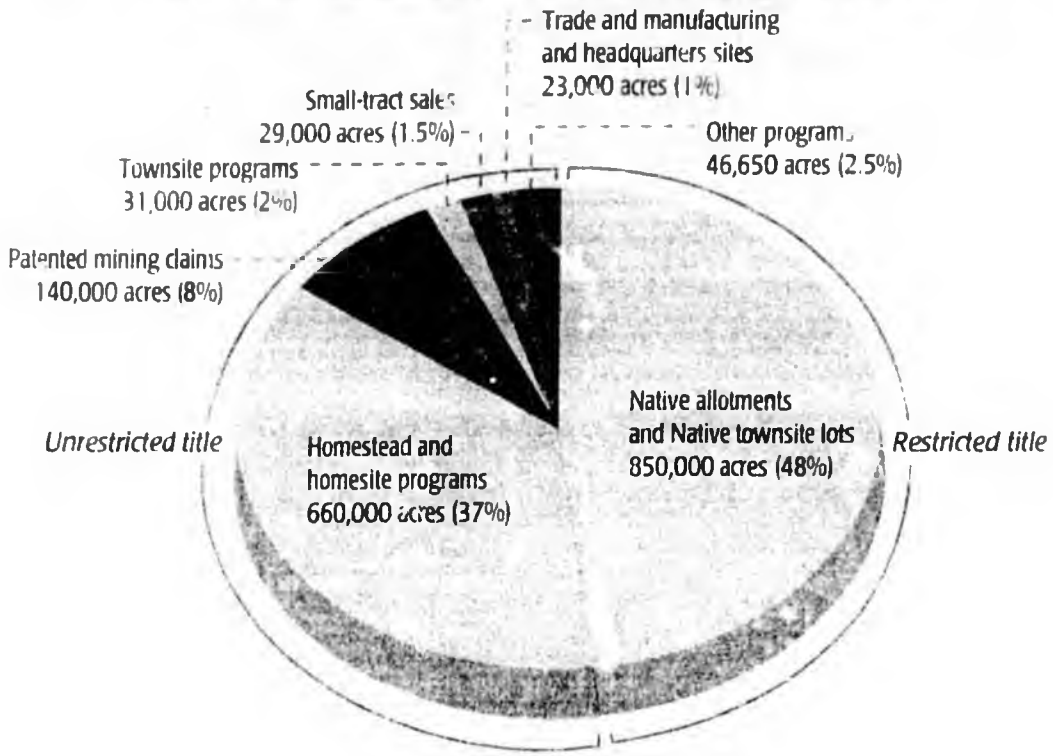
Figure 4. Federal Conveyances To Private Owners, 1867-2000
(Under Federal Land Disposal Programs and Mining Law)



Total: 1.8 million acres

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 does not 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 1978, 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 1980, 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.

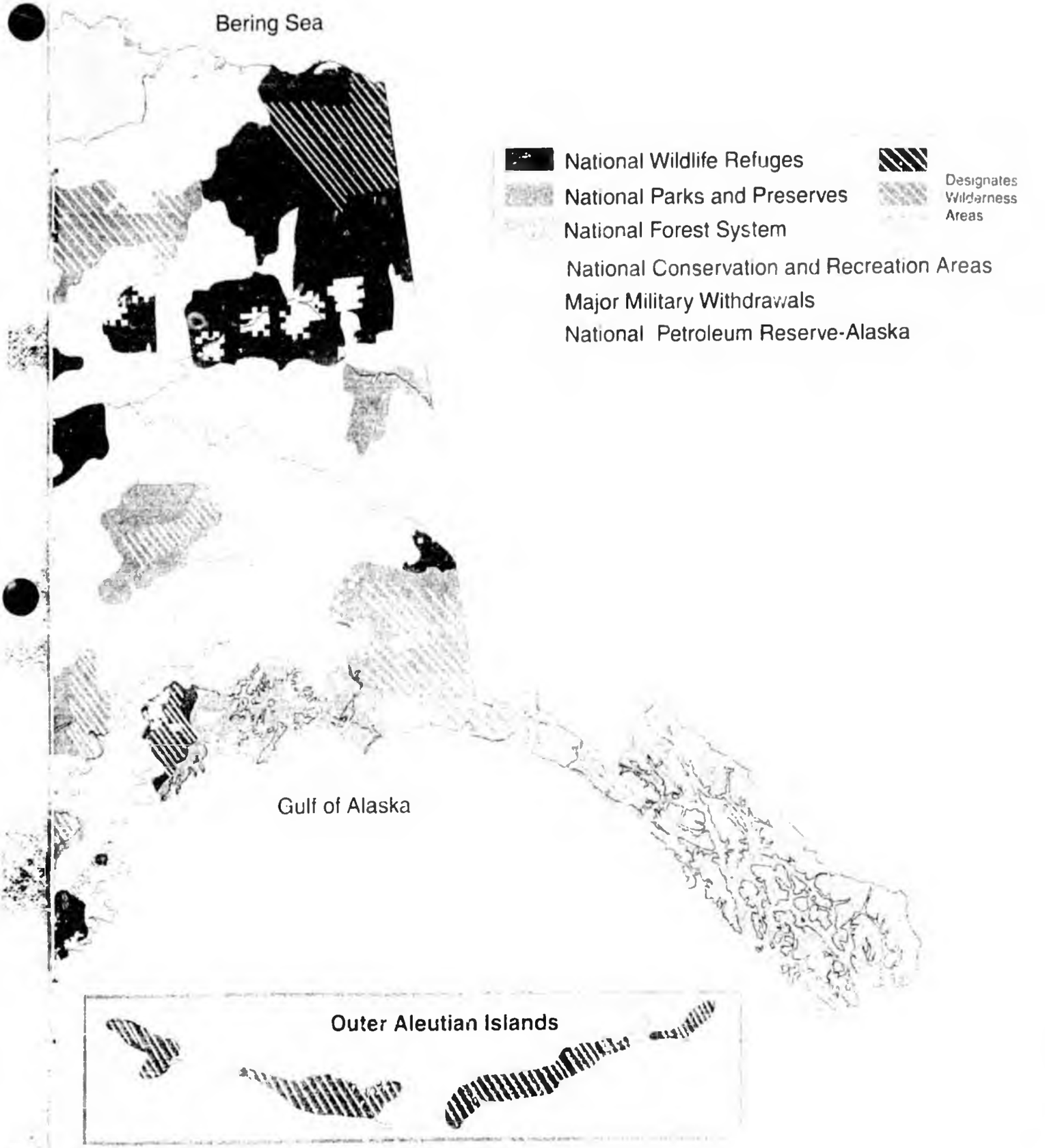
Municipal Land Sales

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.

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.

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 park 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—altogether 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 units. 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 states' 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 land 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."

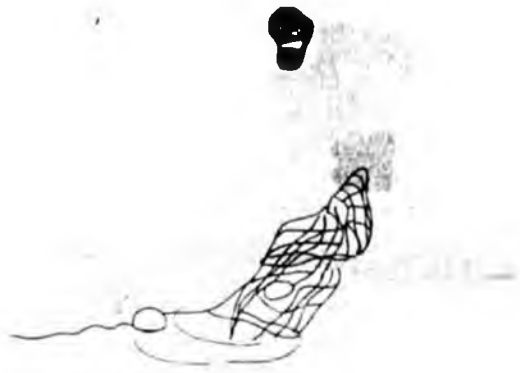
To comply with federal law, the Alaska Legislature in the 1980s passed a law defining subsistence users as those "domiciled in a rural area of the state." In 1989, the Alaska Supreme Court ruled that law unconstitutional, because Alaska's constitution doesn't allow the state to allocate fish and game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

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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

2620(960)

JUL 09 1991

Information Bulletin AK 91-229

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

	Land Transferred Through 06/30/91	FY 91 Total	Entitlement
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

	Land Transferred Through 06/30/91	FY 91 Total	Entitlement
Tentative Approval	50,030,837.34	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.

-91 MON

NATIVE ALLOTMENTS

	Parcels Processed Through 06/30/91		FY 91 Total
	Selection Applications	Grand Total	
Closed (No Conveyance)	2.662		13
Certified	4.352		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
	No Conveyance	Patented	Grand Total of Applications	
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	12,263	0
PLO 1613's	167	440	615	0

ALASKA RAILROAD

	Applications Processed through 06/30/91						FY 91 Total	
	Parcels		Lin. ROW		Grand Total Parcels	Lin. ROW	Parcels	Lin ROW
	#	Acres	Miles	Acres	#	miles		
Patented	12	10,966.00	120	2906.00	68	361	0	0

Wayne A. Booley

NATIVE ALLOTMENT CONVEYANCES

APPLICATIONS RECEIVED	
1906-1960	51
1961-1971	1929
1972-PRESENT	8020
TOTAL	10000
	(15,000 PARCELS)

TOTAL CERTIFICATES ISSUED	
1906-1969	201
1970-1981	253
1982-PRESENT	3871
TOTAL	4325

SUMMARY OF ADJUDICATIVE ACTIVITY 1906 - PRESENT

	FY 1991	TOTAL
TITLE RECOVERY	1	1429 REMAINING
1906 APPROVALS	41	3565
LEGISLATIVE APPROVALS	111	6752
TOTAL APPROVALS		10317
CLOSED NO CONVEYANCE	14	2662
CERTIFICATED	347	4325
AWAITING SURVEY AND CERTIFICATION		5962
PENDING ADJUDICATION		2051
TOTAL PARCELS		15000

SUMMARY OF ADJUDICATIVE ACTIVITY 1906 - PRESENT

	FY 1991	TOTAL
TITLE RECOVERY	1	1429 REMAINING
1906 APPROVALS	41	3565
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TOTAL PARCELS		15000

84TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 2534

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 townsite 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

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'EWART,
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 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. 863, 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'EWART,
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; 48 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 "nonmineral" 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. 415, 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 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.* 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

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DAVID S. CASE
and
DAVID A. VOLUCK

University of Alaska Press, Fairbanks

4 NATIVE ALLOTMENTS AND TOWNSITES

I. Generally

In the early 1900s Congress enacted the Alaska Native Allotment Act of 1906[1] 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

1. *Alaska Use and Occupancy*

Early attempts to protect Alaska Native use and occupancy[4] 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:

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

5. 15 Sta., 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 Act[12] 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 Act[14] 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

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8. *Hickman v. Sutter*, 119 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. Hickle*, 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, 85 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 INDIAN 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 I.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]

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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. 15[illegible]46th Cong. 2d Sess. 7–10 (1879–1880).

24. *See In Re Estate of Walter Howard, Deceased Tlingit of Sitka Tribe*, 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). *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 Leasing Lands within Reservations Created for the Benefit of the Natives of Alaska*, 49 L.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 1903[29] from J.W. Witten, a law clerk a ting 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 Office[32] 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:

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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 Rptr. 200 (D.C. Alaska 1904). *Contra, In Re Incorporation of Haines Mission*, 3 Alaska Rptr. 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 semi-nomadic 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]

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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 ward to 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]

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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 occupancy[52] 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.

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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." *Heirs of Palakia 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 I.D. 282, 285 (1935), *see also* 43 C.F.R. § 67.13 (1938 ed.), 43 C.F.R. § 2561.2 (1976 ed.). *Discussed in Etuckaq v. Andrus*, 587 F.2d 996, 998 (9th Cir. 1978) and *Shields 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, 89,855 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 (1929) (use of land for fishing sufficient occupancy to qualify for an allotment). *Compare with Frank St. Clair*, 53 L.D. 194 (1930) (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 role[56] 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 regulations[58] 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 905[60] 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.

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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, rural 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 notice[62] 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

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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 I.D. 373, 389–390 (1981). *Accord United States v. 10.95 Acres 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); *Kittie Cleogeuk*, 28 L.D. 427 (1899); *A.S. Wainright*, 13 L.D. 120 (1891); *Herbert H. Hilscher*, 67 I.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, (9th 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 1960, but the land was withdrawn for some other federal purpose in 1964, 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.

f. 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.

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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 Sockpealuk*, 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 ANCSA, 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.

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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. Juneau 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 reemphasized 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

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84. *Id.* 7–8. *See also* 1985 U.S.C.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.

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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 ANILCA*[107]

a. Generally

Section 905[108] 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. Babbitt*, 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. § 1643.

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

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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

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

119. *See Olympic v. United States*, 615 F. Supp. 990 (1985); *Heirs of Saul Sockpealuk 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) (NPR-A); § 905(d) (power sites). Prior to passage of ANILCA, some of the lands covered by allotment applications within NPR-A 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 "subject 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.

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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. Rickert*, 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.346 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 restricted[129] 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 regulation[137] 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

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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. 966 (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 right-of-way,[142] probate,[143] and leasing[144] 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.

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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 Choate v. Trapp*, 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* 43 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 h 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.

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154. 43 C.F.R. §§ 2561.2. *See also Shields v. United States*, *supra* n. 52.

155. *Aguilar II*, n 61, above; *Archie Wheeler*, 1 IBLA 139 (1970); *Lucy Arrakana*, 3 IBLA 341 (1971); *John Tuzangiya*, 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 Kostromentinoff, 26 I.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 (1980). *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*, 47 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.

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160. *Aguilar II*, *supra* n.61, discussed also in *State of Alaska*, 45 IBLA 328, 333–334 (1980) (Burski concurring).

161. *Aguilar v. United States*, A76-271 Civil, Stipulated Procedures for Implementation of Order (February 7, 1983).

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 contracting 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/compactor 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

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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) 32166 (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, Barano/Island*, 36 L.D. 261 (1908); *Johnson v. Pacific Coast S.S.*, 2 Alaska Rpts. 224 (D. Alaska 1904).

168. *Compare Charley Clatton*, 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 199 (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]

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171. *State of Alaska v. Juneau Area Director*, 9 IBIA 126, 88 I.D. 1020 (1981); *see also Heffle 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 Vollentine (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 ANTA[186] 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. *McCloskey v. Pacific Const. Co.*, 160 F. 794, 798 (9th Cir. 1908).

184. 43 C.F.R. § 2565.3(c).

185. *See Kizzuck*, *supra* n.179, at 15 (where these procedures are explained).

186. Formerly codified at 43 U.S.C.A. § 736 (1970).

187. *Kizzuck*, *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 ANCSA[196] provides an alternative means for

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189. "Disposal of Lots in Saxman, Alaska," 66 I.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 I.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).

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

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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 inhabitants[199] 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

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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 215.

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. Andrew*, 24 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 lots[210] 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,

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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 110, 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 Cleogeuh*, 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 2561 and 2565.

227. 66 I.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 acres[232] 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

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231. 43 C.F.R. § 2565.3(c); *see also, e.g., City of Klawock v. Andreas, 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.234, 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 Act[241] and the Federal Land Policy Management Act[242] 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 (Burski 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]

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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 *McCloskey 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 IBLA 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 occupants' 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,

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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.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 (1980) (Decision finding no issues of estoppel and confirming Ouzinkie Native Corp. land selection).

260. *Carlo 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 346[261] 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 lands[265] 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

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261. Act of August 15, 1894, ch. 290, 28 Stat. 305, as amended. Also codified in part at 28 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-Tse-Mil-Kin v. Smith*, 194 U.S. 401, 413 (1904).

263. *E.g.*, *McKay v. Kalyton*, 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. Mottaz*, 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. Kalyton*, *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. 419 (1943); *United States v. Payne*, 264 U.S. 446 (1924).

266. *Alaska v. Agli*, 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 I)*, 529 F.2d 135 (9th Cir. 1976) (federal jurisdiction to determine initial entitlement to allotment); *Carlo v. Gustafson*, n.200, above (restricted townsite treated 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. Kalyton*, *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]

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269. 28 U.S.C.A. § 2409a(a). The QTA is the exclusive authority for suits to quiet title to property in which the United States claims an interest. *United States v. Mottaz*, 476 U.S. 834 (*supra*

270. *Alaska v. Babbitt (Albert Allotment)*, 38 F.3d 1068 (9th Cir. 1994); *Alaska v. Babbitt (Foster Allotment)*, 67 F.3d 816 (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 (Geodaiaut)*, 140 IBLA 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(4) (Indian land consolidation); 25 U.S.C.A. § 324 (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 regulation[279] 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]

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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 Naknek v. Bristol Bay Borough*, 466 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. Bracker*, 448 U.S. 136 (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. Ollestead v. Native Village of Tyonek*, 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*, 3 AN-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]

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from Wilson's bankruptcy estate on the strength of government arguments that the state court had no authority to include it in the divorce award (D. Alaska Bankruptcy Ct. No. A 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. *Bryan 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.* 455 U.S. 1020 (gambling held regulatory), with *United States v. Marcyes*, 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 (IBIA).[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 fractioned 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":

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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. *Tooahnippah v. Hickel*, 397 U.S. 598, 605–607 (1970).

308. *See* COHEN (1982), *supra* n.3, at 638, n.48.

309. *Tooahnippah 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. § 373 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]

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312. Richard R. Powell, Powell on Real Property v. 4A ¶ 601(1) (1991). Heirs may attempt to partition their fractional interests into individual lots under 25 C.F.R. § 152.33.

313. *See* F.P. 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 tribe; devise to co-owners; adoption of Indian tribal code)

323. *Babbitt v. Youpee*, 519 U.S. 234 (1997)

324. *Id.* at 706.

325. Personal interview: Glenda Miller, Bureau of Indian Affairs Juneau 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 s'aati* (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 s'aati* 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 s'aati* 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 Coer d'Alene Tribe, Idaho)

329. See G.T. Emmons, The Tlingit Indians (de Laguna ed. 1991); H.K. Daugenbaugh, Our Culture, Tlingit Life Stories (1994); R. Worl, 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. Worl, *supra*, n.329.

332. Daugenbaugh, *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

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334. *See In Re Estate of Walter Sydney Howard, Deceased Tlingit of the Sitka Tribe of Alaska*, 32 IBLA 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* Ewers, *supra* n.329.

337. *Id.*

338. Indian Self Determination and Education Assistance Act, 25 U.S.C.A. § 450(a)(1).

339. *See, e.g., Squire v. Capoeman*, 351 U.S. 1 (1956).

340. *See generally* Cohen (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*, Cohen (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

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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 principles 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. Tabbytite*, 942 P.2d 1141 (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 Stillwater*, 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 townsite 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 townsite 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]

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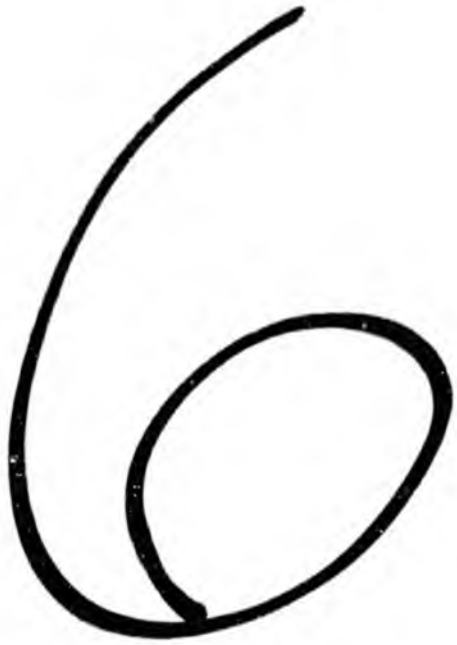
351. *Aguilar II*, *supra* n.61 (allotments); *Carlo v. Gustafson*, *supra* n.200 (townsite lots).

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.



Bureau of Land Management

222 West Seventh Avenue, #13
Anchorage, Alaska 99513
(907) 271-3767
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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 relativcly standard report format I thought I'd pass them on anyway.