

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

**U. S. SENATE COMMITTEE ON ENERGY AND NATURAL  
RESOURCES;**  
**SUBCOMMITTEE ON PUBLIC LANDS AND FORESTS**  
**HEARING ON S. 1466**  
**(THE ALASKA LAND TRANSFER ACCELERATION ACT OF 2003)**  
**AUGUST 6, 2003**

# Office of the President

*Edward K. Thomas*

*Central Council Tlingit & Haida Indian Tribes of Alaska*

320 W Willoughby Avenue, Juneau AK 99801

August 6, 2003

Honorable Lisa Murkowski  
Senate Subcommittee on Public Lands and Forest  
364 Dirksen Office Building  
Washington, DC 20510

Dear Senator Murkowski:

I request that you accept this letter as the testimony of the Central Council Tlingit and Haida Indian Tribes of Alaska on the proposed legislation entitled the "Alaska Land Transfer Acceleration Act of 2003." I request that my testimony be included in the official record of this hearing. I appreciate this opportunity to give testimony on S. 1466.

## INTRODUCTION

The Department of the Interior (DOI) proposes by its Alaska Land Transfer Acceleration Act of 2003 to transfer land in Alaska to the State and Native Corporations. Overall the goal of the proposed legislation is to ensure that the State of Alaska and Native Corporations obtain patents to land. This goal would be admirable except that it eliminates existing property rights of Native allotment applicants. This is justified according to a Bureau of Land Management (BLM) Memo,<sup>1</sup> because Native allotment applicants (or heirs) are the cause of the delays in finalizing Native allotments. It is true that until BLM completes the processing of Native allotments the transfer of some land to the State and Native Corporations is delayed. It is untrue that Native allotment applicants (or heirs) are the cause of the delay. Instead, the blame rests with the inefficient and lengthy processes used by BLM, the Office of Hearings and Appeals, and the Interior Board of Land Appeals (IBLA). The finalization of allotments are delayed by numerous factors which are summarized as follows:

- Many approved applications sit for years awaiting surveys even though some allotments could be certified without surveys.
- Many applications now require hearings because BLM continuously develops and applies stricter standards to prove use and occupancy. One example is an internal memo issued by BLM State Director Cherry in 1999 which set stricter evidentiary

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

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standards making it near impossible for an allotment to be approved on the basis of sworn affidavits and thus more hearings are required.

- Many applications are delayed due to BLM's yearly reorganization when allotment case files are transferred from one employee to another resulting in significant delays because employees must become familiar with a new set of cases each year.
- Many applications sit for years awaiting a hearing, because hearings are generally conducted only in the summer months thereby severely limiting the number of hearings held each year. This delay adds years to the finalization of allotment applications. For example, an allotment case remanded to the BLM in 1987 for a hearing was not heard until 2002. Another example is a hearing was held in 2002 in a case where the application was filed in 1909.
- Many applications sit for years waiting to be processed after favorable hearing decisions or favorable appeal decisions.
- Many applications sit for years waiting for an appeal decision from the IBLA. The average length of time it now takes the IBLA to issue a decision is five years.
- Many applications are not legislatively approved because the State of Alaska filed a protest. However, many of these applications could be legislatively approved if settlements were reached allowing the State to withdraw its protests. BLM should identify these potentially legislatively approvable applications and with BIA, facilitate settlement.

Given that DOI has caused the delays in processing Native allotment applications, it is unconscionable to sacrifice Native allotments for the sake of finalizing the state and corporation land selections. But, that is the effect of S. 1466.

Before S. 1466 proceeds further, DOI must consult with the Tribes in Alaska. Many of the Tribes have compacts or contracts with the Bureau of Indian Affairs to assist Alaska Natives throughout the allotment application process. Therefore, the Tribes' expertise in land matters would be enormously helpful in developing and implementing solutions to finalizing land claims without sacrificing Native allotments. Moreover, meaningful consultation with the Tribes on this proposed legislation is mandated by Executive Order 13175.<sup>2</sup> It is not too late; the Tribes can be consulted and will provide recommendations for amendments to this proposed legislation.

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<sup>2</sup> 65 Fed. Reg. 67249-67252 (November 9, 2000).

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## BACKGROUND

### **The Purpose of the Native Allotment Act of 1906 Was To Grant Title To Alaska Natives of Land Necessary For Subsistence.**

Before I provide my analysis of S. 1466, a brief discussion of the Alaska Native Allotment Act may be helpful. In 1906, Congress enacted the Alaska Native Allotment Act because Native people in Alaska were starving to death due to the encroachment of lands necessary for subsistence.<sup>3</sup> Prior to 1906, Alaska Natives could not get title to land they used to obtain the necessary resources for food, shelter and clothing. Congress intended that the Secretary would convey allotments to Alaska Natives to preserve the subsistence traditions, not destroy them. Protecting traditional uses of land and resources remains equally important today.

The legislative history of the Allotment Act establishes that prior to the passage of the Act, non-native encroachment on Native lands caused widespread devastation which the federal government failed to prevent even though it had a duty to protect Native use and occupancy.<sup>4</sup> The government's failure resulted in the starvation of Native men, women, and children throughout Alaska. This was such an acute problem that President Roosevelt sent a special investigator to Alaska in 1903 in an attempt to alleviate the suffering and death, caused the inability of Native people to access and harvest the traditional resources.<sup>5</sup>

It must be remembered that by 1903, the Alaskan "gold rush" had been underway for almost ten years. Congress knew the heavy traffic through Alaska to the goldfields greatly affected the traditional land uses and possessory rights of Alaska's Native people. There was also substantial traffic from the salmon canneries, oil production, copper mining and commercial logging. These were all activities that took a heavy toll on the same resources that provided food, shelter and clothing to Native Alaskans. The solution was the Alaska Native Allotment Act that carved out allotments of 160 acres of land so that crucial subsistence activities could continue undisturbed for generation after generation.

### **Until 1970, The Allotment Act Was A Well Kept Secret.**

Unfortunately, the government agencies responsible for carrying out the allotment program did not agree that conveyance of allotments was necessary. Consequently, in

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<sup>3</sup> Report on Conditions in Alaska, by James W. Witten, Special Inspector, General Land Office (1903).

<sup>4</sup> *Pence v. Kleppe*, 529 F.2d 135, 141 (9<sup>th</sup> Cir. 1976).

<sup>5</sup> Report, James W. Witten, at 32-33.

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the first fifty-four years of the Alaska Native Allotment Act only 78 allotments were granted,<sup>6</sup> and as of 1970, only 245 allotments had been conveyed.

In 1970, when repeal of the Alaska Native Allotment Act was imminent an effort was finally undertaken to implement the allotment program and assist those desiring to file applications. Because of these efforts, approximately 10,000 allotment applications were filed and pending before the repeal of the Act in 1971 by the passage of the Alaska Native Claims Settlement Act (ANCSA).<sup>7</sup> ANCSA contained a provision that saved pending allotment applications.

Considering that there were far more than 10,000 Alaska Natives in the state in 1971, the 10,000 allotment applications filed by 1971 were only a fraction of what should have been submitted. The problem has never been that there were too many applications filed but rather the process used by the government for deciding Native allotment cases was lengthy, complicated and costly. This same process was not used for homestead and other similar claims for land in Alaska and consequently those other claims were finalized long ago.

**In 1980, Congress Attempted To Streamline The Allotment Adjudication Process But It Failed.**

In 1980, Congress again tried to provide finality to Native allotments by the passage of Section 905, of the Alaska National Interest Lands Conservation Act (ANILCA).<sup>8</sup> Section 905 was designed to remove many of the administrative barriers to obtaining an allotment by authorizing the Secretary of Interior to "legislatively" approve some, but certainly not all, of the pending allotments. Legislative approval eliminated the need for costly and lengthy administrative hearings. The will of Congress was thwarted when the State of Alaska protested some 6,000 applications as a way to prevent legislative approval. It is unknown how many allotments have been legislatively approved. Allotments not legislatively approved, require proof that the applicant's use of the land was substantially continuous for more than 5 years, potentially exclusive of others. There are approximately 4,000 pending allotment parcels requiring adjudication of use and occupancy.<sup>9</sup> Some of these very old cases in need of hearings will be further complicated or unfairly denied because many of the applicants and first hand witnesses have died.

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<sup>6</sup> DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 110 (2d ed. 2002) (citing Bureau of Indian Affairs 1956-1993 Annual Caseloads Report, Summary of Native Allotment Numbers (Juneau 1994)).

<sup>7</sup> 43 U.S.C. 1617.

<sup>8</sup> 43 U.S.C. 1634.

<sup>9</sup> There are approximately 2,800 applications, but each application may have up to four parcels. 1.6 is the average number of parcels in an application. A Report Concerning Open Season for Certain Native Alaska Veterans for Allotments, Prepared for Congress by the Department of the Interior in Response to Section 106 of Public Law 104-42, p. 6 (June 1997).

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Many have failed to obtain allotments because BLM has interpreted the Allotment Act in a restrictive and harsh manner. For example, until a 1976 federal court decision, approximately one thousand applications were denied because the government refused to provide Native allotment applicants with a due process hearing to determine facts in dispute. Some of these applications were reopened but too many remain closed even today.

Although some of the restrictive interpretations and policies of earlier administrations have been reversed by the federal courts and by Secretarial Order, many past interpretations and policies continue. More than any other factor, the government's restrictive interpretations have caused the delay in processing Native allotments. To illustrate this point, one need only consider that in Alaska there are no pending homestead applications nor did the processing of those applications require lengthy and costly adjudication.

Most importantly, there are allotment applications that BLM closed unlawfully which have not yet been reinstated but should be. Eliminating the right to reinstate those applications would be a second denial of due process.

**S. 1466 ELIMINATES IMPORTANT RIGHTS OF NATIVE ALLOTMENT APPLICANTS THAT HAVE BEEN SECURED BY FEDERAL LAW, THE U.S. CONSTITUTION AND DECISIONS OF THE INTERIOR BOARD OF LAND APPEALS.**

S. 1466 eliminates important due process safeguards that were obtained for Native allotment applicants after years of litigation before the IBLA and federal courts. Further, S. 1466 forever eliminates the opportunity of allotment applicants to resurrect applications that were lost through no fault of the applicant. S. 1466 also forever eliminates the opportunity to reinstate those applications that BLM closed in violation of the applicants' constitutional rights.

**Congress Provided Allotment Applicants The Right To Amend Erroneous Legal Descriptions Of Allotments Because The Government Caused The Errors.**

Section 304 (f)(5) eliminates the right of Native allotment applicants to amend an allotment description. It is important to understand that the right to amend the legal description of an allotment arose from the recognition by Congress that a significant percentage of allotment applications contained errors that were not the fault of the applicants.<sup>10</sup>

The right to amend allotment descriptions under Section 905(c) of ANILCA is allowed only in very limited situations; it can be applied only in situations where it is proven the land as described in the application is not what the applicant intended to apply for as the allotment. Thus, an acceptable amendment would describe the land that the

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<sup>10</sup> S. Rep. No. 413, 96<sup>th</sup> Cong., 2d Sess. 237-38, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5181-82.

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applicant originally intended to claim as the allotment. Proof of the applicant's intent is now submitted to BLM by sworn affidavits or by testimony during a hearing.

It is well known and accepted that in 1970-1971, the BIA in Alaska sent the handwritten allotment applications to locations in California and elsewhere for typing. The typed applications were returned to BLM but many contained erroneous legal descriptions; either the location was incorrect or the acreage amount was incorrect. Thus, the descriptions of some allotments must be amended to correct mistakes the government made in the first place.

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

**Congress Provided For Allotment Applicants' Right To Reinstate Allotments That Were Relinquished Unknowingly And Involuntarily.**

Section 304 (f)(3) of S. 1466 eliminates the right of Native allotment applicants to request reinstatement of relinquished allotment land even if the relinquishment is invalid. However, the right to reinstatement of an allotment on the grounds that a relinquishment is invalid is addressed in Section 905 of ANILCA.<sup>11</sup> Further, the IBLA holds that BLM must reopen a relinquished allotment case and determine if the relinquishment is invalid.<sup>12</sup> An invalid relinquishment under the IBLA decisions is one that was unknowingly or involuntary.<sup>13</sup> The right to get a case reopened so the government can investigate whether a past relinquishment is valid is an important right because in these cases the applicant may have been wronged once already and simple fairness dictates wrongs be righted, not compounded.

**Allotment Applicants Have A Constitutional Right To Reinstatement Of Allotments That Were Closed Without An Opportunity For A Hearing.**

Sections 304 (f)(1) and (f)(3) of S. 1466 eliminates all rights to reinstate closed allotment cases. However, federal courts have already ruled that applicants (or heirs) have the right to get closed allotment cases reinstated if BLM closed the case without an opportunity for a hearing because such a closure was in violation of the applicants' due process rights.<sup>14</sup> Before these federal court decisions, BLM routinely rejected and closed allotment cases whenever it believed there was insufficient evidence to prove the applicant's qualifying use of the land claimed for an allotment. The applicants never had a chance to prove otherwise.

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<sup>11</sup> 43 U.S.C. 1634(a)(6).

<sup>12</sup> *Heirs of William Lisbourne*, 97 IBLA 342 (1987).

<sup>13</sup> *Matilda Johnson*, 129 IBLA 82 (1994).

<sup>14</sup> *Pence v. Kleppe*, 529 F.2d 135 (9<sup>th</sup> Cir. 1976); *Pence v. Andrus*, 586 F.2d 733 (9<sup>th</sup> Cir. 1978).

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Until 1976 after the first federal court decision requiring BLM to provide applicants with hearings, BLM had never allowed an opportunity for the applicant to present evidence of qualifying use to an impartial decision maker. Thus, hundreds of allotment applications were closed in violation of due process guarantees. Too many allotment cases remain closed today<sup>15</sup> because of BLM's failure to reopen closed cases unless "the applicant, legal representative or BIA, requests reinstatement and presents clear and compelling evidence that the file was erroneously closed."<sup>16</sup> Eliminating the right to reinstate allotment cases that were closed in violation of the applicants' due process rights would only compound the original violation and lead to certain litigation. Although, the U.S. Supreme Court has repeatedly held that Congress has plenary authority over Indian affairs, which would include Native allotment matters, that Court has also held that Congress when exercising its plenary authority must comply with guarantees of the U.S. Constitution,<sup>17</sup> such as the due process clause and the just compensation clause.<sup>18</sup> Accordingly, Congress should remove Sections 304(f)(1) and (f)(3) from S. 1466. Instead, BLM should reinstate those unlawfully closed cases on its own initiative.

**Allotment Applicants Now Have A Right To File Reconstructed Allotment Applications Where The Government Lost Their Original Applications And This Right Includes A Hearing To Present Evidence That The Original Application Was Timely Filed.**

Section 304 (f)(1) eliminates all rights to file reconstructed applications in cases where the government lost the original applications. Presently under rulings of the IBLA applicants (or heirs) have the right to file reconstructed applications in cases where the government lost their original application, and the BLM has a corresponding duty to investigate those claims and provide the opportunity for an evidentiary hearing.<sup>19</sup>

Unfortunately, Section 304 (f)(2) eliminates this right and instead allows BLM to reject previously filed reconstructed applications unless the BLM's file already contains the following evidence:

1. the name of the person who took the original application and the agency that person worked for;

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<sup>15</sup> A recent internal audit by the Central Council of Tlingit and Haida Indian Tribes of Alaska discovered that 66 percent of the allotment cases under its jurisdiction were closed by BLM in violation of the applicants' due process rights. These cases have never been reopened by BLM but the Tribe has begun work for reinstatement of these cases.

<sup>16</sup> BLM Alaska Native Allotments Handbook, Section II at 13 (1991).

<sup>17</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, (1980). See also, *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977).

<sup>18</sup> See, *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Antelope*, 430 U.S. 641 (1977); *Hodel v. Irving*, 481 U.S. 704 (1987).

<sup>19</sup> *Timothy Afcan, Sr.*, 157 IBLA 210 (2002).

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2. the month and the year the original application was submitted;
3. the specific address where the original application was submitted;
4. two affidavits attesting to the applicants' qualifying use; and
5. two affidavits from non-family members attesting that they know the original applications were filed.

The long list of evidentiary requirements as set forth in Section 304 (f)(2) effectively creates a new standard to prove the government lost an allotment application. In other words, the amount and types of evidence in this list far exceeds what the IBLA now requires to prove an application was lost.<sup>20</sup> Thus, much of the newly required evidence is currently not in BLM's record for existing cases because it has never before been required. It will be impossible for existing cases to meet this new standard because the new standard becomes effective when S. 1466 is enacted so there will be no time for applicants to supplement BLM's records. It is ironic that BLM's repeated attempt to apply the harsh standard described in Section 304(f)(2) has repeatedly been reversed by the IBLA.<sup>21</sup>

Allotment applicants with existing reconstructed applications on file with BLM have never been informed of this new and excessive evidentiary standard. Considering that the applications were lost in 1970-1971, the details required by the new standards some thirty years later might be impossible to meet. This provision is not only grossly unfair but will surely result in costly and lengthy litigation.

**Allotment Applicants Now Have A Right To A Hearing Conducted By An Impartial Administrative Law Judge And Governed By Existing Federal Regulations.**

Section 501 of S. 1466 may eliminate the allotment applicants' right to a hearing conducted by an impartial administrative law judge and governed by federal regulations. Section 501 establishes a new but undefined process for hearings that may or may not be governed by existing federal regulations. Additionally, under the language of the proposed legislation may even be conducted by any employee of the Department of the Interior including BLM employees.

Currently, applicants (or heirs) have a right to a hearing to determine certain factual issues in their allotment cases, and the hearings are conducted by impartial judges from the Office of Hearings and Appeals under rules set by federal regulations. These hearings meet due process guarantees.<sup>22</sup> Unless the Department of the Interior establishes a duplicate hearings and appeals process, it is unlikely that due process

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<sup>20</sup> *Alice Brean v. United States*, 159 IBLA 310 (2003) (holding that the IBLA will set aside BLM's rejection of a reconstructed allotment if the Board decides there is a question of fact whether the application was timely filed and BLM has not provided the applicant with a hearing required by the due process clause).

<sup>21</sup> *Timothy Afcan Sr.*, 157 IBLA at 220; *Alice Brean*, 159 IBLA at 323.

<sup>22</sup> *Pence v. Andrus*, 586 F.2d 733 (9<sup>th</sup> Cir. 1978).

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guarantees will be met. Further, it is certain that a duplicate hearing system will only add more cost and time to the already lengthy hearing process.

It is obvious to those knowledgeable about Native allotments that the allotment hearings process is unduly slow. Nevertheless, resolution of this problem should not unfairly deprive applicants of impartial hearings governed by existing federal regulations that are familiar and lend certainty to the hearings process.

One of the reasons the hearings process is unduly slow is that the Office of Hearings and Appeals generally schedules hearings only in the summer months which drastically reduces the total number of allotment hearings that occur each year. For example, in the year 2003 less than 10 allotment hearings will occur in Alaska.

To improve the hearing process, a better alternative would be for Congress to authorize and fund the Office of Hearings and Appeals to open an office in Anchorage and increase the number of existing administrative law judges. These judges could hold allotment hearings year-round and could do other necessary work such as probate matters. Moreover, these judges could continue to conduct hearings under current federal regulations which would also save money, time and uncertainty in the processing of allotment applications.

**Allotment Applicants Now Have A Right To An Appeal Before The IBLA Is Governed By Federal Regulations.**

Section 501 also establishes a new appeals process that may or may not be governed by existing federal regulations and may be decided by any employee of the Department of the Interior including BLM employees. However, applicants (or heirs) now have a right to appeal BLM's decision to the IBLA which is staffed by impartial administrative law judges governed by federal regulations.

Although many appeals take the IBLA more than several years to decide, the resolution of this problem should not unfairly deprive allotment applicants' access to an impartial appeals Board that has the expertise to decide allotment issues. It could take a new appeals body years to gain the expertise necessary to issue thorough and competent appeals decisions. In addition, if the new appeals body did not have the expertise to render a thorough and competent decision which an appellant has a right to receive, it is likely federal courts would remand the incompetent decisions. This would only add to the years it now takes to receive an appeal decision.

A better alternative to resolve the problem of the delays at the appeal level is for the IBLA to receive sufficient resources that would allow the Board to decide pending and future appeals in a more efficient and timely manner. This solution would also prevent the unnecessary duplication and excessive costs that would occur under the new appeals body contemplated by S. 1466. Moreover, it would save time because the IBLA already has the expertise to render competent appeal decisions and the necessary federal regulations governing the IBLA appeal process are already in place.

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**CLOSING**

Congress enacted the Alaska Native Allotment Act in 1906 so that Alaska Natives would obtain title to land and resources that had fed, clothed and sheltered them for thousands of years. Many Alaska Natives still wait for that promised title.

We urge this Subcommittee to return the proposed legislation to DOI with instructions to conduct meaningful consultation with Tribes in Alaska. After such consultation, we will submit amendments to S. 1466 that will protect rights to Native allotments while eliminating many of the factors that now delay finalizing allotment cases.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward K. Thomas". The signature is written in a cursive style with a long horizontal stroke at the end.

Edward K. Thomas  
President