivalent to lands that otherwise might have been selected. While this might seem fair, it would also be far more costly to administer in many places, it would provide an incentive to establish claims on the most valuable lands, it would result in the need to resolve valuation disputes, and it would provide great disparities as to the value of a cash buy-out alternative among Natives in different areas.

In selecting areas outside CSUs and NPR-A to be available for alternative allotment applications, the Secretary could be directed to exclude areas that contain exceptional natural or cultural resources, or areas of significant public use, as well as administrative sites such as existing Federal campgrounds,

office sites or other withdrawals. The purpose of non-reviewability is to avoid costly and time-consuming litigation delays in allotment decisions and in settling land use arrangements.

See Appendix E for further discussion of alternative compensation, including Tables 11, 12, and 13 as to costs.

7. Native or state selected lands could be closed for allotments unless selections are voluntarily relinquished for the benefit of the applicant. Conveyed lands would not be available for new allotment applications.

Even though ANCSA Corporations are significantly overselected (about 18 million acres) and the state is overselected to a lesser degree, until their entitlement is conveyed, none of their selections can legally be supplanted by a more recent application without concurrence. Consequently, a written relinquishment by the selecting entity would be required prior to conveyance of a Native allotment. It would be best to require that a sufficient relinquishment be obtained by the applicant at the time of filing of the original application.

Under existing DOI policy, no underslected Native Corporation is allowed to become further underslected by voluntary action, as would be the case if an underslected village agreed to give selected lands to an allotment applicant.

If a Native Corporation or the State disapprove an otherwise eligible allotment on Native or State-selected lands, the applicant would be eligible for the alternate compensation described above.

8. The applicant could be required to demonstrate use and occupancy by providing a personal affidavit of use for this application process.

As discussed earlier, the Alaska Native Allotment Act required use and occupancy. Under this option, for cost and administrative reasons, occupancy and use would generally not be verified by a Federal field examination. The applicant would only have to provide a personal affidavit of use and occupancy, and evidence of ANCSA enrollment or a Certificate of Alaska Native Blood. The application form could indicate an appropriate level of criminal penalties for fraudulent claims.

9. Eligible veterans could have eighteen (18) months from the date of passage of legislation to submit applications for allotments.

Eighteen months would provide adequate time to develop an application process and allow time for submission of the applications without unnecessarily impacting other pending land conveyances. If legislation allowing Vietnam veterans to file applications for Alaska Native allotments is enacted, other land transfer activities may need to be suspended until the veteran's applications are noted to the Federal land records. In addition, veteran applications conflicting with pending claims, title restrictions on Federal lands or interests, or other ownership issues would necessitate resolution of the conflicts before the land involved could be conveyed.

10. Applicants could be limited to one 160-acre parcel.

For most of the history of the Allotment Act, from 1906 to 1964, Alaska Native allotments were confined to one parcel of 160 acres. From 1964 to 1971, four parcels were permitted by regulation within the 160-acre limit. Many applications for multiple parcels were received. Multiple parcels

offer much more flexibility, but costs will certainly increase substantially if more than one parcel is permitted now, both as to administrative costs and land transfer and purchase costs, particularly considering the extensive settlements and the great changes in land ownership that have occurred since 1971.

IX. In Conclusion

As directed by Public Law 104-42, this report sets forth the estimated number of eligible Alaska Native Vietnam Era veterans who did not apply for allotments under the Act of May 17, 1906 before that Act was repealed by ANILCA on December 18, 1971; it presents specific potential impacts on CSUs; describes results of our consultations with the Forest Service, the State of Alaska, and Native organizations; and describes matters that Congress should consider in determining whether and what legislation is deemed desirable. The Department is confident that this important issue will generate considerable discussion and debate, and is prepared to work further with Congress on this matter as appropriate.

While responding to statutory requirements of Public Law 104-42, we would point out that any legislation addressing this issue could, as noted in this report, have high costs and impacts on the ongoing programs of the land managing agencies of this Department which the Department has not planned or budgeted for and which are not assumed in the recently completed Balanced Budget Agreement.

Table 8 Scenarios and Costs of Program Implementation

ESTIMATES OF POSSIBLE RANGES OF MAXIMUM AND MINIMUM COSTS OF NEW ALASKA NATIVE VIETNAM ERA NATIVE ALLOTMENT PROGRAM

(Totals are Rounded)

<u>ITEM</u>	<u>SCENARIO 1</u>	<u>SCENARIO 2</u>
(500 Applicants; min. est. no. to apply)		(2,800 Applicants; max. est. no. to apply)

A. Any Location ¹		
1. Transfer Cost ²	56,200,000	10,000,000
2. Buy Backs in CSU's ³	128,000,000	38,000,000
3. Ongoing Cost ⁶	2,000,000	1,000,000
Total Estimated Cost	\$ 186,000,000	\$ 49,000,000
Acres Transferred	448,000 acres	80,000 acres
B. Outside CSU Only ⁷		
1. ½ take land (transfer cost)	28,000,000	5,000,000
2. ½ take cash	70,000,000	12,500,000
3. Ongoing Cost	1,000,000	400,000
Total Estimated Cost	\$ 99,000,000	\$ 18,000,000
Acres Transferred	224,000 acres	40,000 acres

1. Selection from available lands, including CSUs.
2. Cost of adjudication and survey estimating about \$20,000 average per allotment. Totals assume transfers for 2,800 and 500 applicants respectively, the maximum and minimum number of applicants estimated to apply.
3. Cost to purchase inholding from allottee in CSU assuming a Fair Market Value (FMV) of \$800 per acre x 160 acres = \$128,000 per allotment. Fair Market Value varies considerably for different regions and CSUs: as low as \$150 per acre or as high as \$2,900 per acre. (See Tables 11, 12, and 13.) \$800 per acre is the lowest regional cost per acre found for the Park Service (see Table 13). The Park Service and the Fish & Wildlife Service have also made certain estimates on a base estimate of \$400 per acre, applied across the board. Obviously, if costs averaged \$400 per acre these buy-back costs would be halved. However, if actual market values are used in each transaction, costs would be far more.
4. Assumes 1,000 allotments to be bought.
5. Assumes 300 allotments to be bought.
6. Ongoing BIA administrative costs for restricted lands.
7. Assumes no new allotment applications allowed for lands inside CSUs or NPR-A.

Because of the great uncertainty as to the actual number of applicants and the actual cost per transaction, these estimates are necessarily only roughly estimated cost ranges.

Potential Cost of the Cash Buy-Out for All Applicants

We computed the potential cost to the government to buy out all eligible applicants at a flat rate of \$50,000 each. For 632 eligible applicants who served for one year between 1970 and 1971, to receive

\$50,000 each for one parcel, the potential cost would be approximately \$32 million. For applicants for the entire Vietnam Era, 1964 to 1975, based on an estimate of 2,290 eligible *enrolled* applicants, at \$50,000 each for one parcel, the potential cost would be approximately \$115 million. Taking the top estimate of 2,800 possible applicants at \$50,000 each, the cost would be about \$141 million.

Appendix A

Process Used To Gather Data:

The list of Alaska Native Veterans was compiled in the following manner:

1. The BIA, Alaska Title Services Center converted certain fields, i.e., last name, first name, middle initial, date of birth, and social security number (SSN) of the Alaska Native Enrollment (ANE) into text format. This text format file, containing about 103,000 records, was provided to the Veterans Data Processing Center (DPC) in Austin, Texas, on February 14, 1996.

The copy of the ANE data provided to the ATSC is not a purified list. It contains duplicate enrollees, ineligible, and typographical errors in dates of birth, social security numbers, etc.

2. The Veterans DPC ran the ANE data through their Beneficiary Information and Records Locator system (BIRLS), which contains approximately 42 million records.

- a. The first run looked for SSN matches.
- b. The second run looked for exact name matches in the BIRLS and also was run through the alternate name data base. The results from this run were run a second time for matches on dates of birth.
- c. The matching records from *a* and *b* were then run again to identify those who had Vietnam Era service.

The results of these runs included 2,857 matches on social security numbers and 79 matches on dates of birth.

3. The Veterans DPC provided BIA with a text file of the matched data that included the following:

- a. Those whose social security numbers and names match in BIA and VA records and:
 1. Whose Release from Active Duty (RAD) is on or before 12/18/71 and VA has no date of death.
 2. Whose RAD is after 12/18/71 and VA has no date of death.
 3. Whose RAD is on or before 12/18/71 and VA has a date of death.

4. Whose RAD is after 12/18/71 and VA has a date of death.
- b. Those whose names and DOB match in BIA and VA records and:
 1. Whose RAD is on or before 12/18/71 and VA has no date of death.
 2. Whose RAD is after 12/18/71 and VA has no date of death.
 3. Whose RAD is on or before 12/18/71 and VA has a date of death.
 4. Whose RAD is after 12/18/71 and VA has a date of death.

In addition to the data the ATSC initially provided VA, all the match records received back from VA included VA claim number, date of death, VA folder location, and type of discharge.

Subsequent to receiving the data back from VA, we asked for and were supplied the actual Entered on Duty (EOD) and RAD for each matching record.

4. The total number of match records received from VA is 2,936.
 - a. Because the ANE data contained duplicates, 380 of the 2,936 VA matches were eliminated as duplicates. Match total now equals 2,556.
 - b. These records were then run against the ATSC's Native allotment data base to search for individuals who had actually applied for an allotment. One hundred seventy-nine (179) of the VA match records were individuals who applied for Native allotments. Match total now equals 2,377.
 - c. The 2,377 records were then reviewed for discharge type. Of these, 87 were deleted because the individual was dishonorably discharged or discharged under other than honorable conditions. Match total now equals 2,290.
5. These matching Veterans names were then rematched with the BIA Alaska Native Enrollment. Each enrollment number is comprised of a series of four fields. The first two digits are a region identifier (which corresponds with an ANCSA region); the second three digits represent a village, which may or may not correspond with an ANCSA village; the third is a family number and consists of five digits; and the fourth is a two digit number which identifies the individual's place in the family (i.e., 01 is normally the head of household).
6. Using the region and village fields, each Veteran was connected to the village (or region, if at large) to which he was enrolled. A number of Veterans were enrolled *at large*. This means that the Veteran is not enrolled to a village. There were also 217 Veterans enrolled to the 13th Region. Both the at-large and 13th Region enrollees are identified as such in the data. There isn't sufficient information to speculate where they would apply for land.
7. FWS has data to support the theory that Native allotments are normally concentrated within 25 miles of the allottee's village.

8. Using the 25-mile radius, the number of potential applicants were identified to villages and regions. With this information, maps were created by BIA which identified the concentration of the allotments graphically. (See appendices, both tables and maps.)
9. The maps and data were provided to BLM, NPS, and FWS and used in their analysis.

Summary of Data

2,936	Records matched with VA
- 380	Duplicates
= 2,566	Subtotal
- 179	Who had applied for allotments
= 2,377	Subtotal
- 87	Dishonorable (other than honorable)discharges
= 2,290	Subtotal
+ 287	BIA/Tribal Direct Contacts (as of 7/96)
= 2,577	TOTAL

Appendix B

Two thousand two hundred ninety (2,290) NATIVE VETERANS TOTAL WITH VIETNAM ERA SERVICE (the 179 veterans who applied for allotments are not included).

Two thousand seventy-three (2,073) veterans are enrolled to a village or region within Alaska. Of the 2,073 veterans, 236 are deceased. (Deceased veterans are included in enrolled numbers but shown for information only.)

Two hundred seventeen (217) veterans are enrolled to 13th Landless Region (at large). Of the 217 veterans, 28 are deceased.

AHTNA HAS 35 ENROLLED NATIVE VETERANS TOTAL.

AHTNA HAS 4 NATIVE VETERANS ENROLLED IN REGION.

AHTNA HAS 31 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Ahtna	4	0
Chitina	8	1
Copper Center	9	1
Gakona	2	0
Glennallen	2	0
Gulkana	3	0
Mentasta Lake	3	0
Slana	1	0
Tazlina	3	1

ALEUT HAS 76 ENROLLED NATIVE VETERANS TOTAL.

ALEUT HAS 36 NATIVE VETERANS ENROLLED IN REGION.

ALEUT HAS 40 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Adak Station	1	0
Aleut Corp	36	6
Atka	5	1
False Pass	1	0
King Cove	8	0
Nikolski	1	0
Saint George	2	0
Saint Paul	9	2
Sand Point	3	1
Unalaska	8	1
Unga	2	0

ARCTIC SLOPE HAS 72 ENROLLED NATIVE VETERANS TOTAL.

ARCTIC SLOPE HAS 5 NATIVE VETERANS ENROLLED IN REGION.

ARCTIC SLOPE HAS 67 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Anaktuvuk Pass	2	0
Arctic Slope N.A.	5	0
Atkasuk	1	0
Barrow	41	3
Kaktovik	3	0
Nuiqsut	2	0
Point Hope	13	0
Point Lay	1	0
Wainwright	4	0

BERING STRAITS HAS 236 ENROLLED NATIVE VETERANS TOTAL.

BERING STRAITS HAS 30 NATIVE VETERANS ENROLLED IN REGION.

BERING STRAITS HAS 206 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
BSNA	30	5
Brevig Mission	8	1
Council	2	0
Diomedes	3	3
Elim	6	0
Gambel	17	1
Golovin	8	1
Koyuk	7	1
Nome	68	16
Saint Michael	2	0
Savoonga	7	0
Shaktoolik	9	3
Shishmaref	5	0
Solomon	2	0
Stebbins	4	0
Teller	5	1
Unalakleet	33	4
Ungalik	1	0

Wales	9	0
White Mountain	10	1

BRISTOL BAY HAS 111 ENROLLED NATIVE VETERANS TOTAL.

BRISTOL BAY HAS 20 NATIVE VETERANS ENROLLED IN REGION.

BRISTOL BAY HAS 91 NATIVE VETERANS ENROLLED IN VILLAGES.

Village	Enrolled	Deceased
Aleknagik	4	1
Bristol Bay N.A.	20	4
Chignik	6	1
Chignik Lagoon	1	0
Chignik Lake	4	0
Clarks Point	5	1
Dillingham	19	5
Egegik	7	1
Ekwok	1	1
Iliamna	2	1
Kokhanok	2	1
Levelock	2	0
Manokotak	1	0
Naknek	6	0
New Stuyahok	1	0
Nondalton	3	0
Olsonville	1	0
Perryville	3	0
Pilot Point	3	0
Port Heiden	2	0
South Naknek	7	0
Togiak	8	0
Twin Hills	1	0
Ugashik	2	0

CALISTA HAS 257 ENROLLED NATIVE VETERANS TOTAL.

CALISTA HAS 15 NATIVE VETERANS ENROLLED IN REGION.

CALISTA HAS 242 NATIVE VETERANS ENROLLED IN VILLAGES.

Village	Enrolled	Deceased
AVCP Calista	15	2
Akiachak	4	0
Akiak	7	0
Alakanuk	9	0
Andreafsky	2	0
Aniak	7	0
Bethel	31	6
Bill Moores Slough	1	0
Cheformak	4	0
Chevak	5	0
Chuathbaluk	1	0
Crooked Creek	1	0
Eek	5	0
Emmonak	8	0
Fish Village	1	0
Goodnews Bay	2	0
Hooper Bay	21	2
Kasigluk	3	0
Kipnuk	5	0
Kongiganak	4	0
Kotlik	3	0
Kwethluk	10	1
Kwigillingok	5	0
Marshall	5	1
Mekoryuk	10	0
Mountain Village	16	1
Napakiak	9	0
Napamiute	3	0
Napaskiak	1	0
Nightmute	5	0
Nunapitchuk	4	0
Nyac	1	0
Oscarville	1	0
Paimiut	1	0
Pilot Station	6	0
Pitkas Point	1	0

Quinhagak	8	0
Russian Mission	1	0
Saint Marys	5	1
Scammon Bay	6	0
Sheldons Point	2	1
Toksook Bay	2	0
Tuluksak	4	0
Tuntutuliak	4	0
Tununak	5	1
Upper Kalskag	3	0

CHUGACH HAS 78 ENROLLED NATIVE VETERANS TOTAL.

CHUGACH HAS 13 NATIVE VETERANS ENROLLED IN REGION.

CHUGACH HAS 65 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Chenega Bay	4	1
Chugach N.A.	13	0
Cordova	16	5
English Bay	1	0
Eyak	9	2
Grouse Creek	3	0
Port Graham	7	0
Seward	16	1
Tatitlek	5	1
Valdez	3	0
Whittier	1	0

CIRI HAS 210 ENROLLED NATIVE VETERANS TOTAL.

CIRI HAS 47 NATIVE VETERANS ENROLLED IN REGION.

CIRI HAS 163 NATIVE VETERANS ENROLLED IN VILLAGES.

Village	Enrolled	Deceased
Anchor Point	3	1
Anchorage	94	12
Caswell	1	0
Chickaloon	2	0
Chugiak	2	0
Cohoe	1	0
Cook Inlet	47	3
Eklutna	4	0
Fort Richardson	1	0
Homer	3	1
Kasilof	1	0
Kenia	20	3
Ninilchik	6	1
Palmer	6	0
Point Posession	4	0
Salamatof	2	2
Seldovia	6	2
Spenard	1	0
Talkeetna	1	0
Tyonek	4	2
Wasilla	1	1

DOYON HAS 217 ENROLLED NATIVE VETERANS TOTAL.

DOYON HAS 40 NATIVE VETERANS ENROLLED IN REGION.

DOYON HAS 177 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Alatna	1	0
Allakaket	2	0
Anvik	5	0
Arctic Village	2	0
Beaver	2	1
Bettles	2	1
Canyon Village	1	0
Chalkyitsik	1	0
Chicken	1	0
Circle	1	0

Delta Junction	1	1
Dot Lake	1	0
Doyon Ltd.	40	3
Eagle	3	0
Fairbanks	28	4
Fort Yukon	16	3
Galena	7	0
Grayling	1	0
Holy Cross	9	0
Hughes	2	0
Huslia	3	1
Kaltag	2	0
Lake Minchumina	1	0
Manley Hot Springs	1	0
McGrath	9	1
Medfra	1	0
Minto	2	1
Nenana	16	3
North Pole	1	0
Northway	7	0
Nulato	6	1
Rampart	3	0
Ruby	9	3
Shageluk	5	1
Stevens Village	3	0
Takotna	1	0
Tanacross	2	1
Tanana	10	1
Tetlin	1	0
Venetie	6	1
Wiseman	2	0

KONIAG HAS 106 ENROLLED NATIVE VETERANS TOTAL.

KONIAG HAS 21 NATIVE VETERANS ENROLLED IN REGION.

KONIAG HAS 85 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Ambler	8	2
Aiaktalik	1	0
Akhiok	5	1
Kaguyak	1	0
Karluk	5	0
Kodiak	25	3
Larsen Bay	3	0
NANA Koniag	21	3
Old Harbor	3	0
Ouzinkie	12	0
Port Lions	2	0
Port Williams	1	0
Uyak	1	1
Woody Island	18	1

NANA HAS 116 ENROLLED NATIVE VETERANS TOTAL.

NANA HAS 10 NATIVE VETERANS ENROLLED IN REGION.

NANA HAS 106 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Ambler	2	0
Buckland	8	0
Candle	1	0
Deering	3	2
Kiana	2	0
Kivalina	6	0
Knik	2	0
Kobuk	1	0
Kotzebue	51	8
NANA	10	1
Noatak	5	1
Noorvik	14	1
Selawik	7	0
Shungnak	4	0

SEALASKA HAS 559 ENROLLED NATIVE VETERANS TOTAL.

SEALASKA HAS 133 NATIVE VETERANS ENROLLED IN REGION.

SEALASKA HAS 426 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Angoon	24	3
Auke Bay	1	0
Cannery/Tenakee	5	0
Craig	7	0
Douglas	2	0
Dyea	1	0
Haines	8	1
Hoonah	39	2
Hydaburg	12	0
Juneau	87	9
Kake	16	4
Kasaan	2	1
Ketchikan	64	10
Klawock	15	1
Klukwan	8	0
Metlakatla	21	3
Pelican	1	0
Petersburg	10	2
Saxman	2	1
Sitka	68	8
Skagway	1	0
T&H Sealaska	133	12
Thorne Bay	1	0
Wrangell	18	3
Yakutat	13	1

Appendix C

Six hundred thirty-two (632) Enrolled Native Veterans served more than one year of active duty from January 1, 1970 through December 1, 1971.

Five hundred seventy-nine (579) veterans are enrolled to a village or region within Alaska.

Of the 579 veterans, 68 are deceased. (Deceased veterans are included in enrolled numbers but shown for information only.)

Fifty-three (53) veterans are enrolled to 13th Landless Region. (At large)

AHTNA HAS 11 ENROLLED NATIVE VETERANS TOTAL.

AHTNA HAS 1 NATIVE VETERANS ENROLLED IN REGION.

AHTNA HAS 10 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Ahtna	1	0
Copper Center	4	0
Gakona	1	0
Glennallen	1	0
Gulkana	2	0
Mentasta Lake	1	0
Tazlina	1	0

ALEUT HAS 24 ENROLLED NATIVE VETERANS TOTAL.

ALEUT HAS 12 NATIVE VETERANS ENROLLED IN REGION.

ALEUT HAS 12 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Aleut Corp	12	2
Atka	1	0
False Pass	1	0
King Cove	1	0
Nikolski	1	0
Saint George	1	0

Saint Paul	1	1
Unalaska	4	0
Unga	2	0

ARCTIC SLOPE HAS 12 ENROLLED NATIVE VETERANS TOTAL.

ARCTIC SLOPE HAS 2 NATIVE VETERANS ENROLLED IN REGION.

ARCTIC SLOPE HAS 10 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Arctic Slope N.A.	2	0
Barrow	8	1
Nuiqsut	1	0
Point Hope	1	0

BERING STRAITS HAS 61 ENROLLED NATIVE VETERANS TOTAL.

BERING STRAITS HAS 10 NATIVE VETERANS ENROLLED IN REGION.

BERING STRAITS HAS 51 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Bering Straits N.A.	10	1
Brevig Mission	1	0
Council	1	0
Diomedes	2	2
Elim	3	0
Gambell	2	0
Golovin	2	0
Koyuk	1	0
Nome	7	5
Saint Michael	1	0
Savoonga	2	0
Shaktoolik	3	1
Shishmaref	2	0
Stebbins	2	0
Teller	1	1

Unalakleet	6	1
Ungalik	1	0
Wales	1	0
White Mountain	3	0

BRISTOL BAY HAS 32 ENROLLED NATIVE VETERANS TOTAL.

BRISTOL BAY HAS 7 NATIVE VETERANS ENROLLED IN REGION.

BRISTOL BAY HAS 25 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Aleknagik	1	1
Bristol Bay N.A.	7	0
Chignik Lake	2	0
Clarks Point	2	1
Dillingham	8	3
Egegik	2	0
Kokhanok	1	1
Manokotak	1	0
Naknek	2	0
Perryville	1	0
Pilot Point	1	0
Port Heiden	1	0
South Naknek	1	0
Ugashik	2	0

CALISTA HAS 60 ENROLLED NATIVE VETERANS TOTAL.

CALISTA HAS 4 NATIVE VETERANS ENROLLED IN REGION.

CALISTA HAS 56 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
AVCP Calista	4	0
Akiak	1	0
Alakanuk	1	0
Aniak	3	0
Bethel	11	2
Chevak	3	0
Emmonak	2	0
Hooper Bay	2	0
Kipnuk	2	0
Kongiganak	1	0
Kotlik	1	0
Kwethluk	1	1
Kwigillingok	1	0
Marshall	3	0
Mekoryuk	3	0
Mountain Village	7	1
Napamiute	2	0
Nightmute	1	0
Pilot Station	3	0
Saint Marys	1	1
Scammon Bay	2	0
Tuntutuliak	2	0
Tununak	2	1
Upper Kalskag	1	0

CHUGACH HAS 23 ENROLLED NATIVE VETERANS TOTAL.

CHUGACH HAS 8 NATIVE VETERANS ENROLLED IN REGION.

CHUGACH HAS 18 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Chenega Bay	1	0
Chugach N.A.	5	0
Cordova	6	2
Eyak	3	1
Grouse Creek	1	0
Port Graham	2	0

Seward	1	0
Tatitlek	2	1
Valdez	2	0

CIRI HAS 58 ENROLLED NATIVE VETERANS TOTAL.

CIRI HAS 10 NATIVE VETERAN'S ENROLLED IN REGION.

CIRI HAS 48 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Anchorage	33	3
Chickaloon	1	0
Chugiak	1	0
Cohoe	1	0
Cook Inlet	10	1
Fort Richardson	1	0
Kasilof	1	0
Kenai	4	0
Ninilchik	3	0
Palmer	1	0
Spennard	1	0
Talkeetna	1	0

DOYON HAS 80 ENROLLED NATIVE VETERANS TOTAL.

DOYON HAS 15 NATIVE VETERANS ENROLLED IN REGION.

DOYON HAS 65 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Alatna	1	0
Allakaket	2	0
Anvik	2	0
Beaver	1	1
Bettles	1	0
Chicken	1	0

Doyon Ltd.	15	1
Eagle	1	0
Fairbanks	10	3
Fort Yukon	12	3
Galena	1	0
Grayling	1	0
Holy Cross	2	0
Hughes	1	0
Huslia	1	0
Kaltag	1	0
McGrath	3	0
Medfra	1	0
Minto	1	1
Nenana	6	0
Nulato	1	0
Rampart	1	0
Ruby	5	3
Stevens Village	1	0
Takotna	1	0
Tanana	5	0
Venetie	1	0
Wiseman	1	0

KONIAG HAS 37 ENROLLED NATIVE VETERANS TOTAL.

KONIAG HAS 5 NATIVE VETERANS ENROLLED IN REGION.

KONIAG HAS 32 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Afognak	4	1
Akhiok	2	0
Karluk	3	0
Kodiak	6	2
Larsen Bay	1	0
Ouzinke	6	0
Woody Island	10	0

NANA HAS 27 ENROLLED NATIVE VETERANS TOTAL.

NANA HAS 3 NATIVE VETERANS ENROLLED IN REGION.

NANA HAS 24 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Buckland	1	0
Deering	2	1
Kiana	1	0
Kivalina	1	0
Knik	1	0
Kotzebue	13	1
NANA	3	0
Noorvik	4	0
Selawik	1	0

SEALASKA HAS 154 ENROLLED NATIVE VETERANS TOTAL.

SEALASKA HAS 34 NATIVE VETERANS ENROLLED IN REGION.

SEALASKA HAS 120 NATIVE VETERANS ENROLLED IN VILLAGES.

Village Name	Enrolled	Deceased
Angoon	3	0
Auke Bay	1	0
Cannery/Tenakee	1	0
Craig	3	0
Dyea	1	0
Haines	2	1
Hoonah	7	0
Hydaburg	3	0
Juneau	29	2
Kake	3	0
Ketchikan	18	0
Klawock	1	0
Klukwan	2	0
Metlakatla	10	0
Pelican	1	0

Petersburg	3	1
Saxman	1	0
Sitka	24	5
T&H Sealaska	34	4
Wrangell	7	1

Appendix D

Report on Consultation

With ANCSA Regional Corporations,

Alaska Federation of Natives,

And the Alaska Inter-Tribal Council

Held July 9, 1996, in Anchorage, Alaska

Regarding Section 06 of P.L. 104-42, Nov. 2, 1995

The meeting began at 1:15 p.m. with the following in attendance:

Department of the Interior staff:

Glenda Miller, BIA Area Realty Officer	[phone: 586-7403]
Danielle Jerry, USFWS Wildlife Biologist	[phone: 786-3335]
Ramona Chinn, BLM Conveyance Coordinator	[phone: 271-3806]
Connie Van Horn, BLM Native Allotment Coordinator	[phone: 271-3767]
Jan Sosnowski, NPS Realty Specialist	[phone: 257-2586]

ANCSA Regional Corporation Representatives:

Bristol Bay Native Corporation:	Tom Hawkins	[phone: 278-3602]
	Chester Murphy	[phone: 278-3602]
Calista Corporation:	Felix P. Hess	[phone: 279-5516]
Cook Inlet Region, Inc.	Candace Beery	[phone: 274-8638]
Koniag, Inc.	John Merrick	[phone: 561-2668]

AFN Representative: Nelson N. Angapak [phone: 274-3611]

AITC Representative: Bill Viera [phone: 563-9334]

After introductions, Glenda Miller began the meeting with an overview of the 1906 Native Allotment Act to explain what some assumptions in the study may be:

1. Compliance with use and occupancy requirements
2. Not to exceed four parcels
3. Lands must be in Federal ownership

The current BIA Realty Office directory was handed out. Also distributed and discussed were the BIA Statewide Summary of Native Allotment Numbers (1956-1993) and the current Native allotment statistics by realty service provider.

A copy of Section 106 was handed out and Glenda Miller began discussion of the methods used to gather the data required in subsection (a)(1): "The number of Vietnam era veterans, as defined in section 101 of title 38, United States Code, who were eligible for but did not apply for an allotment of not to exceed 160 acres under the Act of May 17, 1906 (chapter 2469, 34 Stat. 197), as the Act was in effect before December 18, 1971."

Data from the BIA Enrollment Roll was provided to the Department of Veterans' Affairs (VA). This consisted of 103,000 records. The roll used is not the "purified" version. Because of this, there were duplicate names and other inaccuracies.

This data was run against the VA system which consists of approximately 42 million records. The matches were made by (1) social security numbers, (2) exact names and dates of birth. These matches were then narrowed to those who served during the Vietnam Era.

The total number of matches was 2,936. This number further refined by eliminating 380 duplicate names. Also eliminated were the 179 who had applied for Native Allotments. Finally, the 87 who had dishonorable or other than honorable discharges were subtracted. The resulting number of matches is 2,290.

A handout was provided which shows the VA match list broken down by region and by village. This was provided in three sorts: The grand total of 2,290; The number of veterans with one year or less service between 1/1/70 and 12/18/71; The number of veterans with six months or less service between 1/1/70 and 12/18/71. {Note: A missing piece of the data is being worked up now, that is the number of veterans who served between 1/1/70 and 12/18/71, by region and village.}

There were also a number of direct client contacts made to the BIA or realty service providers. Of the 683 contacts (approximately), 346 names matched the VA list. Fifty had applied for Native Allotments. This results in 287 individual contacts made by individuals who don't appear to be on the VA match list and who don't appear to have previously applied for a Native Allotment.

When added to the VA match list, the working grand total is 2,577.

The group reviewed maps and overlays which showed: the overall concentration of number of veterans statewide; the concentration of veterans who served six months or less between 1/1/70 and 12/18/71; the concentration of veterans who served one year or less between 1/1/70 and 12/18/71; and the number of direct client contacts made with the BIA or realty service provider. These maps graphically depict the narrative explained above.

Glenda Miller advised that after the report completed the Office of Management and Budget review, it would be available and distributed to the ANCSA Regional Corporations, AFN, AITC, ANB, etc.

Nelson Angapak provided some insight into the history of the legislation. The need for the legislation was first identified in the 1970's, the idea faded and came up again in the 1980's. The first draft of the enabling legislation was made several years ago. So, this need has been persistently pursued since passage of ANCSA.

Nelson Angapak asked about the Native veterans who, for whatever reason, didn't enroll under ANCSA. Glenda Miller explained that if and when there is enabling legislation, there will be much more publicity and outreach efforts to contact such individuals.

Nelson Angapak expressed the fear of the AFN Land Managers Committee that the legislation would be written in such a way as to narrow eligibility criteria far enough so as to disqualify large number of veterans.

Felix Hess expressed the concern that a one year time period for taking applications is too short. {Note: This is the time period provided in the original proposed enabling legislation}

Glenda Miller advised that other issues which had been brought up by the realty offices included: the rights of deceased veterans' heirs, dependent spouses who were also unavailable to apply, and other categories of individuals who may not have been able to apply by 12/18/71.

Felix Hess stated that he had been approached by students who were out of state in 1971, wondering if there's any way they can be included.

Nelson Angapak asked what kind of input Native entities have in the development of report recommendations. Glenda Miller responded that the same opportunity would exist as normally does in this type of legislation.

Candace Beery expressed that there is a need to put a deadline on the process, to avoid unintentional foot dragging (e.g., CSU managers wouldn't be too thrilled with new allotments and BIA/BLM are already swamped with work, etc.)

Glenda Miller briefly addressed the BLM Reinvention Laboratory efforts and positive statements made by some Lab Members about this legislation and the potential opportunity to "do it right."

When asked whether any participants had concerns about how the veterans' legislation might impact ANCSA conveyances, John Merrick said that some corporations won't be happy about certain provisions of the enabling legislation.

Nelson Angapak said that the AFN Land Managers group needs to meet to discuss the impacts

further. He was also concerned about the possibility of open-ended authority.

When the possibility of a possible suspension of ANCSA/State conveyances during the application period was brought up, Nelson Angapak said that the veterans' legislation shouldn't be used as a vehicle for slowing down the ANCSA conveyances.

Felix Huss said there would be some possible resistance from surface owners, particularly as it may impact NCD lands.

Nelson Angapak brought up an idea to allow Veterans allotments the same opportunity for legislative approval as section 905 of ANILCA, absent legal defects, and certain types of conflicts. {Note: ANILCA couldn't be used to do it, because these veterans allotments weren't pending on or before 12/18/71, as required by ANILCA}.

As the meeting ended, Glenda Miller said that a copy of these notes and all handouts would be mailed to the ANCSA Regional Corporations, AFN, AITC, and ANB Grand Camp.

Report on Consultation with Realty Service Providers

Held July 10, 1996, in Anchorage, Alaska

Regarding Section 106 of P.L. 104-42, Nov. 2, 1995

The meeting began at 1:15 p.m. with the following in attendance:

Department of the Interior staff:

Glenda Miller, BIA Area Realty Officer

[phone: 586-7403]

Lesley DeWilde, BIA Fairbanks Realty Specialist

[phone: 456-0223]

Connie Van Horn, BLM Native Allotment Coordinator

[phone: 271-3767]

Brenda Takes Horse, BLM Native Programs Coordinator

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ALASKA

REVIEW OF SOCIAL AND ECONOMIC CONDITIONS

University of Alaska Anchorage • Institute of Social and Economic Research November 2000 • Volume XXXII, No. 1

DIVIDING ALASKA, 1867-2000: CHANGING LAND OWNERSHIP AND MANAGEMENT

By Teresa Hull and Linda Leask

When the U.S. bought Alaska in 1867, it acquired an area twice the size of the 13 original American colonies and three quarters as big as the Louisiana Purchase. This paper looks broadly at changing land ownership and management in Alaska from 1867 through today.

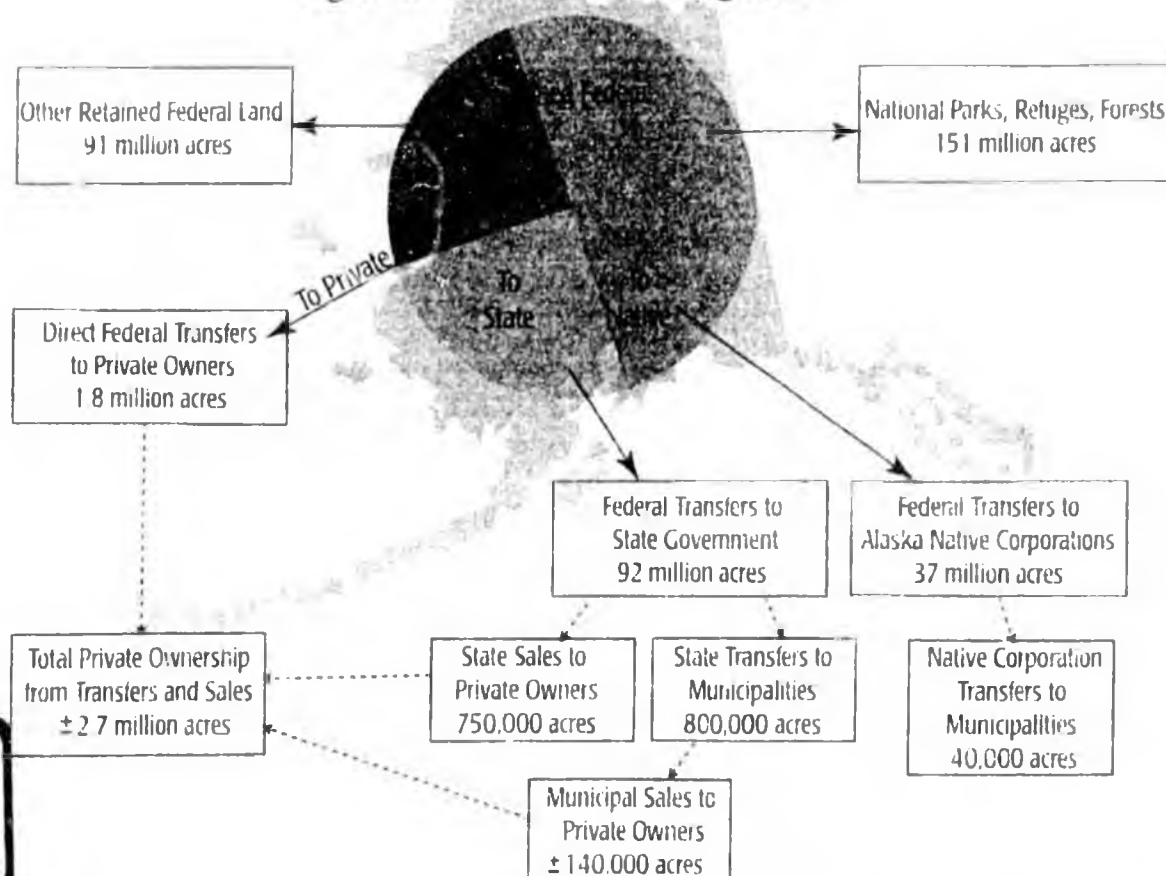
For almost a century, the federal government gave up only a sliver of Alaska's 375 million acres, mostly through homesteading and other land programs.

But when Alaska became a state in 1959, Congress gave the new state rights to about 104 million acres. Then, in 1971, Congress settled Alaska Native land claims with a land grant of 44 million acres and payment of \$1 billion.

The last major division of Alaska lands came in 1980, when Congress added 104 million acres to national parks, wildlife refuges, and other conservation units.

Figure 1 shows land transfers to date resulting directly and indirectly from federal programs and laws. The picture will change in the future, as land transfers and sales continue. The federal government kept land for national conservation systems and other purposes and transferred land directly to private owners, the state, and Alaska Native corporations. The state and the corporations have subsequently transferred land to municipalities. The state and the municipalities have in turn sold land to private owners.

Figure 1. Lands Transfers Through 2000



SCOPE AND ORGANIZATION

This paper is an overview, to give readers the big picture of how Alaska's current land ownership and management developed. Because of limited space, it doesn't cover all the details of this complex topic.

- **Background, pages 2 and 3.** We begin by briefly discussing the evolution of Alaska land ownership, including the three major federal laws shaping recent ownership and management in Alaska: the 1958 Alaska Statehood Act, the 1971 Alaska Native Claims Settlement Act (ANCSA), and the 1980 Alaska National Interest Lands Conservation Act (ANILCA).
- **Chronology, 1867-2000, pages 4 and 5.** From a variety of sources, we compiled this chronology of significant events, laws, and court decisions affecting land ownership and management since Alaska became a U.S. territory.
- **Land Ownership, 1960 and 2000, pages 6 and 7.** Here we compare current Alaska land ownership with ownership in 1960, including notes describing special circumstances.
- **Estimated Private Ownership, pages 8 and 9.** Lands awarded Alaska Natives under ANCSA make up most private lands in Alaska, and their extent is well-documented. This is an estimate of other private ownership—acreage private owners have acquired in other ways.
- **Major Federal Land Withdrawals, pages 10 and 11.** This map shows national conservation units (including wilderness areas) and other federal withdrawals as of 2000. The small size of the map limits our ability to show inholdings.
- **State and Native Corporation Lands, pages 12 and 13.** This map illustrates the broad picture of current state and Native corporation lands; again, its small size limits our ability to depict precise boundaries and other details.
- **Ownership and Management Issues, pages 14 and 15.** Here we briefly describe some of the major issues that have grown out of the recent land transfers.

BACKGROUND

The U.S. bought Alaska from Russia in 1867. The vast new territory lay far to the north, its climate and terrain were often forbidding, and it was largely unmapped. Almost all the 50,000 or so residents were Alaska Natives, whose ancestors had been in Alaska for thousands of years.

For nearly 20 years after the U.S. acquired Alaska, Congress excluded it from the public land laws—meaning no one could get title to land. In 1884, Congress opened the territory to mining laws. Near the turn of the century, it began opening Alaska to homesteading and other programs that allowed individuals and businesses to apply for land.

Congress also acknowledged, beginning in 1884, that Alaska's Native peoples had rights to land. But it would take nearly 100 years for Congress to link land claims to

land title. In 1906 Congress did create a program under which individual Alaska Natives could claim up to 160 acres, and in 1926 it provided a way for Alaska Natives to acquire lots within Native townsites.

Various federal programs over the years offered individuals, schools, missionaries, and others the chance to acquire land. But on the eve of statehood, all but about half a percent of land still belonged to the federal government.

Historians cite various reasons (including, especially at first, federal indifference) for the slow pace of land transfers. But one significant reason was that lands had to be surveyed before they could be transferred. Surveying was difficult and expensive in a huge territory with short summers, vast roadless areas, and unknown terrain. Only an estimated one percent of Alaska lands had been surveyed by 1960. (And surveys continue today; see page 14.)

Also, federal programs like homesteading—which required settlers to clear and cultivate land—were poorly suited to most of Alaska. It was chiefly fishing and mining rather than agriculture that drew immigrants to Alaska.

Still, even though the amount of land patented under federal programs is relatively small compared with Alaska's vast expanses, such private lands are more significant than they might seem based on size. That's because many now fall within national conservation units or Alaska Native corporation lands—and they can affect land management in various ways, as we discuss on page 15.

Alaska Statehood Act

Big changes in land status began when Alaska became a state and got rights to select about 104 million acres of federal land. Unlike in other states, where the federal government specified tracts for land grants, Alaska could choose from lands that weren't reserved for national parks, military bases, or other purposes. The land grant was to help Alaska develop an economic base.

With statehood also came ownership of submerged lands under most navigable waterways and submerged lands up to three miles offshore. But which rivers and lakes are navigable, and where the offshore boundaries fall, remain points of contention between the state and federal governments (see pages 14 and 15).

The statehood act also gave Alaska the authority to manage fish and wildlife. Gaining that authority had in fact been one of the main forces behind the statehood drive. Now, in 2000, a clash with federal law has cost Alaska authority to regulate subsistence hunting and fishing on federal lands, as we discuss on page 15.

Land Freeze and Oil Discovery

Alaska Native land claims had been building for years, particularly in southeast Alaska. But in the 1960s, when the state began selecting lands, Native groups saw increasing threats to lands they had traditionally used—and they organized statewide to press their land claims.

By the end of the 1960s, Native land claims blanketed Alaska. The Secretary of the Interior responded by halting land transfers until those claims were settled.

At about the same time, in 1968 the Prudhoe Bay oil field was discovered on the North Slope. This was to prove the largest oil field in North America, and it was on state-owned land.

The oil companies planned to transport the oil south by building a pipeline across Alaska.

The state government and the oil companies now had compelling reasons to support a claim settlement—because only then would the federal government resume state land transfers and issue right-of-way permits for a trans-Alaska oil pipeline.

Alaska Native Land Claims Settlement

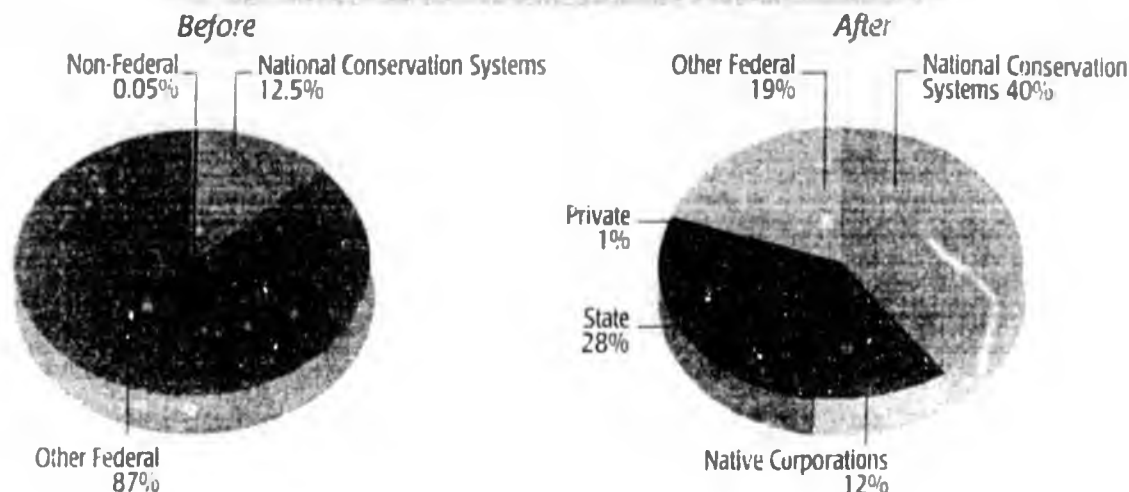
In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA). The act settled Alaska Native land claims with a grant of 44 million acres and payment of \$1 billion. It also provided for village and regional corporations to manage that land and money. Part of the reason for this land grant was—like the state land grant—to help provide a long-term economic base for the corporations. Corporations were to select mainly from tracts the federal government withdrew near villages, but when there wasn't enough available land near villages, they could also choose from other unreserved federal land.

ANCSA also authorized the Secretary of the Interior to withdraw 80 million acres in Alaska for possible inclusion in national parks and other conservation units. That provision grew partly out of the national environmental movement of the 1960s, which saw the passage of federal environmental protection legislation and the rise of environmental groups calling for protection of undeveloped lands.

LANDS ACT

The years from 1971 to 1980 saw bitter controversy over how much land would be added to national parks, wildlife refuges, and other conservation units in Alaska. Opponents argued that taking large areas out of the public

Figure 2. Land Status Before 1958 and After 1980
(When Transfers are Complete)*



*Major Transfers from Unreserved Federal Lands in Alaska

Alaska Statehood Act (1958): 104 million acres

Alaska Native Claims Settlement Act (1971): 44 million acres

Alaska National Interest Lands Conservation Act (1980): 104 million acres

domain—and out of the selection pool for the state and Native corporations—would hinder economic development. Supporters argued that protecting some of the nation's largest and most scenic undeveloped lands should take priority.

In the end, the 1980 Alaska National Interest Lands Conservation Act (ANILCA) added nearly 104 million acres to conservation systems in Alaska, with 56 million acres designated as "wilderness," the most protected classification. These withdrawals, together with existing reservations, make up about 40 percent of Alaska lands.

ANILCA generated management issues and conflicts that remain unresolved today, as described on page 15. One of the most prominent is a clash between federal and state law over subsistence hunting and fishing on federal lands. Another is a debate over the future of the coastal plain of the Arctic National Wildlife Refuge.

Figure 2 shows land ownership before and after the major federal legislation we just described. When transfers are complete, the federal government will own nearly 60 percent of Alaska, largely in national conservation units. The state will own about 28 percent, the Alaska Native corporations 12 percent, and other private owners about 1 percent.

Changes, 1867-2000

The chronology on pages 4 and 5 cites major events affecting land ownership and management in Alaska from 1867 through 2000. The federal laws we just discussed strongly influenced the current patterns, but many other events over the years also contributed.

LAND OWNERSHIP AND MANAGEMENT CHRONOLOGY

1867: U.S. buys Alaska from Russia for \$7.2 million; Department of the Interior says no one can acquire land in Alaska until Congress enacts legislation.

1870: Congress declares Pribilof Islands the first national wildlife refuge; it was to be managed for seal harvests.

1884: Congress passes Organic Act of 1884, extending public mining laws to Alaska. It allows only U.S. citizens to stake claims—thereby excluding Alaska Natives, who were not recognized as citizens until the 1920s. The act also grants missionaries rights to sites they occupy and declares that Alaska Natives "shall not be disturbed in the possession of any lands they occupy or use."

1891: Congress approves establishment of townships, allows individual Alaskans to apply for lots within those townships, allows businesses to acquire up to 160 acres for "trade and manufacturing sites", and designates Annette Island (87,000 acres) as a reservation for Tsimshian Indians.

1903: Congress extends U.S. homesteading program to Alaska. Executive order declares St. Lawrence Island (1.2 million acres) a reindeer reserve for benefit of Alaska Natives.

1906: Congress passes Native Allotment Act, allowing individual Alaska Natives to apply for up to 160 acres.

1907: President Theodore Roosevelt establishes Tongass National Forest (16 million acres) and Chugach National Forest (4.8 million acres).

1912: Congress approves territorial government for Alaska, but retains control of land, minerals, and fish and wildlife.

1914-17: Executive orders establish 10 Native reserves totaling nearly 500,000 acres, with the largest at Norton Bay (316,000 acres) and Kobuk (144,000 acres).

1915: Federal government begins building Alaska Railroad. Construction creates town of Anchorage.

1915: Athabaskan chiefs in the Interior meet with territorial delegate to protest taking of land for railroad—possibly the first formal Alaska Native protest.

1915: Congress "reserves" an estimated 250,000 acres for the future University of Alaska and 20 million acres for schools, with transfers contingent on surveys. But very little acreage had been transferred by 1958, when the act was revoked.

1917: Congress establishes 1.9-million-acre Mt. McKinley (now Denali) National Park.

1918: President Woodrow Wilson establishes Katmai National Monument (2.7 million acres).

1923: President Warren Harding establishes Naval Petroleum Reserve No. 4 (23 million acres). It is now known as National Petroleum Reserve-Alaska (NPR-A).

1925-1933: Executive orders establish Tetlin "public purpose" reserve (768,000 acres) and four small reserves to "promote the interests of the Natives."

1925: President Calvin Coolidge establishes Glacier Bay National Monument, originally 1.1 million acres but enlarged to 2.3 million acres in 1937.

1926: Congress passes Native Townsite Act, allowing Alaska Natives to apply for lots in Native townships.

1929: Congress grants University of Alaska 100,000 acres. The same year it declares Nunivak Island (1.1 million acres) a national wildlife refuge.

1935: Congress authorizes the Tlingit and Haida Indians of Southeast Alaska to bring a land claims suit against the federal government in the U.S. Court of Claims.

1936: Congress extends Indian Reorganization Act (IRA) to Alaska, providing means for Native villages to form federally-chartered governments and to petition the Department of the Interior for establishment of reservations.

1941: Congress establishes Kenai National Moose Range (1.7 million acres).

1941-1946: Secretary of the Interior Harold Ickes withdraws 1.5 million acres for the Venetie Native reservation and several smaller reservations.

1956: Congress enacts Alaska Mental Health Enabling Act with a grant of one million acres to be managed for benefit of mental health programs.

1958: Congress passes Alaska Statehood Act, granting Alaska the broad governmental powers of all states and rights to select about 104 million acres.

1959: U.S. Court of Claims rules (in the 1935 case cited above) that Tlingit and Haida Indians are entitled to compensation for southeast Alaska lands taken from them. Compensation of \$7.5 million paid in 1968.

1960: Secretary of the Interior Frederick Seaton withdraws 9 million acres for Arctic National Wildlife Range (now Arctic National Wildlife Refuge).

1966: Native groups establish Alaska Federation of Natives as statewide organization to press for land claims settlement.

1966-1971: Most land transactions in Alaska halted, pending settlement of Alaska Native land claims. Secretary of the Interior Morris Udall informally began the "land freeze" in late 1966 and formalized it in 1969 with a public law order that remained in effect until 1971.

1968: Oil companies discover Prudhoe Bay oil field on state-owned lands. The land freeze cited above initially blocked issuance of right-of-way permits the oil industry needed for construction of a pipeline south across Alaska.

1971: Congress passes Alaska Native Claims Settlement Act (ANCSA), awarding Alaska Natives 44 million acres and \$1 billion in settlement of their land claims. ANCSA eliminated all Native reserves in Alaska, except Annette Island. It also authorized the Secretary of the Interior to withdraw up to 80 million acres for possible inclusion in national conservation units in Alaska.

1976: Congress passes Federal Land Policy and Management Act, establishing the policy of retaining rather than disposing of public lands and ending most federal land disposal programs.

1978: Alaska Legislature passes law giving subsistence uses priority over other uses of fish and game.

1980: Congress passes Alaska National Interest Lands Conservation Act (ANILCA), adding 104 million acres to national conservation units in Alaska and including a provision giving priority to subsistence uses on federal land with subsistence users defined as rural residents.

1986: Alaska Legislature revises state law to specify that subsistence users are those "domiciled in a rural area."

1986: End of federal homesteading program in Alaska. Homesteading in other states ended 10 years earlier.

1989: Alaska Supreme Court rules that Alaska's constitution prohibits allocating fish and game on the basis of residence. Eliminating "rural" from the state definition of subsistence users puts state law at odds with federal law.

1990: Federal government takes over regulation of subsistence hunting on federal lands.

1995: A panel of the U.S. Ninth Circuit Court of Appeals rules (*Katie John v. United States*) that "public lands" as defined in ANILCA include navigable waters in and near national parks and other conservation areas. That ruling gave the federal government authority to regulate subsistence fishing on many navigable waterways that the state had previously regulated. Alaska's Congressional delegation was able to delay implementation of the ruling until 1999.

1995: Alaska Supreme Court rules (*Totemoff v. Alaska*) that "public lands" as defined in ANILCA exclude navigable waters—and that federal law pre-dating ANILCA gives the state control of navigable waters.

1998: U.S. Supreme Court rules (*Alaska v. Native Village of Venetie Tribal Government*) that lands Native villages received under terms of ANCSA are not "Indian country," a term used to designate areas where federal Indian laws apply. The ruling means that on ANCSA lands, Alaska Native governments do not have tax and other authority granted to tribal governments in Indian country.

1997: The state government loses an 18-year dispute with the federal government over setting the boundary between state and federal submerged lands offshore from the North Slope. If the state had prevailed, it would have controlled more lands with potential for oil and gas development. But the U.S. Supreme Court ruled in favor of the federal government (*United States v. Alaska*; commonly known as Dinkum Sands).

1999: Federal government takes over regulation of subsistence fishing on navigable waters in and near conservation units—an estimated 60 percent of Alaska's inland waters.

2000: U.S. Supreme Court appoints a special master to make recommendations about the state's claim to submerged lands off southeast Alaska, including waters in Glacier Bay National Monument. The state's appeal was prompted by the National Park Service's decision to phase out commercial fishing in Glacier Bay.

2000: The state government appeals the 1995 *Katie John* ruling. The full Ninth Circuit Court of Appeals (11 judges) agrees to hear the state's appeal.

2000: State of Alaska intervenes in cases that could raise the issue of whether Native allotments and townsite lots are "Indian country." In 1998, U.S. Supreme Court said (*Alaska v. Native Village of Venetie Tribal Government*) such lands might be Indian country.

Sources

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Table 1. Alaska Land Ownership, 1960 and 2000
(in Millions Of Acres¹)

	1960	2000
Total Federal Lands	374.00	242.00
Public Domain ²	290.30	61.40
National Parks, Refuges, and Forests	46.90	150.50
<i>National Wildlife Refuges</i>	18.70	76.50
<i>National Parks, Preserves, Monuments</i>	7.50	52.00
<i>National Forests and Monuments</i>	20.70	22.00
National Conservation and Recreation Areas	-	2.20
National Petroleum Reserve-Alaska ³	23.00	23.00
Military Reserves	2.60	1.80
Native Reserves ⁴	4.10	0.08
Other Withdrawals ⁵	7.50	2.60
Total State Lands⁶	-	89.50
General State Lands ⁷	-	77.90
Legislatively-Designated Areas	-	11.30
<i>Parks</i>	-	3.30
<i>Game Refuges, Sanctuaries, CHAs⁸</i>	-	3.20
<i>Forests</i>	-	2.20
<i>Other Special Categories</i>	-	2.60
Mental Health Trust (MHT) Land ⁹	1.00	1.00
University of Alaska Lands ¹⁰	0.15	0.17
Municipal Lands ¹¹	-	0.66
Total Private Lands	0.50	40.09
Alaska Native Corporation Lands ¹²	-	37.40
Other Private	0.50	2.69
<i>Federal Land Programs¹³</i>	0.50	1.30
<i>State Land Programs¹⁴</i>	-	0.75
<i>Municipal Land Sales¹⁵</i>	-	0.14

OWNERSHIP, 1960 AND 2000

The events chronicled on pages 4 and 5 shaped ownership in 1960, when Alaska was a new state, and today, 40 years later. The table notes below provide more information about specific categories.

Ownership Notes

1. We relied on many sources that produce a good picture of changing land ownership. But the acreage figures are not entirely consistent. One of the differences is that some agencies count submerged lands and some don't. For that

and other reasons, the amounts we cite in individual categories don't total to exactly 375 million acres, the size most commonly cited for Alaska.

2. Federal lands managed by the Bureau of Land Management and not withdrawn for specific federal uses. The year 2000 figure includes acreage the state government and Native corporations have selected but the federal government hasn't approved for transfer. About 20 million more acres from the public domain will be transferred to the state and Native corporations.

3. Formerly known as Naval Petroleum Reserve No. 4

4. All Native reserves except for the Annette Island Reserve in Southeast Alaska were revoked by the 1971 Alaska Native Claims Settlement Act.

5. Withdrawals by various federal agencies.

6. State land received under the Alaska Statehood Act. This includes both acreage that has been patented to the state and acreage that has been tentatively approved for patent. The 2000 figure is reduced by acreage the state has transferred to municipalities and sold to private owners. The state has so far received title to about 91 million acres under the statehood act and will ultimately receive about 104 million. It has transferred 800,000 acres to municipalities and plans to transfer another 550,000. It has sold 750,000 acres to private owners so far.

7. Lands the state legislature has not designated for specific purposes. The Alaska Department of Natural Resources classifies these lands by multiple-use management categories, designating the most suitable uses but not necessarily excluding others.

8. Critical habitat area.

9. The federal government granted Alaska one million acres under the 1956 Alaska Mental Health Enabling Act, to be used for the benefit of mental health programs. The Mental Health Trust has sold a small amount of land.

10. The Alaska Legislature approved a bill awarding the university rights to an additional 250,000 acres. The status of that bill is not clear as of late 2000. But if it does go into effect, the new grant combined with the university's current 170,000 acres would bring total university lands to 420,000 acres. The university has sold a few thousand acres.

11. This figure includes lands the state and the Native corporations have transferred to municipalities. As of 2000, the state has transferred close to 800,000 acres to municipalities under the Municipal Entitlement Act and will transfer about 550,000 more, for a total of 1.35 million acres. Municipalities have in turn sold about 140,000 acres to private owners. Alaska Native corporations have transferred about 40,000 acres to municipalities for community needs, as required by the Alaska Native Claims Settlement Act. The corporations will transfer more land to municipalities, but how much is not clear. Individual municipalities and Native corporations can negotiate amounts to be transferred.

12. Lands awarded Alaska Natives so far under the 1971 Alaska Native Claims Settlement Act (ANCSA) including both patented land and interim conveyances.

13. This includes lands deeded to private owners under various federal land programs and federal mining laws, described on pages 8 and 9. The land programs have all

ended, but some additional land will be transferred to individual Native applicants under the Native Allotment Act. When that program closed in 1971, more than 15,000 applications were pending. The BLM estimates that in 2000 about 3,800 of those applications are still pending. Congress has also approved a new opening for Native veterans who served in the military between 1969 and 1971 and did not previously apply for allotments. In late 2000, Congress was considering adding another opening for descendants of Native veterans who died in the Vietnam War between 1964 and 1971.

14. Includes various programs as described on page 9.

15. This estimate is based on information from municipalities with the largest land sales.

What About the Future?

The federal public domain will decline by about 20 million acres, as the federal government transfers another 13 million acres to the state government and 7 million more to the Alaska Native corporations.

Municipal ownership will increase, as municipalities receive more state and Native corporation lands.

Private ownership will increase for several reasons. The state and municipal governments will continue to sell some land. The University of Alaska and the Alaska Mental Health Trust also sell land; those sales amount to only a few thousand acres as of 2000, but may be larger in the future. Also, individual Alaska Natives will receive more acreage under the Native allotment program.

Sources

U.S. Department of the Interior

Bureau of Land Management, Division of Conveyance Management

U.S. Fish and Wildlife Service

National Park Service

U.S. Forest Service

Alaska Department of Natural Resources

Division of Mining, Land, and Water

Alaska Mental Health Trust Office

University of Alaska, Statewide Office of Land Management

Municipalities: Municipality of Anchorage, Kenai Peninsula Borough, Mat-Su Borough, Fairbanks North Star Borough, City and Borough of Juneau, Kodiak Island Borough, Kodiakan Gateway Borough, City and Borough of Sitka

See also the source documents cited for the land ownership chronology, page 5.

PRIVATE LAND OWNERSHIP IN ALASKA

About 40 million acres are in private ownership in Alaska today. But most of that was awarded Alaska Natives in a single large grant, in settlement of their land claims. Its extent is well-documented. How much land has become private through many smaller, individual transactions?

Excluding ANCSA lands, private land in Alaska totals about 2.7 million acres today. We developed that estimate with the help of federal, state, and local governments.

Figure 3 shows that about two thirds of this private land was originally transferred under federal land programs and mining law. Until fairly recent times, the only way private owners could get title to land was through federal programs (or through someone who had already acquired title from the federal government). Many of these private parcels are now inholdings in national conservation units or on Native corporation lands.

Figure 3. How Has Land in Alaska Become Private^a?



Federal land programs	1.66 million acres
Federal mining law	140,000 acres
State land programs	750,000 acres
Municipal land sales	± 140,000 ^b acres
Total, excluding ANCSA land	2.7 million acres

^a Excluding lands awarded under ANCSA.
^b Estimate based on largest municipal land sales.

Federal Land Programs

Federal land programs all closed at least by the 1980s (although in some instances the federal government continues to process applications). Figure 4 breaks down acreage patented under various federal land programs from 1867 to 2000. The largest amounts were patented under the Native allotment and homesteading programs.

For most of the 1900s, individuals and businesses could apply for lands under various programs—although getting title could take years. One of the big problems was that less than 1 percent of Alaska was surveyed before 1960, and lands had to be surveyed before applicants could get title.

Under some programs applicants didn't pay for the land but instead proved they used and occupied it. In other cases, they paid fees or modest charges per acre. Those who acquired lands under most federal programs gained *unrestricted* title—meaning they could sell or otherwise dispose of the lands as they chose, once they had met program requirements and gained title.

But lands conveyed to Alaska Natives under the Native allotment and the Native townsite programs have *restricted* title. To sell or lease these lands, owners have to work with the Bureau of Indian Affairs (or with BIA-approved Native contractors). But the lands aren't taxed, they can't be seized for debts, and they're protected from foreclosure. Owners can also apply for unrestricted title.

Homestead program: Individual citizens could stake a claim on up to 160 acres of unreserved federal land. After five years claimants could get unrestricted title to this land if they had built a house on it, lived there for a specified period, and cultivated part of it.

Homesite program: Individuals could acquire up to 3 acres if they built a house on the land and lived there for a specified period.

Native allotments: Alaska Natives could apply for up to 160 acres if they could show past use. The program formally ended in 1971, when the Alaska Native Claims Settlement Act passed, but the BLM continues to process existing claims, and Congress recently approved a special opening for Native veterans; see note 13 on page 7.

Native townsite lots: Alaska Natives could apply for lots in federally recognized Native townsites. This program closed in 1971, but the BLM is still processing a few applications.

Townsite programs: Non-Natives could apply for lots within the townsites where they lived, once the federal government had approved establishment of the townsites.

Small-tract sales: Allowed individuals to buy tracts of up to 3 acres, mainly for recreational uses, in designated areas.

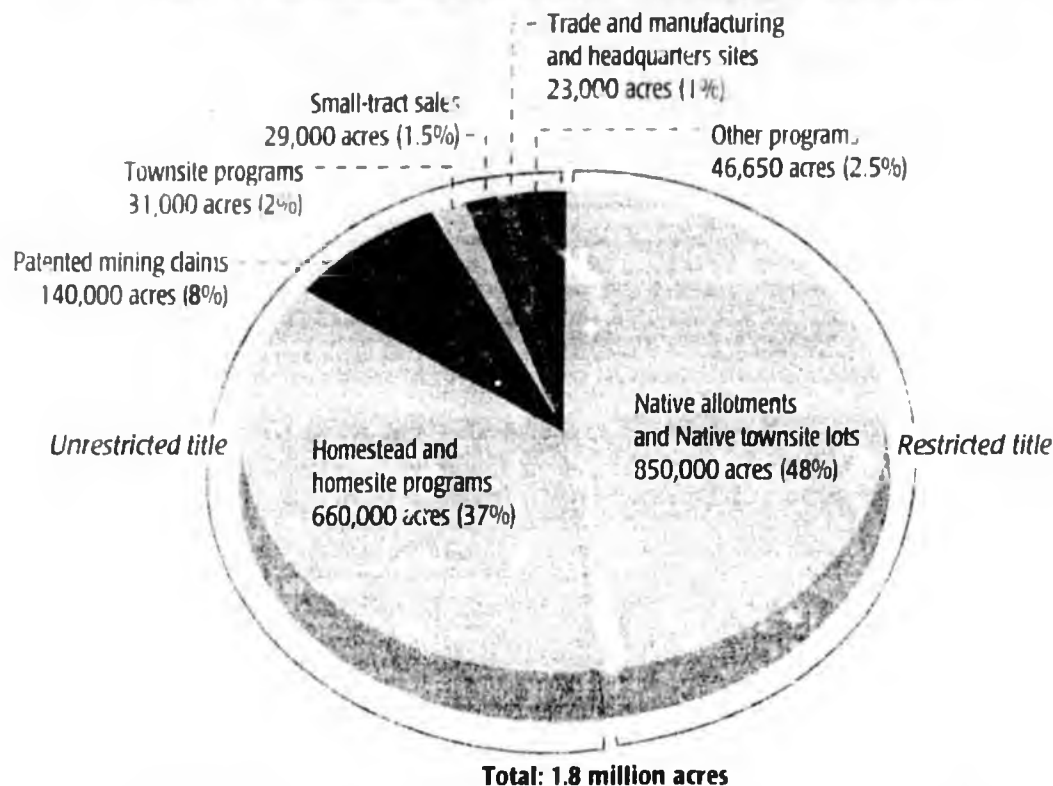
Trade and manufacturing site and headquarters site programs: Individuals could apply for up to 160 acres for sites where they operated businesses, or for 5 acres for headquarters sites, which were for businesses (like guiding service) whose operations covered a wider area.

Other programs: Various other federal land disposal programs allowed individuals or organizations to apply for land—for instance, there were programs that allowed religious organizations and military veterans to acquire land.

Federal Mining Law

Federal mining law still allows individuals to file mining claims on certain federal lands—and to receive patent to those lands if they show mineral discoveries, make improvements, and pay fees. Most but not all federal land in Alaska is now closed to new mining claims. People holding unpatented claims that existed before areas were closed to entry may still be able to patent them.

Figure 4. Federal Conveyances To Private Owners, 1867-2000
(Under Federal Land Disposal Programs and Mining Law)



Owners with *unrestricted* title can sell or otherwise dispose of lands as they choose. Owners with *restricted* title must go through the Bureau of Indian Affairs (or through Native organizations that contract with the BIA) before selling or leasing land. These lands are not taxable, can't be seized to pay debts, and are protected from foreclosure.

Source: Bureau of Land Management

STATE LAND PROGRAMS

Since 1959, state land programs have put about 750,000 acres in private hands—mostly through sales, but also through programs that allow applicants to acquire land by occupying it. The state makes land available after it goes through a land planning and classification process.

State programs have changed over time, and a program may exist but not be open. For instance, state homestead and homesite programs existed in 2000, but no land was available under those programs. Most programs are limited to Alaska residents.

The amount of land offered and sold has waxed and waned—depending on the state budget (and specifically, amounts budgeted to make land available), on legislative requirements, and other demands on state land. Unlike federal law, state law doesn't allow individuals to receive patent to mineral land.

Parcel sizes vary widely by program. Below we describe the range of state programs since 1959. Estimates of how much land was patented under specific programs over the years are not available. Also, land left over from sales is at times sold over the counter.

Agricultural land sales: The state began selling land for agriculture in 1973, but buyers got just the agricultural interest until 1997, when the program was changed to give buyers title to the land, subject to an agricultural covenant.

Auctions: During the early years of statehood, most state land sales were through auctions, and auctions continue today.

Lotteries: The state began selling land by lottery in 1978 and continues to do so.

Homesites and homesteads: Since 1977, variations on these programs have at times offered Alaskans the chance to get title to land by building houses or cabins and living on the land for some period.

Open to entry: Beginning in 1960, this and similar programs allowed individuals to stake parcels on a first-come, first-served basis within designated areas. Currently, the remote recreational cabin sites program allows individuals to buy or lease parcels they stake on certain state lands.

MUNICIPAL LAND SALES

Some municipalities also sell land, including the Matanuska-Susitna, the Kenai Peninsula, and the Fairbanks North Star boroughs. Sale programs vary.

MAJOR FEDERAL WITHDRAWALS IN ALASKA, 2000

Note: This map depicts the general boundaries of major federal withdrawals. It does not include federal public domain or small federal withdrawals. It shows large inholdings, but boundaries are not precise.

Chukchi Sea

Bering Sea



Based on maps prepared by Alaska Department of Natural Resources

Bering Sea



National Wildlife Refuges



National Parks and Preserves



National Forest System



Designates
Wilderness
Areas

National Conservation and Recreation Areas

Major Military Withdrawals

National Petroleum Reserve-Alaska

Gulf of Alaska

Outer Aleutian Islands



STATE GOVERNMENT AND ALASKA NATIVE CORPORATION LANDS, 2000

Note: This map shows the general pattern of lands the State of Alaska and the Alaska Native corporations own. Boundaries are not precise. It does not include lands the state and the Native corporations have selected but the federal government has not yet approved for transfer.

Chukchi Sea

Bering Sea

Source: Based on maps prepared by Alaska Department of Natural Resources.

Beaufort Sea

State Government Lands

Alaska Native Corporation Lands

Outer Aleutian Islands

LAND TRANSFER AND MANAGEMENT ISSUES

Today the state and the Native corporations have each received roughly 85 percent of their federal land grants. Such massive land transfers haven't come without complications and disputes. And even as those land transfers were going on, the federal government shifted more than 100 million acres from the public domain into conservation units—a move that meant big changes in use and management of those lands.

To discuss all the issues these ownership and management changes have generated would require a book. Here we just touch on some of the major issues that have come up, as most of the federal public domain in Alaska either went into state or Native corporation ownership or into national parks and other conservation units.

Ongoing Surveys

The Bureau of Land Management has had the daunting job of surveying all the lands being conveyed to the state and the Native corporations—together about 40 percent of Alaska lands. As recently as 1960, only an estimated one percent of Alaska had been surveyed. The BLM surveys the boundaries of large parcels and also documents the boundaries of thousands of inholdings—valid existing rights to lands within the bigger tracts. These include Native allotments, patented mining claims, and lands patented under federal homestead and other programs.

Lands can't be patented until they're fully surveyed, but to allow transfers to continue, federal law established the "tentatively approved" category for state lands and "interim conveyance" for Native lands. Those are lands conveyed when they are unsurveyed or partially surveyed. Figure 5 shows the status of surveys as of 2000.

Figure 5. Surveys of State and Native Corporation Land, 2000

(In millions of acres)



Fully surveyed	59
Partly surveyed or unsurveyed	69*
Estimated completion	±15 years

* Includes lands transferred to the state under tentative approval and to the Native corporations under interim conveyance; much of that land is partially surveyed.

Source: Bureau of Land Management

Navigable or Non-Navigable?

Submerged lands—lands under rivers and lakes—have raised knotty problems from the start. The Alaska Statehood Act gave the state government, with some exceptions, ownership of lands under rivers and lakes that were navigable at the time of statehood. But at that time, the navigability of very few waterways had been documented.

Navigability is an especially complex issue in Alaska, where rivers and lakes cover more than 10 million acres and where commercial use of a waterway at the time of statehood—a measure of navigability—is often difficult to show.

The navigability of rivers and lakes became a more urgent issue when the pace of land transfers speeded up and when the federal government added 100 million acres to conservation systems. It's in the state's interest to have waterways judged navigable, because ownership of the submerged land gives the state more control of use of rivers and lakes. Also, land under navigable waters is not charged against the state's land grant.

The federal government has made navigability determinations for a number of major river systems, but the navigability of many waterways remains undetermined. The state also makes navigability determinations. The two sometimes disagree; the state has appealed many federal decisions and gone to court a number of times. The state has prevailed in some cases and the federal government in others.

There are many complications in determining navigability. The important point is that the navigability of a number of waterways in Alaska is still in dispute—and is likely to remain in dispute for some time.

Land Management Issues

Twenty years after Congress passed the Alaska National Interest Lands Conservation Act, some of the fires it sparked are still blazing. Both sides in the decade-long fight over how much of Alaska's remaining public domain to keep open to development and how much to put into national conservation systems certainly anticipated big management changes. But those for and against ANILCA took very different views of those coming management changes.

Development and Recreation

Over the years there have been a number of disputes over commercial and recreational activities on or near conservation units—for instance, disputes over existing mining claims in new parks, over proposed road across conservation lands, and over closing areas to motorized vehicles.



Some disputes have involved inholdings—valid existing rights to land that pre-date the creation of new conservation units and conveyance of land to Alaska Native corporations. Private owners of small parcels within larger tracts have access and use rights. For instance, owners of patented mining claims in national parks have access rights. Private owners can establish lodges or other businesses on their land within conservation units. But managers of the conservation units can also regulate access to and use of private inholdings. Inholders and land managers have often disagreed about what constitutes reasonable use that doesn't interfere with the purposes of, for example, a wildlife refuge or a park. In some cases, the federal government buys (or attempts to buy) the inholdings.

A debate that has gone on periodically since 1980 is whether to allow oil development in the coastal plain of the Arctic National Wildlife Refuge. Analysts believe the area may hold billions of barrels of oil—but it is also a calving ground for the Porcupine caribou herd. ANILCA specifically left a decision about allowing oil development to future Congresses—which have considered the issue several times without resolving it. As of 2000, it is still uncertain when Congress will decide this issue.

Another current conflict is over the National Park Service's decision to phase out commercial fishing in Glacier Bay National Monument. The state government in mid-2000 asked the U.S. Supreme Court to determine whether the waters in question, and other offshore lands in southeast Alaska, fall within the state's jurisdiction.

The Alaska statehood Act broadly granted the state ownership of submerged lands up to three miles offshore. But the federal and state governments have disagreed about how to measure offshore boundaries and about other issues related to submerged lands. The Supreme Court recently appointed a special master to begin hearings on the Glacier Bay case, which could take years to decide.

Another uncertainty in late 2000 is how Alaska's national forests will be affected by changes the federal government is considering for roads in national forests throughout the U.S.

Subsistence Management

Despite these ongoing disputes, the most divisive issue to come out of ANILCA so far resulted not from a restriction on development but from a single word in the definition of subsistence: the word "rural." ANILCA gives priority to subsistence hunting and fishing on federal lands—and defines subsistence as "customary and traditional uses" of fish and game by "rural Alaska residents."

To comply with federal law, the Alaska Legislature in the 1980s passed a law defining subsistence users as those "domiciled in a rural area of the state." In 1989, the Alaska Supreme Court ruled that law unconstitutional, because Alaska's constitution doesn't allow the state to allocate fish and game on the basis of residence.

Since that decision more than a decade ago, many things have happened (as detailed in the chronology on page 5). The federal government almost immediately took over regulation of subsistence hunting on federal lands.

But in 1999, the federal government also took over regulation of subsistence fishing on navigable waters on or near federal conservation units. That change in policy came out of a 1995 federal court ruling (*Kate John v. United States*). Alaska's Congressional delegation was able to delay implementation of that ruling for several years.

In 2000, the full U.S. Ninth Circuit Court of Appeals agreed to hear a state appeal of the 1995 decision. But even if that case is decided in the state's favor, it would apply to only some waterways, and the federal government would still regulate subsistence hunting on federal lands.

There have been task forces, special legislative sessions, and other attempts to resolve the clash between federal and state law. Many analysts argue that only an amendment to Alaska's constitution, allowing the state to limit subsistence users to rural residents, will prompt the federal government to return management to the state. Others argue that the solution is to amend ANILCA so subsistence users are no longer defined as rural residents.



The Alaska Legislature has several times tried but failed to get the two-thirds majority it needs to put a constitutional amendment before Alaska voters—who would have to ratify any amendment to the state constitution. It's uncertain what will happen next in this dispute that has already gone on for more than a decade. But it seems unlikely the state will regain sole control of subsistence management any time soon.

The authors thank many people who helped us put this publication together. We especially thank several people at the federal Bureau of Land Management (BLM) and the Alaska Department of Natural Resources (DNR).

Linda Resseguie and Joe Labay of the BLM's Division of Conveyance Management provided information about federal programs and about the status of land transfers and surveys. Dick Mylius and Kathy Atkinson of DNR's Resource Assessment and Development Section gave us information on state land programs and navigability issues. Carol Shobe of DNR's Division of Mining, Land, and Water provided information on state land transfers.

We also thank Vic Fischer, Paul Ongtooguk, and Gunnar Knapp of ISER for their comments on drafts of this paper.

The University of Alaska's Natural Resources Fund helped pay for this publication. The fund supports projects and programs to improve management of and increase understanding about Alaska's natural resources. Part of the income generated by the university's land grant goes into the Natural Resources Fund.

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United States Department of the Interior

BUREAU OF LAND MANAGEMENT
ALASKA STATE OFFICE
222 W. 7th Avenue, #13
ANCHORAGE, ALASKA 99513-7599



RECEIVED
SEP 23 1991

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JUL 09 1991

Information Bulletin AK 21-229

To: DM's, DSD's, SC's

From: State Director

Subject: Conveyance Summary as of June 30, 1991

Attached for your information is a summary of land conveyance actions through ~~March 31, 1991.~~

~~June 30~~

In brief:

ANCSA

	<u>Land Transferred Through 06/30/91</u>	<u>FY 91 Total</u>	<u>Entitlement</u>
Interim Conveyance	25,552,455.24	33,363.14	
Patent	9,969,341.93	92,490.97	
Total	35,521,797.17	125,854.11	45,540,724.81

To date, BLM has issued patents to 10.0 million acres of surveyed land, and interim conveyed 25.9 million acres of unsurveyed land. The BLM must survey and patent an additional 35.5 million acres of land.

STATE

	<u>Land Transferred Through 06/30/91</u>	<u>FY 91 Total</u>	<u>Entitlement</u>
Tentative Approval	50,030,937.34	199,223.60	
Patent	35,913,538.01	456,687.96	
Total	85,944,375.35	655,911.56	104,425,000

To date, the State has received patent to 35.9 million acres of surveyed land, and obtained tentative approval to 50.0 million acres of unsurveyed land. The BLM must survey and patent an additional 68.5 million acres of land.



NATIVE ALLOTMENTS

Parcels Processed
Through 06/30/91

FY 91
Total

Selection Applications Grand Total

Closed (No Conveyance)
Certified

2.662
4.352

13
347

15.000

To date, BLM has completed the processing of 6.918 parcels and 8.013 parcels remain to be processed.

SETTLEMENT CLAIMS AND PLO 1613

Applications Processed
through 06/30/91

FY 91
Total

	<u>No Conveyance</u>	<u>Patented</u>	<u>Grand Total</u> <u>of Applications</u>	
T&M Sites	2,016	593	2,660	0
Headquarter Sites	1,444	710	2,261	6
Homesites	1,929	1,720	3,834	18
Homesteads	9,305	2,964	12,283	0
PLO 1613's	167	440	615	0

ALASKA RAILROAD

Applications Processed
through 06/30/91

FY 91 Total

	<u>Parcels</u> <u>#</u>	<u>Acres</u>	<u>Lin.</u> <u>Miles</u>	<u>ROW</u> <u>Acres</u>	<u>Grand Total</u> <u>Parcels</u> <u>#</u>	<u>Lin.</u> <u>Miles</u>	<u>ROW</u> <u>miles</u>	<u>Parcels</u>	<u>Lin.</u>	<u>ROW</u>
Patented	12	10,966.00	120	2906.00	68	361		0		0

Wayne A. Boddy

NATIVE ALLOTMENT CONVEYANCES**APPLICATIONS RECEIVED**

1906-1960	51
1961-1971	1929
1972-PRESENT	<u>8020</u>
TOTAL	10000
	(15,000 PARCELS)

TOTAL CERTIFICATES ISSUED

1906-1969	201
1970-1981	253
1982-PRESENT	<u>3871</u>
TOTAL	4325

SUMMARY OF ADJUDICATIVE ACTIVITY 1906 - PRESENT

	<u>EY 1991</u>	<u>TOTAL</u>
TITLE RECOVERY	1	1429 REMAINING
1906 APPROVALS	41	3565
LEGISLATIVE APPROVALS	111	8752
TOTAL APPROVALS		10317
CLOSED NO CONVEYANCE	14	2662
CERTIFICATED	347	4325
AWAITING SURVEY AND CERTIFICATION		5962
PENDING ADJUDICATION		<u>2051</u>
TOTAL PARCELS		15000

SUMMARY OF ADJUDICATIVE ACTIVITY 1906 - PRESENT

	<u>EY 1991</u>	<u>TOTAL</u>
TITLE RECOVERY	1	1429 REMAINING
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CERTIFICATED	347	4325
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PENDING ADJUDICATION		<u>2051</u>
TOTAL PARCELS		15000

4

AUTHORIZING THE CONVEYANCE OF HOMESTEAD ALLOTMENTS TO INDIANS, ALEUTS, OR ESKIMOS IN ALASKA

JUNE 29, 1956.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ENGLE, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 11696]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 11696) to authorize the conveyance of homestead allotments to Indians, Aleuts, or Eskimos in Alaska, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

EXPLANATION OF THE BILL

The purpose of H. R. 11696, introduced by Delegate Bartlett, is to authorize the conveyance of homestead allotments to Indians, Aleuts, or Eskimos in Alaska.

Under the act of May 17, 1906 (34 Stat. 197, 48 U. S. C. 357), certain Indians or Eskimos may obtain allotments not in excess of 160 acres of nonmineral land provided that the allotted lands shall be deemed the homesteads of the allottees, and their heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. H. R. 11696 provides that said act be amended to include the Aleuts, natives of Alaska.

As of November 8, 1955, a total of 79 allotments had been made pursuant to the act of May 17, 1906, and 64 additional applications were under consideration.

If enacted H. R. 11696 would, in subsection (a) of section 1, broaden the 1906 act to permit the grant of homestead allotments to Aleuts, as well as to Indians and Eskimos in Alaska.

Subsection (b) makes it clear that homesteads may be selected under section 1 of the 1906 act only from vacant, unappropriated, and unreserved land.

Subsection (c) broadens the 1906 act to permit homesteads to be selected on lands that are valuable for coal, oil, or gas deposits if the minerals themselves are reserved to the United States. That is the rule with respect to homestead selections by non-Indians (act of March 8, 1922, 42 Stat. 415, 48 U. S. C. 376). Such a rule would facilitate administration if it were applied to Indian homestead allotments in Alaska.

Subsection (d) permits Indian, Aleut, and Eskimo homestead allottees to sell their allotments with the approval of the Secretary.

Subsection (e) safeguards the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

Under existing law, when an Indian or Eskimo is entitled to a town-site lot, he is issued a restricted deed that may be alienated with the approval of the Secretary of the Interior; therefore, there seems to be no sound reason why the same rights should not be extended to homestead allottees.

Finally, H. R. 11696 provides that no application for an allotment under this act shall be approved until the applicant has made satisfactory proof of 5 years' use and occupancy—on a substantially continuous basis—of the land as an allotment.

Two bills, H. R. 10505 and H. R. 11023, both similar to H. R. 11696, were also introduced by Delegate Bartlett. The first bill was introduced as the result of an executive communication from the Department of the Interior. H. R. 11023 was drafted to include several technical amendments recommended by the Subcommittee on Territories and Insular Affairs and the Department of the Interior. H. R. 11696 is a clean bill introduced following a second series of subcommittee hearings. The executive communication and the report on H. R. 11023, dated April 2, 1956, and June 7, 1956, respectively, are as follows:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., April 2, 1956.

Hon. SAM RAYBURN,
Speaker of the House of Representatives,
Washington, D. C.

MY DEAR MR. SPEAKER: Transmitted herewith is a draft of a proposed bill to authorize the conveyance of homestead allotments to Indians or Eskimos in Alaska.

We recommend that the proposed bill be referred to the appropriate committee for consideration, and we recommend that it be enacted.

The act of May 17, 1906 (34 Stat. 197, 48 U. S. C. 357), provides for the allotment of not to exceed 160 acres of nonmineral land to certain Indians or Eskimos in Alaska, and provides that "the land so allotted shall be deemed the homestead of the allottee and his

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C, April 2, 1956.

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heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress."

As of November 8, 1955, a total of 79 allotments had been made pursuant to this act, and 64 additional applications were under consideration.

When an allottee dies and his heirs do not wish to live on the allotted land, the land becomes worthless to the heirs for all practical purposes unless they are able to sell the land. Several such situations have arisen. Even before an allottee dies, moreover, the inalienability of the allotment deprives the land of most of its value if the allottee decides to move to another tract. We therefore believe that provision should be made for the sale of the land, subject to the approval of the Secretary of the Interior in order to safeguard the interests of the Indian or Eskimo, and for the conveyance of an unrestricted title to the land unless the purchaser is an Indian or Eskimo who is in need of continued Federal protection and the conveyance specifically provides for a continuance of the restrictions. The proposed bill so provides.

It should be noted that under section 1 of the act of May 25, 1926 (44 Stat. 629, 48 U. S. C. 355a), when an Indian or Eskimo native of Alaska is entitled to a townsite lot he is issued a restricted deed that may be alienated with the approval of the Secretary of the Interior. We believe that there is no sound reason for denying homestead allottees the same right that is extended to townsite allottees.

The Bureau of the Budget has advised that there is no objection to the submission of this proposed legislation.

Sincerely yours,

WESLEY A. D'EWARY,
Assistant Secretary of the Interior.

A BILL To authorize the conveyance of homestead allotments to Indians or Eskimos in Alaska

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any Indian or Eskimo native of Alaska who has received a homestead allotment pursuant to the Act of May 17, 1906 (34 Stat. 197, 48 U. S. C. 357), or his heirs, is hereby authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted. Such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian or Eskimo who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., June 7, 1956.

HON. CLAIR ENGLE,
*Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.*

MY DEAR MR. ENGLE: H. R. 11023, a bill to authorize the conveyance of homestead allotments to Indians, Aleuts, or Eskimos in Alaska, was introduced as a clean bill to include the amendments that the

Subcommittee on Territories proposed to make to H. R. 10505. The latter bill was drafted and submitted by executive communication from this Department on April 2, 1956.

After reviewing H. R. 11023, we believe that several technical amendments are desirable and a draft substitute bill is enclosed which we believe will accomplish the purposes of the subcommittee and also make the corrections explained below.

The primary purpose of the bill, as indicated in our letter of April 2, 1956, is to permit an Indian or Eskimo in Alaska who receives a homestead allotment under the act of May 17, 1906 (34 Stat. 197, 48 U. S. C. 357), or his heirs, to alienate the land with the approval of the Secretary of the Interior, and to permit the purchaser to take an unrestricted title unless he is an Indian or Eskimo who the Secretary determines needs further Federal protection. An Indian or Eskimo who has a townsite allotment in Alaska may alienate the property with the approval of the Secretary, and we believe that an Indian or Eskimo homestead allottee should have the same right.

Subsection (a) of the enclosed substitute bill broadens the 1906 act to permit the grant of homestead allotments to Aleuts, as well as to Indians and Eskimos in Alaska. This is a provision recommended by the subcommittee.

Subsection (b) of the enclosed substitute bill makes it clear that homesteads may be selected under section 1 of the 1906 act only from vacant, unappropriated, and unreserved land. That has been the consistent administrative interpretation of the act. Unless that fact is specified, however, the provision in section 2 of the bill permitting Indian homesteads to be selected in national forests under certain circumstances might be made the basis for an inference that other reserved lands are also available for homesteading.

Subsection (c) of the enclosed substitute bill broadens the 1906 act to permit homesteads to be selected on lands that are valuable for coal, oil, or gas deposits if the minerals themselves are reserved to the United States. That is the rule with respect to homestead selections by non-Indians (act of March 8, 1922, 42 Stat. 415, 48 U. S. C. 376), and it is the rule proposed for other forms of entry by H. R. 11026. It would facilitate administration if the same rule were applied to Indian homestead allotments in Alaska.

Subsection (d) of the enclosed substitute bill contains the substance of our original proposal, which is the principal purpose of the bill, i. e., to permit Indian and Eskimo homestead allottees to sell their allotments with the approval of the Secretary.

Subsection (e) of the enclosed substitute bill contains the subcommittee recommendations that are designed to safeguard the national forests. Some fear was expressed during the subcommittee hearings that the authority to sell homesteads might encourage Indians and Eskimos to seek homestead allotments in the national forests for the purpose of selling them to others. This danger is effectively obviated by enacting into law the substance of the Department's present regulations on the subject, which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

As a technical matter, amended by amending the act, it is preferable to refer to section 31 (337), which recognizes its agricultural use of the forest land, and the provision is substantially continued.

We hope that the provisions of your act will be the principal purpose of all of the safeguards.

Sincerely,

P

Be it enacted by the United States Act of May 1906, amended:

(a) By the sentence that

(b) By the sentence that "unreserved"

(c) By the word "appears" in subject to Stat. 415, 48 U. S. C. 376, and it is the rule proposed for other forms of entry by H. R. 11026. It would facilitate administration if the same rule were applied to Indian homestead allotments in Alaska.

(d) By the word "and" and adding "Aleut, or his heirs, with the approval of the Secretary, to sell their allotments with the approval of the Secretary, to permit the purchaser to take an unrestricted title unless he is an Indian or Eskimo who the Secretary determines needs further Federal protection. An Indian or Eskimo who has a townsite allotment in Alaska may alienate the property with the approval of the Secretary, and we believe that an Indian or Eskimo homestead allottee should have the same right."

(e) By the word "Sec. 2" in this act to establish agricultural purposes.

R. 10505. The communication from

several technical is enclosed which committee and also

our letter of April a who receives a 06 (34 Stat. 197, with the approval purchaser to take who the Secretary Indian or Eskimo the property with Indian or Eskimo

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ontains the sub- o safeguard the ie subcommittee encourage Indians tional forests for or is effectively e Department's homestead selec- upon occupancy unless the land ice to be chiefly high require the

As a technical drafting matter, these provisions should be incorporated by amendment into the 1906 act, rather than restricted to allotments made under the new legislation. Also as a technical matter, it is preferable to refer to lands in the national forests that are chiefly valuable for agricultural or grazing purposes rather than to refer to section 31 of the act of June 25, 1910 (36 Stat. 563, 25 U. S. C. 337) which recognizes only the timber value of the land in comparison with its agricultural or grazing value, and ignores other public values of the forest lands. Finally, as a technical matter, the 5-year occupancy provision should indicate that the occupancy must be substantially continuous and does not include only intermittent use.

We hope that the enclosed substitute bill will facilitate the deliberations of your committee. We believe that it will accomplish the principal purpose of our original proposal and at the same time include all of the safeguards which the Subcommittee on Territories suggested.

Sincerely yours,

WESLEY A. D'EWARD,
Assistant Secretary of the Interior.

PROPOSED SUBSTITUTE FOR H. R. 11023

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of May 17, 1906 (34 Stat. 197; 18 U. S. C. 357) is hereby amended:

(a) By inserting after the word "Indian" in the first sentence thereof the following: ", Aleut".

(b) By inserting before the word "unappropriated" in the first sentence thereof the following: "vacant, unappropriated, and unreserved".

(c) By inserting after the word "Alaska" the first time it appears in the first sentence thereof the following: " or, subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U. S. C. 376-377), vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits."

(d) By striking the period after the first sentence thereof and adding the following: " *Provided*, That any Indian, Aleut, or Eskimo who receives an allotment under this act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions."

(e) By adding two new sections as follows:

"Sec. 2. Allotments in national forests may be made under this act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

"SEC. 3. No allotment shall be made to any person under this act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years."

The Committee on Interior and Insular Affairs recommends enactment of H. R. 11696.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

ACT OF MAY 17, 1906 (34 Stat. 197; 48 U. S. C. 357)

The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of *vacant, unappropriated, and unreserved* nonmineral land in Alaska, or, *subject to the provisions of the Act of March 8, 1922 (42 Stat. 416, 48 U. S. C. 376-377), vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits,* to any Indian, *Aleut or Eskimo* of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress[.]; *Provided, That any Indian, Aleut, or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted and such conveyance shall rest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions.* Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

SEC. 2. Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

SEC. 3. No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

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ALASKA NATIVES AND AMERICAN LAWS

Second Edition

David S. Case
David A. Voluck

5

Alaska Natives and American Laws

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DAVID S. CASE
and
DAVID A. VOLUCK

University of Alaska Press, Fairbanks

I. Generally

In the early 1900s Congress enacted the Alaska Native Allotment Act of 1906¹ and the Alaska Native Townsite Act (ANTA) (1926).² Both laws were designed to foster acquisition of title to land by individual Alaska Natives. The Alaska Native Allotment Act provided up to 160 acres of unappropriated land to Natives who were the head of a household or twenty-one years of age and could establish a prescribed period of use and occupancy for such land. The Alaska Native Townsite Act provided for conveyance of public lands to individuals in certain areas designated and surveyed as townsites.³ Both acts placed restrictions on the title conveyed so that lands could not be alienated or taxed until, as explained below, certain federally prescribed conditions were met. Although both acts were repealed in the 1970s, the 1906 Alaska Native Allotment Act and the 1926 Alaska Native Townsite Act subsequently became the focus of many lawsuits and at least one legislative effort to clarify the land rights of Alaska Natives. Unlike ANCSA, both these statutes were primarily intended to define individual Alaska Native land titles rather than group or corporate rights. They also differ from ANCSA in that they incorporate concepts of restricted title and federal oversight of Native land rights common to the administration of Native lands elsewhere in the United States. Additionally, the federal courts have consistently interpreted restricted Alaska allotment and townsite lands to be subject to specific federal trust responsibilities. Thus, to a degree never determined prior to their repeal, these two statutes have become one focus of unique federal responsibilities to Alaska Natives.

The Alaska Native Allotment Act also has added substantially to the difficulty and uncertainty of making the land distributions required under both ANCSA and the Alaska Statehood Act. Many allotment applications were originally denied without hearings and removed from federal land records, which permitted others to select and even receive title to the same lands originally applied for as allotments. Lawsuits brought under the act successfully established due process rights of Alaska Natives to factual hearings before they could be denied allotments. This required the Interior Department to reinstate some 1,000 allotment applications that had been denied and closed over the years without such hearings.

If lands previously conveyed to others are now determined to be subject to valid Native allotment applications, the courts have also held that the federal government has a trust responsibility to bring a lawsuit to recover the land for the allotment applicant. Besides this rather significant difficulty, the Interior Department was also faced with the prospect of

1. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed 1971) (formerly codified at 43 U.S.C. §§ 270-1-270-3 (1970)).

2. Act of May 25, 1926, ch. 379, 44 Stat. 629 (repealed October 21, 1976) (formerly codified at 43 U.S.C. §§ 733-736 (1975)).

3. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 745 (1982).

literally hundreds of hearings to adjudicate many allotments that were still pending. The whole affair became so confusing, time consuming, and inequitable that Congress passed a law in 1980 intended to give statutory approval to most of the some 8,000 pending allotment applications without further administrative adjudication or factual hearings.

The Alaska Native Townsite Act engendered additional confusion in the administration of ANCSA, but for other reasons. Unlike the Alaska Native Allotment Act, ANCSA did not specifically repeal ANTA. Subsequent legislation did so in 1976, but by then others (including many non-Natives) had laid claim to townsite lots available, under one interpretation of the Townsite Act, to any occupant. The problem was that under one interpretation of ANCSA some of these same lands might be deemed to have been withdrawn for ANCSA village corporations on December 18, 1971. Eventually the courts held that the townsite lands were not withdrawn for ANCSA corporation selection and that they were not available for individual occupancy after the 1976 repeal of ANTA. The courts also held that the vacant townsite lands could be conveyed either to existing cities or to tribal councils, in the case of unincorporated communities.

It is a bit ironic that these two early, previously ignored statutes, designed to afford individual Alaska Natives land title, should have been the focus of so much controversy due in part to the settlement of Alaska Native communal land claims. It is even more ironic that the controversy surrounds two statutes that have been repealed. Nonetheless, it is also significant that the federal government has been held to the responsibility of a trustee in the administration of lands conveyed under both statutes. In spite of their repeal, the Alaska Native Allotment and Townsite Acts are likely to remain vital indefinitely in terms of their influence on other Alaska land rights and continuing federal responsibilities to Alaska Natives.

II. Allotments

A. ALLOTMENT POLICIES

Alaska Use and Occupancy

Early attempts to protect Alaska Native use and occupancy⁴ give some insight into the motivation behind the Alaska Native Allotment Act. Beginning with the Treaty of Cession,⁵ Congress repeatedly protected Alaska Native possessory rights to the lands they occupied. A typical provision, from the 1884 Alaska Organic Act, stated in part:

[T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.⁶

Liberal interpretations of occupancy expanded the meaning of "actual use and occupancy"; thus, use of trails and access to water and to river harbors were also protected.⁷ Judicial decisions upheld the possessory rights under these statutes while expanding the scope of Native title:

4. See generally Chapter 2, above, "Aboriginal Title."

5. 215 Stat. 539, 542 (1867).

6. Act of May 17, 1884, 23 Stat. 24, 26. For a discussion of related laws and administrative action, see F. COHEN, HANDBOOK OF INDIAN LAW (Washington, D.C.: G.P.O., 1942; reprint New York: AMS, 1972), at 411-412.

7. See COHEN, *supra* n.3, at 412, n.172. See also 71 I.D. 342, 349 (1964).

The prohibition contained in the Act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tidelands as well as lands above the high water mark.⁸

Two Alaska cases also stressed the need to consider the communal aspects of Native life in extending protection to village lands.⁹ Finally, *United States v. Berrigan*¹⁰ expanded the scope of federal responsibility to include protections against attempts to relieve Natives of their land by contract. More importantly, the court held the Natives of Alaska to be wards of the government; thus, the United States, not the individual Indian, was the proper party to maintain an action for trespass on Native land.¹¹

As a practical matter, mere statutory recognition of Native property rights was inadequate to protect Native lands from encroachment. Furthermore, the early statutes offered no opportunity for Natives to obtain individual title to land. The Alaska Native Allotment Act¹² was, in part, a congressional response to this situation; it provided Alaska Natives with an opportunity to obtain individual title to land. The purpose of the legislation, expressed in a General Land Office report submitted to the Senate Committee on Public Lands, was to extend "to the Natives of Alaska the rights, privileges and benefits conferred by the public land laws upon citizens of the United States."¹³

2. Allotment Policies Generally

Although the 1887 General Allotment Act and the 1906 Alaska Native Allotment Act¹⁴ differ substantially in purpose and procedure, it helps to understand the 1906 Alaska act to compare it with the earlier act. Both were to some extent the product of reform-minded politicians and missionaries, but each was adopted in a different historical period in response to different political circumstances. They differed in their effect as well. The General Allotment Act is usually credited with the terrible erosion of the Native American land base, whereas the Alaska Native Allotment Act promised a significant increase in Alaska Native land ownership.

A basic premise underlying the General Allotment Act was that individual ownership of land was an indispensable requirement of "civilization."¹⁵ Theodore Roosevelt illustrated this point in a 1901 congressional message, describing the 1887 act as "a mighty pulverizing engine to break up the tribal mass" whereby "some sixty thousand Indians have already

8. *Haskin v. Sutter*, 19 F. 83, 89 (9th Cir. 1902), *aff'd on reconsideration* 128 F. 393 (9th Cir. 1904).

9. *Johnson v. Pacific Coast SS. Co.*, 2 Alaska Rpts. 224, 240 (D. Alaska 1904); *United States v. Lynch*, 7 Alaska Rpts. 568, 572-573 (D.C. Alaska 1927). See also *United States v. Cadzow*, 5 Alaska Rpts. 125 (D.C. Alaska 1905).

10. 2 Alaska Rpts. 442 (1905).

11. See also *United States v. Cadzow* and *United States v. Lynch*, *supra* n.9, accord *Harrison v. Finkle*, 6 F.3d 1347 (9th Cir. 1993).

12. See *supra* n.1. Formerly codified at 43 U.S.C. §§ 270-1-270-3 (1970), repealed with savings clause under the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 18, 45 Stat. 710 (43 U.S.C.A. § 1617).

13. S. Doc. No. 101, 59th Cong., 1st Sess. (1906).

14. Act of February 8, 1887, 24 Stat. 388 (25 U.S.C.A. §§ 348-349), also called the "Dawes Act" after its chief sponsor. See also Act of June 25, 1910, 26 Stat. 855 (25 U.S.C.A. § 336) amending the General Allotment Act as it relates to allotments on the public domain.

15. *Allotment of Land to Alaska Natives*, 71 I.D. 340, 347 (M. 3662 September 21, 1964) (citing an 1876 report from the Commissioner of Indian Affairs). F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 127-138 (1982 ed.) (discussing the history of federal allotment policies). See also F.P. PRUCHA, THE GREAT FATHER vol. II, 659-686 (1984). Also F.P. PRUCHA (ED.) DOCUMENTS OF THE UNITED STATES POLICY 77-80 (1990).

become citizens of the United States."¹⁶ Demands of westward-moving settlers and railroads for Native reservation lands were more pragmatic concerns.¹⁷ These factors were summarized in a 1934 report of the House Committee on Indian Affairs:

In conclusion, let it be said that allotment was first of all a method of destroying the reservation and opening up Indian lands; it was secondly a method of bringing security and civilization to the Indian. Philanthropists and landseekers alike agreed on the first purpose, while the philanthropists were alone in espousing the second. Considering the power of those landseeking interests and their support by the friends of the Indian, one finds inescapable the conclusion that the allotment system was established as a humane and progressive method of making way for "westward movement."¹⁸

From these philosophies and realities, a law of land distribution developed having little relation to traditional Indian communal land ownership. The General Allotment Act, as subsequently amended: (1) granted tracts of 40 acres (irrigated), 80 acres (agriculture), or 160 acres (grazing) to individual Natives; (2) made the grants from reservation lands or from the public domain if the allottee did not reside on a reservation; (3) provided that the U.S. retain title to the allotted lands (prohibiting alienation or encumbrance) until an initial trust period expired; and (4) granted citizenship to those Indians who either voluntarily lived apart from the tribe (adopting the habits of "civilized" life) or who occupied their allotment on the date the trust period expired.¹⁹

The consequences of the 1887 act were disastrous. According to former BIA chief counsel, Theodore H. Haas, the acreage granted was usually insufficient for an economic unit, and fractionalization, due to intestate division after the allottee's death, added to the difficulty.²⁰ As predicted by Senator Henry M. Teller, a former Secretary of the Interior (1882-1885) and an outspoken critic of the act, most allottees soon lost their land at bargain prices.²¹ In less than fifty years, some 90 million acres, or two-thirds of the Indian land base of 1887, and generally the most productive, was lost; approximately 90,000 Indians were left landless.²²

From its inception, the most frequently mentioned source of Indian objection to the General Allotment Act was the disastrous effect individual ownership of land had on tribal

16. 35 CONG. REC. pt. 1, 90 (57th Cong. 1st Sess., 1901). F.P. PRUCHA, ED. *AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900* (1973), focuses on the ultimate goal of the allotment policy as total assimilation of Indians:

The aim was to do away with tribalism, with communal ownership of land, with concentration of Indians on reservations, with the segregation of Indians from association with good white citizens, with Indian cultural patterns, with Native languages, with Indian religious rites and practices—in short, with anything that deviated from the norms of civilization as practiced and proclaimed by the white reformers' themes. (*Id.* at 7-8)

17. D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 83 (1973).

18. Hearing on H.R. Rep. 7902 before the House Committee on Indian Affairs (73rd Cong. 2d. Sess. 1934), at 439-440, cited in 71 L.D. 240, 348 (1964).

19. 25 U.S.C.A. §§ 331 *et seq.*

20. Haas, "The Legal Aspects of Indian Affairs from 1887-1957," *ANNALS*, May 1957, at 12-22. Also F.P. PRUCHA, *THE GREAT FATHER* vol. II, 873 (1984). The problem of fractional heirship still plagues allotment administration everywhere, including Alaska. For more on fractional heirship and Native probate issues, see section IV.D.

21. *Id.* at 16.

22. Dept. Interior, *Report of the Commissioner of Indian Affairs* (1933). Some 60 million of these acres were disposed of as "surplus lands" not needed for allotments on particular reservations. See generally COHEN, *supra* n.6, at 138.

government, unity, and culture. The 1887 appeal of the Indian-organized International Council of Indian Territory is typical:

Like other people, the Indian needs at least the germ of political identity, some governmental organization of his own, however crude, to which his pride and manhood may cling and claim allegiance, in order to make true progress in the affairs of life. This peculiarity in the Indian character is elsewhere called patriotism, and the wise and patient fashioning and guidance of which alone will successfully solve the question of civilization. Preclude him from this and he has little else to live for. The law to which objection is urged does this by enabling any member of a tribe to become a member of some other body politic by electing and taking to himself a quantity of land which at the present time is the common property of all.²³

This objection continues to echo today. The individual ownership design of the Alaska Native Allotment and Townsite Acts is the source of great difficulty when traditional tribal property is at issue. Federal laws governing probate and land use can lead to results inopposite to traditional laws for communal property.²⁴

3. Alaska Allotment Policy

When Congress did extend the allotment philosophy to Alaska, factors influencing the General Allotment Act were found generally inapplicable. According to one Interior Department Solicitor, the relatively few white settlers in early Alaska did not compete with traditional Native land use.²⁵ Freedom from settlement pressure allowed Alaska Natives to continue their traditional land uses free from the restrictions of allotment laws.²⁶ Furthermore, in the early years between 1867 and about 1900, it was repeatedly held (without much explanation) that Alaska Natives did not bear the same relation to the federal government as did other Native Americans.²⁷ Thus, it appeared that allotment laws applicable to other Native Americans were inapplicable to Alaska Natives.²⁸

23. Cited in D.S. OTIS, *supra* n.17, at 94-95. The minority opinion on the 1887 act also focused on this point. The opposition was based upon the experimental nature of the act and the obvious conflict between communal ownership and a scheme for civilization based upon individual property:

We are free to admit that the two civilizations so different throughout, cannot well coexist, or flourish together. One must, in time give way to the other, and the weak must in the end be supplanted by the strong. But it cannot be violently wrenched out of place and cast aside. Nations cannot be made to change their habits and methods and modes of thought in a day. To bring the Indian to look at things from our standpoint, is a work requiring time, patience and the skill as well as the benign spirit of Christian statesmanship.

See also L. MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* (1928); and OTIS, *supra* n.17, at 124-155, discussing the negative effects of the allotment process. H.R. REP. NO. 1576, 46th Cong. 2d Sess. 7-10 (1879-1880).

24. See *In Re Estate of Walter Howard, Deceased Thlingit of Sitka Tribe*, 32 IBIA 51 (February 6, 1993) (challenge to federal probate decision determining heirs to Thlingit clan house in contradiction to tribal law; decided on other grounds). See also section IV.D., below.

25. 71 I.D., *supra* n.15, at 348. The Solicitor is the chief legal counsel for the Interior Department.

26. *Id.* citing a 1903 report on Alaska by J.W. Witten, discussed in text accompanying n.29.

27. See *Leaving Lands within Reservations Created for the Benefit of the Natives of Alaska*, 49 I.D. 592, 594 (May 18, 1923), for examples.

28. But see *Nagle v. United States*, 191 F. 141 (9th Cir. 1911) (holding that the 1887 General Allotment Act did apply to Alaska for purposes of determining Indian citizenship). The court reasoned that article III of the 1867 Treaty of Purchase made federal Indian laws applicable to Alaska Natives and that the Act of March 3, 1871 (16 Stat. 544, 566), prohibiting future Indian treaties, instituted a policy of dealing with Indians by statute rather

The several reports and studies before Congress in 1906 give a fairly detailed and accurate account of the varied conditions of the Alaska Natives. The Department of the Interior received reports in 1903²⁹ from J.W. Witten, a law clerk acting as special inspector, and from Brigadier General Frederick Funston, documenting Alaska Native afflictions. The next year the Senate Committee on Territories conducted extensive hearings in Alaska to compile data for future legislation. The committee noted the "demoralizing influence" of white men, particularly gold seekers.³⁰ At the request of President Theodore Roosevelt, retired navy Lieutenant G. T. Emmons submitted his "Report on the Condition and Needs of the Natives of Alaska" to the Senate in 1905.³¹ Congress also received a report from the General Land Office³² which relied on the previously cited material and proposed a bill to grant individual title to the Natives.

The Land Office report reaffirmed the predominant theme behind the allotment policy (i.e., the necessity of breaking down Indian social structures, culture, and religion to create a property-owning citizen):

*The laws enacted to empower American Indians to acquire lands from the Government for his individual use have proven, perhaps, the wisest and most effectual means of disrupting tribal relations and bringing them into a civilized condition; and it is not seen why the giving of similar rights to the Natives of Alaska would not have much (the same) or greater beneficial effect, since they are by nature a more energetic, industrious and frugal people than the American Indians. (emphasis added)*³³

Emmons, on the other hand, emphasizes the importance of granting property rights purely as a matter of equity to give Alaska Natives:

the right to acquire, hold, and dispose of all real and personal property upon the same terms and conditions as is given to other inhabitants. Discrimination is neither reasonable nor calculated to encourage them in self-improvement.³⁴

The 1887 act, when granting lands to individuals, affirmed the belief that farming was the best way to "civilize" Indians. Given the Native American heritage of communal land use and subsistence hunting and fishing, it now seems incredible to think that Indians would willingly adapt to such a drastic transformation. Nevertheless, it is interesting to note that the House Committee on Public Lands believed agriculture could also play a role in Alaska's Allotment Act:

than treaty. On that basis, the court concluded that the 1887 Allotment Act was a federal Indian law applicable to Alaska Natives. *Accord, In re Minook*, 2 Alaska Rpts. 200 (D.C. Alaska 1904). *Contra, In Re Incorporation of Haines Mission*, 3 Alaska Rpts. 588 (D.C. Alaska 1908). See also *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976) (noting that when Congress passed the 1906 Alaska Native Allotment Act, there was doubt that the 1887 Allotment Act applied to Alaska, because early cases had held that Alaska Natives were not within the definition of "Indian" as used in the 1887 act). *Pence* holds that "Indian" means "the aborigines of America" and that Alaska Natives are therefore included under a statute granting federal jurisdiction over Native allotment claims.

The logical conclusion to be drawn from these cases is that, prior to 1911, lower court cases implied there was a difference between the status of Alaska Natives and lower forty-eight Natives. After the *Nagle* decision, their status in many respects was held to be similar. *Pence* is a more recent determination of their similar status.

29. Rep. of the Secretary of Interior (1903), at 269-279.

30. S. REP. NO. 282, 58th Cong. 2d. Sess. (1904).

31. S. DOC. NO. 106, 58th Cong. 3rd. Sess. (1905).

32. See S. DOC. NO. 101, *supra* n.13.

33. *Id.* at 6.

34. S. DOC. NO. 106, *supra* n.31.

It will be observed that the lands to be allotted under the provisions of this bill are to be nonmineral in character, which necessarily implies that they are to be agricultural lands.³⁵

Obviously, the House authors had no firsthand knowledge of Alaska geography. It is fortunate, therefore, that the Senate took the lead in adapting Native allotment policy to Alaska Native cultures.

The courts have held that the purpose of the Alaska Native Allotment Act was to permit Natives to perfect legal title to the lands they used and occupied.³⁶ It was obvious to Congress that unless the Natives had legal title, miners, settlers, and other non-Natives could trespass, even expropriate, Native lands with impunity by purporting to perfect independent title under other federal laws.³⁷ Given their unfamiliarity with legal procedures and the distance of most Native lands from a court, it was predictable that Natives could not retain land holdings through the slender thread of protection offered by aboriginal possessory rights.

The Alaska Native Allotment Act's legislative history also confirms that Congress believed that traditional reservation policies did not suit the seminomadic lifestyles practiced by the majority of Alaska's Natives and that contact with encroaching white settlements brought grief to Natives through disease, liquor, and unfair game laws.³⁸ Both Emmons and Witten stressed the diversity of Native cultures,³⁹ and the Interior Department Solicitor has held that Congress recognized a need for flexibility in administering allotments to various groups and chose the Secretary of the Interior to mitigate the harshness of any rigid legislative plan.⁴⁰ The Interior Secretary's Alaska allotment authority was exercised by two bureaus, the Bureau of Land Management (BLM) and the Bureau of Indian Affairs (BIA), whose roles in the administration of Alaska allotments are examined below.

4. Guardianship

Many of the reports Congress had before it in 1906 also suggested that the government should assume a comprehensive supervisory role over the social welfare of Alaska's Native population. Witten's report noted the spread of epidemics and a corresponding lack of hospital care, the ravages of alcohol, poor diets and starvation, as well as inequitable fish and game laws. He recommended legislation to establish government guidance over Natives.⁴¹ The Senate investigating committee concurred when advising that responsibility for Native welfare should be assumed by government agents.⁴² The Witten report on Alaska conditions discussed the American Fur Company's perpetuation of a paternal system of employing Native hunters and fishermen and looking after their welfare—which also kept them thoroughly dependent.⁴³

35. H.R. REP. NO. 3295, 59th Cong., 1st Sess. (1906).

36. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. den.*, 449 U.S. 888 (1980).

37. S. DOC. NO. 101, *supra* n.13; H.R. REP. NO. 3295, *supra* n.35.

38. Witten, *supra* n.29, at 279; S. DOC. NO. 106, *supra* n.31, at 3; S. DOC. NO. 101, *supra* n.13, at 8, 131, 163.

39. S. DOC. NO. 106, *supra* n.31, at 2.

The Native people of Alaska comprising four ethnic stocks living under varied conditions of country, climate, pursuits, and food supply, differ essentially from one another, and consequently demand somewhat different treatment according to their several needs.

40. 71 I.D., *supra* n.15, at 354.

41. Witten, *supra* n.29, at 5-16.

42. S. REP. NO. 282, *supra* n.30, at 28 (1904).

43. N.29, *supra* at 5.

Eskimos were in want of schools, hospitals, rigid enforcement of liquor laws, and realistic game laws but particularly needed "a system of careful supervision, instruction and advice to lead them toward self-support."⁴⁴ *In Re Sah Quah*⁴⁵ held the Natives were "practically in a state of pupilage...similar to that toward a guardian," and the 1906 General Land Office Report said it was the "plain duty which our government owes to them as guardian" to aid Natives in every possible manner to develop.⁴⁶ These official declarations tend to establish that the origins of the U.S. government's Alaska Native policy were distinct from the land-related trust responsibilities subsequently embodied in the 1906 Alaska Native Allotment Act. The history leading up to the enactment of the act tends to confirm that by the beginning of the twentieth century the federal government equated the status of Alaska Natives with that of Native Americans generally.

B. SUBSTANTIVE PROVISIONS OF THE ALASKA NATIVE ALLOTMENT ACT

The operative section of the 1906 act states:

The Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a Native of said district, and who is head of a family or twenty-one years of age, and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and *shall be inalienable and nontaxable until otherwise provided by Congress*. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding 160 acres. (emphasis added)⁴⁷

Compared with the General Allotment Act, the 1906 Alaska Native Allotment Act makes qualification appear simple. To obtain a preference right to a maximum of 160 acres of nonmineral land, the applicant had only to: (1) reside in Alaska, (2) be an Alaska Native, (3) be twenty-one or head of a family, and (4) meet whatever incidental requirements the Secretary might lawfully prescribe. Upon Department of the Interior approval, the applicant and his heirs received a perpetual homestead; however, the land could not be alienated or taxed until otherwise provided by Congress.

Then, in a multifaceted 1956 amendment, Congress did authorize the conveyance of allotments by deed, vesting *complete* title in the purchaser, upon approval of the Secretary.⁴⁸ Other important changes included the right to select lands valuable for coal, oil, and gas, provided mineral interests were reserved to the United States.⁴⁹ Aleuts were explicitly recognized and granted the opportunity to apply for allotments in common with Indians and Eskimos.⁵⁰

44. *Id.* at 8 and 14.

45. 31 Fed. 327, 329 (1886).

46. S. Doc. No. 101, *supra* n.13, at 6.

47. Act of May 17, 1906, 34 Stat. 197.

48. Act of August 2, 1956, 20 Stat. 954, 43 U.S.C. § 270-1 (1970). Although the 1956 amendments permitted the Native allottee to convey the land in fee simple (even to another Native), it did not permit the original Native allottee to obtain a fee simple "patent" to the land.

49. *Id.* Equity demanded extension of this right to allotments because it was previously granted to homesteads by the Act of March 8, 1922, 43 U.S.C. § 270-11 (1975).

50. In an unpublished decision, the district court for Alaska held that the 1956 amendment recognizing Aleuts did not broaden the class of Natives eligible under the 1906 act, but was rather a clarification. "While it is possible to distinguish people who are Eskimo, Aleut and Indian, the Court is convinced that Congress did not intend

The apparent codification of existing departmental regulations provided the final changes. First, lands in a national forest could be allotted if founded on occupancy predating establishment of the forest or if the national forest land was valuable for agriculture or grazing purposes.⁵¹ Second, the 1956 amendments legislatively ratified a 1935 administrative rule requiring five years' use and occupancy⁵² before an application could be granted.

Section 18(a) of ANCSA repealed the Alaska Native Allotment Act, but with a savings clause preserving any allotment application that was "pending before the Department of the Interior" on December 18, 1971, ANCSA's effective date. By that time over 10,000 applications had been filed covering nearly 16,000 separate parcels of land and covering nearly 1.5 million acres of land.⁵³ Accurately calculating the total number has been complicated by continuing legal controversies.

There is also no guarantee that all those who had pending allotment applications will be awarded land. Interior Department policies in the early 1970s disfavored awarding allotments where the extent of a Native's use and occupancy could not be established by clear, physical evidence. Since traditional Native land uses (hunting, fishing, and gathering) did not leave much evidence, the effect of the policy was to eliminate or sharply reduce the size of many allotments.⁵⁴ The Interior Department also adopted several restrictive legal interpretations that purported to limit allotment entitlement on a variety of grounds. All of these obstacles to obtaining an allotment were initially supported by a broad view within the Department of the Secretary's discretion to grant (or deny) an allotment application.

The restrictive use and occupancy requirements eventually gave way to more liberal views as did many of the legal interpretations; moreover, the Secretary's discretion was sharply limited by the courts. Nevertheless, the prospect of adjudicating the entitlement of some 10,000 Natives to allotments promised to keep Native (and other) land rights in limbo for decades. Then in 1980 Congress, with some exceptions, granted wholesale legislative approval to most of the pending allotment applications. This was intended to eliminate the bureaucratic necessity of individually adjudicating most of the allotments, but, as was arguably permitted under the law, the state of Alaska initially protested approval of some 6,000 of these applications. To make matters worse, there was also renewed debate about what constituted a pending application. These events are examined more fully below.

to do so, and any amendment to the Alaska Native Allotment Act in 1956 to add the term Aleut was a clarification of existing law and not a change in existing law." *Hein of Palukia Melgenak v. United States*, Case No. A95-0439 CV (JKS) (D.C. Alaska 1997).

51. Formerly codified at 43 U.S.C. § 270.2 (1970).

52. Formerly codified at 43 U.S.C. § 270.3 (1970). See 55 L.D. 282, 285 (1935); see also 43 C.F.R. § 67.13 (1948 ed.), 43 C.F.R. § 2561.2 (1976 ed.). *Decided in* *Etukia v. Andrus*, 587 F.2d 996, 998 (9th Cir. 1978) and *Shield v. United States*, 698 F.2d 987, (9th Cir. 1983), cert. den., 464 U.S. 816 (1983).

53. Telephone interview with Connie Van Horn, Allotment Coordinator, BLM Alaska State Office (November 6, 2001). The actual number of applications is 10,146, covering 15,978 separate parcels. As of 2001, 897,853 acres had been conveyed, 256,662 acres had been rejected or relinquished, and 295,372 acres were pending determination of entitlement.

54. See *Frank St. Clair*, 52 L.D. 597 (1920) (use of land for fishing sufficient occupancy to qualify for an allotment). Compare with *Frank St. Clair*, 53 L.D. 194 (1936) (amount of land actually used for fishing held to reduce allotment from 160 to 9.36 acres).

C. CHANGING ALASKA ALLOTMENT POLICIES

1. Introduction

The Alaska Native Allotment Act was primarily intended to afford individual Alaska Natives the opportunity to perfect legal title to the lands they used and occupied.⁵⁵ However, the act was not self-executing; rather it required people who were unfamiliar with bureaucratic procedures and technical legal requirements to file a written application with an often distant government office, and to establish their use and occupancy by legally sufficient proofs in a language not their own. Moreover, the government agencies responsible for implementing the act took an initially passive role⁵⁶ and, in the years immediately preceding the act's repeal, often interpreted their responsibility as requiring a rigorous testing of each application's legal and factual sufficiency.⁵⁷ The act's implementation became further confused in the 1960s and 1970s by shifting administrative interpretations of the legal and factual criteria by which allotment applications were to be judged. Later judicial determinations held that some of these criteria were erroneous and an abuse of agency discretion.

The Alaska Native Allotment Act has spawned at least eight often very technical legal issues considered below, only some of which have been judicially laid to rest. Those that remain lie like little booby traps beneath the ground of federal land policy in Alaska. The factual question of what constitutes "use and occupancy" sufficient to qualify for an allotment under the Interior Department's regulations⁵⁸ has been another area of fertile debate. Until judicially reversed as an abuse of due process, the Interior Department took the view that it had nearly unfettered discretion to determine these factual issues. The Interior Department abandoned many of the more restrictive policies either voluntarily or under judicial decree, but the policy shifts left uncertainty in their wake, because allotments rejected under earlier regimes (and removed from the records) had to be reinstated.

The situation has perhaps become less confused since the 1980 passage of the Alaska National Interest Lands Conservation Act (ANILCA).⁵⁹ Section 905⁶⁰ of that act eliminated all the legal and factual criteria for the approval of many allotments pending before the Department of the Interior "on or before" December 18, 1971. However, after the passage of ANILCA it was still not initially clear which allotments were excepted from its provisions and the extent to which allotments rejected before December 18, 1971, might still be considered to have been pending "on or before" that date. These legal, factual, due process, and ANILCA issues are discussed more fully below.

55. *United States v. Atlantic Richfield Co.*, *supra* n.36, at 1015. See also S. REP. NO. 495, 92d Cong., 1st Sess. at 91 (1971).

56. "Until shortly before the passage of the Alaska Native Claims Settlement Act, most Alaska Natives were generally unaware of the availability of allotments. A longstanding failure to implement the 1906 act, cultural and language barriers, and the isolations of most Alaska villages resulted in a low application rate until the late 1960s." *Olympic v. United States*, 615 F. Supp. 990, 994 (D.C. Alaska 1995). In the first fifty years following passage of the 1906 act, only 151 Natives in the whole of Alaska had applied for Native allotments and only 78 had received land. BUREAU OF INDIAN AFFAIRS 1956-1993 ANNUAL CASELOADS REPORT, SUMMARY OF NATIVE ALLOTMENT NUMBERS (Juneau, 1994).

57. *Barr v. United States*, unpublished Slip Op. No. A76-160 Civil (D. Alaska January 18, 1980), at 5-6.

58. 43 C.F.R. subpart 2561.

59. Pub. L. No. 96-487, 94 Stat. 2371 (December 2, 1980).

60. *Id.* § 905, 94 Stat. 2435, 43 U.S.C.A. § 1634.

2. Legal Issues

a. Preference Right

It is well established that the Alaska Native Allotment Act entitles Alaska Natives to a "preference right" to an allotment based on their use and occupancy of land.⁶¹ In practical terms this means that if an Alaska Native occupies a tract of land, he or she has a preferred right to file for title to the land under the Alaska Native Allotment Act. A third party who files for the land while the Native still occupies it can obtain no rights to the land. However, it has been administratively determined in cases involving competing claims to the same land that in order for the Native claimant to maintain the preference right prior to filing an allotment application, there must be either sufficient physical evidence of the Native's occupancy to put a third party on notice⁶² or "open and notorious use" at the time of a conflicting government right-of-way grant.⁶³ Alternatively, the Native can establish and maintain the preference right in the absence of physical evidence of occupancy or open and notorious use by filing an allotment application.⁶⁴

b. Ancestral Use

Among other things, the 1956 amendments to the Alaska Native Allotment Act permitted Natives to acquire lands in national forests if the application for the allotment was "founded on occupancy of the land prior to the establishment of the particular forest."⁶⁵ It was not clear from the language whether "founded on occupancy" meant founded on the applicant's personal occupancy or founded on prior Native occupancy generally. The Tongass National Forest in southeast Alaska was the principal forest affected by this amendment. It had been established in a series of withdrawals in the early twentieth century. Obviously, if the 1956 amendments were construed to apply only to personal occupancy begun before the early twentieth century, precious few Alaska Natives would be alive in 1956 to claim the benefit of these later amendments.

The government, with some earlier unreported exceptions, interpreted this provision to require the applicant's personal occupancy prior to the establishment of the forest. In 1977, a Native named Albert Shields, Sr., filed a lawsuit on behalf of himself and approximately 200 other applicants, claiming he and the others were entitled to allotments in the Tongass and Chugach National Forests because their ancestors had occupied the

61. E.g., *Aguilar v. United States (Aguilar II)*, 474 F. Supp. 840 (D. Alaska 1979) (preference right held sufficient to require federal government to recover land for Native applicant if erroneously conveyed to state). See also *Yakutat & Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 L.D. 362, 364 (1921); *Frank St. Clair*, 52 L.D. 597, 598 (1929).

62. *United States v. Flynn*, 53 IBLA 208, 237-238, 88 L.D. 373, 389-390 (1981); accord *United States v. 10.95 Acre of Land*, 75 F. Supp. 841, 844 (D. Alaska 1948). Regarding requirements of physical occupancy, see also *United States v. Alaska*, 201 F. Supp. 796 (D. Alaska 1962); *Kirtie Cleague*, 28 L.D. 427 (1899); *A.S. Wainwright*, 14 L.D. 120 (1891); *Herbert H. Hilscher*, 67 L.D. 410, 416 (1960). Discussed also in *Mary Olympic (On Reconsideration)*, 65 IBLA 26 at 30-31 (June 22, 1982).

63. *Golden Valley Electric Ass'n (On Reconsideration)*, 98 IBLA 203, 207 (1987); *Alaska v. Babbitt (Albert Allotment)*, 38 F.3d 1068 (9th Cir. 1994); *Alaska v. Babbitt (Foster Allotment)*, 67 F.3d 864, 19th Cir. 1995).

64. *United States v. Flynn*, 53 IBLA *supra*, n.62 at 237-238; *Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985), *aff'd sub nom. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987). However, it is arguable whether the same requirements of evidence of physical occupancy would apply where the competing claim (e.g., a state land selection) was not initiated in reliance on the absence of such evidence. See generally *Aguilar II*, *supra* n.61, at 843-845, discussing Native preference rights in the context of state land selections.

65. Formerly codified at 43 U.S.C. § 270-2 (1970).

lands for which they had applied prior to the establishment of the forests. The courts rejected these claims and instead adopted the government's interpretation of the statute.⁶⁶

Ancestral use also became an issue in a 1982 case involving allotments located within the boundaries of federal wildlife refuges (another form of federal land withdrawal). Although no question of statutory interpretation is involved here, under the terms of the Allotment Act and its implementing regulations, Natives may obtain title only to land that was "vacant, unappropriated and unreserved" at the time Native occupancy commenced.⁶⁷ In many cases, the federal withdrawals that removed the lands from the vacant, unappropriated, and unreserved category go back a great number of years. Since Natives did not begin applying for allotments in significant numbers until the 1960s, it can be inferred that in many cases the personal occupancy of the applicant did not commence until after the lands were withdrawn for some federal purpose. In these cases, ancestral use and occupancy may be the only basis on which the necessary Native occupancy could be established. Even though the Natives raised new arguments and presented different facts, this 1982 case was decided against the Natives on similar grounds as was the Shields lawsuit.⁶⁸

c. Five-Year Prior Rule

The regulations implementing the 1906 Alaska Native Allotment Act and later the 1956 amendments to it required the allotment applicant to "make satisfactory proof of substantially continuous use and occupancy of the land for a period of five years."⁶⁹ For many years the Department of the Interior interpreted this requirement to mean that the five years of use and occupancy had to be completed while the land was also "vacant, unappropriated and unreserved." In other words, if a Native commenced occupancy of a tract of land in 1900, but the land was withdrawn for some other federal purpose in 1904, the Native allotment would be denied because the required use and occupancy had not been completed five years prior to the later withdrawal. Natives brought a lawsuit challenging this interpretation, but before the lawsuit could be decided, the Secretary of the Interior reversed the rule.⁷⁰ Allotments that had been rejected on the basis of the old rule were subsequently reinstated on the Interior Department records.⁷¹

d. Statutory Life

If an allotment applicant failed to make the necessary proof of five years' occupancy within six years after the date of the allotment application, the Interior Department would routinely close the file and reject the allotment. Before doing so, the Department would send the applicant a letter requesting his or her proof of occupancy, but in the absence of a response the file would be closed. The Interior Department considers the six-year requirement to prove use and occupancy to be the "statutory life" of an allotment application. In other

66. *Shields v. United States*, *supra* n.52.

67. Formerly codified at 43 U.S.C. § 270-1 (1970). See also 43 C.F.R. § 2561.0-3 (1996).

68. *Akootchook v. Watt*, Slip Op. No. F-82-4 Civil (D. Alaska August 5, 1983), on appeal, *Akootchook v. United States Department of Interior*, 747 F.2d 1316 (9th Cir. 1984), *cert. den.* 471 U.S. 1116 (1985); *Akootchook v. United States Department of Interior*, 271 F.3d 1160 (9th Cir. 2001).

69. 43 C.F.R. § 2561.2(a) (2000). See also *Shields v. United States*, *supra* n.52 (stating in dicta that the five-year occupancy requirement applies to allotments outside national forests).

70. S.O. 3040 (May 25, 1979). See also Solicitor's Opinion, Recision of the "Five Year-Prior Rule" for Alaska Native Allotments (April 26, 1979).

71. Forty-three allotments were reinstated due to the recision of the five year-prior rule. Interview with Alaska Regional Solicitor (January 17, 1984).

words, if the applicant does not make the required proof of five years' use and occupancy within six years, the application is automatically presumed to die. It is not clear whether this presumption is justified, and the question has led to repeated litigation.⁷²

g. Married Woman Rule

The Alaska Native Allotment Act permitted allotments to be made only to the "head of a family" or to Natives over twenty-one years of age.⁷³ The Interior Department originally presumed that a married woman could not qualify for an allotment under the first criterion, because she was not the head of a household; her spouse was presumed to hold that distinction. The Department subsequently changed its position so that a married woman could obtain an allotment so long as she was twenty-one years old.⁷⁴ Applications denied under the prior rule were subsequently reinstated.

h. Mineral Waiver

The Alaska Native Allotment Act originally prohibited Native allotments on lands that had potential value for mineral extraction. The 1956 amendments to the act permitted allotments on lands that were valuable for coal, oil, or gas so long as minerals were reserved to the United States under applicable law.⁷⁵ If the lands were found to be valuable for these minerals, the Interior Department sent the applicant a request to waive the right to those minerals (a "mineral waiver"). However, if the applicant did not respond to the request, the file was closed and the application rejected. On later analysis, the Interior Department concluded that it was not necessary to request the waiver and that the coal, oil, or gas could be reserved to the United States under the authority of existing law whether the applicant waived the rights or not.⁷⁶

This policy shift naturally raised the question of whether the applications of the Natives who failed to provide the mineral waivers should be reinstated. Although it had reversed its previous policy, the Department still took the position that such applications need not be reinstated. One applicant challenged this seemingly inequitable practice and convinced the Interior Department's Board of Land Appeals (IBLA) that his allotment application should be reinstated.⁷⁷ The applicability of this decision to other similarly situated applicants has yet to be fully determined by the Department of the Interior.

⁷² *Olympic v. United States*, 615 F. Supp. 990 (D.C. Alaska 1985). See also *Mary Olympic*, 47 IBLA 58 (April 14, 1980); on reconsideration, 65 IBLA 26 (June 22, 1982) (rejecting allotment application where applicant failed to prove five years' use and occupancy prior to his death in 1967). Compare with *Frederic Howard*, 67 IBLA 157 (September 27, 1982) (accepting allotment application for approval where rejection for failure to prove use and occupancy occurred after December 18, 1971, therefore, allotment was deemed to be pending "on or before" December 18, 1971 and subject to automatic approval under § 905 of ANILCA, discussed below). See also *Heirs of Saul Sockpeaiuk*, 115 IBLA 317 (1990); *Heirs of Edward Peters*, 122 IBLA 109 (1992).

⁷³ Formerly codified at 43 U.S.C. § 270-1 (1970). See also 43 C.F.R. § 2561.0-3.

⁷⁴ "Native Land Allotments in Alaska," Memorandum from Acting Regional Solicitor to State Director, BLM, Anchorage and Area Director, BIA, Juneau (April 29, 1965).

⁷⁵ Formerly codified at 43 U.S.C. § 270-1 (1970). See also 43 C.F.R. § 2561.0-3 (2000). See also Act of March 8, 1922, 42 Stat. 415, § 43 U.S.C. § 270-11 (1975), (repealed effective October 21, 1976), permitting reservations of coal, oil and gas to the United States.

⁷⁶ Of the 687 allotment files closed prior to ANILCA, 459 were rejected on grounds of statutory life or failure to file a mineral waiver. Of the remaining 223, 221 were originally reopened under *Pence I*, but subsequent IBLA decisions throw doubt on the legality of all but 80 of those reopenings; see n.101, *infra*. Interview with John M. Allen, Alaska Regional Solicitor (December 15, 1982).

⁷⁷ See *William Demoski*, 143 IBLA 90 (March 4, 1998) (Burski concurring specially).

g. Relinquishments

Allotment applicants may voluntarily relinquish their applications, but there is a question about the scope of the government's responsibility to ensure that any relinquishment is knowing, voluntary, and in the allotment applicant's best interest. An allotment applicant might be motivated to relinquish his or her claim under a variety of circumstances. For example, if the lands applied for are also claimed by a village corporation entitled to lands under ANCSA, the corporation might agree to convey other lands to which the corporation may be entitled to the applicant, in exchange for the applicant's relinquishment of the allotment application for the land in the village selection. In other cases, allotment applicants might be motivated to relinquish part of their application in order to settle third-party claims challenging the applicant's entitlement to the land.

In any such case, however, there is always a question of whether the allotment applicant is being treated fairly and not acting under duress or other undue pressure. It is also the established policy of the Interior Department to enable Alaska Natives to acquire title to the lands they use and occupy and to protect those lands from encroachment.⁷⁸ It seems to follow that this policy requires the Department to take some independent steps to ensure that relinquishments do not, in effect, deprive Alaska Natives of their land entitlement under the Allotment Act.

Until the late 1970s, the BIA did not authorize or investigate any allotment relinquishments. Due to some questions about the validity of certain relinquishments, the Secretary of the Interior directed the Commissioner of Indian Affairs to approve all relinquishments.⁷⁹ BIA policy now requires an independent investigation and approval of all relinquishments.⁸⁰ Since 1977, Department of the Interior policy also requires the concurrence of the BIA even in the relinquishment of an allotment application before the allotment has been approved or conveyed to the Native applicant.⁸¹

h. Missing Allotment Applications

According to regulations first published in 1964, the BIA was required to certify each allotment application to ensure that the applicant was Native, that the applicant occupied the lands, and that the claim did not infringe on other Native claims.⁸² The regulations presupposed a more active BIA role in the allotment program, including assisting Natives in making applications.⁸³ However, due to inadequate funding, the BIA was unable to meet this added burden, so it began to rely on nonbureau personnel to perform the BIA certification duties. Moreover, it became apparent in 1969 or 1970 that the settlement of Alaska Native land claims would likely mean repeal of the Alaska Native Allotment Act. This gave impetus to a coordinated drive among several agencies, aided by the BIA, to assist Natives in filing allotment applications.

78. 43 C.F.R. § 2561.0-2. *See also* 43 U.S.C.A. § 1634 (a)(6) (exempting allotment applications that have been "knowingly and voluntarily relinquished" from ANILCA's statutory approval provisions).

79. Letter from Secretary Andrus to Senator Stevens, July 12, 1977.

80. Bureau BIA Area Director Memorandum, "Procedure for Filing Requests for Reinstatement of Relinquished Native Allotment Applications" (August 16, 1985).

81. BLM, ALASKA HANDBOOK, NATIVE ALLOTMENTS (1991), II-14 to 15. Citing to July 12, 1977, letter from Secretary of the Interior Cecil Andrus, to Alaska Senator Ted Stevens.

82. 43 C.F.R. § 2561.1(d).

83. *Barr v. United States*, *supra* n.57, at 6-7.

Using the combined resources of the Alaska Legal Services Corporation (ALSC), the Rural Alaska Community Action Program (RurAl CAP), the Alaska Federation of Natives (AFN), and the BIA, the drive produced some 10,000 applications in the space of sixteen months. The drive began with a meeting in June 1970 at which the participating agencies agreed on their respective roles. In the ensuing drive, the BIA (with the assistance of the BLM) trained ALSC and RurAl CAP volunteers in the requirements of the Allotment Act. RurAl CAP prepared the applications in the field and forwarded them to the BIA for certification and delivery to the BLM.⁸⁴ Unfortunately in the rush of applications, between 300 and 500 applications were lost. Many of these were collected by RurAl CAP volunteers but never delivered to the BIA; they were discovered several years later in village and RurAl CAP offices throughout Alaska.

The discovery resulted in a lawsuit that asserted the RurAl CAP volunteers were acting as agents of the BIA and that their receipt of the allotment applications constituted receipt of the applications by the Interior Department. The court never decided the issue, because the Interior Department and plaintiffs agreed to a settlement at a preliminary stage of the litigation. Under the terms of the settlement, about 500 allotment applications were reinstated.⁸⁵

3. *Factual Issues: Use and Occupancy Criteria*

Recall that under the terms of the Alaska Native Allotment Act the Secretary of the Interior was permitted to grant allotments "in his discretion and under such rules as he may prescribe." One of the major requirements of the Secretary's regulations was that an allotment applicant must establish five years' "substantially continuous use and occupancy" of the applied-for lands.⁸⁶ As further elaborated in the regulations, the use and occupancy must also be "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use."⁸⁷

The use and occupancy criteria, even as elaborated in the regulations, were open to further administrative interpretation, particularly as to the type of use and occupancy that would qualify. For example, if "substantial actual possession and use" were interpreted to mean "intensive, physical possession and use," then seasonal occupation of a fish camp might be sufficient occupancy for an allotment of only the land immediately surrounding the camp. The result, typically, would be the reduction of a 160-acre claim to a five-acre tract, and indeed that was the effect of early twentieth-century Interior Department interpretations.⁸⁸

This restrictive interpretation was reiterated in unpublished internal memoranda in the early 1960s which equated the criteria for Alaska Native use and occupancy to the criteria used to adjudicate the land rights of non-Natives. For example, under other federal laws non-Natives could claim up to five acres for a headquarters site, five acres for a homesite or 160 acres for a homestead.⁸⁹ Analogizing Alaska Native use and occupancy to the use and occupancy requirements of these acts translated into five acres for a fish camp or subsistence hunting site, ten acres for a principal place of residence, and the full 160 acres

84. *Id.* 7-8. See also 1985 U.S.C.A.N. 5070, at 5181-5182.

85. *Barr v. United States*, A76-160 Civil, "Order Approving Settlement" (October 1, 1982).

86. 43 C.F.R. § 2561.2.

87. 43 C.F.R. § 2561.0-5(a).

88. *E.g. Frank St. Clair*, *supra* n. 54.

89. 43 U.S.C. § 687a (1975) (headquarters and homesites); 43 U.S.C. § 270 (1975) (homesteads).

only if the land were "intensively used or improved" such as for farming or industry.⁹⁰ Largely as a result of this policy, the average land grant to an Alaska Native allottee fell to forty-six acres in the early 1960s; during the same period, non-Natives applying for land under the Alaska Homestead Act received an average of 124 acres.⁹¹

In 1964, however, the Interior Department Solicitor re-examined the use and occupancy criteria and concluded that the Alaska Native Allotment Act was intended to include more typical types of Alaska Native use and occupancy such as fishing, berry picking, and hunting. He also concluded that, given the seminomadic Native way of life, it was permissible for the 160-acre entitlement of any individual to be spread among several parcels.⁹² These criteria were more liberal than those previously employed, but as discussed earlier there were relatively few allotment applications pending before the Interior Department until the allotment drive in 1970-71. Following the drive, the Department was faced with more than 10,000 applications, and pressure began to build within the federal bureaucracy to limit allotment awards and size.⁹³

Following the passage of ANCSA, the Interior Department adhered initially to liberal use and occupancy requirements characterized by the absence of any requirement that applicants demonstrate signs of physical use. In early 1973, however, at the suggestion of the BLM Alaska State Office, the Department reversed itself and, among other things, required applicants to demonstrate substantial physical evidence such as fishwheels, campsites, docks, and trails. Two months later, however, the BLM suspended these guidelines in the face of massive Native criticism and subsequently abandoned the physical evidence requirements if the applicant could provide corroborating testimony of use and occupancy.⁹⁴

Thus, by 1973, the policies adopted in 1962 requiring intensive, physical possession and use of the land had been jettisoned and replaced by criteria that were more favorable to the type of use Alaska Natives typically made of land. Nonetheless, the repeated shifts in the use and occupancy criteria no doubt generated substantial confusion among Natives subject to the policy. Allotments that were rejected or reduced in size under the earlier policy were not necessarily redetermined under the later, more liberal criteria. Even more important, however, throughout this period the Department took an expansive view of the scope of its discretion under the Alaska Native Allotment Act, to the point of denying allotments without opportunity for full factual hearings or even adequate notice. It took a judicial decision, but it was later held to be a denial of due process to reject allotments without adequate notice and an opportunity for a hearing on factual issues.

4. *Allotment Due Process*

The Fifth Amendment to the U.S. Constitution requires, among other things, that persons may not be deprived of a property right without due process of law. Notice and an opportunity for a fair and impartial hearing are fundamental requirements of due process,

90. Unpublished memorandum from Robert Coffman, Chief of Lands and Minerals, Department of the Interior, to BLM Anchorage and Fairbanks district managers (June 7, 1962), cited in D. CASE, *THE SPECIAL RELATIONSHIP OF ALASKA NATIVES TO THE FEDERAL GOVERNMENT* 56 (1982).

91. Public Land Statistics 1962-1971, BLM, Alaska.

92. 71 I.D. 344-354 (1964).

93. See CASE, *supra* n.90, at 56.

94. *Id.* at 57.

but persons are not entitled to them if what they stand to lose at the hands of government does not constitute property. Since the Allotment Act, by its terms, authorized the Secretary to grant allotments "in his discretion," the Interior Department took the position for many years that Alaska Natives had no property interest in obtaining an allotment. Under this view, whether the Secretary granted an allotment was purely a matter of choice (discretion), and receiving an allotment was therefore a privilege rather than a right.

During the nineteenth and early twentieth centuries, the courts had developed a fairly clear distinction between rights (entitled to due process) and privileges (which were not). But by the 1960s and early 1970s, the U.S. Supreme Court had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."⁹⁵ Shortly thereafter, a dispute arose in Alaska over whether the procedures the Interior Department used to deny Alaska Native allotments conformed to due process. The Interior Department argued that its procedures were sufficient because receiving an allotment was a privilege; therefore, denial of an allotment did not require procedural due process.

Sarah Pence, an Alaska Native, along with several hundred other allottees, was denied her allotment. These denials were based on the BLM's factual conclusion that the Natives had not used and occupied the land as required under the allotment regulations. The BLM's conclusion was usually based on a physical examination of the land from a helicopter at low altitude. If no evidence of use and occupancy was found, the applicant was advised of the deficiency by letter and given additional time to submit other evidence to substantiate use and occupancy. If the applicant failed to respond or the evidence was deemed insufficient, the BLM rejected the application and so advised the applicant by letter. The applicant then had thirty days to appeal the decision to the Interior Board of Land Appeals. After filing the appeal, the applicant could then request a factual hearing, but (because an allotment was deemed a privilege) IBLA took the position that it had no obligation to provide such a hearing.⁹⁶

Sarah Pence filed a lawsuit to compel the Interior Department to provide hearings before denying any allotment. The lower court agreed with the government,⁹⁷ but the Ninth Circuit reversed on appeal and ordered the government to provide the requested hearings.⁹⁸ In doing so, the court concluded that entitlement to an allotment was a "sufficient property interest" to warrant procedural due process. As a result, the Interior Department had to reopen 221 allotment applications previously rejected for factual reasons without opportunity for a hearing.⁹⁹ There was further litigation over the precise nature of the procedures to be followed in conducting the hearings; Native interests contended that the usual Interior Department hearing procedures were not suitable, given Native cultural and language differences. The courts rejected these arguments unless it could be shown that the Department's normal procedures prejudiced Natives,¹⁰⁰ but the need for the hearings was substantially reduced in 1980 with the passage of the Alaska National Interest Land Conservation Act.

95. *Board of Regents v. Roth*, 408 U.S. 564 at 571 (1972).

96. There were also practical reasons for not allowing hearings; the administrative cost of possibly several thousand such hearings would be substantial.

97. *Pence v. Kleppe*, 391 F. Supp. 1021 (D. Alaska 1975).

98. *Pence v. Kleppe (Pence I)*, 529 F.2d 135 (9th Cir. 1976).

99. Interview with acting chief, Allotment Section, BLM Alaska State Office (January 27, 1984).

100. *Pence v. Andrus (Pence II)*, 586 F.2d 733 (9th Cir. 1978).

In 1982, however, the IBLA cast doubts on the propriety of reopening many of the *Pence* allotments. In an appeal known as *Mary Olympic*,¹⁰¹ IBLA ruled that any allotment which had been finally rejected by the Department prior to December 18, 1971, may not be reopened if the allotment applicant (Mary Olympic's father) had failed to file a timely appeal or request for reconsideration of the rejection. In this case, the allotment application mistakenly described other land than that which the applicant was occupying. BLM asked the applicant for a new land description in 1967, but he died before he could comply. Shortly thereafter, his application was rejected for failure to describe the land he was claiming, and the applicant's heirs did not appeal or ask for reconsideration.

Since neither the heirs nor the applicant contended that he had used and occupied the land applied for, the BLM denied him a hearing and held he was not entitled to have the application reinstated under the court's decision in *Pence I*.¹⁰² Since the rejection and failure to appeal all occurred prior to 1971, the IBLA held that ANCSA's savings clause preserving allotments "pending on" December 18, 1971, did not apply to an allotment finally rejected before 1971. Mary Olympic appealed the IBLA's decision, and it was overturned in the United States District Court for Alaska. The court held that section 905(a) of ANILCA, discussed below, applied to approve the Native allotment application of Mary Olympic's father legislatively.¹⁰³

The court was able to reach that conclusion without detailed analysis of the "pending on or before" issue because, during the course of the litigation, the government conceded that section 905(a) legislatively approved the application.¹⁰⁴ In the wake of the *Mary Olympic* decision, the IBLA has held that when the BLM has rejected a Native allotment application before the December 18, 1971, deadline without proper due process as required by *Pence*, such closure is improper and without legal effect. Accordingly, those closed applications needing to be revived for a hearing under *Pence* are considered legally "pending before the Department [of Interior] on December 18, 1971." Thus, the BLM is required to reinstate these applications for either approval or adjudication in accordance with section 905(a) of ANILCA.¹⁰⁵ The IBLA has also held that an allotment rejected after December 18, 1971, was (by definition) "pending on" December 18, 1971 and so protected by the ANCSA savings clause. Whether the applicant appealed the rejection was held irrelevant.¹⁰⁶

5. Effects of ANILCA¹⁰⁷

a. Generally

Section 905¹⁰⁸ of ANILCA attempted to reduce the likelihood of literally thousands of use and occupancy hearings by legislatively approving many allotments. ANILCA also reduced

101. *Mary Olympic*, 47 IBLA 58 (1980); *Mary Olympic (On Reconsideration)*, 65 IBLA 26 at 27 (June 22, 1982).

102. *Id.* at 35.

103. *Olympic v. United States*, 615 F. Supp. 990, 993-995 (D.C. Alaska 1985).

104. *Id.* at 992.

105. *Heirs of Saul Sockpealuk et. al.*, 115 IBLA 317, 326 (1990). But see *Silas v. Rabbitt*, 96 F.3d 355 (9th Cir. 1996) (Native allotment applications properly adjudicated and closed before December 18, 1971, need not be reopened under *Pence* and are not available for legislative approval under § 905 of ANILCA).

106. *Frederick Howard*, 67 IBLA 157 (September 30, 1982).

107. Act of December 2, 1980 Pub. L. No. 96-487, 94 Stat. 2371 (codified in scattered parts of 16 and 43 U.S. Code).

108. Sec. 905, 94 Stat. 2371, 43 U.S.C.A. § 1634; see generally S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. 5182. Citations hereinafter are to § 905, which is codified at 43 U.S.C.A. § 16-13.

the importance of determining whether allotments were nonmineral in character and permitted allotment applicants to amend the land descriptions in their applications to reflect their original intent more accurately as well as giving the Secretary of the Interior broad powers to adjust land descriptions to eliminate conflicts among applications. Section 905 also authorized allotments located in hydropower site withdrawals and in the National Petroleum Reserve-Alaska (NPRA) even if the applicant could not prove that use and occupancy was established prior to these withdrawals. Finally, it required that any other rights individuals may have to the land applied for as an allotment be adjudicated prior to granting the allotment. If those rights are found to be valid, then the allotment is required to be made "subject to" those rights.

b. Legislative Approval

Until ANILCA, the major obstacle to the rapid approval of many pending allotments was the use and occupancy requirement imposed by the regulations implementing the Alaska Native Allotment Act. Whether use and occupancy was established by physical evidence or the testimony of others, it took a substantial amount of time for the BLM to investigate each allotment. Then, if there was a dispute about the extent of the applicant's use, an administrative appeal was likely to follow, consuming more time and energy, before the fate of the application could be adjudicated. In the meantime, state and Native corporation conveyances could not be finalized until potentially conflicting allotments had been adjudicated. ANILCA cut through this thicket by granting legislative approval to large numbers of allotments, thus reducing the need for factual investigations and hearings on use and occupancy questions.

Briefly, section 905 provided for legislative approval (on the 180th day following the effective date of the act) of all allotment applications "which were pending before the Department of the Interior *on or before* December 18, 1971" (emphasis added).¹⁰⁹ However, there are four major exceptions to the blanket approval, some of which are fraught with legal issues. In addition, it was not initially clear what constituted an application that was "pending . . . on or before" December 18, 1971. Each of these issues is discussed more fully below.

c. Exceptions to Legislative Approval

Allotment applications covering lands affected by any of four factors were excepted from legislative approval and have to be adjudicated, for the most part, under the normal procedures required under the Alaska Native Allotment Act. The lands subject to these exceptions are: (1) lands that within 180 days after ANILCA's effective date, the Secretary determined valuable for minerals (other than coal, oil, or gas); these lands are subject to adjudication of their mineral status only; (2) lands within a national park or that have been "validly selected," tentatively approved (TA'd) or patented to the state, unless those lands had been withdrawn for village corporation selection under ANCSA; (3) lands subject to Native corporation, state, or private protest under specified circumstances; and (4) lands that an applicant has "knowingly and voluntarily" relinquished.¹¹⁰

The most controversial of the exceptions was the one relating to state protests;¹¹¹ it imposed specific requirements on the exercise of the protest right. First, all protests had to

109. Sec. 905(a)(1).

110. Sec. 905(a)(3), (4), (5) and (6), respectively.

111. Sec. 905(a)(5)(B).

be filed with the Interior Department within 180 days of ANILCA's effective date. Second, protests could be filed only if the allotment application was for lands that were "necessary" for access to lands owned by the United States, the state or one of its political subdivisions, or to public waters used for transportation. Furthermore, the state had to specify the facts demonstrating the necessity of the lands for access and that there was no reasonable alternative access. The state filed 6,000 protests on the 180th day following the enactment of ANILCA, most of which did not appear to meet the requirements of specificity required under the law.¹¹² The state has abandoned the great majority of its protests and as of 1997 many of those remaining were still under review.¹¹³

Despite the withdrawal of the vast majority of state protests, ANILCA's goals of expediting allotment finality became stalled. In *Stephen Northway*, the IBLA ruled that once a protest is filed under ANILCA section 905(a)(5), the application must be fully adjudicated, even if the protest is later withdrawn and the competing interest in the land is removed.¹¹⁴ This decision requires the BLM to undergo the lengthy and expensive process of adjudicating thousands of individual Native allotment applications, even in the absence of a countervailing interest. On behalf of the affected Native applicants, the Alaska Legal Services Corporation petitioned the Secretary of the Interior to repudiate the *Northway* decision and declare that, absent any other reason that would require adjudication, withdrawal of an ANILCA protest lifts the bar to legislative approval and eliminates needless adjudications.¹¹⁵ With regard to withdrawn state protests, ALSC's petition was rendered moot by a 1998 amendment to ANILCA. Section 905(a)(7)(C) states that the protest provision will cease to apply when the state of Alaska withdraws or dismisses a protest of a Native allotment.¹¹⁶ As for any remaining withdrawn protests from the private sector affected by the *Northway* decision, the Secretary of the Interior has issued an initial secretarial decision granting ALSC's request to lift the bar to statutory approval of allotments following the withdrawal of protests.¹¹⁷

d. "Pending On or Before"

Section 905 applies only to allotment applications "pending" before the Interior Department "on or before December 18, 1971." Read literally, this phrase could mean that any allotment application filed prior to December 18, 1971, was, by definition, pending before December 18, 1971. The question of what was a pending application in 1971 was further confused by the IBLA's decisions in *Mary Olympic* and *Frederick Howard*. However, as discussed above, decisions from the IBLA, the federal district court for Alaska, and the Ninth Circuit Court of Appeals have provided the backdrop for understanding the issues raised by ANILCA's "pending

112. Cf. *Henrietta Roberts Vaden*, 70 IBLA 171 (1983).

113. Personal interview with Robert D. Arnold, Deputy Commissioner, Alaska Department of Natural Resources (June 10, 1983). Also, telephone interview with Carol Shobe, Realty Branch of Alaska Dept. of Natural Resources (June 19, 1997). Statistics on relinquished state protests for Native allotments have been merged with ANCSA protests, making totals for Native allotments indiscernible. Issues involving withdrawn state protests and the reservations for public trail easements continue to complicate the adjudication process.

114. *Stephen Northway*, 96 IBLA 301 (1987).

115. See 43 C.F.R. § 4.5 (authority of Secretary to take jurisdiction at any stage of any case before the IBLA or an employee of the Interior and render a final decision).

116. ANCSA Land Bank Protection Act of October 31, 1998, PL 105-333, § 9, 112 Stat. 3134, 43 U.S.C.A. § 1634(a)(7)(C).

117. 62 Fed. Reg. 7033 (February 14, 1997).

on or before" language. Native allotment applications initially closed by the BLM without adequate due process as required by *Pence v. Kleppe*¹¹⁸ are considered improperly closed. Because these applications must be reinstated for proper adjudication under *Pence*, the initial closure before the ANCSA savings clause was without legal effect, and the applications are viewed as pending before the Department of Interior on December 18, 1971. Applications improperly closed before December 18, 1971, have been reinstated and are eligible for either approval or adjudication in accordance with the provisions of section 905 of ANILCA.¹¹⁹ However, applications that were properly adjudicated under the standards outlined in *Pence I* and *Pence II* and closed before the passage of ANCSA are not considered "pending on or before December 18, 1971." Accordingly, such applications need not be reopened and are not eligible for adjudication or approval under section 905 of ANILCA.¹²⁰

e. Allotment Minerals

In section 905(a)(2), Congress apparently ratified the Interior Department's practice of reserving any coal, oil, or gas under an allotment to the United States. More significantly, however, this provision also defined sand and gravel as being "nonmineral" and required the Interior Department to identify all allotments which were valuable for other minerals within 180 days. These last two provisions, in effect, sharply reduced in importance the requirement under the Allotment Act that allotments be allowed only on "nonmineral" lands.

f. Petroleum Reserve and Powersite Lands

Prior to ANILCA, allotments, by the terms of the Allotment Act, could be had only on "vacant, unappropriated and unreserved" lands. A number of complex questions had arisen over conflicts between various federal withdrawals and the claims of allotment applicants. The applicants frequently contended that their occupancy predated the withdrawals or that the withdrawals themselves permitted new Native occupancy. The government, on the other hand, generally took the position that the withdrawals precluded new Native occupancy and that, at least for the older withdrawals, few Natives had initiated valid occupancy prior to the withdrawal. Nowhere were these problems more acute than within the National Petroleum Reserve-Alaska (formerly Naval Petroleum Reserve No. 4) and the numerous hydropower site withdrawals that peppered the state.

Although the NPRA and power site lands are treated somewhat differently in different subsections of section 905,¹²¹ ANILCA legislatively changed them from occupied, appropriated, or reserved lands to lands that were "vacant, unappropriated and unreserved" for purposes of the Allotment Act. Allotments within the NPRA were specifically included with all the other allotments located on unreserved lands that were legislatively approved

118. *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

119. See *Olympic v. United States*, 615 F. Supp. 990 (1985); *Hiers of Saul Sochpealuk et al.*, 115 IBLA 317 (1990).

120. *Silas v. Babbitt*, 96 F.3d 355 (9th Cir. 1996) (application that failed on its face to establish qualifying use need not be re-adjudicated under § 905 of ANILCA solely because at one time it was "pending before December 18, 1971").

121. Sec. 905(a)(1) (NPRA); § 905(d) (power sites). Prior to passage of ANILCA, some of the lands covered by allotment applications within NPRA were reportedly conveyed to a few ANCSA village corporations as a part of their ANCSA entitlement. The status of the allotment applications covered by those conveyances was an unresolved issue. Personal interview with Department of the Interior, Alaska Regional Solicitor (February 2, 1984). However, in *Akpik v. Babbitt*, Civ. No. 90-143 (D. Alaska, 1995) it was held that § 12 of the Alaska Land Status Technical Corrections Act of 1992, Pub. L. No. 102-415, § 12, 106 Stat. 2115, 43 U.S.C.A. § 1634 (f) adequately addressed this issue.

under ANILCA. Allotments within the power site withdrawals were subject to legislative approval only under certain circumstances, however. For example, allotments within currently licensed or operating power sites were not to be legislatively approved. Similarly, if the allotment applicant commenced use and occupancy of the power site lands after they had been withdrawn for a power site, then the allotment was made subject to a twenty-year right of reentry in favor of the United States.

g. Boundary Adjustments

ANILCA provides for the adjustment of allotment boundaries under two circumstances: (1) unilaterally by the Interior Department if the land descriptions of two or more allotment applications conflict, and (2) by the allotment applicants or their heirs if the application does not reflect their true intent at the time of application.¹²² The Interior Department's adjustments must be consistent with the prior use of the land and beneficial to the affected parties "to the extent practicable." Most important, however, the Interior Department's decision is shielded from judicial review unless it decreases an allotment by 30 percent or more or excludes an applicant's improvements. This seems to be a limited legislative exception to the due process types of limitations imposed on the Interior Secretary's discretion under *Pence I*.

An allotment applicant's amendment of his or her land description operates to permit legislative approval of the amended land description only, but also affords anybody who may have another claim to the lands covered by the amended description sixty days to protest the amendment. Thus, an allotment applicant who wants to amend an application runs the risk that by doing so the application may lose its prior legislative approval. On the other hand, if the original application is within one of the exceptions to legislative approval, it might then be possible to amend it in such a way as to take it out of the exception. Finally, the Interior Department can require that all allotment applications in any particular area be amended by a certain date in order to facilitate survey of all the allotments in the area.

h. Other Conflicting Entries

It should be noted that the Interior Department's authority to adjust boundaries, discussed above, is confined to conflicts between two or more *allotment* applicants. It cannot be used, apparently, to resolve conflicts between allotment applicants and other individual applicants for rights to the public lands (e.g., mining claims or homesteads). Resolving these conflicts appears to be the purpose of section 905(e) which requires the Interior Department to identify and adjudicate other recorded land entries in conflict with an allotment application prior to granting an allotment. Somewhat ambiguously, section 905(e) requires only that any allotment approved under ANILCA that conflicts with another valid, individual entry shall be made "subordinate to" the conflicting entry. Thus it appears possible for an allotment applicant to have legal title to an allotment which is subject to the right of another to use

122. Sec. 905(b) and (c), respectively. *Mary Olympic*, see *supra* n.101, held that the right to amend an application was personal to an allotment applicant and could not be exercised by the applicant's heirs. This conclusion had cast a cloud over many allotment applications since the applicants are often elderly and many of the land descriptions in the applications are rumored to be inaccurate. However, the federal district court held that an heir to a Native allotment application approved by § 905 of ANILCA was entitled to amend erroneous land descriptions in the application. *Olympic v. United States*, 615 F. Supp. 990, 995 (D.C. Alaska 1985).

the land.¹²³ By its terms, however, this provision does not apply to the entries of Native corporations, the state or other allotment applicants covered under other provisions of section 905.

D. FROM TRUST TO RESTRICTED STATUS

1. General

The concept of a "trust," unique to the English common law, developed out of efforts to avoid some of the limitations on feudal land titles in early England.¹²⁴ A trust relationship in the strict sense of the term always involves the disposition of property between two types of owners—legal and equitable. The legal owner holds the legal title to the property but only for the benefit of the equitable owner. The equitable owner has the full right to use and occupy the property and do anything with it except sell or lease it; powers of sale and lease are part of the legal title which belongs solely to the legal owner.

In this strict sense of "trust," the United States assumes a "trust relationship" with Native Americans whenever it retains the legal title to Native lands and accords the Native a permanent right of occupancy and use (i.e., an equitable interest). This is the usual basis of the trust relationship between the federal government and Native American tribes on treaty or statutory reserves.¹²⁵ The same narrow trust relationship exists between the federal government and Native allottees under the 1887 General Allotment Act, so long as the government has not granted a fee patent to the allottee.¹²⁶

"Trust land" is, therefore, land (or an interest in land) held between the United States as legal owner and the Native tribe or individual as equitable owner. "Restricted lands" are theoretically distinguished from trust lands, because both the legal and equitable title are held by the Native owner; however, the ability of the owner or others to affect the title is restricted by federal statutes and regulations.¹²⁷ In most circumstances, the U.S. Supreme Court has found the distinction between trust and restricted title to be unimportant in determining the benefits and burdens imposed on restricted or trust lands.

123. The allotment, however, would not likely survive if the valid, conflicting interest was also a fee interest (e.g., a homestead) for the same land. On the other hand, the allotment would probably survive if the conflicting interest was less than a fee interest (e.g., an easement). See *Arnold v. Morton*, 526 F.2d 1101 (9th Cir. 1976) (discussing the meaning of "subject to" clauses in federal withdrawals). See also 43 C.F.R. § 2650.3-1(a) (excluding fee interests but including less than fee interests in ANCSA conveyances under §§ 14(g) and 22(b) of ANCSA). Accord Alaska Reg. Sol. Memo, "Legislative Approval of Native Allotments" (March 10, 1981), at 7 and Alaska Reg. Sol. Memo, "Right-of-way On A Native Allotment" (December 22, 1983), at 3-5.

124. A.W. SCOTT, *THE LAW OF TRUSTS* 1, 3-26 (§ 1) (1967).

125. See e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942).

126. Act of February 8, 1887, n. 14 above. See also *United States v. Ruckert*, 188 U.S. 432 (1902) (denying authority to the State of South Dakota to tax permanent improvements or personal property on allotments because of the trust status of the land). See also *United States v. Clarke*, 445 U.S. 253 (1980) (prohibiting inverse condemnation of a trust allotment in Alaska). See n. 34b below, discussing *United States v. Clarke*. But see *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 542 (1980) (describing the nature of the "limited trust" under the General Allotment Act). See also *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983) (describing the scope of the trust responsibility under other statutes specifically regulating allotment administration).

127. See 25 C.F.R. § 152.1(d) (defining "trust land" for allotments), and 25 C.F.R. § 152.1(c) (defining "restricted land" for allotments). Townsites under the Alaska Native Townsite Act (formerly codified at 43 U.S.C. § 733 (1970)) are also restricted lands.

One leading case held that administrative practice and congressional appropriations supporting it required the probate of both trust and restricted allotments to be determined by the Secretary of the Interior;¹²⁸ two later cases held that Oklahoma's estate tax could be imposed on restricted¹²⁹ and trust lands alike.¹³⁰ In determining federal obligations over Native lands, the Supreme Court has generally relied on the specific statute or regulation at issue rather than abstract ideas of restriction and trust.¹³¹ In most cases, the practical outcome is similar for both trust and restricted property;¹³² nevertheless, some statutes imply that trust lands might be afforded more protection than restricted lands.¹³³ Other statutes, however, may afford more flexibility to restricted property owners in dealings with their land.¹³⁴

2. *Restricted Status in Alaska*

a. *General*

For seventy-five years the Interior Department officially interpreted the Alaska Native Allotment Act to authorize trust allotments only.¹³⁵ Then, in 1980 the IBLA overruled the Department's earlier precedents and held that Alaska Native allotments were held in restricted title.¹³⁶ The basis for the decision was the actual language of the documents which conveyed allotments as "the homestead of the allottee and his heirs in perpetuity." The IBLA also relied on an Interior Department regulation¹³⁷ which, pursuant to the 1956 amendments to the Allotment Act, authorized the *allottee*, with the approval of the Secretary of the Interior, to convey the *complete title* to the land by deed to another free of any restrictions against alienation and taxation. Since the allottee was authorized to convey the full title and since the Department appeared to convey a "homestead" to the "allottee and his heirs in perpetuity," the IBLA concluded that the allottee also held the legal title to the allotment, subject to statutory restrictions against alienation and taxation.¹³⁸

b. *Fee Patent Issue*

The IBLA's decision had one immediate and positive result; it permitted Alaska Native allottees to obtain fee patents to their allotments in their own names. Originally the 1906 Native Allotment Act prohibited any sale or transfer of an Alaska Native allotment other

128. *United States v. Bowling*, 256 U.S. 484 (1921).

129. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

130. *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948).

131. E.g., *United States v. Bowling*, n.128, above; see generally COHEN (1982), *supra* n.3, at 605-638 and *Mitchell I and II*, *supra* n.126.

132. See, e.g., 25 C.F.R. § 162 (relating to leasing).

133. See, e.g., 25 U.S.C.A. § 202 (prohibiting inducement of an Indian to execute an instrument purporting to convey trust land and imposing criminal penalties).

134. Act of June 25, 1910, ch. 431, §1, 36 Stat. 855, 25 U.S.C.A. § 372 (permitting certificates of competency to remove restrictions against alienation upon a restricted allottee's application). See also 25 C.F.R. pt. 152. Compare with Act of May 8, 1906, ch. 2348, 34 Stat. 182, 25 U.S.C.A. § 349 (permitting the Secretary of the Interior to issue fee patents unilaterally for trust lands under the General Allotment Act of 1887).

135. *Charlie George*, 44 L.D. 113 (1915); *Frank St. Clair*, 52 L.D. 597, 601 (1929). See also *Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 F. 906 (9th Cir. 1916).

136. *State of Alaska*, 45 IBLA 318 (1980).

137. 43 C.F.R. § 2561.3 (1996).

138. *State of Alaska*, *supra* n.136, at 322. Curiously, however, § 905(a)(1) of ANILCA requires the Secretary of the Interior to issue a "trust certificate" for a legislatively approved allotment.

than by inheritance, but the 1956 amendments did permit Natives to sell their allotments with the approval of the Secretary of the Interior.¹³⁹ If the sale was to a non-Native, the effect was to remove the restrictions against alienation and taxation, but there was no legal authority for an Alaska Native to have the restrictions removed without conveying the land. The only authority that could be used in Alaska applied solely to restricted allotments and permitted the Secretary of the Interior to remove restrictions against alienation by granting a "certificate of competency" upon the allottee's application.¹⁴⁰ Thus, redefining the status of Alaska allotments also redefined the Interior Department's ability to remove Alaska allotment restrictions against alienation.¹⁴¹

c. Other Administrative Matters

Because most of the federal statutes dealing with the administration of allotments apply alike to restricted and trust allotments, Alaska Native allotments are subject to many of the same statutory protections and limitations imposed on allotments elsewhere. For example, the general tight-of-way,¹⁴² probate,¹⁴³ and leasing¹⁴⁴ statutes are all applicable to Alaska Native allotments. Similarly, the provisions of law imposing restrictions on taxation and alienation on fee lands purchased with the proceeds from the sale of nontaxable restricted lands have also been held to apply to proceeds from Alaska Native allotments.¹⁴⁵ Thus Alaska Natives can sell their allotments and reinvest the proceeds in unrestricted, taxable lands which will then become restricted and tax exempt. In general, administrative determinations tend to clarify the legal status of Alaska Native allotments and to treat them, in all significant respects, as other restricted Native American lands are treated elsewhere.¹⁴⁶

E. ALLOTMENT ADMINISTRATION

1. Generally

The Bureaus of Land Management and Indian Affairs are the two agencies within the Interior Department responsible for the administration of the Alaska Native Allotment Act. The BLM is primarily responsible for adjudicating the applicant's entitlement to an allotment, while the BIA is responsible for assisting in acquisition and administering the land after it is conveyed to the Native and so long as it remains in restricted status. The legislative approval of many allotments under ANILCA significantly reduced the BLM's adjudicative role while at the same time substantially increasing the BIA's responsibilities.

139. Formerly codified at 43 U.S.C.A. § 270-1 (1970).

140. Act of June 25, 1910, n 134, above; see Assoc. Sol. Indian Affairs Memo, "Administrative appeal of Nel. W. Nelson, Jr." (March 2, 1981). Compare with Op. Alaska Reg. Sol., "Certificates of Competency" (January 16, 1975) (prohibiting application of 25 U.S.C.A. § 372 because Alaska allotments were then considered trust lands).

141. It is perhaps not clear that removing the restrictions against alienation under 25 U.S.C.A. § 372 also removes the restrictions against taxation imposed under the terms of the Alaska Native Allotment Act. See *Comate v. U.S. App.*, 224 U.S. 665, 673 (1912) (tax exemption held to be a separate property right which survived congressional elimination of restrictions against alienation).

142. Right of Way, 25 U.S.C.A. §§ 311 *et seq.*; see also 25 C.F.R. pt. 169.

143. Probate, 25 U.S.C.A. § 373 *et seq.*; see also 25 C.F.R. pt. 4 subpart D.

144. Leasing, 25 U.S.C.A. §§ 1415 *et seq.*; see also 25 C.F.R. pt. 162.

145. Op. Alaska Reg. Sol., "Katherine Koskoff—Applicability of 25 U.S.C.A. § 409a (1970) to Sale of Native Land Allotment" (February 7, 1975). See 25 U.S.C.A. § 409a.

146. *E.g.*, *State of Alaska*, 45 IBLA 318 (1980).

Initial processing of an allotment application begins with the BIA's certification of the application, but investigation, adjudication, survey, and conveyance of the allotment are the BLM's responsibility. Though coexisting within the Department of the Interior, their differing statutory authorities and philosophies have frequently put the two bureaus in conflict with each other. The BIA must manage all Indian affairs and matters arising from Indian relations,¹⁴⁷ while the BLM is charged with protecting more general government and public interests in federal lands.¹⁴⁸

2. BLM's Role

a. Processing Allotment Applications

The allotment application was required by regulation to be filed with the appropriate Alaska BLM office having jurisdiction over the lands.¹⁴⁹ However, since the BIA also had to certify that the applicant was a Native and certain other matters,¹⁵⁰ the applications were frequently submitted first to the BIA for certification, after which the BIA would file the application with the BLM. Thereafter, the applicant or the BIA had six years to make "satisfactory proof" that the land had been used and occupied for a substantially continuous period of five years.¹⁵¹ In the absence of clear physical evidence, this was typically a form or affidavit, completed by three persons knowledgeable of the facts, which was submitted by the BIA or the applicant's lawyer.

Once an application was filed with BLM, the agency adjudicated the applicant's entitlement to an allotment. It was this phase of the administrative process that section 905 of ANILCA eliminated for all those allotments qualified for legislative approval. BLM, of course, still has the task of determining which allotments were legislatively approved. Allotment applications not legislatively approved under ANILCA are adjudicated according to BLM's regulations and procedures described below.

On receipt, the application is referred to "preadjudication" for serialization and preliminary examination to insure all qualifications have been met. If deficient, the curative information is requested from the BIA or the applicant. An accepted form is submitted to the Alaska BLM's land records department to be noted on the public lands status plats, thereby providing public notice of the segregation of the land from the public domain. The lands claimed in the allotment applications are thus unavailable for subsequent application (except for state of Alaska or ANCSA corporation top filing).¹⁵²

During preadjudication, the status of the land is reviewed to determine if, as required by the 1956 amendments, the land is "vacant, unappropriated and unreserved,"¹⁵³ although, under ANILCA, this requirement is eliminated or modified for lands within NPRA or a power site withdrawal. Under the longstanding regulations and current court decisions, adjudicated allotment applicants must satisfy a five-year use and occupancy requirement

147. See 25 U.S.C.A. § 2.

148. See Federal Land Policy and Management of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C.A. §§ 1701 *et seq.*

149. 43 C.F.R. § 2561.1(a).

150. 43 C.F.R. § 2561.1(d).

151. 43 C.F.R. § 2561.2.

152. 43 C.F.R. §§ 2091.1(a), 2091.5-6 (ANCSA corporation top filing); § 906(e) of ANILCA (State top filing).

153. Formerly codified at 43 U.S.C.A. § 270-1 (1970).

either prior to or subsequent to application.¹⁵⁴ Furthermore, in order to establish a preference right to state land selections, the applicant must demonstrate that occupancy began some time prior to the date of the state's selection application.¹⁵⁵ Applications within most federal withdrawals must also be for occupancy begun before the withdrawal.¹⁵⁶ Applications are no longer subject to screening to determine if they are valuable for minerals unless they were so determined within the 180-day time limit of section 905(a)(3) of ANILCA.

After preadjudication, the application is scheduled for a field examination. A field examination may also be scheduled for allotments approved under ANILCA as a means of checking boundaries prior to survey. Thirty days before the examination, the applicant and appropriate ANCSA corporations are notified. The applicant or his designee is requested to accompany the examiner, and interpreters are used if there is a language barrier. BLM realty specialists are responsible for doing the field examination and preparing a report of their findings. One of the principal problems facing a realty specialist is verifying use and occupancy where the land is often covered by snow over half the year and the claimed use of fishing, hunting, or berry picking leaves little or no physical evidence of occupation. Frequently, under these circumstances, witness verification of the applicant's use and occupancy is the only possible proof.

The results of the field examination are reported to the BLM's land law examiners who, in a process called "final adjudication," make a preliminary finding of acceptance or rejection of the claim. If the application is rejected, the applicant has thirty days to appeal the decision and is entitled to a hearing if there are factual issues in dispute.¹⁵⁷ If the allotment is deemed valid, the applicant receives an "administrative approval" of the application pending a land survey. The survey (which can take many years to work into BLM's survey schedule) establishes the legal boundaries of the allotment. After survey, the BLM issues a conveyance document certifying the Native allotment which, as provided in the Allotment Act, grants the "allottee and his heirs" a "homestead...in perpetuity" which is restricted against taxation or alienation.¹⁵⁸

b. *Erroneously Conveyed Allotments*

Owing to the uncertainty of Native use and occupancy and shifting allotment policies, lands have sometimes been mistakenly conveyed to another—usually the state of Alaska or an ANCSA Native corporation. Unfortunately for the allotment applicant, it is also well established that once the Interior Department conveys land it loses all jurisdiction to retract the conveyance, even if the conveyance was due to fraud or mistake.¹⁵⁹ Under this doctrine, a federal lawsuit brought by the United States is the only way to cancel the erroneous patent and recover the land.

154. 43 C.F.R. §§ 2561.2. See also *Shields v. United States*, *supra* n. 52.

155. *Aguilar II*, n. 61, above; *Arctic Wheeler*, 1 IBLA 139 (1970); *Lucy Anvakana*, 3 IBLA 341 (1971); *John Cusungmya*, 28 IBLA 83 (1976).

156. See e.g., 43 C.F.R. §§ 2561.0-8(c) (national forest lands). See also S.O. No. 3040 (May 25, 1979) (rescinding the "five-year-prior" rule), and *George Kostrominoff*, 26 L.D. 104 (1898).

157. 43 C.F.R. § 4-411. See also *Pence I*, n. 98, above.

158. BLM procedures were furnished by the Alaska BLM State Office Division of Conveyance Management. See generally *State of Alaska*, 45 IBLA 318 (1989). See also BLM Alaska State Office, *Conveyance News*, Vol. 6, No. 2 (May/June 1983), discussing the then current status of BLM allotment processing, procedures and issues. In 1983 it was commonly reported that survey of all allotments would take fifty to seventy years.

159. *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897), see also, e.g., *State of Alaska*, 45 IBLA 328 (1980).

It was against this background in 1976 that Ethel Aguilar, on behalf of herself and other Alaska Natives, sought to compel the United States to recover the land she had applied for but which had been patented to the state of Alaska. The United States contended that it had no jurisdiction to recover the land, but the Alaska Federal District Court held that since Natives had a preference right under the Allotment Act to lands they used and occupied, the United States had a trust responsibility to investigate the legitimacy of her claim. If her claim to the land could be established, the court held that the United States also had an obligation to bring a lawsuit to recover the land.¹⁶⁰

In early 1983, the representatives of the allotment applicants and the United States stipulated to court-approved procedures requiring the government to investigate erroneously conveyed allotments.¹⁶¹ Under these procedures, the Alaska BLM office is required to review all allotment applications on lands conveyed to the state. If an application is determined to be legally defective, then it will be rejected without an administrative hearing. However, if it is found defective for some factual reason (e.g., failure to establish use and occupancy), then the BLM must schedule a hearing for the applicant and any other party who might be adversely affected by the applicant's claim. If the application is found valid (either with or without a hearing), then the case will be referred to the U.S. Department of Justice, which has the final administrative decision of whether to bring a lawsuit to cancel the erroneous patent.

3. BIA's Role

a. General

Most BIA responsibilities in Alaska are directed through the Alaska Regional Office, headed by a "Regional Director." The regional office is composed of several functional divisions, branches, and offices, among them one responsible for the BIA's realty program.¹⁶² The regional office realty staff typically includes a director, one or more realty specialists, a land law examiner, an archaeologist, and an appraiser, as well as secretarial support. The regional office realty staff insures that all regulations and laws have been followed by reviewing virtually every action taken at lower bureaucratic levels, including tribal offices. All papers requiring approval or a decision by the Regional Director are funneled through the regional realty staff. Additionally, the regional office interacts with other government agencies (e.g., BLM, Housing and Urban Development, or Economic Development Administration) when it comes to other land-related federal Native programs in Alaska.

As of 2001, local BIA realty programs were located in two field offices in Anchorage and Fairbanks. These offices are charged with directly assisting the BIA's Native clientele, and are headed by field representatives who are assisted by realty officers and specialists. When necessary, the regional office assists the field and tribal realty staffs with appraisals, training, and the like. In both field offices, some or all of the realty program has now been contracted or compacted out to regional tribal organizations and tribal governments under the Indian Self-Determination Act (Pub. L. No. 93-638).¹⁶³ Realty operations in the BIA offices previously located in Bethel, Juneau, and Nome have been mostly contracted.

160. *Aguilar II*, *supra* n.61, discussed also in *State of Alaska*, 45 BIA 328, 333-334 (1980) (Burski concurring).

161. *Aguilar v. United States*, A76-271 Civil, Stipulated Procedures for Implementation of Order (February 7, 1979).

162. The precise names for each of these divisions, branches and offices change over the years, but their functions remain substantially the same.

163. Act of January 4, 1975, 88 Stat. 2203, 25 U.S.C.A. §§ 450 *et seq.* Self-Governance Amendments for compacting at § 102 of Pub. L. No. 103-413, 108 Stat. 4270, 25 U.S.C.A. §§ 458aa-458gg.

Thus, the BIA field office or a tribal contractor/compact is typically the first point of contact for a Native allottee with a question related to the administration of allotted land. The BIA or its contractor provides counseling and advice regarding sales, leases, or grants of rights-of-way related to allotments, and also investigates all trespass claims.¹⁶⁴ However, the actual responsibility for approving a sale or lease or granting a right-of-way remains with the Regional Director and is not contractible to a tribal organization.¹⁶⁵ The BIA maintains a clearinghouse of land records at their Alaska Title Plant, but uses the Alaska state recording system to record the titles of Native allotments.¹⁶⁶

b. Pending and Approved Allotments

For many years there was substantial confusion about BIA authority over applied-for allotments, because the land was theoretically under the BLM's jurisdiction until it was actually conveyed to an allottee. Upon the filing of an allotment application, the BLM characterized the allotment as "pending"; upon administrative approval it was termed an "approved" allotment, and upon conveyance it became "certified." For many years the lands covered by the allotment application were considered to be within the BLM's jurisdiction so long as the application was either pending or approved. That turned out to have sometimes serious consequences for the allotment applicant, even though the Interior Department had an obligation to protect Alaska Native use and occupancy.¹⁶⁷

Although the practice has now been discontinued, pending and approved Alaska allotments were sometimes treated like public lands, especially when it came to federal executive actions affecting those lands.¹⁶⁸ Thus, there are reports that the BLM has permitted the extraction of sand and gravel from pending allotments even though the practice seems to be prohibited under BLM's regulations.¹⁶⁹ Similarly, rights of way on "Indian lands" are to be granted only by the BIA,¹⁷⁰ but the term "Indian lands" is nowhere clearly defined to mean pending or approved Alaska Native allotments.

The situation became more acute during the construction of the trans-Alaska pipeline in the mid-1970s. Oil companies, working against construction deadlines, sometimes needed

164. See generally 25 C.F.R. pt. 152 (sales), part 162 (leasing and permitting) and part 169 (rights-of-way).

165. These responsibilities are delegated from the Commissioner of Indian Affairs to the BIA Area (now Regional) Directors in BIA Manual (BIAM) 10 BIAM 3 (January 20, 1975). See also 39 Fed. Reg. (No. 173) 32160 (September 5, 1974) (regarding delegations to the Commissioner [now the Assistant Secretary], of Indian Affairs). The title of Commissioner was changed to Assistant Secretary in 209 Interior Department Manual (DM) 8.1. See also 25 C.F.R. § 271.32(d) (regarding contractible realty programs which do not constitute trust responsibilities).

166. See 25 C.F.R. § 150.5(b).

167. See 43 C.F.R. §§ 2091.4-1 and 2561.0-2. See also *Pacific Steam Whaling*, 26 L.D. 558 (1898) (trade and manufacturing site denied if it would encroach on a Native village; accord, *Baranof Island*, 36 L.D. 261 (1908); *Johnson v. Pacific Coast S.S.*, 2 Alaska Rpts. 224 (D. Alaska 1904).

168. Compare *Charley Clifton*, 48 L.D. 435 (1920) (approval of allotment prevented withdrawal of townsite covering same land), and *United States v. Lynch*, 7 Alaska Rpts. 568 (D. Alaska 1927) (Natives in possession under 1884 Organic Act could not be dispossessed by court or Secretary of the Interior), with *Herman Joseph*, 21 IBLA 109 (July 30, 1975) (allotment application did not preclude subsequent power site withdrawal). See also *Russian American Co. v. United States*, 199 U.S. 570 (1905) (occupancy begun after 1884 does not prevent later federal withdrawal); *Alaska Commercial Co.*, 39 L.D. 597 (1911), *rev'd on reconsideration* 41 L.D. 75 (1912) (occupancy prior to 1884 affords a priority of continued occupancy as against a later federal withdrawal).

169. 43 C.F.R. §§ 3600.0-3(a)(3) (prohibiting disposal of mineral materials on Indian lands).

170. 25 C.F.R. § 169 and 43 C.F.R. §§ 2802.1-6.

to acquire rights of way across pending or approved Native allotments, but it was not clear whether a grant only from the BLM would protect the companies against later claims of trespass once the land was conveyed to the Native applicant. The companies resorted to a hybrid procedure involving a right-of-way grant from the BLM and the allotment applicant with the "non-objection" of the BIA. In at least one such case, the practice resulted in prolonged litigation when the allottee refused to consent to the right of way after he received conveyance of the allotment.¹⁷¹

The impasse was at least partially resolved in 1979 by a memorandum of understanding (MOU) between the BLM State Director and the BIA Area (now Regional) Director, spelling out their respective agencies' responsibilities over pending and approved allotments.¹⁷² Under the terms of the MOU, BIA is to have full authority over approved allotments to grant less than fee interests (i.e., sales were not originally permitted) and to protect against trespass. Both agencies are to coordinate the granting of less than fee interests on pending allotments, but the BLM retains trespass abatement authority on these lands.¹⁷³ The Assistant Secretary for Indian Affairs has subsequently determined that approved allotments can also be sold under BIA procedures prior to survey.¹⁷⁴

III. Native Townsites

A. TOWNSITE ADMINISTRATION

Like the 1906 Native Allotment Act, the 1926 Alaska Native Townsite Act (ANTA)¹⁷⁵ provided an opportunity for individual Alaska Natives to obtain title to lands in the public domain.¹⁷⁶ However, federal administration of the Townsite Act was plagued by bureaucratic and statutory confusion. Initially, the Interior Department may have assumed that ANTA was a separate scheme for the establishment of exclusively Native towns,¹⁷⁷ but in 1938 it adopted a regulation permitting non-Natives to get townsite deeds in Native villages as well.¹⁷⁸ From at least 1938 to 1959, ANTA townsites appear to have been administered in substantially the same way and according to the same regulations as townsites under the 1891 act, which granted citizens (usually non-Natives) the right to establish townsites in Alaska.¹⁷⁹

171. *State of Alaska v. Juneau Area Director*, 9 BIA 126, 881 D. 1020 (1981); see also *Hefle v. Alaska*, 633 P.2d 264 (Alaska 1981).

172. Memorandum of Understanding (MOU) between the Bureau of Land Management (BLM) and the Bureau of Indian Affairs (BIA) on division of responsibilities for Native allotments, BLM Agreement No. AK-950-AG9-323 (1979).

173. However, a delegation from the Acting Deputy Commissioner of Indian Affairs to the Juneau Area (now Regional) Director purports to delegate joint authority to the BIA for trespass abatement under 43 C.F.R. § 2561.

174. Letter from Assistant Secretary-Indian Affairs to James Vollenweide (December 2, 1983).

175. Act of May 25, 1926, 44 Stat. 629 (formerly codified at 43 U.S.C.A. §§ 733 *et seq.* (1970)).

176. See COHEN (1942), *supra* n.6, at 412.

177. See 51 L.D. 501, 502 (1926) and 52 L.D. 65-66 (1927).

178. 56 L.D. 569, 571 (1938) (permitting non-Native deeds in Native villages).

179. *City of Klawock v. Gustafson*, Slip Op. No. K 74-2 (D.C. Alaska November 11, 1976), at 14, discussed in *Klawock v. Gustafson*, 585 F.2d 428 (9th Cir. 1978). See also 37 L.D. 334 (1908) (holding that Alaska Natives could not acquire title under the 1891 act). Compare 43 C.F.R. §§ 2564.0-4(b) (relating to the establishment of "Native townsites") with 43 C.F.R. § 2565.1 (relating to the establishment of "non-Native townsites").

Under the 1891 Townsite Act,¹⁸⁰ the Secretary of the Interior was required to name a trustee to designate public lands in Alaska as townsites for the "several use and benefit" of townsite occupants. According to the published regulations, the occupants of a proposed townsite applied to the BLM State Director to survey the town's exterior boundaries.¹⁸¹ Once the exterior boundaries were surveyed, the residents petitioned the Secretary of the Interior to designate a trustee to supervise the subdivision of the townsite.¹⁸² The federal government then issued the trustee a patent for the proposed townsite land, thereby permitting the trustee to "enter" those lands and withdraw them from the public domain.¹⁸³ As a matter of practice, the original occupants then obtained a subdivisional survey for the occupied portion of the townsite and deeds to their individual lots within the subdivided plat. The townsite trustee held any remaining unsubdivided lands in trust for future occupants until such time as they might petition to have the land subdivided into lots.

The costs of subdividing (i.e., survey) were prorated against the lots, and right of occupancy was determined as of the date of the subdivisional survey.¹⁸⁴ After paying the assessed fees, the occupants of each lot received their deeds from the trustee, and the unoccupied lots were sold at public auction. Any remaining unsold lots were deeded to the municipality. Because the first subdivision did not usually use up all the unsubdivided land in the townsite, the trustee would repeat the process for the unsubdivided lands until the whole townsite was subdivided and all the lots either individually acquired or deeded to the municipality.¹⁸⁵ When that was accomplished, the trustee could close out his trust.

Section 4 of ANTA¹⁸⁶ permitted the Secretary to adopt regulations to implement the act, but except for deed applications and fee payments, he adopted no such regulations. Instead, he applied the procedures used under the 1891 act to the establishment and disposition of Native townsites.¹⁸⁷ These procedures made no clear distinction between Natives and non-Natives in townsite administration. Prior to 1959, it was possible for both Natives and non-Natives to be deeded lots within the subdivided portion and to occupy land in the unsubdivided portion of the same townsite. Under pre-1959 townsite administration, the major differences between Natives and non-Natives were that Natives were not required to pay survey fees and were issued a deed that restricted their ability to convey their property. The property was also statutorily protected from taxation, execution on a debt or contract, liabilities of the patentee, and claims based on adverse occupancy or prescription.¹⁸⁸ Prior to 1959, if a lot was vacant after subdivision, the trustee could either sell it at auction or, if the

180. Act of March 3, 1891, § 11, 26 Stat. 1095, 1099 (formerly codified at 43 U.S.C.A. § 732 (1970)).

181. See 43 C.F.R. § 2565.1(a). But see 43 C.F.R. §§ 2564.0-4(b) and 2564.3 (relating to "Native townsites"). It is still not clear whether the townsite trustee precisely followed the 1891 procedures when it came to "Native townsites." The size of the townsites was limited to between 160 and 640 acres depending on the population. See 43 C.F.R. § 2565.1(c), but townsites range in size from 10.73 acres (Kodiak) to 805.17 acres (Barrow).

182. 43 C.F.R. § 2565.1(b).

183. 43 C.F.R. § 2565.1(c). "Withdrawal" and "entry" are now considered to occur at the time the petition is filed. Source: Telephone interview with townsite trustee (May 11, 1974). Under established precedent, the effect of "entry" by the townsite trustee was to vest the ultimate right to the land in the occupants and the community. *McCluskey v. Pacific Const. Co.*, 160 F.794, 798 (9th Cir. 1908).

184. 43 C.F.R. § 2565.3(c).

185. See *Kluuock*, *supra* n.179, at 15 (where these procedures are explained).

186. Formerly codified at 43 U.S.C.A. § 736 (1970).

187. *Kluuock*, *supra* n.179, at 14. See also 43 C.F.R. §§ 2564.0-3 *et seq.*

188. Formerly codified at 43 U.S.C.A. § 733 (1970).

municipality had a corporate charter, deed it to the municipality. Vacant, subdivided lots could not be simply occupied by individuals after the date of the subdivision.

Then in 1959, the Interior Solicitor issued the first of the so-called *Saxman* opinions.¹⁸⁹ The opinion stated that section 3 of the 1926 act authorized the trustee to convey vacant subdivided lots of a Native townsite only to *Natives*. The trustee was prohibited from disposing of any vacant Native townsite lots "to white purchasers by competitive bidding . . . or otherwise."¹⁹⁰ A subsequent opinion prohibited the trustee from conveying unoccupied Native townsite lots to the municipality as well.¹⁹¹

These opinions had the practical effect of protecting predominantly Native communities from non-Native encroachment. The townsite trustee had no alternative but to retain unoccupied lots in trust until they could be occupied and deeded to individual Natives.¹⁹² Inconsistently, however, the trustee still permitted both Natives and non-Natives to occupy vacant *unsubdivided* land within the exterior townsite boundaries.¹⁹³

The trustee's authority to permit non-Natives to occupy the unsubdivided portion of a Native townsite was finally challenged in 1974 by the predominately Native City of Klawock. In *Klawock v. Gustafson*, the Alaska Federal District Court affirmed the right of non-Natives to occupy unsubdivided lands and went on to overrule the reasoning of the *Saxman* opinions and held:

There is no basis in the statute or legislative history for special treatment of townsites that are predominantly Native beyond the statutory provision for restricted deeds and prohibitions of charges for liens on Native-owned lots for the owner's debts.¹⁹⁴

The *Klawock* decision required that administration of Native townsites be according to the methods used prior to the *Saxman* opinions. Following the decision, however, the pressure by non-Natives on Native communities became even greater. In 1976 the unsubdivided townsite lands were the only federal lands in Alaska then available merely for the cost of occupying and improving them.¹⁹⁵ This made them especially attractive in light of the expanding non-Native population and an acute shortage of available land.

ANCSA did not clearly resolve the status of unoccupied land in pending Native townsites in Native communities. Section 14(c) of ANCSA¹⁹⁶ provides an alternative means for

189. "Disposal of Lots in Saxman, Alaska," 66 L.D. 212, 2 Op. Sol. on Ind. Affairs 1857 (M-36563, May 11, 1959). The opinion held that § 3 of the 1926 act (formerly codified at 43 U.S.C.A. § 735 (1970)) did not permit the trustee to collect the prorated survey fee from Native occupants.

190. 66 L.D. at 214.

191. See Op. of Acting Field Solicitor, Juneau, (August 31, 1960), cited in *Klawock*, *supra* n.179, at 16.

192. In practical terms, the trustee had to leave the unoccupied lots open to Native occupancy even after the subdivision was completed. This was not specifically permitted by the regulations, which required that the unoccupied lots either be sold to private parties or deeded to the municipality. *Klawock*, *supra* n.179, at 16. See also 43 C.F.R. §§ 2565.5 and 2565.7.

193. *Klawock*, *supra* n.179, at 16-17.

194. *Id.* at 17-18. The court also held that these restrictions were sufficient to prevent Natives from being assessed for the costs of the subdivisional services.

195. Under Interior Department regulations, unoccupied, subdivided lots can only be (1) sold at auction (43 C.F.R. § 2565.5(a)), (2) sold to a federal, state or local government agency (43 C.F.R. § 2565.5(b)) or (3) deeded to the municipality (43 C.F.R. § 2565.7). The Alaska Regional Solicitor has held that if the city formally objects to the sale (43 C.F.R. § 2565.5(b)(3)), the trustee does not have to attempt to sell the unoccupied lots before deeding them to the city. Op. Alaska Reg. Sol., "Disposal of Unoccupied Lots in Alaska Townsites" (February 8, 1977).

196. 43 U.S.C.A. § 1613(c).

municipalities and individuals to acquire lands in villages. However, some 106 townsites established under ANTA were not clearly eliminated either by ANCSA or the subsequent repeal of the Native Townsite Act in 1976 by the Federal Land Policy Management Act (FLPMA).¹⁹⁷ The federal townsite trustee administered the ANTA townsites and a state trustee administered the ANCSA municipal lands; often these included lands in the same villages. For a time, non-Natives were able to establish new occupancy rights under ANTA on the same types of lands for which ANCSA supposedly prohibited occupancy rights as of December 18, 1971. These problems added confusion to the ANCSA settlement and created conflict over lands within the core of many ANCSA villages.

This background raises the major questions surrounding townsite administration in Alaska. Specifically, these include:

1. The nature of federal obligations to Natives under ANTA.
2. Native occupancy rights under ANTA.
3. The effect of ANCSA and FLPMA on ANTA.

B. FEDERAL OBLIGATIONS

1. Two Agencies

Similar to the administration of allotments, federal administration of the 1926 Native Townsite Act was divided between the two federal agencies, BLM and BIA. The BLM employed the townsite trustee who was responsible for withdrawing, surveying, and deeding townsite lands. The BIA Regional Director, along with regional and field and tribal realty staffs, handled land management matters for the Native owners of restricted townsite lots.¹⁹⁸ Although both the townsite trustee and the BIA have trust responsibilities toward the Native occupants, these responsibilities appear legally different in kind.

2. Townsite Trustee's Obligations

The townsite trustee was a federal employee who held land in trust for Native and non-Native inhabitants¹⁹⁹ of a particular townsite. Until he issued a deed to each townsite occupant, he held the legal title to property in which the occupant had an equitable interest, but at least after the *Klawock* decision his trust responsibilities did not include protection of predominately Native towns from non-Native residence and ownership of land. On the other hand, he has been held to "strict fiduciary standards" in implementing ANTA for the benefit of individual Natives.²⁰⁰

The trustee's role related back to an 1867 Townsite Act,²⁰¹ which provided that a county judge could hold townsite land in trust, do the survey, and establish the rights of occupants. Presumably because there were no county judges in Alaska, Congress permitted the Secretary

197. Act of October 21, 1976, 90 Stat. 2744, 43 U.S.C.A. §§ 1701 *et seq.*

198. As noted earlier, any of the BIA's realty functions and services are now contracted or compacted to tribes or tribal organizations under the Indian Self-Determination and Education Assistance Act and the Self-Governance Amendments, 25 U.S.C.A. §§ 450 *et seq.*

199. See *Klawock*, *supra* n.179, at 17 and 19.

200. *Carlo v. Gustafson*, 512 F. Supp. 833, 838 (D. Alaska 1981).

201. Act of March 2, 1867, Ch. 177, 14 Stat. 541, R.S. 2387 (formerly codified at 43 U.S.C.A. § 718 (1970)).

of the Interior to appoint a trustee to administer the 1891 Alaska Townsite Act. Although the Secretary initially appointed private citizens to the trusteeship, in time the townsite trustee became a federal employee.

Under the 1891 act, the trustee was specifically required to approximate the procedures of the 1867 act "as near as may be" and to reach:

[t]he same results . . . as though the entry had been made by a county judge and the disposal of lots in such townsite and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory.²⁰²

Because Natives were excluded from the 1891 act, Congress enacted the 1926 Native Townsite Act. The *Saxman* opinions indicated that the trustee had more responsibilities for Native townsites than for non-Native townsites, because he had to hold vacant subdivided lots until settled on by Natives.²⁰³ As previously discussed, the implication from the *Saxman* opinions was that the trustee had an obligation to protect Native townsites from non-Native encroachment; however the *Klawock* decision overruled the *Saxman* opinions.²⁰⁴ Thus, after *Klawock*, ANTA did not require the townsite trustee to protect Native townsites from non-Native encroachment,²⁰⁵ but did require careful administration of ANTA to benefit Native occupants of townsites.²⁰⁶

3. The BIA's Obligations

It is important to recall that under ANTA a Native occupant received a deed or patent to the occupied lot. This language indicates that the Native occupant received full legal and equitable title to his or her occupied lot (subject to certain restrictions). As noted earlier, the difference between the legal and equitable (beneficial) title to property is the distinguishing feature of a property-related trust responsibility.²⁰⁷ Because townsite lots are deeded to the occupant, they convey full title and therefore do not establish a federal-Native trust responsibility in the narrow sense of the term. That does not mean the federal government, particularly the BIA, cannot have other equally binding obligations to Alaska Native townsite owners. It can and it does.

These obligations arise in part because Native townsite deeds normally are restricted to prevent the owner from selling the lot. Prior to 1948, all Native townsite deeds were inalienable except on approval of the Secretary of the Interior; then ANTA was amended to permit the owner to obtain an unrestricted deed by petitioning the Secretary for a determination that the owner was competent to manage his or her own affairs.²⁰⁸ Initially, the Interior Department required that any proposed sale of Native townsite property be

202. Formerly codified at 43 U.S.C.A. § 732 (1970).

203. *Klawock*, *supra* n.179, at 16-17. See also 66 I.D. at 218.

204. See *supra*, n.179. See also *Carlo v. Gustafson*, *supra* n.200, *Ruth B. Sandvik*, 26 IBLA 97 (July 9, 1976), and *City of Klawock v. Andreu*, 34 IBLA 85, 83 I.D. 47 (1976).

205. Following the *Klawock* decision, the townsite trustee publicly announced that "unsubdivided lands in some patented townsites are available to both Native and non-Natives alike to stake and build upon." Unnumbered bulletin, "Unsubdivided Townsite Lands" (June 14, 1977).

206. *Carlo v. Gustafson*, 512 F. Supp. 833 (D.C. Alaska 1981) (ANTA imposes a trust responsibility on the townsite trustee to determine the proper Native occupant of a townsite lot carefully).

207. SCOTT, THE LAW OF TRUSTS, *supra* n.124, at 3-4.

208. Act of February 26, 1948, 62 Stat. 35 (formerly codified at 43 U.S.C.A. § 737 (1970)).

reviewed by the Commissioner of Indian Affairs,²⁰⁹ but current regulations require only the BIA Regional Director's approval for sale of restricted townsite lots²¹⁰ or issuance of unrestricted deeds.²¹¹ These restrictions, necessitated by the statutory inalienability of the land, quite naturally require Native owners of restricted lands to rely on the BIA for advice in the sale or other disposition of their lands. Moreover, as restricted lands, Native townsite lots are afforded a variety of BIA services under a number of specific federal statutes and regulations applicable to restricted Indian lands.²¹²

The necessity for these services appears founded on the statutory requirement that the townsite remain inalienable.²¹³ Moreover, Native reliance on the services probably creates enforceable federal obligations even though there is no trust responsibility arising out of the restrictions on the property alone. At least so long as the BIA provides these services or obtains congressional funding to do so, it has an obligation to provide the services equally to all owners of inalienable townsites.²¹⁴ It is also clear that the federal obligations arising out of specific statutes authorizing these services are fiduciary obligations in the strict sense.²¹⁵

C. ISSUES IN TOWNSITE ADMINISTRATION

1. Introduction

The issues inherent in the administration of the 1926 Alaska Native Townsite Act remained virtually dormant until the mid-1970s. Then, with the implementation of ANCSA and increased attention to village land rights, there came an explosion of litigation. Although there were several lawsuits, there were two main issues: (1) whether ANTA permitted only Native occupancy and (2) the effect of ANCSA and FLPMA (the Federal Land Policy Management Act) on ANTA.

2. Native Occupancy Rights

a. General

Recall that Alaska Native occupancy rights were theoretically protected from encroachment by section 8 of the 1884 Organic Act, but the terms under which Natives could acquire title to the lands they occupied were "reserved for future legislation by Congress."²¹⁶ Initially,

209. Circular No. 1082a, 56 I.D. 569, 570 (1938). See also 25 C.F.R. § 152.22(a) (1996) and 43 C.F.R. §§ 2564.5 *et seq.*, relating to BIA approval for transfer of restricted lands.

210. 43 C.F.R. § 2564.5.

211. 43 C.F.R. §§ 2564.6 and 2564.7. These restrictions do not, of course, grow out of the lack of complete title in the owner. They are based on statutory prohibitions, not a deficiency in the owner's title. The situation is analogous to a person's being legally determined to be incompetent to manage his or her own affairs. Such a person may have complete title to property, but is deprived by a court of the authority to deal with the property. Title to restricted lands is in this respect different from title to either trust or aboriginal lands. In either of the latter cases, the United States holds the legal title and the Natives have an equitable interest. In either case, the federal government also has a trust responsibility to protect the lands from encroachment.

212. *E.g.*, 25 C.F.R. pt. 152 (sale of restricted lands), pt. 162 (leases and permits on restricted lands), pt. 169 (rights-of-way over Indian lands), and 43 C.F.R. §§ 4.200 *et seq.* (probate). See also the associated statutes cited in the regulations.

213. *Cf.* COHEN (1942), *supra* n.6, at 119, nn.260 and 261 and accompanying text.

214. *Cf. Ruiz v. Morton*, 415 U.S. 199, 236 (1973) (applying this principle in the context of BIA general assistance benefits).

215. *Mitchell II*, *supra* n.126, at 224-226.

216. See *supra*, n.6, and accompanying text.

the Interior Department permitted Natives to acquire townsite lands under the 1891 Townsite Act,²¹⁷ but subsequent Interior Department decisions prohibited lands occupied by Natives from being included in lands withdrawn as townsites under the 1891 act.²¹⁸ Subsequent regulations adopted in 1904 again permitted both Natives and whites to acquire lands under the 1891 act,²¹⁹ but these too were amended in 1908 to preclude Natives from acquiring title.²²⁰ In doing so the Interior Department concluded that the 1884 Organic Act was intended to protect Native occupancy rights by retaining title to the land in government ownership. Permitting Natives to acquire title under the 1891 act would have given them unencumbered title and was held to be contrary to the usual policy of restricting the sale of Native-owned lands.²²¹

As discussed earlier, section 1 of ANTA permitted Natives living in predominately white towns to acquire title to Native-occupied lands, while section 3 permitted the Interior Secretary to withdraw lands "occupied by . . . Natives of Alaska, as a town or village" which the townsite trustee was then to convey to the individual Native occupants.²²² Thus ANTA permitted Natives living in white communities to acquire townsite lots by restricted deed and arguably permitted the setting aside of other lands exclusively for Native communities. From 1938 to 1959 townsites were administered similarly under both sections 1 and 3 of the 1926 act.²²³ The so-called *Saxman* opinions changed these procedures in 1959 and seemed to require that lands administered under section 3 be held exclusively for Native occupancy.²²⁴ Then in 1976 the *Saxman* opinions were judicially reversed, and all the ANTA townsites were opened to non-Native occupancy.²²⁵ ANCSA and the 1976 repeal of the Townsite Act both cast doubt on this conclusion.

b. The Saxman Opinions

Under the usual requirements of Alaska townsite administration, the residents of the proposed townsite would petition for a townsite. The lands for the townsite were then withdrawn, surveyed, and patented to the trustee. Occupants would then petition for a subdivisional survey of their lots and would receive deeds for lots based on the survey. When the lands were subdivided, there would usually be lots within each subdivision that were not occupied. The regulations permitted such lots to be sold either to the highest bidder or for "fair value" to a government agency; any lots remaining could be deeded to the municipality. Typically in

217. *Non-Mineral Entries in Alaska*, 12 L.D. 583, 595-596 (1981).

218. *Kittie Clegeuh*, 28 L.D. 427 (May 22, 1899); *Accord, Louis Greenbaum*, 26 L.D. 512 (April 13, 1898); *Pacific Steam Whaling Co.*, 26 L.D. 558 (April 22, 1898); *John G. Brady*, 28 L.D. 535 (June 23, 1899) (all relating to protection of Native occupancy from disposition under §§ 12-14 of the 1891 act).

219. 33 L.D. 163, 167-8 (August 1, 1904).

220. 37 L.D. 337 (December 29, 1908).

221. The noncitizen status of Natives was also sometimes advanced as a reason that the 1891 act could not be applied to them. In 1923 the Interior Department adopted regulations permitting citizen Natives to acquire lots under the 1891 act (50 L.D. 27, 46). The General Citizenship Act of 1924 (8 U.S.C.A. § 1401) seemingly eliminated this obstacle for noncitizen Indians, but Congress nonetheless enacted ANTA two years later, because it was not clear that Alaska Natives were "Indians." See D.C. MITCHELL, *SOLD AMERICAN* 71, 72 (1997) (discussing the early federal reluctance to recognize Alaska Natives as Indians).

222. See *supra*, n.175, and accompanying text.

223. See *supra*, n.176 and 177, and accompanying text.

224. See *supra*, n.189, and accompanying text.

225. See *supra*, n.194 and 195, and accompanying text.

Alaska, not all of the lands withdrawn would be surveyed. Those lands that were not surveyed remained unsubdivided until future occupants petitioned for a survey. Until 1959, these were the procedures used to administer both Native and non-Native townsites.²²⁶

The first *Saxman* opinion concluded that section 3 of the 1926 act required the trustee to dispose of the lots "to Native occupants of a Native town or village" (emphasis added), which precluded sales of unoccupied, subdivided lands in Native townsites to non-Natives by competitive bid. The opinion implied further that the trustee could fulfill the trust by deeding the lands in the subdivided portion to Natives whose occupancy began *after* the subdivisional survey.²²⁷ Although the *Saxman* opinion suggested that the townsite regulations ought to be revised to reflect its conclusions, the regulations were never revised. A subsequent solicitor's opinion concluded on the basis of the *Saxman* opinion that unoccupied subdivided lands in Native townsites could not be deeded to municipalities either.²²⁸ Thus, under the *Saxman* opinions, subdivided lots in Native townsites could be disposed of only to individual Native occupants.

c. *Klawock v. Gustafson*

The *Saxman* opinions limited the trustee's options when it came to disposition of the subdivided lots, but the trustee apparently interpreted them not to prohibit non-Native occupancy of the unsubdivided portion of a Native townsite. Non-Natives occupying such lands could then request a subdivisional survey and receive deeds to the lands they occupied, thus establishing non-Native occupancy of what, under the rationale of the *Saxman* opinions, were lands supposedly held for exclusive Native occupancy. The situation came to a head in the southeast Alaskan Native community of Klawock. The state of Alaska and individual non-Natives had occupied parcels in the unsubdivided portion of the Klawock townsite and constructed substantial improvements. Following subdivisional survey, the occupants applied for and were awarded deeds over the protests of the City of Klawock, which claimed, among other things, that under section 3 of ANTA only Natives could occupy lands in Native townsites.

The city appealed the trustee's award of the deeds administratively, but lost;²²⁹ on judicial review, the Alaska Federal District Court rejected the reasoning of the *Saxman* opinions and concluded that the Native townsites administered under section 3 of ANTA were to be administered according to the same regulations as non-Native townsites under the 1891 act. In reaching its decision, the court concluded that the 1926 act:

was primarily concerned not with establishing Native towns but with issuing deeds to individual Alaskan Natives for the parcels they occupied within townsites on federal land in Alaska.²³⁰

d. *Effects of Klawock v. Gustafson*

Like a stone dropped into a quiet pool, *Klawock v. Gustafson* sent ripples to the far shores of Alaska townsite administration. First, by overruling the *Saxman* opinions, it cast doubt on the land rights of individuals who commenced occupancy after subdivisional survey. Second, it affirmed the right of non-Natives to establish occupancy on unsubdivided lands in Native

226. See generally *Klawock v. Gustafson*, *supra* n.179, at 15, and 43 C.F.R. subparts 2564 and 2565.

227. 66 F.D., *supra* n.189, at 215.

228. Discussed in *Klawock v. Gustafson*, *supra* n.179, at 16.

229. *City of Klawock v. Andrew*, *supra* n.204.

230. *Klawock v. Gustafson*, *supra* n.179, at 12.

townsites. Third, it was interpreted administratively to permit municipalities in Native townsites to acquire unoccupied subdivided and (later) unsubdivided lands. This administrative interpretation led to a successful claim for attorney fees by Klawock's lawyers to which all Native townsites in the state had to contribute.

i. Native Occupancy After Subdivision

Under the townsite regulations, the date of the subdivisional survey is the crucial date for the determination of an occupant's claim to a lot.²³¹ Under the first *Saxman* opinion, however, Natives could establish occupancy after the subdivisional survey. In rejecting this aspect of the *Saxman* opinion, the *Klawock* decision implies that Native occupants after the subdivision who have not received their deeds may never receive them. Since there were no such occupants before the court, they were not considered in the decision, but there have been no reported disputes over this issue.

ii. Non-Native Occupancy

At the time of the *Klawock* decision (1976) there was relatively little land available in Alaska that people could acquire merely by occupying it. Most lands were tied up by ANCSA or state selections or the national and public interest withdrawals under sections 17(d)(1) and (2) of ANCSA. The court's decision kept open some 6,400 acres²³² of unsubdivided townsite lands for acquisition by occupancy. The seeming availability of these lands for inexpensive settlement resulted in a non-Native land rush of fairly serious proportions in once isolated, culturally homogeneous villages.²³³ Subsequently, the Interior Department's Alaska Regional Solicitor concluded that the Federal Land Policy Management Act, which repealed ANTA some twenty-one days before the *Klawock* decision, also prevented new occupancy of unsubdivided townsite lands.²³⁴

iii. Municipal Land Rights

Following the *Klawock* decision, the Interior Department was asked again to examine the right of a municipality to lands under the 1926 act. In 1977 the Interior Department's Alaska Regional Solicitor concluded that since the proceeds of any sale of subdivided lots went to the municipality, the municipality could, in effect, outbid any purchaser.²³⁵ The townsite trustee subsequently advised occupants of unsubdivided lands that unless their occupancy predated the 1976 repeal of the 1926 act, the municipalities would be entitled to receive all the unsubdivided lands as well.²³⁶ The entitlement of the municipalities to the

231. 43 C.F.R. § 2565.3(c); see also e.g., *City of Klawock v. Andrews*, *supra* n.204.

232. Statistics from BLM state office, Townsite Trustee.

233. See, e.g., AFN Convention Resolution No. 77-8, Native Townsites—Claims in Unsubdivided Townsite Tracts, summarized in 1977 AFN Convention Report at 29 (January 4, 1978).

234. Op. Alaska Reg. Sol., "Effect of Repeal of Townsite Laws on Occupants who entered after October 21, 1976" (February 20, 1980). One occupant of a townsite who initiated occupancy after the passage of FLPMA and the repeal of the townsite act unsuccessfully challenged the Alaska Regional Solicitor's opinion. For a full discussion, see *Royal Harris*, 45 IBLA 87 (January 17, 1980), *Royal Harris v. United States*, A80-174 Civ (D. Alaska 1987) (Judgment and Order of Dismissal).

235. Op. Alaska Reg. Sol., (Feb 8, 1977), *supra* n.195, see also 43 C.F.R. § 2565.5(b)(3), (requiring city approval of any sale and 2565.7, regarding disposition of proceeds of sales).

236. Discussed in *Royal Harris*, *supra* n.231, at 88.

unoccupied, subdivided lands was clear.²³⁷ but it was less clear as to the unsubdivided lands.²³⁸ However, there have been no reported disputes over this issue.

iv. Attorney Fees

One of the truly unanticipated results of the *Klawock* decision was that every Native townsite in the state was required to contribute a portion of the value of the lands within each townsite to the payment of the City of Klawock's attorney's fees. The federal appeals court held that as a direct result of the lawsuit each Native community became entitled to lands to which they were not previously entitled under the *Saxman* opinions. Since each of these communities benefited from the efforts of the attorneys on behalf of Klawock, the court held that the lands the communities were to receive constituted a common fund for the payment of the attorney fees.²³⁹ Ultimately the federal district court confirmed an award of \$176,000 in fees which the affected communities paid in proportion to the amount of land they were due to receive as a result of the *Klawock* litigation.²⁴⁰

3. Effects of ANCSA and FLPMA

a. General

The Alaska Native Claims Settlement Act²⁴¹ and the Federal Land Policy Management Act²⁴² are unrelated statutes, but both have been claimed to affect the scope or rights under ANTA. Read one way, ANCSA could have been interpreted to withdraw for ANCSA corporation selection unsubdivided ANTA townsite lands located in Native villages. FLPMA, on the other hand, specifically repealed ANTA on October 21, 1976, and has been held to deny the right to establish occupancy on unsubdivided lands after the date of repeal.²⁴³ Since the effects of both ANCSA and FLPMA are subject to valid existing rights, whether and under what circumstances the federal townsites constitute such rights became the focus of debate. In addition to these issues, ANCSA also established a separate scheme of municipal land entitlements and townsite administration which went beyond the federal townsite laws.

b. ANCSA

Among other things, section 11(a)(1) of ANCSA automatically withdrew for ANCSA corporation selection all public lands within the core township(s) enclosing a Native village.²⁴⁴ "Public lands" are defined in ANCSA to mean "all Federal lands and interests therein" in Alaska,²⁴⁵ which might well have included land withdrawn for townsites but not yet subdivided or occupied by individuals. The Ninth Circuit Court of Appeals initially held that this might be sufficient to withdraw automatically for ANCSA selection all vacant

237. See *Klawock v. Gustafson*, *supra* n.179.

238. See *Royal Harris*, *supra* n.234, at 93 (Bartski dissenting).

239. *Klawock v. Gustafson*, *supra* n.179.

240. Interview with John M. Allen, Alaska Regional Solicitor (December 15, 1982).

241. Act of December 18, 1971, Pub. L. No. 92-203, 85 Stat. 688 (43 U.S.C.A. §§ 1601 *et seq.*).

242. Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743 (43 U.S.C.A. §§ 1701 *et seq.*).

243. See *Royal Harris v. United States*, *supra* n.234.

244. 43 U.S.C.A. § 1610(a)(1)(A).

245. 43 U.S.C.A. § 1602(e).

unsubdivided townsite lands.²⁴⁶ If this interpretation had been sustained it would have required unoccupied, unsubdivided lands in the core townships to be conveyed to Native corporations under ANCSA instead of to individuals or municipalities under ANTA.

However, the ANCSA 11(a)(1) withdrawals are all "subject to valid existing rights"; therefore, the question was at what point the rights of the townsite trustee, the townsite occupants, and the municipality become valid as to the ANCSA withdrawals. It was generally assumed that if the rights were vested before December 18, 1971, then they were both valid and existing at the time ANCSA became law. The Interior Department regulations and the Alaska Regional Solicitor also indicated that a community's application for a townsite segregated the entire tract applied for and established a vested right in the individuals and the community to receive it eventually.²⁴⁷ One unreported decision of the Alaska Federal District Court had gone so far as to uphold the claim of the city of Barrow to unoccupied, subdivided townsite lands as a "valid existing right" predating the ANCSA withdrawals,²⁴⁸ but under the Department's regulations merely surveying the land and patenting it to the townsite trustee also appeared to vest such rights.²⁴⁹ Ultimately the federal courts sided with the Interior Department and held that the federal townsite lands were not available for ANCSA corporation selection. This also meant that the unoccupied townsite lands were reserved for the municipalities.²⁵⁰ A final decision in 1989 held that these unoccupied "residual" lands located in unincorporated communities could be conveyed to the tribal governments of such communities.²⁵¹ This cleared the way for the federal townsite trustee to dispose of all the unoccupied subdivided and unsubdivided townsite lands in both unincorporated and incorporated communities. As of 1997 all the lands in the federal townsites had been distributed either to individual occupants, to municipalities, or to tribal governments. Two townsites have yet to be formally closed, but they were expected to be closed in due course.²⁵²

c. FLPMA

Section 703(a) of FLPMA specifically repeals the townsite provisions of both the 1891 and 1926 acts, but section 701 prevents termination of any "land use right or authorization" and preserves all land "withdrawals, reservations, classifications and designations" in effect as of the date of the repeal. It was held administratively that the effect of the repeal was to prevent all new occupancy of townsite lands after October 21, 1976.²⁵³ The federal courts upheld this interpretation.²⁵⁴

246. *Alegnagik Natives Ltd. v. Andrus (Alegnagik I)*, 648 F.2d 496 (9th Cir. 1980), on rehearing, 648 F.2d 505 (9th Cir. 1981).

247. Cf. 43 C.F.R. § 2091.4. See also 43 C.F.R. § 2565.1(a) and Op. Alaska Reg. Sol., "Effect of Repeal of Townsite Laws on Occupants who entered after October 21, 1976" (February 20, 1979) at 3; see also *McCluskey v. Pacific Coast Co.*, 160 F.794, 798 (9th Cir. 1908).

248. *City of Barrow v. Gustafson*, A 80-333 Civil Slip Op. (D.C. Alaska August 27, 1981).

249. See 43 C.F.R. § 2565.1(c).

250. *Alegnagik Natives, Ltd. v. United States (Alegnagik II)*, 635 F. Supp. 1477 (D. Alaska 1985), *aff'd* 806 F.2d 924 (9th Cir. 1986).

251. *Alegnagik Natives, Ltd. v. United States (Alegnagik III)*, 886 F.2d 237 (9th Cir. 1989).

252. Telephone interview with Martin Hansen, Townsite Trustee (November 12, 1998).

253. *Royal Harris*, *supra* n.234.

254. *Alegnagik II*, *supra*, 806 F.2d 924 (9th Cir. 1986).

d. ANCSA Municipal Lands

Section 14(c) of ANCSA appears to be an alternative to the subsequently repealed Alaska townsite laws. As now amended, it requires each village corporation to deed to local residents, businesses, and nonprofit organizations the surface estate of those village lands they occupied as of December 18, 1971.²⁵⁵ As originally enacted, a minimum of 1,280 acres of the remaining surface estate also had to be conveyed to the incorporated municipality or to the state in trust for any future municipality, but 1980 amendments to ANCSA now permit village corporations to negotiate lower municipal grants with the state or affected municipalities.²⁵⁶ These provisions permit more flexibility in the administration of municipal lands than was possible under the Alaska townsite laws, and permit Alaska villages to acquire more land for municipal purposes than was possible under the federal townsite laws. As Congress concluded when it repealed ANTA in 1976, ANCSA had made it "obsolete."²⁵⁷ It was not until 1989, however, that the courts made good on this conclusion by allowing the unoccupied townsite lands in unincorporated communities to be conveyed to the tribal governments.²⁵⁸

4. Miscellaneous Issues

There are numerous opportunities for error in any procedurally complex, bureaucratic land withdrawal and conveyance scheme. The 1926 Native Townsite Act is no exception. In at least one instance too much land was identified for possible inclusion in a townsite and erroneously patented to the townsite trustee. Although the trustee protested the error, procedures were perhaps not then available to correct the patent. Individuals occupied the excess lands and an ANCSA village corporation also selected it. When petitioned to subdivide the land and deed the lots, the trustee refused. On appeal, the "ILA concluded that the excess lands had not even been included in the survey of the designated "townsite" and had therefore been erroneously patented to the trustee. The occupant's claims were rejected and the village land selection affirmed.²⁵⁹ It has also been held, however, that the trustee has a fiduciary obligation to administer ANTA for the benefit of Native occupants of townsite lots. The responsibility is based in part on the restricted status of the lands conveyed to Natives under the act as well as the general special responsibility of the federal government to Natives.²⁶⁰

IV. Jurisdictional Issues

A. GENERAL

The restricted titles of Alaska Native allotments and restricted townsite lots carry certain jurisdictional implications with them. First, they are subject to certain federal statutes applicable to restricted lands governing probate and the granting of rights of way, leases,

255. 43 U.S.C.A. § 1613(c)(1).

256. 43 U.S.C.A. § 1613(c)(3).

257. H.R. Rep. No. 94-1163 at 26, reprinted in 1976 U.S.C.A.N. 6175, at 6200.

258. See *Alegnagik III*, 886 F.2d 237 (9th Cir. 1989).

259. Stephen Kenyon (On Reconsideration), 65 IBLA 44 (June 23, 1982); *Ouzinkie Native Corp. v. Watt*, A80-196 Civ. (D. Alaska 1984) (Memorandum and Order); *In The Matter of Stephen Kenyon*, IBLA 80-453 (1989) (Decision finding no issues of estoppel and confirming Ouzinkie Native Corp. land selection).

260. *Carla v. Gustafson*, *supra* n 200.

and similar interests. These effectively preclude state courts from exercising jurisdiction to decide disputes arising over these matters on allotment and townsite lands. Other federal statutes grant special authority to the federal courts to adjudicate disputes about allotment entitlements and specifically preclude state jurisdiction. These jurisdictional niceties were sometimes not fully appreciated in Alaska, which has led to litigation testing the precise scope of state authority on a variety of issues.

B. FEDERAL COURT JURISDICTION

The federal courts have exclusive jurisdiction under 25 U.S.C.A. §§ 345 and 346²⁶¹ to adjudicate "the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." In all such suits the United States must be named initially as a defendant,²⁶² but others may be named also.²⁶³ The statute affords jurisdiction to decide disputes involving both the issuance of allotments and the interests of Natives in their allotments after they are acquired, but only waives the sovereign immunity of the United States as to the former claims.²⁶⁴ The statute applies to both trust and restricted lands²⁶⁵ and has been applied to Alaska townsite and allotment lands in several circumstances.²⁶⁶ However, the Eleventh Amendment to the U.S. Constitution prevents individual allotment owners from suing a state in federal court for trespass or other claims related to the allotment. Only the federal government can bring such suits against states as an exercise of its trust responsibility.²⁶⁷

Prior to the enactment of this statute neither state nor federal courts had jurisdiction over allotment disputes. The United States was an indispensable party to most such disputes because of the trust or restricted status of the allotted lands, but had not waived its immunity from suit, so it was impossible for a court to acquire jurisdiction over all the parties necessary to resolve most allotment disputes. Only the Secretary of the Interior had authority to resolve such disputes.²⁶⁸ The statute is a limited waiver of federal sovereign immunity for federal jurisdictional purposes, but it does not permit state courts to adjudicate disputes involving the title, ownership, or possession of an allotment.

Federal courts also have jurisdiction to resolve quiet title actions brought against the federal government under the federal Quiet Title Act (QTA) for property in which the

261. Act of August 15, 1894, ch. 290, 28 Stat. 305, as amended. Also codified in part at 25 U.S.C.A. § 1353. See generally COHEN (1982), *supra* n.3, at 313-316.

262. This requirement was added in 1901; prior to that time the United States was not a necessary party. *Hy-Yu-Tie-Mil-Kin v. Smith*, 194 U.S. 401, 413 (1904).

263. E.g., *McKay v. Kalyon*, 204 U.S. 458 (1907). Whether the United States is an "indispensable" or merely a "necessary" party may depend on the circumstances, particularly whether the dispute involves ultimate ownership of the land. See COHEN (1982), *supra* n.3, at 315, n.273.

264. *United States v. Morazz*, 476 U.S. 834, 845 (1986). As to the latter type of case, the statute only allows suits by Natives against private parties.

265. *McKay v. Kalyon*, *supra* n.263 (trust lands); *Heckman v. United States*, 224 U.S. 413, 441 (1911) (restricted lands). See also *Arenas v. United States*, 322 U.S. 4129 (1943); *United States v. Payne*, 264 U.S. 446 (1924).

266. *Alaska v. Agil*, 472 F. Supp. 70 (D. Alaska 1979) (25 U.S.C.A. § 1353 grants exclusive jurisdiction to federal courts to determine entitlements to allotments); *Pence v. Kleppe (Pence D)*, 529 F.2d 135 (9th Cir. 1976) (federal jurisdiction to determine initial entitlement to allotment); *Carlo v. Gustafson*, n.200, above (restricted townsite created as an allotment for purposes of 25 U.S.C.A. § 345).

267. *Harrison v. Hickel*, 6 F.3d 1347 (9th Cir. 1993).

268. *McKay v. Kalyon*, *supra* n.263, at 468 (citation omitted).

federal government "claims an interest."²⁶⁹ The QTA specifically waives federal immunity for suit in all such cases *except* for those pertaining to "trust or restricted Indian lands." The practical effect of this limited waiver is to prevent judicial challenges to federal decisions granting allotments. This principle has been applied in Alaska to prevent the state of Alaska from litigating a federal decision to grant an allotment in conflict with the federally granted right of way for the bridge across the Nenana River on the main highway between Anchorage and Fairbanks.²⁷⁰

C. EFFECT OF P.L. 280

Under P.L. 280,²⁷¹ some states, including Alaska, now have general jurisdiction to adjudicate "causes of action" arising in "Indian country" (which includes allotments).²⁷² Although trust and restricted lands are repeatedly treated in the same manner under the law,²⁷³ differences in the nature of the land title have provided a springboard into the already animated debate over Indian country in Alaska.²⁷⁴ Absent a clear federal decision to the contrary, the plain meaning of Indian country incorporates Native allotments and Native townsites.²⁷⁵

Beyond the debate over Indian country status, P.L. 280 itself excludes from such jurisdiction any authority to "adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [trust or restricted] property or any interest therein." Moreover, nothing in P.L. 280 is intended to "authorize the alienation, encumbrance or taxation" of trust or restricted lands or the regulation of such lands in a manner "inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto."²⁷⁶

269. 28 U.S.C.A. § 2409(a)(2). The QTA is the exclusive authority for suits to quiet title to property in which the United States claims an interest. *United States v. Morton*, 476 U.S. 834 (1986) *supra*.

270. *Alaska v. Babbitt (Albert Allotment)*, 38 F.3d 1068 (9th Cir. 1994); *Alaska v. Babbitt (Foster Allotment)*, 67 F.3d 854 (4th Cir. 1995). But see *Alaska v. Babbitt (Bryant Allotment)*, 182 F.3d 672 (9th Cir. 1999) (distinguishing *Albert* and *Foster* if the allotment applicant did not initiate use and occupancy before the initial grant of a state right of way for the same highway). See also *State of Alaska (Gooliatan)*, 140 F.B.I.A. 205, 214 (1997) (holding that allotment use and occupancy attaching after grant of a competing right of way is subject to the right of way).

271. Pub. L. No. 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588, now codified as amended in scattered parts of 18 and 28 U.S.C.A. See 28 U.S.C.A. § 1360 (civil jurisdiction) and 18 U.S.C.A. § 1162 (criminal jurisdiction), applied to Alaska, Act of August 8, 1958, Pub. L. No. 85-615, 72 Stat. 545. Other provisions of P.L. 280 not related to Alaska were repealed and substantially reenacted as part of the 1968 Indian Civil Rights Act, Pub. L. No. 90-284, Title IV, April 11, 1968, 82 Stat. 78, 25 U.S.C.A. §§ 1321-1326.

272. "Indian country" is now defined at 18 U.S.C.A. § 1151 to include reservations, allotments and dependent Indian communities.

273. COHEN (1982), *supra* n.3 at 618. See also 25 C.F.R. § 150.2 (1996) (Indian land); 25 U.S.C.A. § 2201(a) (Indian land consolidation); 25 U.S.C.A. § 323 (Rights of way across Indian lands); 25 U.S.C.A. § 371 & 43 C.F.R. pt. 4 (probate of Indian lands).

274. See *Aaron Jones v. State of Alaska*, 936 P.2d 1263 (Alaska 1997) (discussing differences between General Allotment Act and Alaska Native Allotment Act with regards to Indian country).

275. COHEN (1982), *supra* n.3, at 766 ("Native allotments in Alaska also should be Indian country so long as they remain in Indian title"). Also Op. Sol. M 36,975 at 124-130 (January 11, 1993) ("With respect to Alaska Native allotments, we conclude that they do fall within the statutory definition of Indian country").

276. 28 U.S.C.A. § 1360(b).

1. Civil Disputes

Thus, in the civil arena, P.L. 280 has been construed as a fairly limited grant of state jurisdiction only to *adjudicate* disputes,²⁷⁷ and to preclude local taxation,²⁷⁸ zoning, or other regulation²⁷⁹ of restricted Indian lands. The Alaska Supreme Court has also consistently interpreted P.L. 280 to prohibit state court adjudication of disputes involving restricted or trust property.²⁸⁰ Nonetheless, disputes arise about the jurisdiction of Alaska state courts over restricted allotment and townsite lands, particularly in domestic relations matters. In a divorce, the allottee's spouse might claim to have contributed during the marriage to the improvement of the allotted land. Under these circumstances (especially if there are children involved), the lower courts have attempted to apportion the benefit of the allotment indirectly between the parties.

For example, in one case the superior court ordered the allottee to will the allotment to the children of the marriage.²⁸¹ In another, involving the same land, the court in effect ordered separate maintenance of the spouse and children on the allotment.²⁸² In yet another instance, the lower court ordered the value of the allotment included in the calculation of the property division.²⁸³ No case presenting the question of the scope of Alaska state court jurisdiction to apportion the benefit of an allotment indirectly has yet been reported, but under the authority now established, it does not seem likely that a court would have such jurisdiction if it in any way authorized the "alienation [or] encumbrance" of the land or constituted an adjudication of "ownership or right to possession...or any interest" in the allotment.²⁸⁴

²⁷⁷ See generally *Bryan v. Itasca County*, 426 U.S. 373 (1976) (regarding the limitations of P.L. 280 jurisdiction). See also C. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

²⁷⁸ *People of South Nalene v. Bristol Bay Borough*, 406 F. Supp. 870 (D. Alaska 1979) (local government precluded from taxing restricted townsite lots and permanent improvements (fixtures), but permitted to tax personal property located on allotment).

²⁷⁹ *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), cert. den., 429 U.S. 1038 (upholding 25 C.F.R. § 1.4 which prohibits state or local regulation of the use of trust and restricted lands except with the authorization of the Secretary of the Interior). See also *Applicability of Health and Sanitation Laws of the State of California on Indian Reservations*, 2 Op. Sol. on Ind. Aff. 1986 (M-36768 February 7, 1969); 58 I.D. 42 (1942). The numerous federal statutes and regulations governing the lease, sale, etc. of restricted lands are also likely to preempt state or local regulation of these lands. Cf. *White Mountain Apache Tribe v. Braker*, 448 U.S. 176 (1980). See also *supra*, n.134-138, and accompanying text. But see Memorandum from Alaska Regional Solicitor's Office: Juneau City and Borough Municipal Code Enforcement in "Juneau Indian Village" (May 2, 1989 Anchorage) (interpreting 25 C.F.R. § 1.4 narrowly as applying only to leased lands and exploring legal avenues for enforcement of local zoning and regulation on Native townsites in Juneau). For a detailed discussion of zoning issues and Native land, see *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

²⁸⁰ *Heffle v. Alaska*, 633 P.2d 264 (Alaska 1981) (state courts have no jurisdiction over allotments; therefore, state court injunction against barricading disputed trans-Alaska pipeline system right of way held improper). See also *Cf. Ollstead v. Native Village of Iyonek*, 560 P.2d 31 (Alaska 1977), cert. den. 434 U.S. 938 (state courts have no jurisdiction to adjudicate entitlement to tribal trust property), *Calista v. Mann* 564 P.2d 53 (Alaska 1977) (state adjudication of restricted ANCSA stock prohibited except as permitted under ANCSA).

²⁸¹ *Schade v. Schade*, No. 67-55 (Third Judicial Dist., Alaska Superior Ct. Order dated December 20, 1967).

²⁸² *Schade v. Schade*, 3KO 80-385 (Alaska Superior Ct. order dated January 20, 1981) (permitting ex-spouse and children to remain on ex-husbands' allotment pending further action in the case).

²⁸³ *Wilson v. Wilson*, 3AN-76-4251 Civil (Alaska Superior Ct. order dated March 29, 1978). The Assistant Secretary for Indian Affairs subsequently refused to permit sale of the allotment to satisfy the divorce judgement; see "In the matter of the application for sale of Native allotment by Noel B. Wilson," Memorandum from Assistant Secretary (September 14, 1978). The federal bankruptcy court subsequently excluded the value of the allotment

2. Criminal Disputes

As applied to Alaska, P.L. 280 affords the state broad jurisdiction to enforce its criminal laws with the "same force and effect" within Indian country as elsewhere in the state.²⁸⁵ As with civil jurisdiction, however, enforcement of criminal laws cannot authorize the "alienation, encumbrance or taxation" of trust or restricted property, nor may it become an excuse for the adjudication of "ownership or right to possession . . . or any interest" in a restricted Alaska Native allotment or a townsite lot.²⁸⁶ In practical terms, though, criminal prosecutions do not generally involve issues which will touch on any of those matters prohibited under P.L. 280, so the state's criminal jurisdiction of allotted and townsite lands is relatively unfettered.

One potential area of doubt, however, centers on the distinction between prohibitory (criminal) and regulatory (civil) laws. As explained earlier, it has been held that P.L. 280 was not a grant to states of civil regulatory authority.²⁸⁷ Accordingly, when a state seeks to enforce a law within Indian country under authority of P.L. 280, it must be determined whether the law is criminal in nature and enforceable in Indian country, or civil in nature and applicable only as it may be relevant to private civil litigation in state court.²⁸⁸

In *California v. Cabazon Band of Mission Indians*,²⁸⁹ the U.S. Supreme Court adopted a test to define the difference between prohibitory (criminal) and regulatory (civil) laws for purposes of P.L. 280 jurisdiction:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.²⁹⁰

After lengthy discussion, the majority in *Cabazon* held that because gambling was not prohibited, but rather regulated by California's gaming laws, the state could not use P.L. 280 to force tribal gambling operations in Indian country to comply with state regulations.²⁹¹

from Wilson's bankrupt estate on the strength of government arguments that the state court had no authority to include it in the divorce award (11 Alaska Bankruptcy Ct. No. 3-79-00310). *But see Sheppard v. Sheppard*, 655 P.2d 895 (Ida. December 16, 1982) (upholding award of value spouse contributed to purchase of trust property) accord *Fisher v. Fisher*, 656 P.2d 129 (Ida. December 30, 1982). *But see Sheppard v. Sheppard*, *supra*, at 923-924 (Bistline dissenting).

284. *McKay v. Kalyton*, *supra* n.263, at 469 (prohibiting indirect state court adjudication of allotment possession). See also *In Re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal. 1977) (prohibiting application of any state law to dispute involving trust or restricted property).

285. 18 U.S.C.A. § 1162(a).

286. 18 U.S.C.A. § 1162(b).

287. *Brian v. Itasca County*, 426 U.S. 373 (1976).

288. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).

289. *Id.*

290. *Id.* at 209 (however the Court did warn that it is not a "bright-line rule" and full examination of the state law at issue is necessary).

291. Compare *Seminole Tribe of Indians v. Butterworth*, 658 F.2d 310 (5th Cir. October 5, 1981), *cert. den.* 453 U.S. 1020 (gambling held regulatory), with *United States v. Marjey*, 557 F.2d 1361 (9th Cir. 1977) (sale of fireworks held prohibited under state law and, therefore, a criminal violation within the meaning of the Assimilative Crimes Act (18 U.S.C.A. § 13)).

Following this line of reasoning, it is possible to conclude that other regulatory schemes that impose criminal penalties may also be excluded from the state's P.L. 280 allotment and townsite jurisdiction.²⁹²

However, the Alaska state appeals court has held that Alaska can enforce its hunting laws on Alaska Native allotments.²⁹³ In this case the defendant shot a deer out of season for subsistence purposes on his uncle's Native allotment. Addressing the P.L. 280 distinction between "criminal/prohibitory" laws and "civil/regulatory" laws outlined in *California v. Cabazon Mission Band of Indians*, the state appeals court held that Alaska's hunting law was criminal in nature. With an interesting choice of language, the court explained, "[w]hile hunting is not against Alaska's public policy, unregulated hunting is."²⁹⁴ The appeals court found support for its reasoning from the Alaska Supreme Court's ruling in *State v. Eluska*,²⁹⁵ which held that unless permitted by Alaska statute or by regulation, the taking of fish or game is prohibited. Because one is not permitted to hunt out of season or without a license, the appeals court found Alaska's hunting law prohibitory and, accordingly, enforceable on a Native allotment. Despite the appeals court's efforts to distinguish Alaska's situation from the federal precedent established in *Cabazon*, it is still not clear that Alaska's interest in regulating hunting and fishing is different than California's interest in regulating gambling operations. In both cases the states in fact allow the activity to occur, but then regulate how, when, and where it may take place.

D. PROBATE

A comprehensive statutory scheme places the probate of restricted allotment and townsite lands, such as those found in Alaska, within the exclusive jurisdiction of the Secretary of the Interior.²⁹⁶ A statute enacted in 1910 requires the Secretary to determine the heirs of any allottee who dies intestate; the same statute also permits allottees to devise (bequeath) their restricted or trust lands by will, with the approval of the Secretary of the Interior.²⁹⁷ Both provisions apply to restricted and trust lands,²⁹⁸ and have been applied in Alaska for many years.²⁹⁹ If there are no heirs, public domain allotments (such as those in Alaska) escheat (revert) to the United States.³⁰⁰

Restricted and trust lands are probated under Interior Department regulations promulgated under the authority of the 1910 act.³⁰¹ Under these regulations, the appropriate

292. It may be significant, however, that Alaska allotments and townsites are not located on reservations. Cf. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973), discussed in *New Mexico v. Mescalero Apache Tribe, United States*, 462 U.S. 324 at 335, n.18 (1983) (regarding off-reservation state jurisdiction).

293. *Aaron Jones v. State of Alaska*, 936 P.2d 1263 (Alaska 1997).

294. *Id.* at 5.

295. *State v. Eluska*, 724 P.2d 514 (Alaska 1986).

296. See generally COHEN (1982), *supra* n.3, at 633-638.

297. Act of 1910, ch. 431, 36 Stat. 855, 25 U.S.C.A. § 372 (determination of intestate heirs); 25 U.S.C.A. § 373 (disposal of allotments by will).

298. *United States v. Bowling*, *supra* n.128. The implementing regulations also treat restricted and trust property the same. 43 C.F.R. § 4.201, defining "Restricted Property."

299. Authority of the Secretary of the Interior to Dispose of Reindeer Belonging to Estates of Deceased Natives of Alaska, 54 I.D. 15 at 19; reprinted as Regulation of Reindeer Owned by Alaska Natives in 1 Op. So. on Ind. Aff. 320 at 322 (M-27127 Jul. 26, 1932).

300. 25 U.S.C.A. § 373b.

301. 43 C.F.R. pt. 4, subpart D and 25 C.F.R. pt. 15.

BIA "deciding official" superintendent acts as executor or administrator of the estate.³⁰² He initiates the probate by forwarding information about the estate to an administrative law judge.³⁰³ The judge notifies interested parties, holds a hearing, and determines the heirs, or devisees, as well as the disposition of creditors, claims, and any attorneys' fees.³⁰⁴ Any person aggrieved by the decision has sixty days to request a rehearing,³⁰⁵ but all decisions of the IBIA are final for the Board of Indian Appeals (BIA).³⁰⁶ The decisions of the IBIA are final for the Interior Department but may be reviewed in federal court.³⁰⁷ Review of intestacy cases is limited to issues unrelated to the determination of heirs, because, under the 1910 act, the Secretary's decision is "final and conclusive" on that point.³⁰⁸ The scope of review is broader for testacy cases, and the Secretary's discretion to disapprove a will is somewhat limited and also subject to judicial review.³⁰⁹

The comprehensive federal involvement with restricted property has led to some significant problems for both the Department of the Interior and the Native landholder, particularly in the area of probate. With the placement of a foreign system of property law and inheritance atop deep-rooted Native law and custom, it is not surprising complication and difficulty has followed. In particular, the fractionated heirship of Native lands and federal conflicts with tribal law, discussed below, illustrate continuing areas of concern for restricted lands in Alaska.

1. Fractionated Heirship

The phenomenon of fractionated heirship frustrates both the federal trust administration and the individual use and enjoyment of trust and restricted lands in Alaska and the contiguous United States:

For many years a pervasive problem has faced individual Indians, Indian tribes, and the Bureau of Indian Affairs—the fractionated ownership of allotted lands. The problem has reached the point where the Department of the Interior's ability to administer trust lands, probate trust estates and maintain the Individual Indian Money (IIM) System is being taxed beyond its ability to cope with the ever-increasing level of fractionation.³¹⁰

Fractionated heirship stems from the federal statute and accompanying regulations governing the probate of Indian trust estates.³¹¹ When the owner of a Native allotment or townsite dies, their interests pass to their heirs as undivided fractional interests. Each heir is a "tenant in common":

302. See 43 C.F.R. §§ 4.210 and 4.270 and 25 C.F.R. § 15.203.

303. If the estate has a cash value of less than \$5,000, the BIA "deciding official" may determine the heirs and distribute the assets, 25 C.F.R. § 15.206.

304. See 43 C.F.R. § 4.250 *et seq.* and 25 C.F.R. §§ 15.301 *et seq.* (allowing claims).

305. 43 C.F.R. § 4.304.

306. 43 C.F.R. § 4.356(e).

307. *Toohnippah v. Hickel*, 397 U.S. 598, 605-607 (1970).

308. See COHEN (1982), *supra* n. 3, at 638, n. 48.

309. *Toohnippah v. Hickel*, n. 307, above.

310. Memorandum to Tribal Leaders from Ada E. Deer, Assistant Secretary Indian Affairs, U.S. Dept. of the Interior (October 20, 1994).

311. 25 U.S.C.A. § 573 and 43 C.F.R. § 4.200.

The chief attribute of tenancy in common is unity of possession by two or more owners. All co-owners . . . of a tenancy in common share a single right to possession of the entire interest. In addition, each [co-owner] has a separate claim to the fractional share of the property interest. However, the fractional shares are "undivided," that is, they are not assigned to any particular portion of the property . . . each [co-owner]—regardless of the size of fractional share—has a right to possess the whole, until such division occurs.³¹²

The situation is analogous to eight persons inheriting one automobile. One person does not receive the steering wheel while the other receives the trunk—rather they each have an equal right to the whole of the car. Continuing with the analogy, it is not hard to imagine conflicts between the eight heirs over who gets to drive, in which direction the vehicle should go, and selecting the color for a new paint job. The situation worsens with the passing of each generation, as more and more heirs inherit the right to use the same automobile.

To illustrate, if an Alaska Native dies possessing a 160-acre allotment and the Department of the Interior determines that there are four heirs to the allotment, the heirs will not inherit 40 acres each. Rather each heir will inherit an undivided quarter interest in the entire 160-acre allotment. The second generation will be co-owners with equal rights to the whole of the allotment. In time, each of the second generation will pass away and be probated under the same federal system. If for example, each of the second generation has four heirs, the third generation will consist of sixteen co-owners of the original 160-acre allotment. With the passing of successive generations, this multiplication of ownership can greatly increase the number of interest holders in a restricted property, making use or conveyance impractical. Moreover, the Department of the Interior is charged with the unwieldy task of keeping land records, administering transactions, offering realty consultation, finding heirs, and probating the estate of each Native individual who holds a fractional interest in a Native allotment or townsite. In time, the land ownership can become so divided that the cost of administering the fractional interests far exceeds not only any income derived from the property, but the value of the property as well.³¹³

As early as 1928 Congress was informed that the situation was administratively unworkable and economically wasteful. By 1934 the burden of increasing ownership of Indian lands was clear:

The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.³¹⁴

However, Congress' first attempt at solving the problem of fractionated heirship did not come until 1983, with the passage of the Indian Land Consolidation Act (ILCA).³¹⁵

312. RICHARD R. POWELL, *POWELL ON REAL PROPERTY* v. 4A § 601(1) (1997). Heirs may attempt to partition their fractional interests into individual lots under 25 C.F.R. § 152.33.

313. See *EP. PRUCHA, THE GREAT FATHER* v. II 873-874 n.26 (1984) (an example of an allotment in South Dakota, which in forty years had 150 heirs; the probates were 250 typewritten pages long and cost more than the value of the land; because checks were not issued to the heirs for less than one dollar, it was estimated that 1600 years would have to elapse before sufficient funds would accumulate from rentals for a check to be issued). The problem of ever-increasing ownership becomes even more absurd in Alaska, where multitudes of heirs can share a single Native townsite which is often less than one acre of land.

314. *Hodel v. Irving*, 481 U.S. 704, 707-708 (1986) citing to comments of Rep. Howard, 78 CONG. REC. 11728 (1934).

315. Indian Lands Consolidation Act Pub. L. No. 97-459, 96 Stat. 2517, codified at 25 U.S.C. §§ 2201 *et seq.*

ILCA provides for the adoption of tribal land consolidation plans designed to eliminate fractionation and consolidate tribal landholdings.³¹⁶ ILCA also provides for the adoption of tribal inheritance law for trust or restricted lands within a particular Indian tribe's reservation or otherwise subject to that tribe's jurisdiction.³¹⁷ The act allows for tribal inheritance laws that prevent nonmembers of the tribe or non-Indians from being entitled to inherit trust or restricted land. However, if an Indian tribe does adopt such a restrictive inheritance code, ILCA affords nonmember or non-Indian spouses and children the option to take a life estate in the interests they would have inherited. At the end of such a life estate, the land passes according to the tribal code.³¹⁸ Notably, section 207 of ILCA provides for the automatic reversion to the tribal government of trust or restricted land when the fractional interest represents 2 percent or less of the acreage, and when that interest earned its owner less than \$100 in the year preceding death.³¹⁹

In *Hodel v. Irving*,³²⁰ heirs who stood to inherit "escheatable interests" sued the federal government, claiming that the escheat provision of section 207 of ILCA was unconstitutional. The U.S. Supreme Court agreed, holding that the right to pass on property (even small fractions of property), is a valuable right and section 207 of ILCA effectively abrogated the right to pass on property to one's heirs, without just compensation. Accordingly, the Court held that the escheat provision of ILCA results in a taking of property without just compensation in violation of the Fifth Amendment of the Constitution.³²¹ Congress attempted to temper the effects of section 207 by amending the law in 1984. The amendments define escheatable fractions as equaling 2 percent or less of the total acreage and incapable of earning \$100 in any one of the five years before the decedent's death. Further, the amendments allow a fractional interest owner to devise otherwise escheatable interests to co-owners of the same parcel in an effort to consolidate. Last, the amendments allow for the Secretary of the Interior to adopt an approved tribal code to govern escheatable interests, and an approved tribal code would take precedence over section 207 of ILCA.³²² The constitutionality of these adjustments was challenged, and once again the U.S. Supreme Court found the escheat provision of ILCA unconstitutional.³²³ The Court held that the amendments to section 207's escheat provision suffered from the same constitutional infirmities overturned in *Hodel v. Irving*.³²⁴

Beyond the halls of Congress and the chambers of the Supreme Court, the problem of fractionated heirship continues to worsen. However, the Bureau of Indian Affairs, tribal governments, and Native landowners are taking steps to address fractionation. The Bureau of Indian Affairs provides will-drafting services and encourages all restricted Native land owners to draft a will, as fractionation intensifies under intestate succession.³²⁵ Native landholders

316. 25 U.S.C.A. § 2203 (tribal land consolidation plans subject to approval of Secretary of the Interior)

317. 25 U.S.C.A. § 2205 (tribal inheritance codes subject to approval of Secretary of the Interior)

318. 25 U.S.C.A. § 2205 (a)(b) (option to retain life estate only for spouse and/or children eligible for at least 10 percent interest in land or living on the land as a home at time of decedent's death).

319. 25 U.S.C.A. § 2206 (referred to as the "escheat provision")

320. *Hodel v. Irving*, 481 U.S. 704 (1986)

321. *Id.*

322. 25 U.S.C.A. §§ 2206(a), (b), (c) (escheat to tribal devise to co-owners; adoption of Indian tribal code)

323. *Babbitt v. Youper*, 519 U.S. 234 (1997)

324. *Id.* at 706.

325. Personal interview: Glenda Miller, Bureau of Indian Affairs Bureau Area Realty Branch (June 23, 1997). In the absence of an approved will, the Interior Department probates land according to Alaska intestate succession laws, ALASKA STAT. §§ 13.12.102-103, which often leads to multiple heirs.

can also utilize the federal regulations to gift-deed fractional interests for consolidation purposes while retaining a life estate in the land.³²⁶ Although a bit complicated, the heirs can also partition the land according to the fractions owned, receiving individual titles to various pieces of the land.³²⁷ Additionally, Native landowners, Indian tribes, and agency personnel have combined to form the Indian Land Working Group (ILWG). ILWG assembles in various parts of the country with the purpose of developing solutions to fractionated heirship as well as other difficulties encountered by Native owners of trust or restricted land.³²⁸

2. Federal Conflict with Tribal Law

The federal scheme for inheritance of restricted property can lead to discord when traditional tribal property is at issue. The case of a Tlingit clan house provides a clear example of such a conflict.³²⁹ Tlingit villages in southeast Alaska contain local divisions of clans which are further subdivided into housegroups. Clan and housegroup membership is passed matrilineally through the mother's bloodline. Traditionally, a housegroup would share a large wooden clan house which would hold the housegroup's crests, regalia, and other common property.³³⁰ Despite contemporary family housing, the clan house is still the link to traditional ceremony and is at the root of Tlingit government. Because of its central importance within the community, a clan house is not owned by any one person—it is property shared by the entire clan.³³¹ The laws and customs surrounding ownership and inheritance are particular and well established.

Typically, clan leaders select a *hit saati* (Keeper of the House) to live in the clan house and take care of it for the benefit of the clan housegroup. In accord with the communal nature of the clan house, the *hit saati* does not personally own the clan house, but is entrusted with caring for the house and the property it contains.³³² When the clan house keeper dies or becomes unable to fulfill these responsibilities to the clan, a new *hit saati* will be selected to guard the clan's interests in the house.³³³

At the time Tlingit villages were surveyed and subdivided in accordance with the Alaska Native Townsite Act of 1926, many clan house keepers were issued restricted deeds from the townsite trustee as the individual occupant of a clan house. The townsite conveyance initiated a federal scheme that implements individual ownership rights in the deed holder and recognizes the ability of the clan house keeper to sell, transfer, and devise a clan house. At first, community efforts to weave the dual systems of property allowed the tribal law for clan houses to coexist

326. 25 C.F.R. § 152.25.

327. 25 C.F.R. § 152.33.

328. See draft amendments to Indian Land Consolidation Act entitled "Indian Trust Estate Planning and Land Title Management Improvement Act" presented at Indian Land Working Group, Sixth Annual Indian Land Consolidation Symposium (November 12, 1995) (on file at: Coeur d'Alene Tribe, Idaho).

329. See G.T. EMMONS, *THE TLINGIT INDIANS* (de Laguna ed. 1991); H.K. DAUENHAUER, *OUR CULTURE, TLINGIT LIFE STORIES* (1994); R. WOLF, *PRINCIPLES OF TLINGIT PROPERTY LAW AND CASE STUDIES OF CULTURAL OBJECTS* (1994); *Chilkat Indian Village IRA v. Johnson*, 20 ILR 6127 (December 1993), for in-depth discussion of the Tlingit Indians, clan and housegroup structure, and clan laws concerning property and inheritance.

330. *Id.*

331. WOLF, *supra*, n.329.

332. DAUENHAUER, *supra*, n.329 at 22-23.

333. *Id.* Kinship lines, character, and knowledge of clan tradition figure prominently in the succession of clan house keepers.

with federal administration of townsite property. However, with the passing of time, present generations are experiencing difficulty preserving clan ownership and custom.³³⁴

The federal conflict with tribal law is compounded by the practice of applying the state law of intestate succession in cases where a clan house keeper has failed to draft a will. Under Alaska intestate succession laws, property often passes to the spouse and/or children.³³⁵ Under Tlingit tribal law and traditional marriage practices, a clan house keeper's spouse and children will purposefully be of a different clan.³³⁶ In this way, the individual ownership and patrilineal probate rules to restricted lands leads to results in opposition to tribal law and custom. A sale not authorized by the clan will place ownership in persons outside the clan and unrelated to the care of the clan house.³³⁷

The issues of fractionated heirship and federal conflicts with tribal law have yet to be resolved. However as Congress, the Department of the Interior, and Native property owners confront the problems facing restricted properties in Alaska, increased tribal involvement may prove valuable. As has been noted, local tribes and villages are in a position to offer solutions "responsive to the true needs of Indian communities."³³⁸

E. FEDERAL INCOME TAX

Native Americans, like most United States residents, are generally subject to the federal income tax, but the courts have carved out an exception for income derived directly from allotted lands.³³⁹ Although that rule arose on trust land held under the terms of the 1887 General Allotment Act, the lower courts and the Internal Revenue Service have applied the ruling generally to most allotments and to income traced directly to the land.³⁴⁰ The exemption also applies to all types of income whether it is capital gains or ordinary income, but the exemption has been denied if the income is not derived from the land. Thus, the U.S. Supreme Court has held that the interest or other reinvestment income earned on tax-exempt income is not itself exempt from tax.³⁴¹ For example, income from the sale of allotment timber or rent of the raw land is exempt, but income from rent of a building or derived from a business on the land is not exempt. Similarly, the lower courts have held that rental from cattle grazing on trust or restricted lands is not tax exempt, presumably because the tax had no direct effect on the land.³⁴² Somewhat analogously, the lower courts have held that income derived from improvements located on an allotment is not tax

³³⁴ See *In Re Estate of Walter Sydney Howard, Deceased Tlingit of the Sitka Tribe of Alaska*, 32 IBIA 51 (February 6, 1998) (challenge to federal probate decision determining heirs to Tlingit clan house in contradiction to tribal law, decided on other grounds).

³³⁵ ALASKA STAT. §§ 13.12.102-103.

³³⁶ The Tlingit Nation divides clans and housegroups into two matrilineal groups termed moieties, Raven and Eagle (sometimes Wolf). The division of Raven and Eagle is important, among other things, for Tlingit exogamous marriages (marriage outside one's moiety); under traditional law children are born into their mother's clan which is necessarily different from their father's clan. See ENGLISH, *supra* n.329.

³³⁷ *Id.*

³³⁸ Indian Self Determination and Education Assistance Act, 25 U.S.C.A. § 450(a)(1).

³³⁹ *Stare v. Caporman*, 351 U.S. 1 (1956).

³⁴⁰ See generally OHEN (1982), *supra* n.3, at 391-399 and at 394, n.38.

³⁴¹ *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935).

³⁴² *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980), *cert. den.*, 450 U.S. 920. See generally, OHEN (1982), *supra* n.3, at 395.

exempt.³⁴³ The suggestion in these cases is that income from a business located on an allotment is separable from the income that could be allocated to the land alone.³⁴⁴

F. CONDEMNATION

There is no general prohibition against federal condemnation of individual trust or restricted lands, but state condemnation is available only under the authority of federal law.³⁴⁵ It has also been held (in a case arising on an 1887 trust allotment in Alaska) that condemnation under this authority must be by judicial action and may not be had less directly by "inverse condemnation."³⁴⁶ The Secretary of the Interior also has authority under several statutes to grant rights of way across allotments for fair compensation, with or without the consent of the landowner,³⁴⁷ but has interpreted his authority under the more recent of these statutes to require the consent of the allottee for all rights of way.³⁴⁸ It has been contended that these authorities also preclude state condemnations without the consent of the Secretary and the Native owner, but thus far the lower courts have rejected that argument.³⁴⁹

V. Conclusion

It is more than a little ironic that the 1926 Alaska Native Townsite Act, which Congress has termed obsolete, and the Alaska Native Allotment Act, which was only passively administered for many years, should, after ANCSA, have become the focus of so much litigation. The court decisions resulting from this litigation emphasize the continuing responsibilities of the federal government that have evolved from these two enactments. These responsibilities have been characterized as those of a fiduciary or trustee for Native lands. So, although the Alaska Native Allotment and Townsite Acts have both been repealed, the lands conveyed under them will likely remain a focal point of the federal trust responsibility in Alaska.

Both acts convey lands subject to federal restrictions against alienation and taxation: since 1932 these restrictions have been held sufficient to entitle Alaska Natives to the full range of federal protection and services afforded restricted Native lands elsewhere.³⁵⁰ Thus, restricted Alaska allotments and townsite lots are probated through the Interior Department, may be alienated only according to federal statutory and regulatory requirements, and are not generally subject to state taxation or regulation. As with restricted lands elsewhere, in

343. *E.g., Critz v. United States*, 597 F.2d 708 (Ct. Cl. 1979), cert. den., 444 U.S. 920 (1970) (income from motel, restaurant and gift shop not tax exempt).

344. Allotments and income from allotments have also been held exempt from federal estate taxes; the same principle seem applicable to exempt them from gift taxes as well. COHEN (1982), *supra* n.3, at 398-399.

345. Act of March 3, 1910, ch. 832, § 3, 31 Stat. 1084, 25 U.S.C.A. § 357.

346. *United States v. Clarke*, 445 U.S. 253 (1980). See also *Law Offices of Vincent Vitale v. Tabbyute*, 942 P.2d 1101 (Alaska 1997) (denying an attorney's lien to collect fees due for representation of the Native owner of a trust allotment in *United States v. Clarke*). See 25 U.S.C.A. § 410 (prohibiting payment of debts from the proceeds of lease or sale of a trust allotment without the approval of the Secretary of the Interior). It is not clear the same restriction would apply to restricted allotments such as most of those in Alaska.

347. Compare Act of February 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C.A. §§ 323-328, which requires consent, with various rights of way permitted without consent under earlier statutes codified at 25 U.S.C.A. §§ 311-322a.

348. See 25 C.F.R. pt. 169. See generally COHEN (1982), *supra* n.3, at 626-627.

349. *Yellowfish v. City of Sillwater*, 691 F.2d 926 (10th Cir. 1982), cert. den., 461 U.S. 927 (1982).

350. See 54 I.D. 15, 19, *supra* n.299.

Alaska it has been repeatedly held that the federal government has a fiduciary responsibility to administer these lands for the benefit of Alaska Natives.³⁵¹

These responsibilities are derived from the federal restrictions imposed on the allotments and townsit lots and from numerous specific statutes regulating allotment use.³⁵² Under these restrictions, statutes, and the history at their foundation, the allottees and restricted lot owners must rely on the government to protect their title and to provide competent advice regarding land use and ownership decisions. As the U.S. Supreme Court has said in the context of another statute:

[T]he statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

...

Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." (citations omitted)³⁵³

Alaska Native allotments and restricted townsit lots are not, in the strict sense of the term, "trust" lands. Nonetheless, the statutory limitations imposed on them along with the comprehensive statutory and regulatory framework in which they are administered has drawn the federal government and some 10,000 Native landowners into a course of dealing that compels the Natives to rely on the government for protection and advice. If this is not a trust relationship in the strict property sense of the term, it is a close enough approximation to impose fiduciary obligations on the government. Native reliance on the relationship, coupled with the government's overriding duty of fairness when dealing with the Natives, also compel this conclusion.³⁵⁴

351. *Aguilar II*, *supra* n.61 (allotments); *Cario v. Gustafson*, *supra* n.200 (townsite lots).

352. *Mitchell II*, *supra* n.126.

353. *Id.*, 463 U.S. 206, 225.

354. *E.g.*, *Morton v. Ruiz*, 415 U.S. 199 at 236 (1972) (acknowledging such a duty in the context of the BIA general assistance welfare program). *See also*, *Mitchell II*, 463 U.S. at 225-226.

6

Bureau of Land Management

222 West Seventh Avenue, #13

Anchorage, Alaska 99513

(907) 271-3767

Fax: (907) 271-4223

FAX TRANSMISSION COVER SHEET

Date: February 17, 1999

To: Carol Yeatman, ALSC

Fax: 279-7417

Re: Native Allotment Statistics

Sender: Connie Van Horn

YOU SHOULD RECEIVE 1 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (907) 271-3767.

Carol: Here are a few relatively simple Native allotment statistics from our computer system. The others are a little more complicated - I'll be getting back with you about them as soon as I can.

Pending Parcels (includes both approved and unapproved): 4482

Unapproved, title recovery/affirmation: 1044

Unapproved, non-title recovery: 631

Approved, title recovery/affirmation: 225

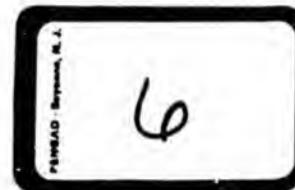
Approved, non-title recovery: 2582

Field Examination Required: 352

Closed, Certificated: 9010

Closed, Not Certificated (includes rejected, relinquished etc.): 2475

I know some of these are figures you didn't request, but since they came through in a relatively standard report format I thought I'd pass them on anyway.



LIS data - the way certain things were coded into the system years ago and the reliability of the data today, peculiar ways we have to query LIS etc.. Answers can be derived but we always seem to have to place major caveats on them.

I'll try to give you a call on Monday. I'm rarely at my desk but I try to check my voice mail fairly regularly, so please feel free to leave messages anytime. Sorry for this garbled response.

Bureau of Land Management

221 West Seventh Avenue, #13
Anchorage, Alaska 99513
(907) 271-3767
Fax: (907) 271-4223

FAX TRANSMISSION COVER SHEET

Date: February 5, 1999
To: Carol Yeatman
Fax: 279-7417
Re: Request for Native allotment information
Sender: Connie Van Horn

YOU SHOULD RECEIVE 2 PAGE(S), INCLUDING THIS COVER SHEET. IF
YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (907) 271-3767.

Carol: I just got your voice mail message - I'm working on rough draft regulations to implement the new Alaska Native Vietnam veterans' allotment legislation, and I don't get back to my desk very often. I got your fax yesterday with questions about the Native allotment program. I'll need to chew on the questions a little before I talk to you about them - some appear to be fairly simple for us to answer but others are more complicated than they first appear. Some of the questions can probably be answered with computer reports from our Land Information System (LIS), but some pertain to information that isn't necessarily maintained in LIS - it may take me a little while to figure out how best to gather the information. For instance, field exams still required - that's simple, although I don't have the exact figure at hand (somewhere around 450, I believe, but that's strictly from poor memory). Administrative split of parcels is more difficult - I'm not sure how to find out and will have to do some thinking about it. Budget questions are tricky and I may need to talk to you to clarify precisely what costs we're talking about. Yes, I believe there's an update to the work assignments document - I'll see if I can get ahold of a copy for you on Monday. Protest and stat life information can be gnarly because of the nature of

1. How many allotment applications have been approved? How many denied? How many pending?
2. How many field examinations are still required?
3. How many applications were protested by the State, but the protest was later withdrawn and application was subsequently denied?
4. How many statutory life claims are pending? How many were denied?
5. How many single parcels claimed for allotments have been administratively split into two or more parcels? How many of these split parcels have been approved? How many denied?
6. What is the total amount budgeted for allotment work?
7. Is there a FY 1999 update of the "Division of Conveyance Management Work Assignments" document?

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
ANCHORAGE AND STATEWIDE OFFICE
1018 WEST SIXTH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501-963
TELEPHONE (907) 272-9431
FAX (907) 279-7417

February 4, 1999

Connie Van Horn
U.S. Department of the Interior
Bureau of Land Management
Alaska State Office
222 W. 7th Avenue
Anchorage, Alaska 99513

Via Facsimile 907/271-4223

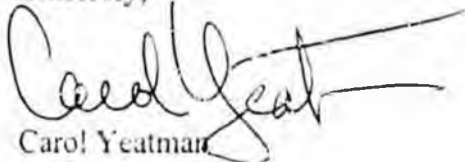
RE: Request for Information

Dear Ms. Van Horn:

After I left the message on your telephone voice mail this morning, it occurred to me that the request for information that I called you about would be better transmitted in writing. I have therefore enclosed a written set of questions requesting certain statistical information concerning Native allotment applications. I realize that the answers to my questions will likely need to be retrieved from computer data banks and I am hoping that the requested information can be retrieved fairly quickly and easily.

After you have had time to review the enclosed, please call me if you have any questions or if the information is not readily available. I appreciate your help in this matter.

Sincerely,



Carol Yeatman
Staff Attorney

Enclosure

7

**STATUS OF NATIVE ALLOTMENTS
WITHIN THE
TONGASS NATIONAL FOREST**

March 4, 1999

Pending	Conveyed	Closed/Rejected	Total
61	49	399	509

**STATUS OF THE 61 PENDING NATIVE ALLOTMENTS
WITHIN THE TONGASS NATIONAL FOREST**

Involves Title Recovery of Lands from State/Village or Region	Approved -Waiting Survey	Needs Adjudication
8	24	29

**STATUS OF THE 448 CLOSED NATIVE ALLOTMENTS
WITHIN THE TONGASS NATIONAL FOREST**

Closed - Certificate of Allotment Issued	49
Rejected - Shields Decision (ancestral use or did not predate withdrawal)	301
Rejected - Not Timely Filed with the Department	12
Rejected- Statutory Life of the Application Expired (did not file use and occupancy within 6 years of filing the application)	5
Closed - Insufficient land description	27
Rejected - Hearing held. Allotment rejected by Administrative Law Judge Decision	3
Closed or Rejected - Reason not indicated on the case file abstract.	41

8

LEXSEE 698 F.2d 987

Albert SHIELDS, Jr., Heir of Albert Shields, Sr., et al., Appellants, v. UNITED STATES of America, et al., Appellees

No. 81-3120

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

698 F.2d 987; 1983 U.S. App. LEXIS 30744

June 8, 1982, Argued and Submitted

February 7, 1983, Decided

PRIOR HISTORY:

[**1]

Appeal from the United States District Court for the District of Alaska

DISPOSITION:

AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, a class of applicants for land allotments, challenged a judgment of the United States District Court for the District of Alaska, which granted summary judgment to appellee United States on a suit by appellants which sought review of the denial of their applications for land allotments under the Alaska Native Allotment Act, Pub.L. No. 171, 34 Stat. 197 (1906)(amended 1956, repealed 1971).

OVERVIEW: Appellants, a class of applicants for land allotments, were certified as a class by the district court in a suit against appellee United States filed by one class member seeking review of an appeal of the Interior Board of Land Appeals which affirmed the Bureau of Land management's denial of the class member's application for a land allotment under the Alaska Native Allotment Act (Act). Pub.L. No. 171, 34 Stat. 197 (1906)(amended 1956, repealed 1971). The district court granted appellee's motion for summary judgment. On appeal, the court affirmed. The court held that Alaska natives applying for allotments within a national forest under the Act must establish personal, rather than

ancestral, use and occupancy of the land prior to establishment of the national forest.

OUTCOME: The court affirmed the district court's grant of summary judgment to appellee United States in a suit under the Alaska Native Allotment Act (Act) brought by appellants, a class of applicants for land allotments, because the Act required personal use and occupancy of the land by the applicants.

LexisNexis(TM) HEADNOTES - Core Concepts

Governments > Native Americans > Property Rights
[HN1] See 43 U.S.C.S. § 270-2 (repealed 1971)

Governments > Legislation > Interpretation

[HN2] In interpreting statutes the appellate court's objective is to ascertain the intent of Congress. The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used

JUDGES:

Wright, Skopil and Alarcon, Circuit Judges.

OPINIONBY:

SKOPII

OPINION:

[*988] SKOPII, Circuit Judge.

Appellant class, approximately 200 applicants for allotments under the 1906 Alaska Native Allotment Act, appeal a district court decision holding that the Allotment Act requires the applicant to establish personal, rather than ancestral, use and occupancy of the

land prior to its withdrawal for national forests. We affirm.

I.

In 1906 Congress passed the Alaska Native Allotment Act, Pub.L. No. 171, 34 Stat. 197 (amended 1956, repealed 1971), which authorized the Secretary of the Interior to grant Alaska Natives allotments of up to 160 acres. In 1956 Congress amended the Allotment Act, Act of Aug. 2, 1956, Pub.L. No. 931, 70 Stat. 954 (codified at 43 U.S.C. § § 270-1 to 270-3 (1970) (repealed 1971)) ("Allotment Act").ⁿ¹ The text of the 1906 Allotment Act became section 1, and was amended to allow alienation. Section 2 provided that allotments in national forests could be made

"if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary [**2] of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

Section 3 provided that no allotment (whether in or outside a national forest) could be made except on proof of five years "substantially continuous use and occupancy" by the applicant.

ⁿ¹ The Allotment Act was repealed by section 18 of the Alaska Native Claim Settlement Act ("ANCSA"), 43 U.S.C. § 1617, with a savings clause for applications pending on December 18, 1971, 43 U.S.C. § 1617(a).

On December 13, 1971 Albert Shields, Sr. filed an application for an allotment of 160 acres of land presently within the Tongass National Forest. The land for which he applied had been withdrawn for national forest use by presidential proclamation on February 16, 1909. Mr. Shields alleged that his grandfather had lived on this land beginning in the 1850's. Mr. Shields was born in 1915, and his use of the land began in 1920. The BLM rejected Mr. Shields' application for allotment because [**3] he had failed to demonstrate either personal use prior to the withdrawal or that the land was chiefly valuable for agricultural grazing purposes. The Interior Board of Land Appeals ("IBLA") rejected Mr. Shields' appeal for the same reasons. 23 IBLA 188 (January 5, 1976).

Mr. Shields filed this action in district court in the District of Columbia on February 23, 1977 to review the IBLA denial of the application for allotment. The case was transferred to the District of Alaska on motion of the United States. The plaintiff, Albert Shields, Sr., died on

November 13, 1977 and Albert Shields, Jr. was substituted as plaintiff.

The district court certified a plaintiff class of all Alaska Natives who had made timely application for allotments under the Alaska Native Allotment Act for land located within a national forest whose applications had been denied on the grounds that they cannot establish personal occupancy of that land prior to the forest withdrawal. Both sides filed cross-motions for summary judgment.

On January 9, 1981 the district court granted the government's motion for summary judgment and held that Alaska Natives applying for allotments within a national forest under the [**4] 1906 Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest. *Shields v. United States*, 504 F. Supp. 1216 (D Alaska 1981).

[*989] II.

The sole issue before us is whether Alaska Natives applying for allotments within a national forest under the Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest.

III.

Section 2 of the Alaska Native Allotment Act, as amended in 1956, provides:

[HN1]

"Sec. 2. Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

43 U.S.C. § 270-2 (1970) (repealed 1971) (emphasis added). The government contends the statute requires that the applicant must personally have occupied the land prior to the withdrawal; appellant claims that occupancy by a direct ancestor is sufficient.

[HN2] In interpreting statutes the [**5] court's objective is to ascertain the intent of Congress. *Philbrook v. Glodgett*, 421 U.S. 707, 95 S. Ct. 1893, 44 L. Ed. 2d 525 (1975). The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *Hughes Air Corp. v. Public Utilities Comm.*, 644 F.2d 1334 (9th Cir 1981). The language of the statute, however, does not aid our search for congressional intent. The statute does not indicate whether personal or ancestral occupancy is required.

Appellants argue that unless section 2 is read to require only ancestral occupancy, the additional requirement of five years use and occupancy in section 3 would be rendered meaningless, in violation of the rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless. *Hughes Air Corp.*, *supra*, at 1337; *Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978), *cert. denied*, 442 U.S. 930, 99 S. Ct. 785, 61 L. Ed. 2d 298 (1979); *Patagonia Corp. v. Board of Governors of Federal Reserve System*, 517 F.2d 803 (9th Cir. 1975). This argument is meritless. [**6] The section 3 five year occupancy requirement applies to allotments under both sections 1 and 2. Section 1 authorizes allotments from any public lands in Alaska, while section 2 authorizes allotments under specific conditions from national forest lands. Thus, the personal occupancy requirement of section 3 has meaning as applied to section 1 allotments, regardless of the interpretation of section 2.

Because the language of the statute does not reveal congressional intent, we must look to the legislative history. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868 (9th Cir. 1981). The 1956 amendments to the 1906 Alaska Native Allotment Act began as a House Bill, HR 11696. The House Report states that sections 2 and 3 "[safeguard] the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest. ..." H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2 (1956) [hereinafter cited as House Report]. Congress was concerned that the 1956 amendments which permitted alienation of allotments would allow some natives to secure [**7] land in national forests for the purpose of selling it. *Id.*

The Senate Report clearly states that "allotments may be made in the national forests ... if the native had occupied the land prior to the establishment of the forest." S.Rep. No. 2696, 84th Cong., 2d Sess. 1, reprinted at 1956 U.S.Code Cong. & Ad.News 4201, 4202 (emphasis added). This indicates that personal, rather than ancestral, use is required.

Both the House and Senate Reports are clear that sections 2 and 3 were "enacting into law the substance of the Department's present regulations on the subject" of allotments. House Report at 4, Senate Report at 4, reprinted in 1956 U.S.Code & Ad.News [**90] at 4204. We therefore look to the Department of the Interior's contemporaneous regulations for the interpretation of "occupancy."

The early regulations of the Department of the Interior relating to allotments within national forests required that allotments must be "founded on actual occupancy prior to the establishment of the forest." 48 L.D. 70, 71 (1921), 50 L.D. 27, 48 (1923), 51 Pub Lands Dec. 145, 145-46 (1925) (emphasis supplied). In 1935 the Department dropped the word "actual" from its [**8] regulations, and from then on utilized the "founded on occupancy" language that was subsequently enacted into the amended *Alaska Native Allotment Act* 55 Interior Dec. 282, 283 (1935), 43 C.F.R. § 67.7 (1938-1954); 43 C.F.R. § 67.2 (1958); 43 C.F.R. § 22.12.9.2(c) (1965), 43 C.F.R. § 256.10-8(c) (1977). The regulations contain no explanation of what is meant by the term "occupancy," nor any indication that the deletion of the word "actual" indicated a change in legal rights.

The administrative practice with regard to these regulations at the time of the 1956 amendments gives little aid in determining the meaning of the term "occupancy." There has been minimal implementation of the Native Allotment program. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1015 (D.Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888, 101 S. Ct. 243, 66 L. Ed. 2d 113, 101 S. Ct. 244 (1980). S.Rep. No. 405, 92d Cong., 1st Sess. at 91 (1971). As of the time of congressional consideration of the 1956 amendments, a total of 79 allotments had been made pursuant to the 1906 Act. House Report at 3. There are very few reported decisions of the Department of the [**9] Interior regarding these allotments. The earlier published decisions do not address the issue in this case, as they involved natives whose personal use of the land predated the establishment of the national forest (the national forest having been recently established). *Yakutat & Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 L.D. 362 (1921), *Frank St. Clair*, 52 L.D. 597 (1929).

In several unpublished decisions in the 1950's the Bureau of Land Management permitted allotments on the basis of ancestral rather than personal occupancy. *Jack Gumble*, Anchorage 017456 (August 10, 1951) (decision by Director of BLM); *Charles G. Benson*, Juneau 011549 (August 24, 1961), *John Littlefield*, Anchorage 133471 (April 28, 1961). However, these decisions were unpublished and of little precedential value.

Since the 1956 amendments the only published I.B.L.A. decisions regarding allotments, involving about 200 consolidated cases in the 70's, held that personal occupancy was required by the Allotment Act. *Louis P. Simpson*, 20 I.B.L.A. 387 (June 16, 1975), petition for reconsideration denied, 41 I.B.L.A. 229 (Oct. 30, 1975); *Mary Y. Paul*, 21 I.B.L.A. 223 (July 31, [**10] 1975); *Christine Laverne Hanlon*, 23 I.B.L.A. 36 (December 2, 1975); *Estate of Benjamin Wright*, 23 I.B.L.A. 120

(December 23, 1975); *Nadja Davis Gamble*, 23 I.B.L.A. 128 (December 23, 1975); *Albert Shields, Sr.*, 23 I.B.L.A. 188 (January 5, 1976); and *Arthur R. Martin*, 41 I.B.L.A. 224 (June 27, 1979). The Board dismissed the 1950's decisions of *Gamble*, *Benson*, and *Littlefield* as possibly erroneous and nonprecedential. *Louis P. Simpson, supra*, 41 I.B.L.A. 229 (petition for reconsideration).

Appellants argue that they should prevail because ambiguous language should be construed in favor of the natives. When unresolved ambiguity exists, this court has applied that familiar canon of statutory construction. E.g., *Escondido Mutual Water Co. v. F.E.R.C.*, 692 F.2d 1223, 1236-37 (9th Cir. 1982); *Rehner v. Rice*, 678 F.2d 1340, 1348 (9th Cir.), cert. granted, 459 U.S. 966, 103 S.Ct. 291, 74 L.Ed. 2d 275 (1982). Nonetheless, we agree with the district court that the canon is but a guideline and not a substantive law. *Shields*, 504 F.Supp. at 1219, n. 25. The canon of construction cannot be used by the courts to accomplish what Congress did not intend. [**11] *Andrus v. Glover Construction Co.*, 446 U.S. 608, 619, 100 S.Ct. 1905, 1911, 64 L.Ed. 2d 548 (1980). Nor can the canon be used to judicially legislate. *Blackfeet Tribe of Indians v. Groff*, 729 F.2d 1185, at slip op. at 5838 (9th Cir. 1982).

[*991] Here, the language of the statute is not conclusive. Nevertheless, the legislative and administrative history is sufficient for us to construe the intent of Congress. Further, it is appropriate to give great weight to the construction given to a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed. 2d 616 (1965). For example, in *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), cert. denied, 389 U.S. 1046, 88 S.Ct. 764, 19 L.Ed. 2d 838 (1968), we were presented with an ambiguous statute with no enlightening legislative history. We declined to apply the canon of liberal construction because we found sufficient administrative practice to warrant judicial deference. *Assiniboine*, 378 F.2d at 432.

CONCLUSION

After reviewing the legislative and administrative history, we conclude that Congress intended to limit allotments [**12] on national forest lands to those individuals whose personal occupancy antedated the withdrawal of the land for the national forest. Accordingly, the decision of the district court is AFFIRMED.

ALBERT SHIELDS, JR.,
Heir of Albert Shields, Sr.,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellee.

Certification Required by Ninth Circuit
Court of Appeals Rule 13(e)

The undersigned, counsel of record for Appellant certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of the court to evaluate possible disqualification or recusal.

All class members as defined by the District Court. This Court's decision will determine whether their applications for Native Allotments will be adjudicated pursuant to the Act of May 17, 1906, 34 Stat. 197. The class is defined thus:

- (1) All Alaska Natives who made timely application for allotments under the Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197 as amended, 70 Stat. 954 (1956) for land which is located within a national forest and whose applications have been or will be denied on the grounds that they cannot establish their personal use of that land prior to the forest withdrawal.
- (2) Where the allotment applicants described in paragraph (1) above are deceased the heirs or devisees of the decedent's interests in the allotment.

EXHIBIT 4
Page 1 of 4

This definition includes the following persons known to counsel, their heirs and assigns.

Albert Shields, Sr.
Hazel Marjorie Bennett
Cyril George
James D. Howard
Elizabeth Martin
Lydia M. George
Gerald Jackson, Sr.
William E. Howard
Louis R. Howard
Kelly James
Charles B. Jackson, Sr.
Carl Marvin, Sr.
Frederick Simpson, Sr.
Cecelia Greenewald
Rosie Edenshaw
Mary S. Lauth
Woodrow F. Morrison
Ronald C. John, Sr.
Harold R. Allard
Henry W. Leask
Cecil Delbert Charles
Rudolph Smith
Annie Turnmire
Harvey F. Leask
Edward W. John
Deborah A. Dalton
Annabelle Peele
Austin D. Hammond, Jr.
Walter Williams
Lillian Hammond
Frank A. Young, Sr.
Ester Littlefield
Francis D. Hanson
Joseph C. Williams, Sr.
Carolyn L. Martin
William Nelson
Albert Frank
Eddie L. Jack, Sr.
Scotty Jackson
Charlie Jim, Sr.
William S. Sutton
Frank R. Lauth, Jr.
David S. Peele
Ida B. Gallagher
Charles B. Metz
Daniel P. Henry
Lyle T. Martin

Louis P. Simpson
Robert G. James, Sr.
Adeline M. Jim
George Dalton, Jr.
Peter Olaf Howard, Jr.
Jones C. Yeltatzie
Martha L. Decker
George R. Howard
Frank See
Dennis Jackson
Rollo Shaguanie, Jr.
Charles Jimmie, Sr.
Richard K. Dalton, Jr.
Florence E. Howard
Robert W. George, Sr.
Thomas L. Morrison
Phillip Williams
Elizabeth M. Gardner
Charles M. John
Harriet J. Knudson
Dennis H. Gray
Ruby Smith
Albert F. Lauth, Sr.
Nana P. Estus
Edward N. Kunz, Sr.
Mary Willis
Agnes M. Keller
Harriet P. McAllister
Glenn G. Howard
Robert R. Martin, Jr.
William Jim
Paul Johnny
Austin P. Hammond, Sr.
Violet Hamilton (deceased)
Darlene T. Martin
Lilly L. Demmert
Charlie Joseph, Sr.
Charlie Jackson, Jr.
Pauline Jim
Norman Edward Nelson
Virginia Amy Y. Demmert
Frank Lauth, Sr.
David Abraham
Lawrence T. George, Sr.
Annie B. P. Esmino
George Jim, Sr.
Edith M. Renner

EXHIBIT 14

Page 2 of 4

Sam Newman
 Willie Jackson
 Forest DeWitt, Sr.
 Frank M. Williams
 Chester James, Jr.
 James Demmert, Sr.
 Richard Bean
 Oscar W. Osborne
 Robert H. Gray, Jr.
 William B. Thomas
 George M. Ramon
 John Howard, Sr.
 Violet M. Dalton Blakely
 Tommy L. Jackson, Sr.
 Loren Jackson
 Elizabeth Torres
 William P. Aragon
 Perry Brown
 Paul Wilson, Jr.
 Elsie L. John
 David M. Howard
 Robert J. Peratrovich, Sr.
 (Robert J. Peratrovich, Jr., Heir)
 Jessie Gray
 Sarah B. Williams
 George F. Adams
 Helen L. Trout
 Raymond Mork
 Peter J. Lundy
 George A. Davis
 Mary J. Johnson
 Bernice M. Obert
 Sandra Y. Arca
 Annie Bennett
 Nadja Davis Gamble
 Arthur J. Demmert, Jr.
 Gabriel D. George
 Tommy Jackson, Jr.
 Johnny Jack, Sr.
 Franklin R. James
 Charlie Jim, Jr.
 Mrs. Jenny Jim
 Martin Johnson
 Stella Brown Adams
 Mike Jackson
 Pat C. Ware
 Melvin L. James
 Fanny D. Brown
 Jacob White, Sr.
 Della M. J. Cheney

Bernice George Peery
 William A. James
 Henry Katasse
 Mary Y. Paul
 Samuel G. Johnson
 Martha E. James
 Leo Houston, Sr.
 Bertina B. Peterson
 Chester James, Sr.
 Minnie D. Johnson
 Andrew Gamble, Sr.
 Helene James
 Herman Davis
 Gary Jackson
 Daisy Frank
 Mary Jim Joseph
 Tommie J. Immie
 Alex G. Johnson
 Eliza York
 Leonard Gilbert John
 Pete Howard
 Elizabeth Vivian Houston

George Dalton, Sr.
 Margaret Ethel Martin
 Franklin Williams
 Charles M. DeWitt
 Delores E. Yadao
 David John
 Lillian J. John
 Elsie H. Wilson
 Christina Laverne Hanlon
 Andrew Gordon McKinley
 Benjamin A. Wright
 Arthur R. Martin
 Patrick W. Gardner
 Norman Jackson
 Roger L. Howard, Sr.
 Willy Jack, Sr.
 Andrew Jim
 Frank Jim
 Joseph B. Jim
 Moses Johnson
 William H. Samato, Sr.
 Claudine M. Laws
 Woodrow W. Morrison
 William G. Demmert, Sr.
 George W. Nelson, Jr.
 Benson Kadake
 Eli J. Howard

Elsie M. Johnson
Joan E. Wilson
Mrs. Mary B. Johnson
Paul F. James, Sr.

William S. Johnson
Bessie Rose Williams
Amy G. Walker
Warren Sheakley, Sr.

All native village or regional corporations which have top-filed pursuant to 13 U.S.C. §1611 on land now claimed for an allotment by a class member. The decision will not affect the amount of land to which a corporation may receive title, but it may affect the precise tracts of land available for conveyance to the corporations. Those corporations which may be affected are:

Kootynoowee, Inc.
Puna Totem Corp.
Klawock Heenya Corp.
Cape Fox Corp.
Shee Atika Inc.
Sealaska Inc.
Native of Afognak, Inc.
Ouzinki Native Corp.
Chugach Natives, Inc.
Shuyak Inc.

Shaan Seet, Inc.
Kake Tribal Corp.
Klukwan, Inc.
Yak-tat Inc.
Goldbelt Inc.
Koniag Inc.
Titnik, Inc.
Cook Inlet Region, Inc.
Eyak Corp.

Craig D. Tillery
Craig D. Tillery
Attorney of Record for Appellant

Albert SHIELDS, Jr., Heir of Albert Shields, Sr., Plaintiffs, v. UNITED STATES of America et al., Defendants

No. A 77-66 Civil

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

504 F. Supp. 1216; 1981 U.S. Dist. LEXIS 10252

January 9, 1981

COUNSEL:

[**1]

Alaska Legal Services Corporation, Craig Tillery, Mike Jeffrey, Gregory O'Leary, Richard Brown, Anchorage, Alaska, for plaintiffs.

Rene Gonzalez, U. S. Atty., District of Alaska, Anchorage, Alaska, John M. Allen, Bruce Schultheis, Dept. of Interior, Anchorage, Alaska, for defendants.

OPINION BY:

FITZGERALD

OPINION:

[*1216]

OPINION

This case presents a single issue: Must Alaskan Natives applying for allotments within a national forest under the 1906 Alaska Native Allotment Act establish personal use and occupancy of the land prior to establishment of the forest? n1 Resolution of the issue turns on the construction given section 2 of the 1956 Amendments to the Native Allotment Act. n2

n1. This court has jurisdiction under 28 U.S.C. § 1353 (1976) and 25 U.S.C. § 345 (1963). *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976). This case is before this court on review of a final decision by the Interior Board of Land Appeals denying Albert Shields, Sr.'s application for allotment.

n2. Act of May 17, 1906, 34 Stat. 197, as amended; Act of August 6, 1956, 70 Stat. 954.

repealed by the Alaska Native Claims Settlement Act, § 18, with a savings clause for applications pending on December 18, 1971, 43 U.S.C. § 1617(a) (1980).

[**2]

Sec. 2 Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

The precise question is what the Congress meant by "founded on occupancy of the [*1217] land prior to the establishment of the particular forest..." The plaintiff claims that the applicant must demonstrate that Native occupancy was established prior to the applicable withdrawal for the forest. The defendants contend that the applicant must personally have occupied the land prior to the withdrawal.

Plaintiffs consist of a class of Alaska Natives who have applied for allotments under the 1906 Alaska Native Allotment Act. The land they seek is located within a national forest and was occupied by Alaska Natives prior to the forest withdrawal, but plaintiffs are unable to establish their personal use of it before its withdrawal.

THE 1906 ACT

The Treaty of Cession n3 in which the United States obtained Alaska by purchase from Russia in 1867 did not address the property [**3] rights of the Native inhabitants. It provided only that the Natives would be subject to such laws as the United States might adopt with respect to the aboriginal tribes. n4 The Organic Act

of 1884 n5 contained the first mention of the property rights of Alaskan Natives. Section 8 provided:

n3. Treaties of March 6, 1867, 15 Stat. 539.

n4. *United States v. ARCO*, 435 F. Supp. 1009 (D. Alaska 1978), aff'd 612 F.2d 1132 (9th Cir. 1980), cert. denied 449 U.S. 888, 101 S. Ct. 243, 66 L. Ed. 2d 113 (1980).

n5. Act of May 17, 1884, 23 Stat. 24.

... that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress

In 1887 Congress enacted the General Allotment Act n6 which provided:

n6. 25 U.S.C. § 334.

[**4]

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive Order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children . . .

Since in several decisions Alaskan Natives had been found not to be within the definition of "Indian", there was doubt whether the General Allotment Act applied to Alaskan Natives. Congress moved in 1906 to eliminate this doubt n7 by passing the Alaska Native Allotment Act, which provided in part: n8

n7. *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

n8. Act of May 17, 1906, 34 Stat. 197, as amended, Act of August 6, 1956, 70 Stat. 954, repealed by the Alaska Native Claims Settlement Act, § 12, with a savings clause for applications pending on December 18, 1971, 43 U.S.C. § 1617(a) (1980).

[**5]

That the Secretary of the Interior is hereby authorized and empowered in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

In 1910 Congress amended the General Allotment Act n9 to allow for allotments in the national forests.

n9. 25 U.S.C. § 337.

The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the [**6] general allotment laws, to any Indian occupying, living on, or having improvements on land included within [**1218] any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

No such amendment was made to the Alaska Native Allotment Act despite the fact that some sixteen million acres of Native lands were set aside by presidential proclamations in 1902, 1907 and 1909 to create what is now the Tongass National Forest. n10 Additional land was set aside by presidential proclamation for the Chugach National Forest commencing in 1907. n11

n10. See *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 466-67, 147 Ct Cl 315 (1959) [**7]

n11. Presidential Proclamation of July 23, 1907.

The early decisions of the Department of the Interior relating to allotments within national forests required "actual" occupancy prior to the establishment of the national forest. n12 However, this requirement was dropped in 1935 n13 in favor of the "founded on occupancy" language at issue in this lawsuit. The earliest published regulations of the Department of the Interior incorporated this language as well as a provision of the 1910 General Allotment Act making land included within a national forest available for allotment if it was chiefly valuable for agriculture or grazing and personally occupied by the applicant. n14

n12. 48 *Pub. Lands Dec.* 70, 71 (1921); 50 *Pub. Lands Dec.* 27, 48 (1923); 51 *Pub. Lands Dec.* 145, 146 (1925).

n13. 55 *Pub. Lands Dec.* 282, 283.

n14. 43 *C.F.R.* 67.7 (1940).

The Allotment Act, as adopted in 1906, provided that allotments were [**8] inalienable unless otherwise provided by Congress. The 1956 Amendments to the Act were designed to rectify this situation. n15 As originally introduced, the bill addressed only the alienation issue. n16

n15. H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956).

n16. H.R. 10505, 84th Cong., 2d Sess. (1956).

Apparently some concern was expressed in the House Subcommittee that Alaska Natives might seek allotments in the national forests solely for the purpose of selling the land to others. To eliminate this danger the substance of the Interior Department's regulations on the subject were enacted into the bill. A report from the Department of the Interior concerning this legislation n17 stated:

n17. H.R. Rep. No. 2534, 84th Cong., 2d Sess. 4 (1956).

Subsection (e) of the enclosed substitute bill (Sections 2 and 3 of the Act) contains [**9] the subcommittee recommendations that are designed to

safeguard the national forests. Some fear was expressed during the subcommittee hearings that the authority to sell homesteads might encourage Indians and Eskimos to seek homestead allotments in the national forests for the purpose of selling them to others. This danger is effectively obviated by enacting into law the substance of the Department's present regulations on the subject, which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

The House Report n18 echoed the Department's analysis:

n18. *Id.* at 2.

Subsection (e) safeguards the national forests by enacting into law the substance [**1219] of present regulations which prohibit homestead [**10] selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

The Senate Report n19 was even more explicit on the occupancy requirement:

n19. S. Rep. No. 2696, 84th Cong., 2d Sess. 1 (1956).

Allotments may be made in the national forests if the land is chiefly valuable for agricultural or grazing purposes, or if the native had occupied the land prior to the establishment of the forest.

Early administration practice, n20 while sparse, n21 appears to have required individual occupancy of the land prior to the forest withdrawal. Although there were some exceptions to this practice, n22 since the 1956 Amendments, the Department has consistently required individuals seeking allotments to establish their own use and occupancy of [**11] the land prior to the establishment of the particular forest withdrawal. n23

n20. See e.g. *Yakutat and Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 Pub. Lands Dec. 362, 364 (1921); *Frank St. Clair*, 52 Pub. Lands Dec. 597, 598 (1929).

n21. Although the Native Allotment Act dates back to 1906, few certificates of allotment were granted under the Act for the first 50 years. As of November 8, 1955, a total of 79 allotments had been made pursuant to the Act, and 64 additional applications were under consideration. S.Rep.No.2696, 84th Cong., 2d Sess. (1956).

n22. See exhibits 25-27 to Plaintiffs' Motion for Summary Judgment.

n23. See e.g. *Louis P. Simpson*, 20 IBLA 387 (1975); *Mary Y.*, 21 IBLA 223 (1975); *Christina Laverne Hunion*, 23 IBLA 36 (1975); *Estate of Benjamin Wright*, 23 IBLA 120 (1975); *Nadia Davis Gwable*, 23 IBLA 128 (1975); *Arthur R. Martin*, 41 IBLA 224 (1977). On petition for rehearing in the Simpson case the IBLA indicated that those earlier decisions (see note 22) which did not require proof of personal occupancy prior to the withdrawal were erroneous. 41 IBLA 229-30 (1979).

[*12]

It is obvious that when Congress amended the 1906 Act it gave great weight to the Interior Department's interpretation and practices regarding the statutory language at issue. Such circumstances are persuasive evidence that the interpretation urged by the agency is the one intended by Congress. n24 This principle is especially true when, as here, there are long-standing administrative decisions interpreting the availability of land for Native selection, acceptance of that interpretation by Congress, and enactment of legislation prepared by the agency charged with administration of the Act. n25

n24. *Udall v. Tallman*, 380 U.S. 1, 16-18, 85 S. Ct. 792, 801-02, 13 L. Ed. 2d 616 (1965); *Russ v. Wilkins*, 624 F.2d 914, 922-24 (9th Cir. 1980).

n25. Plaintiffs argue vigorously that the principle of statutory construction requiring ambiguities and doubtful expressions in statutes passed for the benefit of Indians to be resolved in favor of Indians dictates a ruling in their favor.

This canon, however, is only a guideline, not a substantive law and should not be used to defeat the manifest intent of Congress. *U.S. v. Atlantic Richfield Co.*, 612 F.2d 1132 (9th Cir. 1980), cert. denied 449 U.S. 888, 101 S. Ct. 243, 66 L. Ed. 2d 113 (1980).

[**13]

Based on the administrative and legislative history, I conclude that Congress was primarily concerned with allowing for alienation of allotments when it amended the Alaska Native Allotment Act in 1956. Due to its concern that such legislation might encourage the selection and sale of such allotments within national forests, Congress enacted into law the substance of then existing regulations on the subject. I conclude that the intent of Congress in this regard was to restrict allotments within national forests n26 by prohibiting them except: [*1220] to those individuals who could demonstrate personal occupancy of the land prior to the establishment of the forest or unless the land selected is chiefly valuable for agricultural or grazing purposes. I find, therefore, that the language "founded upon occupancy of the land prior to the establishment of the particular forest" requires Alaska Natives who seek allotments within a national forest to demonstrate their personal use and occupancy of that land prior to the establishment of the forest.

n26. Plaintiffs have strongly argued that Congress could not have intended to require personal use and occupancy of the land prior to the forest withdrawal since the withdrawals occurred in the early 1900's and few Native Alaskans, if any, would have been eligible for allotments when the Act was amended in 1956. This argument assumes, however, that the purpose of the amendments was to assure the right to allotments in the national forests. On the contrary, the purpose of the amendments appears to have been the safeguarding of the national forests from allotments sought only for sale.

[**14]

Plaintiffs' Motion for Summary Judgment is, therefore, DENIED. Defendants' Cross Motion for Summary Judgment is GRANTED and the case is DISMISSED.

9

**STATUS OF HOMESITES/HEADQUARTER SITES
HOMESTEADS AND TRADE & MANUFACTURING SITES
WITHIN THE
TONGASS NATIONAL FOREST
March 4, 1999**

CASE TYPE	CONVEYED	CLOSED	TOTAL
Homesites & Headquarter Sites	622	265	887
Homesteads	280	259	539
Trade & Manufacturing Sites	65	50	115



10

Native Allotment Statistics as of January 2, 2002CLOSED

Closed, Certificated:	10,119
Closed, Not Certificated:	<u>2,514</u>
Total Closed	12,633

ACTIVE (Includes Pending and Approved)

Total Active Title Recovery:	1,110	(1/3 of total)
Total Active Non-Title Recovery	<u>2,235</u>	(2/3 of total)
Total Active	3,345	
Pending, Title Recovery	918	(83% of active TR cases are unapproved)
Pending, Non-Title Recovery	<u>565</u>	(25% of active non-TR cases are unapproved)
Total Pending	1,483	(44% of total active cases are unapproved)
Approved, Title Recovery	192	(17% of active TR cases are approved)
Approved, Non-Title Recovery	<u>1,670</u>	(75% of active non-TR cases are approved)
Total Approved	1,862	(56% of total active cases are approved)

Total Parcels, Active and Closed 15,078

A large percentage of active non-Title Recovery cases are approved (75%), but only 17% of non-Title Recovery cases are approved. This low percentage results from the fact that we do not issue formal approval decisions on Title Recovery cases because we have no jurisdiction over the land. We make validity determinations, but only recently (within the past month) did we get approval for a specific action code to reflect that a case has been determined valid. In the past our notation of validity determinations in ALIS was haphazard at best - some such determinations were only noted in the general remarks field of the abstract, many were not noted at all. Consequently ALIS does not currently reflect the approved/non-approved status of all Title Recovery cases.

The terms "active" and "pending" are not synonymous. For purposes of this report, "active" simply means a case is not closed. The term "pending" means, with regard to Native allotment applications, that an application has not yet been approved. This distinction is significant because management responsibility for Native allotment applications transfers from BLM to BIA at the time of approval. The number of active Native allotment applications should equal the total of those pending and those approved, and all Native allotment applications are either pending or approved but not both.



1

1



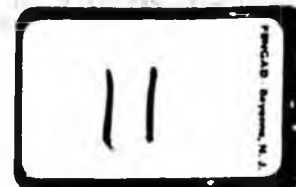
United States Department of the Interior

BUREAU OF LAND MANAGEMENT
ALASKA STATE OFFICE
222 W. 7th Avenue, #13
ANCHORAGE, ALASKA 99513-7599

Native Allotment Adjudication

ALL REGIONS

November 29, 2002



Alaska Native Veteran Allotment Application Statistics as of November 22, 2002

Applications Received	743
Number of Parcels	992
Number of Applications without Land Descriptions	243
Number of Parcels Rejected	176
Number of Parcels Appeals have been Filed On	40
Number of Parcels Appeals have been Dismissed On	10
Number of Parcels Field Exams Requested for	85

Reasons for Rejections (Some parcels were rejected for more than one reason):

Land Applied for was Previously Conveyed	62
Non-Resident	14
Tongass N.F. (U/O doesn't predate withdrawal)	14
Nunivak Island (U/O doesn't predate withdrawal)	3
Katmai National Preserve (U/O doesn't predate)	3
Kenai Moose Range (U/O doesn't predate withdrawal)	2
Chugach N. F. (U/O doesn't predate withdrawal)	3
Denali N. P. (U/O doesn't predate withdrawal)	1
St Lawrence Island (U/O doesn't predate withdrawal)	1
Failure to Correct Application Deficiencies	2
Ineligible Military Service Dates	42
Inactive National Guard Service	14
Less Than Honorable Military Service	1
Applicant has a pending 1906 NA Appln/Allotment	2
Cause of Death	2

12

Fact Sheet



Alaska Department of
**NATURAL
RESOURCES**

Division of Mining, Land & Water
March 2000

Title: Land Ownership In Alaska

Current land ownership in Alaska can be traced back to three main events in the state's history.

- ♦ Russian traders arrived in Alaska in the mid-1700's and established small, scattered trading posts and settlements. Alaska Natives (the Eskimo, Indian, and Aleut peoples) continued as the primary "landowners" during this period of Russian occupation.

On October 18, 1867, Russia sold Alaska to the United States government. As a result, the federal government owned the Alaska Territory, approximately 375 million acres (about one-fifth the size of the continental U.S.).

- ♦ Alaska became a state in 1959. The federal government granted the new state 28% ownership of its total area. Approximately 103,350,000 acres were selected under three types of grants: Community (400,000 acres), National Forest Community (400,000 acres), and General (102,550,000 acres). Additional territorial grants, for schools, university and mental health trust lands, totaling 1.2 million acres were confirmed with statehood. All grants combined gave the State of Alaska approximately 105 million acres.
- ♦ In 1971 Congress passed the Alaska Native Claims Settlement Act (ANSCA). This law granted 44 million acres and 1 billion dollars to village and native corporations created under the act. Generally, ANSCA gave Native selections priority over state land selections.

State Land

To date, the state has received patent to approximately 85% (90 million acres) of its total land selections. The state was permitted to select lands, from any federal land not already reserved for other uses, to provide:

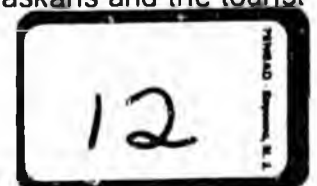
1. Land and resources to support the state's economy for road construction, economic development, and building houses, schools, and other public and private facilities.
2. A reduction in federal control over state internal affairs by giving the state ownership and jurisdiction over its own land.

The state chose land to meet three specific needs - settlement, resources and recreation.

Settlement - The State of Alaska selected land to encourage development and settlement. Land for public facilities, road construction and other public needs were included. Once owned, the state transfers large tracts of land to local governments, and leases and disposes of land to the private sector. There are approximately 580,000 acres currently in the state's land disposal bank for eventual lease or sale.

Resources - The Alaskan economy is based on exploration for and the development of natural resources. Lands were selected for agriculture, forestry, commercial fisheries, mining potential, oil and gas development, and wildlife habitat.

Recreation - Lands for wildlife, back-country recreation, and varying degrees and types of developed recreation were chosen and reserved to provide a variety of experiences for Alaskans and the tourist industry.



Once land is selected, land planners develop state land use plans. Planners consider laws and policies set by the Governor and state legislature, the character of the land itself, recommendations made by resource experts and public input to determine the most appropriate management of currently owned or selected state land. Plans are developed for land in selected status in anticipation of its conveyance to the state.

Federal Land

The federal government is still the largest landowner in Alaska with 60% of the total area (222 million acres). This acreage includes national parks, wildlife refuges, national forests, military reservations and the North Slope National Petroleum Reserve. More than a dozen federal agencies manage federal lands in Alaska.

The majority of federally owned lands have been set aside for public use (approximately 80 million acres). These are designated as follows:

The National Park Service and Fish and Wildlife Service manage about 119.3 acres (48.3 and 71.0 million acres respectively) for primary uses of resource protection and fish and wildlife conservation.

The Forest Service and Bureau of Land Management manage about 97.7 million acres (19.8 and 77.9 million acres respectively) for multiple use purposes including timber production, fish and wildlife, recreation, water and mining. Management of these lands is based on priorities and compatibility among various uses.

The remaining federal land is designated for special purposes, such as military reservations, the National Petroleum Reserve and U.S. Postal Service lands.

Native Lands

Native lands are private lands. The Alaska Native Claims Settlement Act, passed by Congress in 1971, mandated the creation of regional and village Native corporations for the disbursement of the 44 million acres and payment of one billion dollars mandated to Native ownership.

Thirteen regional corporations were created for the distribution of ANSCA land and money. Twelve of those shared in selection of 16 million acres, the thirteenth corporation, based in Seattle, received a cash settlement only. 224 village corporations, of 25 or more residents, shared 26 million acres. The remaining acres, which include historical sites and existing native-owned lands, went into a land pool to provide land to small villages of less than 25 people.

Other Private Land

Land in private ownership (other than Native land) comprises less than one percent of the total land in Alaska. Much of the best land for development around Alaska's communities is, or will be, privately owned. Private land development meets people's needs by providing places to live, work, shop and recreate. It also provides a tax base for cities and communities to help support public services.

13

Our Choices, Our Future: Analysis of the Status of Alaska Natives Report 2004

Prepared by:
Alaska Native Policy Center
Greta J. Goto, Director
George Irvin, Project Manager
Sarah Sherry, Project Staff
Katie Eberhart, Data and Statistical Analysis

Prepared for the
Alaska Federation of Natives
July, 2004

Alaska Native Policy Center
First Alaskans Institute
606 E Street, Suite 200
Anchorage, Alaska 99501
(907) 677-1700
Fax: (907) 677-1780
www.firstalaskans.org

This report was prepared with funding from the Alaska Federation of Natives utilizing grant monies from the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services.

First Alaskans Institute is a non-profit 501 (c) 3 organization dedicated to developing the capacities of Alaska Native people and communities to meet social, economic, and educational challenges of the future. Its priorities are improving Native education, developing future Native leaders and increasing Native impact on public policy.

Alaska Native Policy Center is a project of First Alaskans Institute. The purpose of the Alaska Native Policy Center is to enable Alaska Natives to become informed about, actively involved in, and to have impact on the education, economic and social policy issues that will determine our futures as 21st century indigenous peoples.



Preface

Alaska Native Elders knew long ago that times were changing, that the pace of change would increase, and that new ways of learning would be required to meet new challenges. They knew that we would have to be able to read different kinds of signs along the trail ahead in order to understand what was coming.

Our Elders were right. Times continue to change, and the speed of change accelerates. But even so, we know that our Elders want us to keep our eyes focused on the trail, to be strengthened by our Native cultures and traditions, such as sharing and working together. That is the foundation of this report: sharing what we have learned in order to strengthen our ability to work together and to shape the world ahead.

The recently published *Status of Alaska Natives 2004* is a data report prepared by UAA's Institute of Social and Economic Research (ISER) for the Alaska Federation of Natives. It presents data on Alaska Native population, health, economic condition and education and is compiled from many sources, including the U.S. Census.

This document, prepared by the First Alaskans Institute's Alaska Native Policy Center, is an analysis of ISER's *Status of Alaska Natives 2004*. Its purpose is to give us all an understanding of what the data mean based on analysis by Native people. Its perspective rests on input from the very people whom the numbers describe. We tried to capture interpretations of the data that reflect what Alaska Natives see every day and that they intuitively understand. In seeing the data compiled in a whole piece, we may gain insights and new perspectives that serve to make the trail ahead brighter.

We know that there are many initiatives and dedicated work that good people all across the State of Alaska, Native and non-Native, are doing to address the issues raised in the data in the *Natives 2004* report. We also know that there is much more that needs to be done. We hope that this analysis provides helpful perspective and prompts meaningful initiative as Native people shape their futures.

The Alaska Native Policy Center views this analysis of the *Natives 2004* report as the beginning of a knowledge development effort to understand Alaska Native population, health, economy and education data and to share that information. The Policy Center asks for your comments on the data presented in this report (using the attached comment card or our website, www.firstalaskans.org). Did the data surprise you? What are the root causes of the issues the data raise? What actions must be taken to improve the situation?

Native Elders were right. Change has come and is coming faster still. To keep on the clear, bright trail, we must understand clearly our present status and use that knowledge to have our footsteps firmly follow in theirs.

Sincerely,

Byron I. Mallott
President and CEO
First Alaskans Institute

Greta L. Goto
Director
Alaska Native Policy Center

Background

Fifteen years ago, the Alaska Federation of Natives published its *AFN Report on the Status of Alaska Natives: A Call for Action*. That study, prepared by the Institute of Social and Economic Research (ISER) at the University of Alaska Anchorage, summarized population, health, economics and education statistics about modern Natives. In August, 2003, AFN asked UAA's ISER to update and expand the 1989 Report. AFN wanted to know how the landscape of Alaska Native well-being had changed in the intervening years.

ISER recently completed its work, entitled the *Status of Alaska Natives Report 2004* (hereafter referred to as *Natives 2004*). AFN also wanted the updated statistics to be shared with the Alaska Native Community, and it wanted to know what the Native Community thinks about the data. Accordingly, AFN contracted with the First Alaskans Institute's Alaska Native Policy Center in a knowledge development effort to:

- bring ISER's updated statistics back to the Native community in order to get feedback from Native people on what the data mean and what actions can be taken to improve the statistics; and
- write and publish an analysis of the 2004 statistics from a Native point of view, for a Native audience.

The Policy Center made 20 formal presentations of data to over 1,400 participants in meetings held in seven regions. The following facts and findings are based on the data, discussions and feedback from these meetings.

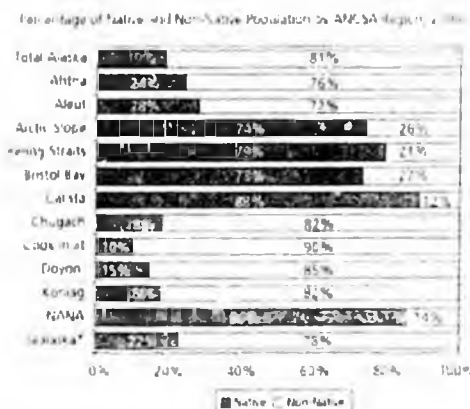
Alaska Native Population

The Facts

The majority of the Alaska Native population (58%) still lives in rural and remote Alaska, and the urban Alaska Native population (42%) is increasing. Both rural and urban Native populations are young, living longer, and experiencing a changing household composition.

- Census 2000 shows a total statewide Alaska Native population of 119,241 people (19% of the total state population of 626,932).
- 82% of the population living in remote rural areas are Alaska Natives.
- Alaska Natives are comparatively young, with a median age of 24 years.
- More than 44% of all Natives in Alaska are 19 years of age or younger.
- The Native population is statistically balanced between males and females, 50.2% male and 49.8% female.
- 42% of all Alaska Natives live in urban Alaska, and 58% live in rural areas of the state. There is great geographical mobility among Native people, and the 2000 Census shows a trend of people moving from rural villages to regional centers and to urban areas of Alaska.
- The life expectancy of the Native population is increasing, and more people now survive to old age than in prior decades.
- If the Native population continues to grow at the rates by which it increased during the 1990's, it is predicted to number 140,000 people in the year 2010 and 165,000 in 2020.

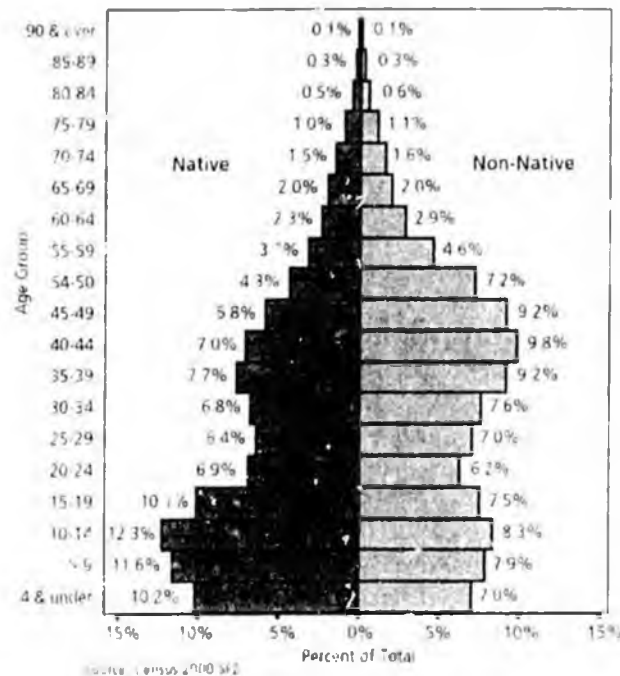
Figure ES-1. Percentage of Native and non-Native Population by ANCSA Region, 2000



*Includes Annette Island Reserve.

Source: U.S. Census 2000 (SF 2) 100-Percent Data

Figure ES-2 Alaska Statewide Native and Non-Native Population by Age Group, 2000



The Findings

When the Policy Center presented these data in meetings and discussions, it found that participants wanted to see population numbers both on a statewide level and for their respective regions. Participants wanted to see population forecasts for each of the regions for planning and decision-making. It was clear that there is a need for consistent and periodic updates of population data that regions can use for planning purposes.

Three themes emerged from the discussion on population: youth, Elders, and migration from villages to urban areas.

- **Youth** Young Native people are going to need economic opportunities to take them into their adult lives and careers. There needs to be an understanding of how young people can enter existing jobs – and jobs that might be created through economic development. Healthy

behaviors need to be encouraged and supported so young Native adults can get and keep jobs. The public education system must teach the skills needed in a modern workforce.

- **Elders** Information on the aging Native population is critical to plan for services that Elders will need for quality of life so that Elders can live where they want to live, in their home communities, with their families, surrounded by familiar faces, speaking their languages, eating their foods, free of pain and stress.
- **Migration** The Policy Center heard that many Native people are moving from the village for economic and educational opportunities and for access to health care that might not currently be available in their communities. The issue does not, or should not, stop with that simple explanation. Many participants in the discussions and regional meetings thought that the movement to regional hubs and urban areas represents deeper issues that need to be addressed, including cost of living and safety in the community.

Meeting participants were concerned with what might happen to villages if people move out. If more people from rural Alaska move into urban centers, what kinds of pressures will that place on systems of education, health, housing, transportation, public safety? Is urban Alaska prepared to deal with an influx of rural residents? How will village systems change as people move from villages?

Alaska Native Health

The Facts

Alaska Natives have witnessed major changes in the provision of health care. Recent health indicators show the progress made in health over the last four decades (1960's through 1990's).

- A new Alaska Native Medical Center in Anchorage was opened in 1997 and is operated by the Alaska Native Tribal Health Consortium.
- The Community Health Aide system has expanded to more than 170 villages.
- In recent years, 81% of Native children have been immunized for many of the common childhood diseases - a higher rate than for the entire United States.
- Native life expectancy increased from 46.4 years in 1950 to 69.5 years in 1997.
- Native infant mortality rates have decreased.
- Contributing to the decrease in diseases like tuberculosis and hepatitis are additions to housing units and improvements in safe water and sewer. Nearly 3700 new housing units were built in remote Alaskan communities in the late 1990's. 77% of rural homes had safe water and sewer by 2001.

Even with the progress made, the data indicate new and continuing disparities in the health condition of Alaska Natives compared to the non-Native population. Many of the health disparities seem to be related to alcohol abuse and changes in dietary patterns.

- Native rates of Fetal Alcohol Spectrum Disorder (FASD) doubled, from 2.5 cases per 1,000 births

in the late 1980's to 5 cases per 1000 births in the late 1990's.

- Alcohol and other substance abuse contribute to child abuse and neglect, domestic violence, sexual assault and incarceration.
- More than one-third of all prison inmates in Alaska are Natives, almost double the percentage of Natives in the total population.
- Native teen birth rates, smoking rates and use of marijuana are higher than those of non-Natives.
- About 40% of Alaska Natives smoke cigarettes, and many use smokeless tobacco.
- Thirty percent of Natives are considered obese, up from 20% in 1990's.
- Alaska Native diabetes rates doubled between 1985 and 1999.

The Findings

The data presented in the *Natives 2004* report indicate that health improvements have been made where access to health care has improved. These improvements deal with the physical side of health care, prevention, diagnosis and treatment of disease.

When the Policy Center brought selected health data to discussions and regional meetings, it found that participants were not surprised by the data. They seemed to think that the reported rates of Fetal Alcohol Spectrum Disorder (FASD), suicide and smoking were low. Everyday experience indicated higher numbers than what the data showed. As the Policy Center reviewed the data and feedback, the following were identified as health-related data about which participants wanted more information:

- **Relationships among population, health and education data.** Participants wanted to see a bigger picture that connected different age groups, risk factors that might be present for each of the age groups, and how that might affect education and economic conditions. For example, one participant at the education discussion series asked, "What are the future impacts of FASD births, drug births and HIV births on the schools, the workplace and society in general?" Another

asked, "What are the economic and social costs associated with FASD (ethical diagnosis and care of children and adults, the cost of that care, the burden placed on the education system, future impacts on the workforce, and the preventability of the problem)?" Many participants recommended continued dollars for prevention programs, diagnostic programs and funding for education of children with FASD.

- **Preventive health services** on matters of behavioral health, particularly to reduce levels of tobacco use, abuse of alcohol and/or other drugs, trafficking, obesity, and AIDS
- A clearer statistical picture of the extent of **HIV infection** among Alaska Natives. This information must be completely anonymous, and it must be gathered with strict ethical considerations
- A **reliable data base on adult alcohol consumption patterns** - by communities, regions, genders, age groups, and other important variables is needed to understand the behavior. Further research into the "underground economy" of drug and alcohol supply is needed, which links to the relationship between substance abuse and criminal behavior/incarceration
- The **extent of substance abuse**, including prescription, as well as illicit drugs
- Information on the racial composition of local and state police forces, prosecutors, public defenders, judges and magistrates and how this might affect incarceration rates
- **Comparative life expectancies** for Alaska Natives at different ages, by gender, and by different regions and communities
- Specific health needs and adequacy of current services for **Native veterans**, both men and women, and especially those who have been combat
- The health of **Native Elders**. As Alaska Natives live longer, we need to understand which specific health disorders will require more care (for example, Alzheimer's disease, other dementia, diabetes, various types of cancer, circulatory disease, lung conditions, restricted physical mobility, and Elder abuse)
- **Alaska Native mental health issues**, which are often related to substance abuse problems. We need better understanding of why substances are abused

- More complete data on **Native suicide risk factors**: gender, age groups, linkages to substance abuse or mental health problems, geographic regions. Professional care-givers need detail in order to design more effective prevention programs.

Alaska Native Economy

The Facts

The economics chapter of the *Natives 2004* report provides a broad overview of rural economies, looking at individual circumstances, the structure of rural economies, and rural and urban comparisons.

Employment data indicate that Alaska Natives are increasingly participating in the cash economy; that more Alaska Native women are employed than men, particularly in urban areas, and that younger Alaska Natives are almost as likely as non-Natives to be in the labor force. Alaska Natives continue to be under-represented in professional, managerial, technical and sales occupations. Natives are also under-represented on the personnel rosters of the federal and state governments.

- 17% (76,281) of Alaska's work force (people age 16 and older) are Native
- 33% of unemployed Alaskans are Natives
- Of all Alaskans with work experience in 2000, Natives are most heavily represented in the labor, service, clerical, operative (mainly fish processing) and craft occupations.¹

Income data indicate that Alaska Natives get the largest proportion of their income from wages and salaries and that income levels are at a continuing disparity with non-Natives. Native families that live in rural areas are especially likely to be unemployed, to have low incomes, and to live below the poverty line, compared to non-Natives, regardless of where they live.

- Native total cash income – the sum of all income from all sources – was \$1.5 billion in 2000, about 12% of Alaska's total cash income
- 71% of all income for Alaska Natives comes from wages and salaries

- Per capita Native income from wages and salaries is \$9,113, non-Native per capita wage and salary income is \$18,819

Cost of Living data clearly indicate that rural Alaskans continue to pay significantly higher cost for electricity and food. This disparity with urban Alaska has not improved and has actually worsened during the last few decades:

- Southwest Alaska pays an average price of \$0.44/kwh before the Power Cost Equalization (PCE) adjustment – compared to the average of \$0.11/kwh in Anchorage.
- In 2003, residents of Lime Village would pay \$0.80/kwh without the PCE program adjustment.²
- It takes 2.8 wage earners in Bethel to buy an average house, compared to 1.5 wage earners in Anchorage.
- The average residential customer in remote rural Alaska uses less electricity than do customers in urban areas of the state, while paying more for that electricity.
- In all but five of the last 20 years, the average cost of food for a family of four in Bethel has been 50% higher than for a family of four in Anchorage.
- More than 10% of Native households outside Anchorage do not have phones.

Poverty data also indicate continuing disparities between Native and non-Native households:

- About 20% of Native people have incomes below the federal poverty line, compared to only 7% of non-Native Alaskans.
- In 2000, one-quarter of Native families headed by a woman or a man without a spouse were below the poverty line.

Business data indicate that Native firms are making strides:

- Alaska Natives own 11% of all business firms in Alaska, a higher percentage than for Native Americans in any other state. These firms, many of which are very small operations, generate about 5% of Alaska's total business revenues.
- ANCSA regional and village corporations also have a large role in Alaska's economy, generating almost \$3 billion in annual revenues and employing 13,000 people.

- Native profit and non-profit corporations are among Alaska's largest employers and landholders, ten of them being among the 100 largest private firms in the state.

The Findings

Economic data indicators in the *Natives 2004* report showed both that circumstances had improved and that disparities still existed. For "economic development" to work in rural Alaska, regional leaders and policy-makers will need to obtain the input from the people who live in rural Alaska, both Native and non-Native. If economic development is going to work, the people who will be affected must be involved in the process.

The Policy Center found that local and regional leaders want a practical, on-the-ground understanding of the structure of local and regional economies so that they can better plan for the future. The process of how cash enters, circulates and leaves a village is an economic fact – it needs to be understood. As the Policy Center reviewed the data and feedback, the following were identified as economy-related data about which participants wanted more information:

- **Energy economies** in rural communities (for home heating, electricity and transportation) are a subset of the economy that needs to be understood. What does it cost the average family household, with and without Power Cost Equalization, for electricity? What happens to village families if PCE is reduced or eliminated? What types of home heating fuel are used, and how much does the fuel cost in villages in Alaska? People need to understand how the whole energy system in rural Alaska compares with the urban situation.
- **Food economies**, including various mixes of cash and subsistence in different villages, affect cost of living. The amount of cash needed to buy equipment and supplies used in subsistence harvesting is not fully understood.
- **Jobs** currently exist in various villages, but research is needed on how much these jobs pay, whether or not these are living wages, what levels of education and skills are required to hold the jobs,

and what job placement programs exist. What development opportunities (for new job creation) exist in villages and regions, and how will local and regional residents prepare for those jobs? How much of current local employment is dependent on public appropriations vs. private investment? How do we involve that large demographic bubble of Native children and teenagers in their own futures and economic choices?

- The economy of Alaska has been dependent on two **revenue sources**: State and federal funds. The decline of public funds will affect all Alaskans, but it will continue to hit Natives and other minorities hardest.
- For **effective planning**, linkages across data (e.g. income and education levels) must be understood by business and civic leaders and policy-makers. The world's economy is increasingly based on knowledge and communication of information. More traditional jobs, in which people manufacture things, have been decreasing. The best-paid employees in modern society work with their minds, and this requires good education and job skills from both traditional learning and from high school, technical training and college.

But disparities in educational achievement continue to worry Alaska Native parents and educators:

- In 2002, only 5% of all teachers certified and teaching in Alaska's statewide public education system were Alaska Native.
- Native high school dropout rate almost doubled in just three school years (1999-2001).
- Between fall, 2001, and spring, 2003, only 49% of Native third-grade students passed Alaska's benchmark reading test. During the same three school years, only 14.3% of Native 11th and 12th graders passed the High School Graduation Qualifying Exam's reading test.
- In 2000, 3,138 Alaska Natives were enrolled in either college or graduate school, 1071 (34%) were men, while 2067 (66%) were women.
- Less than 3% of the University of Alaska's statewide faculty was Native in the fall of 2003, and more than one-half of those were instructors, not professors.

Alaska Native Education

The Facts

Alaska Native education has seen some improvements over the last thirty years. access to local high schools and educational attainment are the most notable.

- Since 1974, 155 new high schools have been built in Alaska, mainly in villages.
- 71% of rural Alaska Natives, age 20 and over, have high school diplomas, up from 48% in 1980.
- The number of Natives who have gone on to four-year college degrees more than tripled between 1980 and 2000.
- In 2000, 73% of all Alaska Natives over the age of 18 held high school diplomas, and 25% of the same age group held bachelor degrees. Also in 2000, almost 40% of Native high school graduates had completed at least one year of college.
- There is a growing cadre of second-generation Native college graduates - those whose parents had received their own degrees.

The Findings

The data indicate improvements in Native access to education and in Native educational attainment. They also point out severe disparities that will continue if not addressed by Alaska Natives. The quality of education, its relevancy to the skills needed in the modern world, and the safety of the educational facilities are continuing disparities that must be corrected. Additional issues of educational disparity include low test scores, comparatively few Native educators, and increasing dropout rates that if unchecked will prevent many Native students from achieving their hopes and dreams.

Alaska Native leaders, school board members, parents, teachers, community leaders and policy makers need the kind of data provided in this analysis in order to have a clear understanding of Native education issues and to work to better to improve the whole picture. The Policy Center Project Team and participants in the discussions and meetings identified the following data needs:

- Research shows that **preschool child development programs** (nursery school, pre-kindergarten, Montessori, Head Start, etc.) are beneficial to early learning. We need to know which communities still lack early childhood learning programs, including **literacy programs**. Many Native students entering elementary school are at a significant disadvantage in the numbers of words they know, compared to non-Native students. This vocabulary disparity must be addressed in order for Native students to succeed in school.
- Mt. Edgecumbe High School and the Rural Alaska Honors Institute (UAF) have **successful records of high school preparation**. Cook Inlet Tribal Council has had success in working with Native students to improve their studies and bring up their test scores. What are these programs doing that is helping Native students succeed? The underlying philosophies of these programs, teaching materials and methods may be transferable to other areas of the state.
- The performance record of schools using **immersion programs** that put Native cultures, languages and Elders back into the classroom must be better understood because such programs appear to be helping student achievement as well as galvanizing community support. Participants wanted to know what effect this has on learning.
- Support for **growing teachers and administrators** is needed. How many Native people are studying to become educators, and what kind of support do they receive from the Native community? Teacher training must prepare teachers in what students need to know in order to function in today's knowledge-based society. Better information about the impacts of teacher turnover and whether or not teachers from a local community are more inclined to stay in the community and support the educational program is also needed.
- **Local school boards and their policies** are a critical part of the school and learning process. In a survey conducted by the McDowell Group,⁴ parents identified school boards and school districts as the most responsible entities for addressing issues of education. How can school boards better respond to what needs to be done to improve education for Alaska Natives?
- **High school drop out rates** must be better documented and understood. Students, as well as teachers, parents, school board members, local Native leaders and community members, need to be involved in this effort. Students know why they are dropping out and how we can help them stay in school.
- **GED numbers** need to be understood. Additionally, what are the differences in post-secondary attainment or training opportunities between those who earn GED's and those who earn high school diplomas?
- **Computer skills** are critical to success in the modern workforce. Do Alaska's schools have the necessary access to computers, the internet and methods to teach proficiency in computer skills?
- The data identified improvements in educational attainment, but a continuing gap exists, particularly in **higher education**. Strategies for how to close the gap of access to post-secondary education are needed.
- The dynamics of the Native "**brain drain**," whether it moves Native students from rural to urban Alaska or from Alaska to other states or countries, needs to be understood. Who are the students who move, why do they go, and how can we utilize their skills and training to address the issues raised in the *Natives 2004* report?

Conclusions

The *Status of Alaska Natives Report 2004*, prepared by ISER, is a compilation of data on population, health, economy and education. It is a lineal timeline that depicts trends over the last thirty years, and it also provides a snapshot of the current Alaska Native population, health, economic condition and education. The data indicate a seeming paradox: that many of the changes have been for the better, and yet, there are disparities and new challenges. There is no single answer to addressing the issues raised by the data in the *Natives 2004* report. But there are at least three areas on which we must work simultaneously: improving public education, continuing to address the health issues (especially behavioral health), and creating jobs and lowering the cost of living in rural Alaska.

Based on feedback from Policy Center discussions and regional meetings, participants

identified the need for additional data in different formats because it is critical to understanding the status of populations and communities, and to decision-making and allocating resources:

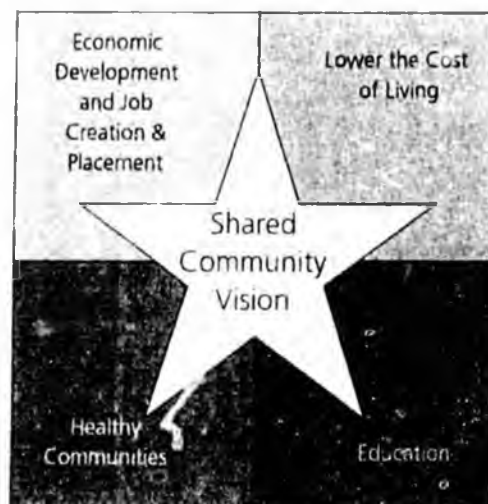
- Make data available by the 12 regions, as well as in urban-and-rural formats, in order to allow regional and local entities to develop scenarios based on current and potential economic development projects. This should include numbers of Alaska Natives in urban centers. If current rural-to-urban migration patterns continue, there will be continued pressures on urban service providers for employment, education, housing and health services.
- Provide data on the numbers and types of jobs that currently exist in the public and private sectors, by ANCSA region, including local industries/employers (fishing, tourism, education, health, etc.), and Native profit and non-profit entities. People need to know what jobs they should be preparing for and how to link our educational systems to this process.
- Provide data on telecommunication, energy and transportation infrastructures, by region, for planning purposes. (Note: some of this information is available from state agencies like the Department of Transportation.)
- Provide data on food and energy costs by region, and show the relationship of costs to household income in order to see where income goes and if there is any left for discretionary items.
- Provide forecasts of population by region, in order to plan for potential economic development activities and educational needs.
- Provide accurate data on how many people are actually unemployed. The number of people (of 16 years and older) not in the workforce may be more useful than are current state and federal unemployment statistics.

The Policy Center also heard about the many examples of how people and organizations are addressing issues raised by the data. The work that the Cook Inlet Tribal Council is undertaking with Alaska Native high school students in the Anchorage School District, the immersion programs in Southeast schools and in Bethel, the Spirit Camps' teaching of culture and language, the Alaska Native Science & Engineering Program at the University of Alaska,

the Community Development Quota program, the economic force of the Alaska Native Claims Settlement Act corporations, and the diabetes awareness programs in Norton Sound are all examples of how people and organizations can and do respond.

The Policy Center also heard concern for how Alaska Natives can maintain their own cultures in a modern world of different values. For example, in the discussion of economic development, there is a cultural need to protect subsistence; it is tied to Native values and lifestyles and yet economic development is needed to provide jobs. Some communities and regions are promoting economic development because it is needed. Some communities want to maintain a predominantly subsistence lifestyle. Some individuals in each type of community want to be able to do both. How do Alaska Natives maintain and preserve cultures given these pressures? Another example - with an increasingly urban Native population, how will the various cultures of Alaska's Natives be carried on?

Each of the data presentations by the Policy Center closed with the graphic illustration shown below.



Source: Adapted from "Alaska's Jobs for Alaska's People" by Commonwealth North, June 2003.

It is a small jigsaw puzzle, and its centerpiece - "shared community vision" - links together four complex challenges that face Alaska Natives:

- the need for **economic development and job creation and placement**, which will provide family cash income, in combination with subsistence harvesting, in order to strengthen the "mixed" economic base of Native communities,
- the need to **lower the cash cost-of-living** for basic necessities in rural villages (e.g., electricity, fuel oil and food), in order that people can afford to live where they want to live,
- the need for **healthy communities**, whether in villages or urban areas, with emphasis on behavioral health, individual wellness and disease prevention, and
- the need to **make public schools effective** community institutions that teach Native, as well as non-Native, students the basic academic skills from a culturally relevant context that is needed in a knowledge-based society

Although there are many other issues facing Alaska Natives, these four are critical. If they can be made better, the whole level of Native life will improve.

But none of these issues can be addressed unless Native individuals and communities take the lead. What is needed is a shared community vision that gives our people a perspective on where we have come from, where we are now, and where we are going - *signs along the trail*. Without such vision, little can change, but with it, wonderful things are possible.

Endnotes

¹ Institute of Social and Economic Research (2004, May). *The status of Alaska Natives report 2004* (Vols. I-III). Anchorage, AK. Pages 4-10 to 5-16.

² Alaska Energy Authority (2004, January). *Statistical report of the power cost equalization program fiscal year 2003*. Anchorage, AK: Alaska Energy Authority.

³ Note. See "A Survey of Native Perspectives on Alaska Issues", prepared for the Alaska Humanities Forum and the First Alaskans Institute, June 2003.



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- Dr. George Charles, UAF College of Rural Alaska
- Linda Joule, Kotzebue IRA
- Susan Labelle, Chugachmiut, Inc.
- Will Mayo, Vine Ministries
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Background

Fifteen years ago, the Alaska Federation of Natives published its *AFN Report on the Status of Alaska Natives: A Call for Action*. That study, prepared by the Institute of Social and Economic Research (ISER) at the University of Alaska Anchorage, summarized population, health, economics and education statistics about modern Natives. The report raised awareness of serious issues, such as alcohol abuse and other health problems, rural economies and educational attainment. It urged Native leaders and public officials to address those challenges.

The issues raised in the 1989 AFN Report led to the very detailed *Alaska Natives Commission Report* in 1994 and the *AFN Implementation Study*, submitted to Congress thereafter. From these studies, regional "Wellness" programs were funded by Congress, and federal funding was added to the re-authorized Alaska Native Education Equity Act.

Since the mid-1990's, there has not been an updated report on the Alaska Native population and its socio-economic conditions. Thus, in August, 2003 AFN asked UAA's ISER to update and expand the 1989 Report. AFN wanted to know how the landscape of Alaska Native well-being had changed in the intervening years.

ISER recently completed its work, entitled the *Status of Alaska Natives Report 2004* (hereafter referred to as *Natives 2004*). That Report is a 400-page document which contains very detailed information on the population, health, economy, and education status of Alaska Natives.

AFN also wanted the updated statistics to be shared with the Alaska Native Community, and it wanted to know what the Native Community thinks about the statistics. Accordingly, AFN contracted with the First Alaskans Institute's Alaska Native Policy Center in a knowledge development effort to:

- bring ISER's updated statistics back to the Native community in order to get feedback from Native

people on what the data mean and what actions can be taken to improve the statistics, and

- write and publish an analysis of the 2004 statistics from a Native point of view, for a Native audience

The *Natives 2004* data report and the Alaska Native Policy Center's analysis can be used to gain a better understanding of the Alaska Native population and the issues Alaska Natives face. More importantly, the data can be used to understand the status of rural and Native communities today, in order to plan effectively for tomorrow.

Both the ISER *Natives 2004* Report and this analysis of its data were funded by AFN, utilizing grant monies from the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services.

The Process

In order to guide this 11-month project and to oversee the writing of its analysis, the Policy Center formed a seven-member Project Team made up of experienced leaders from around the state. The Project Team met between November, 2003 and June, 2004. They kept the project on track, guided this analysis, and assisted in bringing data presentations to the regions. The team included:

- Kanaylak, Dr. George P. Charles, Assistant Professor, Department of Alaska Native and Rural Development, UAF, Director/Principal Investigator, National Resource Center for American Indian, Alaska Native, & Native Hawaiian Elders, "Voices of our Elders", UAA, Bethel Native Corporation and Calista Corporation Shareholder, Alaska National Guard, US Army Reserve and US Navy Vietnam veteran (Calista region)
- Linda Joule, Executive Director and former Wellness Director, Native Village of Kotzebue (Kotzebue IRA (NANA region))
- Susan LaBelle, Community & Social Services Division Director, Chugachmiut, Former Trustee,



Alaska Mental Health Trust Authority, Adjunct Faculty, UAA (Chugach region)

- Will Mayo, sole proprietor - Nagheltaale Consulting, President, VINE Alaska, Inc., a Native ministry for wellness, former President of Tanana Chiefs Conference, Inc, former Senior Advisor on Rural Policy under former Governor Tony Knowles (Doyon Region).
- Dr. Gordon L. Pullar, Director, Department of Alaska Native and Rural Development, UAF, President, Leisnor Village Tribal Council and former President, Kodiak Area Native Association (Kenaiq Region)
- Ricardo Worl, Loan Program Manager, Tlingit Haida Regional Housing Authority, Dartmouth College Admissions Office Alumni Director for Alaska, Native Youth Olympics coach, former Assistant Vice President of National Bank of Alaska and Editor of *Alaska Native Magazine*. (Sealaska region)
- Miranda Wright, Academic Program Head and Assistant Professor, Department of Alaska Native and Rural Development, UAF, Treasurer and member, Board of Directors for Doyon, Limited (Doyon region)

Because of time and budget, the Policy Center had two criteria to select the regions it would visit to bring the information to the Native community. 1) Coverage of all major ethnic groupings of Alaska Natives (Athabascan, Aleut/Unangan, Alutiiq/Sugpiaq, Inupiaq, Tlingit, Haida, Tsimpsian, and Yupik); and 2) Coverage of those regions with the largest numbers of villages. Using the numbers of villages from the membership of the Alaska Federation of Natives, the Policy Center chose five regions:

- Bering Straits/Kawerak region, representing 20 villages
- Calista/Association of Village Council Presidents region, representing 57 villages
- Bristol Bay Native Corporation/Bristol Bay Native Association region, representing 31 villages
- Doyon/Tanana Chiefs Conference region, representing 42 villages
- Sealaska/Central Council of Tlingit Haida Indian Tribes of Alaska region, representing 21 villages

By the end of the dissemination project, the Policy Center had reached seven regions including Bering Straits, Calista, Chugach, Cook Inlet, Bristol Bay, Doyon, Sealaska and had made 20 formal presentations to Elders, high school and college students, regional and village leaders, and to Native community members:

- Four presentations of data to the Alaska Native Policy Center Discussion Series held in the Anchorage area. Each meeting in the Series focused on a separate data category (population, health, education or economy). Participation in the Series included representatives from Native organizations, including the Cook Inlet Tribal Council, the Alaska Native Tribal Health Consortium, and the Native Village of Barrow. Representatives from organizations like Alaska Pacific University, the Denali Commission, the Alaska Industrial and Export Authority, and the Alaska Energy Authority also participated in the discussion series.
- A presentation to the Bristol Bay Village Leadership Workshop in Anchorage, reaching dozens of regional and local leaders.
- A presentation to students from the Kuspuk School District Career Exploration program.
- A presentation to the UAA College of Education's faculty and administrators in Anchorage.
- A presentation to the College of Rural Alaska's "Federal Law and Alaska Natives" course, by teleconference through UAF.
- A presentation to Elders and community leaders at the Chugachmiut Regional Wellness Conference in Anchorage.
- A presentation to the Kawerak Elders and Youth Conference in Nome, which was also broadcast by radio across the region.
- A presentation to regional and village leaders attending the Calista Regional Economic Summit in Bethel, also broadcast region-wide by radio.
- Another large community presentation in Bethel.
- A presentation to the Bristol Bay Land and Resources Conference in Dillingham, also broadcast region-wide by radio.
- A presentation to regional and village leaders at the Tanana Chiefs Conference's Annual Convention in Fairbanks, also web-cast by the Internet.

- A presentation to Native youth participating in the Alaska Native Professional Association/Alaska Native Heritage Center Mentor Program in Anchorage
- A presentation to Native and non-Native college students at the UAA's "Alaska Native Perspectives" Class
- A presentation to Native and non-Native college students at the UAA's "Alaska Native Politics" Class
- A presentation to members of the Alaska Legislature's Bush Caucus (House and Senate) in Juneau
- A presentation to 120 Native and non-Native high school student government leaders attending the semi-annual meeting of the Alaska Association of Student Governments in Yakutat
- A presentation to regional and village leaders and delegates to the 2004 General Assembly of the Central Council of Tlingit and Haida Indian Tribes of Alaska in Juneau

More than 1,400 people have seen selected data from the *Natives 2004* Report and have discussed them in some detail. Many more have heard some of these presentations aired over radio stations KDLG, KYUK and KNOM. The feedback, comments and questions received during these discussions are an important part of the analysis that follows.

Structure of the Report

This report examines selected data that give a good overview of the current health, economic and education situation of Alaska Natives. They were selected from among the several hundred data findings in ISER's *Natives 2004* Report.⁴

Chapter One is the introduction to this analysis, including a brief project background and summary of the project process.

Chapter Two summarizes the sources of these data, the limitations of the data, and why it is important to know and understand data.

Chapters Three, Four, Five, and Six present a discussion of selected data on Alaska Native

population, health, economy and education and includes feedback from participants in the Policy Center discussions and regional meetings and information on programs that address many of the issues raised by the data. Each chapter closes with issues and implications of the selected data.

Chapter Seven is an overview of selected data by the 12 Native regions in Alaska. As the Policy Center presented this material in each region, participants requested many of the statewide statistics for their own region. The Policy Center has made an effort to accommodate those requests where such regional data are available.

Chapter Eight summarizes the issues and implications of the data from the previous chapters.

A glossary, works cited, and selected resources for further study follow Chapter Eight.

When the Policy Center took the data to the Native Community, meeting participants consistently noted that the data do not stand in isolation from one another. They are inter-related and influence one another in daily life. Thus, there is a reason why the data sections of this analysis focus first on population, then health, economics, and education. Population identifies who and where Alaska Natives are. Health provides fundamental indicators of physical well-being. Economics and education are important "drivers" of issues presented under health.

Endnotes

⁴ For the detailed *Status of Alaska Natives 2004* report, please visit these websites: Alaska Federation of Natives at www.nativefederation.org; First Alaskans Institute at www.firstalaskans.org; or ISER at www.iser.uaa.alaska.edu

- Why data are important to know and understand
- Data sources
- Discussion of data limitations
- Issues and implications

"This brings to mind how, as a trapper, I would look for signs in the snow. Going over the rise, rounding the bend, every turn brought new information to consider. Should I explore this area or move on? You always have to pay attention to the signs in order to succeed and not waste time. Looking at this data reminds me that we have to carefully read the signs in order to make good decisions."

--Will Mayo, April 2004, Alaska Native Policy Center Project Team, comments regarding the Status of Alaska Natives Report 2004

Why Data are Important to Know and Understand

Data are used for understanding the condition of populations, communities, or businesses - for planning and for decisions about allocation of resources. For example, demographics are used to distribute federal dollars for programs such as Medicaid, Head Start, Unemployment Insurance, and Social Service block grants. Demographics are also used to distribute state funds to local communities for programs such as the State Revenue Sharing and Municipal Assistance (not funded in FY 04).

Demographic data are also used to determine "populations at risk in order to develop rate computations which quantify the possible existence of a problem and its severity." Examples would include birth rates, death rates, teen pregnancy rates and crime rates.

As the Policy Center presented these data to the Native community in discussions and regional meetings across the state, it became clear that Alaska Natives wanted to know and understand these data. They wanted the information to be presented in a statewide format, in a 12-region (ANCSA) format, and in an urban-rural format, so they could see and understand trends.

In preliminary discussions with the Institute of Social and Economic Research (ISER), the Policy

Center recommended that the data be broken out in a 12-region format so that the data would be relevant to Alaska Natives. In some cases, ISER accommodated this request, and in some cases they were unable to do so because the data were not available. Where possible, the Policy Center has presented data in a 12-region format to accommodate the requests of Alaska Natives.

Data Sources

This section discusses the sources of data in the *Natives 2004* report, and analyzes those data limitations. The *Natives 2004* report was compiled from many existing sources of data. Although ISER conducted some interviews, no primary research, such as surveying, was done. When reviewing statistics, one must determine the source of the information and the assumptions used in presenting the data. The main sources of data for the *Natives 2004* included the:

- U.S. Census 2000, including Summary Files 1 through 4 (SF1, SF2, SF3, and SF4) and the American Indian Alaska Native Summary File (AIANSF) and the Equal Employment Opportunity File (EEO). SF1 and SF2 are based on a 100 percent count of population and provide geographical and racial data. SF3 and SF4, and the AIANSF are based on sample data. www.census.gov Map 2-1 shows census areas and the 12 ANCSA regional boundaries.
- Public Use Microdata Sample (PUMS). See glossary for more information.
- U.S. Censuses 1990, 1980, 1970 and 1960
- U.S. Department of Commerce
- U.S. Bureau of Economic Analysis
- Alaska Department of Labor, Research and Analysis Section
- University of Alaska Cooperative Extension Service
- Alaska Department of Education and Early Development
- University of Alaska Office of Institutional Planning, Research and Assessment



Map 2-1 Native Regional Corporations and Census Areas



Source: ISER, *Status of Alaska Natives Report, 2004*, page A-26

- Zick Report: Federal Programs and Alaska Natives
- U.S. Centers for Disease Control and Prevention
- National Center for Health Statistics
- Alaska Native Health Service
- Alaska Bureau of Vital Statistics
- Alaska Division of Public Health
- Alaska Department of Health and Social Services
- Alaska Native Tribal Health Consortium
- Alaska Native Health Board

Discussion of Data Limitations

The *Natives 2004* report presents historical and current data on population, health, economy, and education of Alaska Natives, using the above sources of information. Much of the report is based on the Census 2000 which ISER states is the most "important, single source of

information on the status of Alaska Natives." However, there are limitations to the Census and other types of data that one must be aware of in order to interpret it accurately. In the *Natives 2004* report, ISER identifies a number of these limitations, and we agree with ISER's assessment. The limitations that ISER noted as well as those identified by the Policy Center are discussed below.

Census Data

- **Counting and Sampling:** Census data can be a 100% count, compiled from all households in Alaska, or it can be based on a sampling of households. In order to address the issues of accuracy in sampling the population in rural Alaska, the 2000 Census sampled a higher proportion of households than it did elsewhere (up to 50% of households in some places).

"In general, does the Census accurately count lower-income, transient and minority populations? More specifically, did the 2000 Census get an accurate count of all Natives living in both urban and rural areas of Alaska?"

"How does migration affect the Census calculations? Many of our village residents move between the village and regional hubs or urban centers several times per year."

"What implications do these population figures have on the need for future services - like public school education, health services, job training and Elder care?"

--Comments and questions from Population Discussion Series, October 2003, regional meetings January through May 2004

- **Human Errors in Processing:** Among possible non-sampling errors, the process of identifying places to do the count of households can result in undercounting. ISER gives the example of the 1980 and 1990 censuses that "estimated an undercount of about 2 percent of the entire population of the state." The timing of the census can cause non-sampling errors if not all residents are present during the time of the count.
- **Under-counts and Over-counts:** According to the Alaska Department of Labor, in at least 10 census areas (Wade Hampton, Valdez-Cordova, Bethel, Northwest Arctic Borough, Dillingham, Yukon-Koyukuk, Nome, Southeast Fairbanks, North Slope Borough, and Lake and Peninsula), the 2000 Census under-counts children between birth and 9 years old and over-counts youths 10-17 years.⁶ Other age categories were not affected.
- **A New Census Definition of Race:** The 2000 Census gave people the choice of identifying themselves as Alaska Natives of *single race* or of *mixed race*. This choice was not available prior to 2000. The choice causes difficulties in comparing the 2000 census with previous censuses, which had counted only those who

identified themselves as Natives of single race. Because comparisons are necessary, ISER developed a "bridging" process, which estimates how many Alaska Natives in prior censuses would have identified themselves by mixed race, if they had been allowed to. The methodology is presented in Appendix A of the *Natives 2004* report.

- Some state and federal agencies have not yet determined how they will accommodate the change in definition of population from 2000 to prior Census. E.g., the change in definition affects such calculations as birth rates and death rates. Thus, some of the data presented in the *Natives 2004* report do not have the most recent statistics.
- The Integrated Public Use Microdata Sample (IPUMS) allows researchers to look at relationships between different variables - for example, educational levels in a household. However, the IPUMS data set has a shortcoming in that it does not provide data on a regional basis for Alaska because of the relatively small size of regional populations. Only Anchorage and the "rest of Alaska" can be identified consistently over time using the IPUMS.

Health Data

The health data are presented in a statewide format. When the Policy Center presented data to regional meetings, participants wanted to see them for their respective ANCSA regions.

"Statewide data don't tell me what's happening in my region, or locally."

"What is happening at the regional level? Priority issues at regional and local levels often differ from statewide issues."

"What do the FASD, obesity and diabetes numbers look like for my region?"

--Comments and questions from Discussion Series, October 2003, regional meetings January through May 2004

Like the Census data, there were some limitations to the uniformity of health data sources. The questions regarding health data sources are listed below.

- Some health data are available by ANCSA region, for example, birth rates. [An example of health data that can be seen by 12 regions is birth rates. See http://health.hss.state.ak.us/dph/bvs/birth_statistics/nrc.htm (link to the 'state totals').] However, the issues of time series and using the new Census definitions of race may affect the uniformity across data sources.
- Data on rural plumbing statistics used in the ISER report come from the Department of Environmental Conservation, Village Safe Water Program and the Census data. The data do not correspond one-to-one due to differences in the data gathering process.
- Health data are often age-adjusted to account for the fact that the incidence of some diseases changes with age. Thus, as the Native population ages, the prevalence of some diseases may increase and the prevalence of other diseases may decrease.
- The standard population age rate was changed in 2000 which can affect comparisons of age rates using the old standard.⁹ ISER has attempted to present their data recognizing these difficulties.
- The control groups against which Alaska Natives are compared are inconsistent, "non-Native Alaskans," "all Alaskans," and "White Alaskans" are often used.

General Data

- **Geographic comparisons:** ISER noted that there are at least seven ways for geographic comparisons among data, census areas, boroughs, election districts, judicial districts, urban-rural, ANCSA regions, school districts, local governments, census designated places, Alaska Native village statistical areas, and Tribal-designated statistical areas.¹⁰ This many break-outs of data can lead to questions

of uniformity and interpretation in trying to compare the numbers across differing regional break-outs.

- **Lack of Uniformity in Data from Different Sources:** Many agencies did the primary data research used in the *Natives 2004* report. But they gathered their information in different ways, for different purposes. For example, the Census includes Lower 48 Indians who live in Alaska in the count of "Alaska Natives." But other data gatherers (for example, health organizations and school districts) may separate these groups for purposes of service delivery and public funding. This can affect the accuracy of comparisons between data from different sources.
- **Data calculation:** Calculation methods for certain data, such as drop-out rates (gathered by school districts) and village unemployment rates (gathered by the Alaska Department of Labor) were questioned at virtually every discussion held by the Policy Center. People wanted to understand how these numbers were gathered and why they do not seem to represent the true situation seen every day in their communities.
- There is a lack of cultural indicators that measure such things as 1) subsistence participation (family harvesting and communal sharing) and 2) Native language use in different regions of the state.

Issues and Implications – The Alaska Native Policy Center View

ISER took measures to identify the data sources and the limitations of the data used in the *Natives 2004* report. Throughout this analysis, the Policy Center will discuss data that raise questions and will identify data that should be included in any further study of the socio-economic condition of Alaska Natives. Until data-gathering methods are modified, researchers, policy makers and others will either have to rely on current methods used by

federal and state agencies, or conduct their own primary research to gather the information.

"The North Slope Borough, recognizing limitations of the U.S. Census, has conducted its own local census periodically since 1989 in order to reflect accurately the population of its communities. The North Slope Borough Census captures the same information as the U.S. Census—and in some cases goes into more detail than the federal census. The local census is 70-90% accurate, depending on specific community responses. Since 1989, the Borough has successfully challenged the State of Alaska's population estimates for Tribal Cap Determination purposes by utilizing its own census figures. The data captured by the local census is used to make decisions and plan for local communities."

—Harczarek, Robert. Senior Planner. The North Slope Borough. Personal Interview (2004, June 21)

Alaska Natives are not the only ones to question the accuracy of Census data. On December 5, 2003, the Anchorage Daily News ran an Associated Press article on census counts of Indian reservations in the Lower 48 which states: "Reservations posed a multitude of problems, not the least of which were ever-changing households, frequent moves, mistrust of government officials, and differing definitions of who is an Indian. But, for the first time, tribes do not have to accept the official census number—and more than 100 tribes nationwide are challenging the 2000 Census results."

The *Natives 2004* report provides a very detailed look at the socio-economic status of Alaska Natives. The Alaska Native Policy Center views this report as the beginning of a process of periodic updates to that information. The data will change over time and should be regularly updated in a consistent format.

Regarding the collection of health data, the Alaska Natives Commission's Report recommended that, "A coordinated data system should be established that integrates

the efforts of the Alaska Area Native Health Service, the Centers for Disease Control and Prevention, the State of Alaska, the Veterans Administration, other cognizant agencies and Native health corporations."

—Irwin, M. (Ed.) (1994) Alaska Natives commission final report (Vols I). Anchorage, AK: Alaska Native Commission. Page 97

The Policy Center is seeking feedback on what the data mean to you. It aims to track certain data in order to monitor what is happening within the Native Community and to measure progress over time. It wants to be responsive to the Native Community's need to be able to "drill down" from the statewide and regional levels of data to see how issues affect local communities. In fact, the Policy Center has already begun that process with its Alaska Native K-12 Education Indicators Report (see www.firstalaskans.org).

Finally, as reported in Chapter One, the Policy Center has already taken data to many meetings for participant discussions. However, this analysis is likely to generate more discussion and thought on the data found in the *Natives 2004* report. Look closely at the data. Send your feedback to the Alaska Native Policy Center on how you view the accuracy of the data and the root causes of the serious issues that the data raise—and about what the Native Community can do in order to improve the quality of life for Alaska Natives.

Endnotes

¹ Williams, J. G. (2004, February) *Alaska population overview, 2001-2002 estimates and census 2000* Alaska Department of Labor and Workforce Development. Research and Analysis Section. Page 7.

² Institute of Social and Economic Research (2004, May) *The status of Alaska Natives report 2004*. (Vols. I-III) Anchorage, AK. Page A-1.

Ibid., page A-18.

³ Williams, J. G., *Alaska Population Overview, 2001-2002 Estimates and Census 2000*. February 2004. Department of Labor and Workforce Development, Research and Analysis Section. page 23. Further discussion of this issue is in the *Status of Alaska Natives Report 2004*, page A-13.

⁴ Alaska Department of Health and Social Services (Winter 2000). *The Impacts of Changing to the Year 2000 Standard Population on Age-Adjusted Death Rates in Alaska*. *Alaska vital signs*. No. 2. Vol. 8.

⁵ Institute of Social and Economic Research (2004, May) *The status of Alaska Natives report 2004*. (Vols. I-III) Anchorage, AK. Page A-23.

⁶ The Associated Press. (2003, December 5). *Tribes challenge accuracy of 2000 census results*. *Anchorage daily news*.

In the 1989 *AFN Report on the Status of Alaska Natives: A Call for Action*, ISER reported that the Alaska Native population included approximately 75,000 people. Data from the 2000 census show an increase of the Alaska Native population to 119,241 people. The Alaska Native population is predicted to be 165,000 by the year 2020. What will the future look like?

Alaska Native Population Facts at a Glance

The majority of the Alaska Native population (58%) lives in rural Alaska, and there is a growing urban Alaska Native population (42%). Both rural and urban Native populations are young, living longer, and experiencing a changing household composition.

- Census 2000 shows a statewide Alaska Native population of 119,241 people (19% of the total state population of 626,932).
- 82% of the population living in remote rural areas are Alaska Natives.
- Alaska Natives are comparatively young, with a median age of 24 years.
- More than 44% of all Natives in Alaska are 19 years of age or younger.
- The Native population is statistically balanced between males and females: 50.2% male, and 49.8% female.
- 42% of all Alaska Natives live in urban Alaska, and 58% live in rural areas of the state. There is great geographical mobility among Native people, and the 2000 Census shows a trend of people moving from rural villages to regional centers and urban areas of Alaska.
- The life expectancy of the Native population is increasing, and more people now survive to old age than in prior decades.
- If the Native population continues to grow at the rates by which it increased during the 1990's, it is predicted to number 140,000 people in the year 2010 and 165,000 in 2020.

Discussion of Selected Data from the Status of Alaska Natives Report 2004

The following section discusses selected data on Alaska Native population and is taken from the *Status of Alaska Natives Report 2004 (Natives 2004)*. The Policy Center's Project Team identified these data as those that provide a good overview of the Alaska Native population. These selected data compare the numbers of Alaska Natives to American Indians, and the age, gender, statewide and urban/rural differences among Alaska Natives. This chapter also presents additional data on households and where Alaska Natives live. When the Policy Center presented these data in regional meetings, the Alaska Native Community said it wanted to see these numbers on a 12-region basis. We have provided that in Chapter Seven.

Alaska Natives and American Indians

State of Alaska: Largest Percentage of Native Population

Five states have Native American populations greater than 7% of the total state population. Of these states, shown in Table 3-1, Native Americans are a larger percentage of Alaska's total population than are Native Americans in any other state. The actual numbers of Native Americans in several other states are greater than the number of Native Americans that live in Alaska.

Table 3-1. States with Native Americans Greater than 7 percent of Population in 2000

State	Total Population	Native American Race, Alone or Mixed*	Percent of State Population
Alaska	626,932	119,241	19.0%
Oklahoma	3,450,654	391,949	11.4%
New Mexico	1,819,046	191,475	10.5%
South Dakota	754,844	68,281	9.0%
Montana	902,195	66,320	7.4%

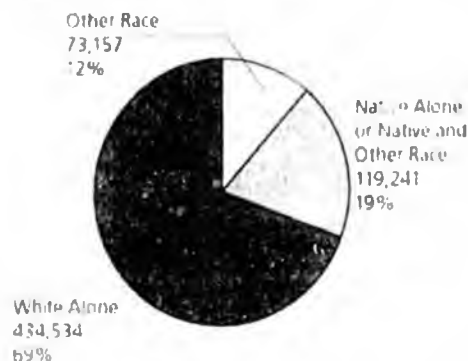
*American Indian and Alaska Native alone or in combination with one or more races.
Source: Census 2000 Summary File 2 (SF 2) 100-Percent Data

Source: ISER, Status of Alaska Natives Report, 2004, pages 2-5

Racial Composition of Alaska

In Alaska, 19% of the total population are Alaska Natives (by single race or in combination with another race), 12% are Other Races (Black, Asian, Pacific Islander, Hispanic, and other), and 69% are White, as illustrated in Figure 3-1. The Alaska Native population includes many

Figure 3-1. Racial Composition of the Alaska Population, 2000



Source: ISER, Status of Alaska Natives Report, 2004, pages 2-6

ethnic groupings and cultural affiliations. The major ethnic backgrounds include Athabascan, Aleut/Unangan, Alutiq/Sugpiaq, Inupiaq, Tlingit, Haida, Tsimpsian, and Yupik.

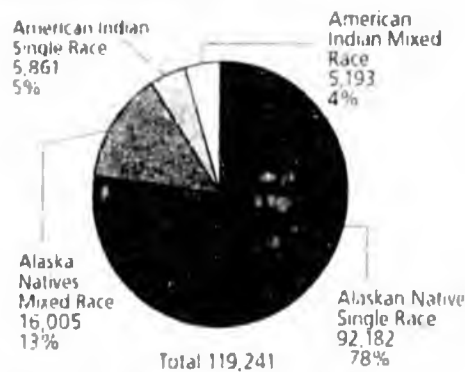
Composition of the Alaska Native Population

The Census defines the "Alaska Native" population as *all Native Americans living in Alaska at the time of the Census*—whether they are Eskimos/Indians/Aleuts from Alaska or Lower 48 Indians. Of this total of 119,241 people in 2000, approximately 11,000 were Lower 48 Indians, and about 108,000 were Eskimos/Indians/Aleuts from Alaska. 78% of the 119,241 were Alaska Eskimos/Indians/Aleuts of single race, and 13% were Alaska Eskimos/Indians/Aleuts of mixed race. 5% of the 119,241 were Lower 48 Indians of single race, and 4% were Lower 48 Indians of mixed race.¹⁰

ISER further concluded that 119,241 is the number that should be used as the total Alaska Native population for these reasons:

1. The American Indian population in Alaska is a small share of the total Native American population and its characteristics are not significantly different from the Alaska Native. Consequently, including them in the Alaska Native population¹¹ does not materially influence our analysis and conclusions¹² and.
2. Most of the American Indian population in Alaska is located in urban areas, so the snapshot of rural Natives is not influenced by the inclusion of American Indians.¹³
3. Since Alaska Statehood, the Census has combined Alaska Eskimos/Indians/Aleuts with Lower 48 Indians in our state. In order to see population trends, the ISER report and this analysis compare five censuses from the past 40 years: 1960, 1970, 1980, 1990, and 2000. This is possible only if we use the same uniform definition of "Alaska Natives" that the Census publishes.

Figure 3 Composition of Alaska Native Population in Alaska, 2000



Source: ISER, Status of Alaska Natives Report, 2004, pages 2-3

In recent years, the Alaska Native population has become more mixed by race than in earlier decades. In 2000, only 76% of Natives who were 75 or older were of mixed race, but 22% of Natives less than 20 years of age were of mixed race. Alaska Natives were far less likely to report mixed race (17.7%) than were Native Americans living in the Lower 48 states (52.1%).¹³

Alaska Natives: Growing, Young, and Changing

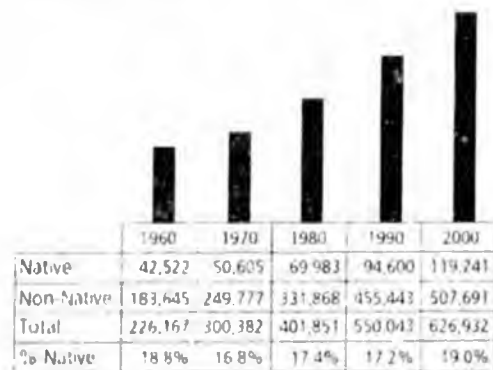
Population Trends

The Alaska Native population has grown over the last 40 years. Figure 3-3 shows that in 1960, the Native population was estimated at 42,522 (18.8% of the population); and in 2000, it was estimated at 119,241 people (19% of the population). Even with the large in-migration of non-Natives to Alaska in the last 40 years, the percentage of the Native population has remained close to 19%.

Population Projections

In the *Natives 2004* report, ISER provided a population forecast. Based on assumptions of stable rates of natural increase, ISER predicted that the Alaska Native population would

Figure 3-3 Alaska Native and non-Native Population, 1960-2000



Source: ISER, Status of Alaska Natives Report, 2004, pages 2-7

increase to 140,000 by 2010, and to 165,000 in 2020, Figures 3-4 and 3-5, respectively (see page 33).

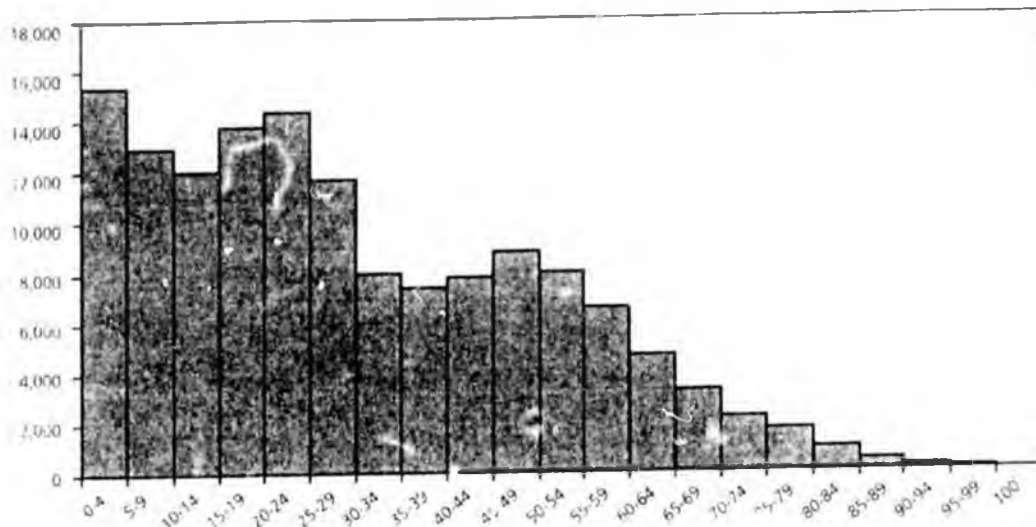
As the 2010 projection indicates, the Native population will see "age bubbles" in the workforce ages of 20-24 and 45-49, and by 2020, the Alaska Native population would have another age bubble of 5 year-olds and younger. The implications of these population forecasts are:

- Growing numbers of people in the workforce age group that will require job creation and placement.
- Growing numbers of Elders who live longer and who will require home care, health care, and other services.
- Growing numbers of school-age children that will need an education system that meets the needs of Alaska Native students.¹⁴

Population by Age Group

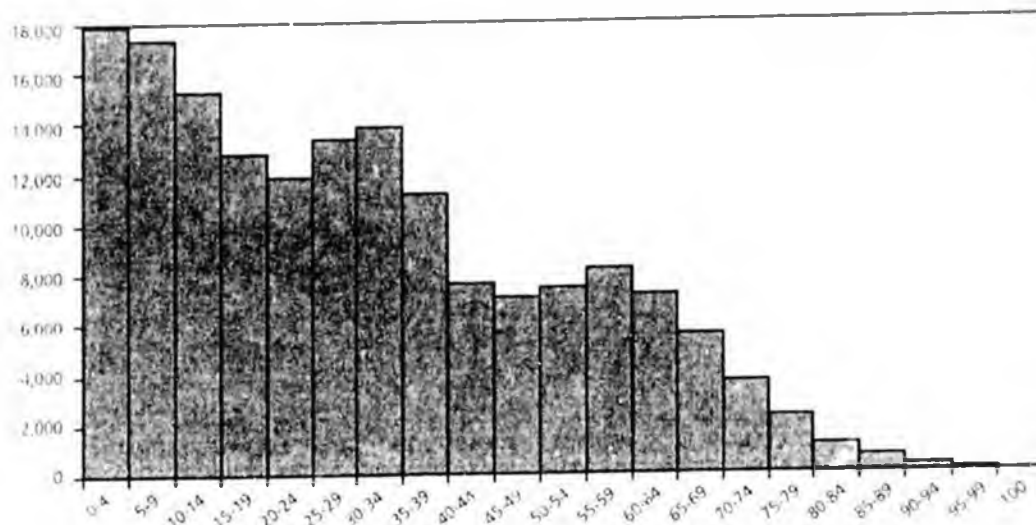
The population growth of Alaska Natives is due in part to annual birth rates (the number of births per 1,000 of population, each year), which have historically been higher than those of non-Natives. It also comes from decreasing annual death rates and the fact that Alaska Natives are living longer. Alaska Native median

Figure 3-4 Alaska Native Population Forecast 2010



Source: ISEER, Status of Alaska Natives Report, 2004, pages 2-60

Figure 3-5 Alaska Native Population Forecast 2020



Source: ISEER, Status of Alaska Natives Report, 2004, pages 2-60