SPECIAL LEGAL STATUS OF ALASKA NATIVE ALLOTMENTS AND RESTRICTED NATIVE TOWNSITE LOTS

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Roger L. Hudson, Attorney
Office of the Regional Solicitor, Alaska Region
U.S. Department of the Interior
4230 University Drive, Suite 300
Anchorage, Alaska 99508-4626
(907) 271-4131

SPECIAL LEGAL STATUS OF RESTRICTED NATIVE ALLOTMENTS AND TOWNSITE LOTS / CONTENT OUTLINE

V. JUDICIAL AND REGULATORY JURISDICTION

I. ACQUISITION AUTHORITIES AND NATURE OF TITLE

A. 1906 Native Allotment Act, Act of May 17, 1906, 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954, formerly codified at 43 USC §§ 270-1 through 270-3 (1970):

> ". . . 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"

- Repealed with a savings clause for pending applications by § 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 USC § 1917.
- Regulations governing acquisition and entitlement are found at 43 CFR Part 2561. Extensive judicial and administrative caselaw and special legislation dealing with entitlement issues is beyond the scope of this presentation.
- Nature of Alaska Native allottee's title is fee, subject to statutory restrictions on alienation and taxation. State of Alaska, 45 IBLA 318 (1980), overruling Charlie George, 44 L.D. 113 (1915). Alaska Native allotments are not "trust" land, to which the United States holds legal title.
- There are a very few trust allotments in Alaska, acquired under authority of the General Allotment Act of Feb. 8, 1887, 24 Stat. 388, as amended, codified at 25 USC §§ 331 et seq. See, e.g., U.S. v. Clarke, 445 U.S. 253 (1980).
- Restrictions on alienation require approval of Secretary of the Interior for any valid alienation of an interest in the land. Unapproved transfers of interest are null and void. Retroactive approval is discretionary but possible if equity dictates. See, e.g.: United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984); Sonny Thornburg v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 239 (1990); or Wesley Wishkeno, et al. v. Deputy Assistant Secretary Indian Affairs (Operations), 89 I.D. 655, 11 IBIA 21 (1982).
- Roughly 14,000 parcels scattered across the state, increasingly characterized by multiple owners.

B. Alaska Native Veterans Allotments. A new opportunity for a limited class of applicants. Act of October 21, 1998, Pub. L. 105-276, 112 Stat. 2516, as amended, now codified at 43 U.S.C. § 1629g. Regulations found at 43 CFR, Part 2568.

- Legislation created limited window of opportunity (now closed) for otherwise eligible Alaska Natives, who were in the military for 6 months or more between 1969 and 1971, or entered service between June 2, 1971 and December 3, 1971, to apply for allotment.

- To qualify, both the rules under the original 1906 Act, and new requirements must be satisfied.
- Expanded category of lands ineligible for conveyance, but opportunity for qualified applicants to select alternative lands for conveyance.

C. 1926 Native Townsite Act, Act of May 26, 1926, 44 Stat. 629, as amended by the Act of February 26, 1948, 62 Stat. 35, formerly codified at 43 USC §§ 733-36 (1970):

> ". . . a deed therefore which shall provide that the title conveyed is inalienable except upon approval of the Secretary of the Interior: Provided, That nothing herein contained shall subject such tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the patentee, or to any claims of adverse occupancy or law of prescription."

- Repealed with a savings clause by § 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub.L. No. 94-579, 90 Stat. 2743, 2790.
- Regulations governing acquisition, removal of restrictions, and alienation, are found in 43 CFR Part 2564.
- Except with respect to restricted individual land ownership, Native townsites are legally indistinguishable from other Federal townsites, established pursuant to the Act of March 3, 1891, 26 Stat. 1099, 43 U.S.C. 732 (1970), Klawock v. Gustafson, Case No. K-74-2, unpublished Nov. 11, 1976 decision by U.S. District Judge Fitzgerald. See also 56 I.D. 569 (1938).
- A Native's right to restricted townsite lot must be established on the basis of occupancy on or before the date of approval of a subdivisional survey. 43 CFR § 2565.3(c).
- There are roughly 4,100 restricted Native townsite lots located in about 100 Alaska communities.

D. Common Categories of Unrestricted Native Land:

1. Alaska Native Claims Settlement Act (ANCSA) § 14(c)(1) primary places of residence, or business, or subsistence campsites or reindeer headquarters. 43 U.S.C. 1613(c)(1). These tracts may enjoy certain tax benefits, but are not subject to any federal restrictions or alienation.

2. ANCSA § 14(h)(5) primary places of residence. 43 U.S.C. § 1613(h)(5).

3. ANCSA Corporation shareholder homesites of up to 1-1/2 acres, authorized to be received tax free prior to December 18, 1991, pursuant to ANCSA § 21(j), 43 U.S.C. § 1620(j), added by § 1407 of the Alaska National Interest Lands Conservation Act (ANILCA), Pub.L. 96-487, 94 Stat. 2371, 2495 (1980), as amended by Pub.L. 100-241, 101 Stat. 1810, and Pub. L. 102-415, 106 Stat. 2113.

4. Former allotment or restricted townsite lots, purchased or inherited by non-Natives. Restrictions on alienation and taxation terminate by operation of law upon passage of title to a non-Native owner. There is no minimum Native blood quantum (other than greater than zero) to qualify as Native for inheritance purposes.

5. Former allotment lands owned by a Native as to which restrictions have been voluntarily removed pursuant to 25 CFR Part 152.

6. Former restricted townsite lots sold to a non-Native or a Native. Unlike allotments, restrictions cannot be maintained when a restricted townsite lot is sold to another Native. Cf. Juanita Melsheimer v. Assistant Secretary for Indian Affairs, 11 IBIA 155 (1983), allowing retention of restrictions in the case of a gift of a townsite lot to another Native.

7. All ANCSA corporate lands, or interests therein.

E. Special Pre-Patent Jurisdictional Problems. This outline deals primarily with allotments and restricted townsite lots as to which the Native owner holds legal title. There are other complicating situations where a Native asserts ownership, but does not presently hold legal title.

1. Allotment application approved by BLM, but land not yet surveyed.
   a. An allotment cannot be patented to the allottee until a U.S. Survey is completed. However, the allottee can pay for a private survey at his own expense, to be conducted pursuant to BLM Cadastral Survey instructions, and later reviewed and adopted as a U.S. Survey.
   b. The same legal description and physical boundary location problems apply to some allotments or parcels which were "legislatively approved" pursuant to ANILCA § 905(a), 43 U.S.C. § 1634(a), even though legal title has passed as to these lands.
   c. Even prior to survey interests in legislatively approved allotments are regarded as alienable, although serious practical issues are presented. December 28, 1983 letter decision by the Assistant Secretary – Indian Affairs in the appeal of James L. Lindgren. Errors resulting from lack of surveys have resulted in litigation.
   d. Administrative jurisdiction over such lands passes from the BLM to the BIA pursuant to a 1979 Memorandum of Understanding between the BLM and BIA.

2. Unapproved allotments subject to federal jurisdiction.
   a. Applications not yet adjudicated, or on administrative or judicial appeal from approval or disapproval decision.
   b. Once approved, but while under challenge, responsibilities do transfer to BIA, but account of conditional status of approval will be taken. E.g., by establishment of escrow for lease or right-of-way payments.

   Aguilar cases. In Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), Judge von der Heydt held that an allotment applicant's statutory preference right relates back to the time of the commencement of use and occupancy. Many parcels of land were conveyed to the State of Alaska (or other third parties including ANCSA corporations) in error or prior to the allotment applicant's filing of a formal application. The United States entered into a 1983 stipulation setting forth procedures to cover such situations, and possible recovery of title from the State of Alaska. The same procedures have been applied in the context of conveyances to ANCSA corporations or other third parties.

   - The federal government has no direct administrative jurisdiction over such lands prior to recovery of title. See State of Alaska v. Marcia K. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984).
   - The Department is now "adjudicating" validity of applications even where land is held by third party, including granting hearing before rejection of application. Post-Hearing decisions are administratively appealable.
   - The prospective allottee's ultimate legal rights, and/or interim use of the land, if any, are in significant measure dependent on the good will of the legal owner. In many cases the allotment claimant is time barred from challenging the prior conflicting conveyance although the United States may not be. No such lawsuits have been filed to date.
   - Third-party legal title holders have considerable leverage in negotiating the terms of a voluntary reconveyance to the government, and/or any interim use, occupancy, or resource-related activities on the disputed parcel.
   - Most, but not all, BLM requests for reconveyance have been accommodated by third parties.

II. EFFECT OF INALIENABILITY WITHOUT SECRETARIAL APPROVAL ON REAL PROPERTY TRANSACTIONS

A. Protection Against Involuntary Sale to Satisfy Debts

1. In the case of restricted townsite lots, this protection is explicit. 43 U.S.C. § 733 (1970).

2. In the case of Native allotments, the same result obtains, although statutory language is less explicit.

a. To begin with, State courts lack jurisdiction to adjudicate restricted Indian land title or right to possession, 28 U.S.C. § 1360(b); Heffle v. Alaska. 633 P.2d 264, 26 (Alaska 1981). See State Superior Court Judge Ripley's July 10, 1990 Order, refusing to enforce execution of judgment against allotment in Willis v. Sampson, Case No. 3AN-87-787-1 Civil.
b. Secondly, as a matter of substantive federal law, a Native allotment cannot be alienated without the owner's consent, and the approval of the Secretary of the Interior. 43 U.S.C. § 270-1 (1970); 25 CFR §§ 152.17, 152.22. The Secretary will not approve an alienation without the owner's consent, Id. See also, e.g., Bacher v. Patencio, 232 F. Supp. 939 (S.D. Cal. 1964), aff'd. 368 F.2d 1010 (9th Cir. 1966); State of Alaska v. Acting Juneau Area Director, BIA, and Arctic John Etalook, 9 IBIA 126 (1981).
c. All allotment statutes ". . . constitute part of a single system evidencing a continuous purpose on the part of Congress. The statutes are in pari marteria, and must be so construed." United States v. Jackson, 280 U.S. 183, 196 (1930). See generally, F. Cohen, Handbook of Federal Indian Laws (1982 ed.), at 617-18. Therefore cases such as Mullen v. Simmons, 234 U.S. 192 (1914), which rejected a judgment creditor's effort to execute against an allotment, are controlling.
d. Whether an allotment is vulnerable to execution by a judgment creditor was tested in the consolidated cases of Picket v. Sampson, No. A93-077 and Devlin v. Sampson, No. A93-096 in the local U.S. District Court, but settlement prevented conclusive ruling.
e. Bankruptcy. Title to restricted property does not pass to trustee and can't be sold to satisfy creditor claims. In In Re Russie, 96 F. 609, 610 (D. Ore. 1899).
f. Attorney's attempt to collect fee from proceeds of successful suit, deposited in Individual Indian Money (IIM) account, rejected. After court awarded allottee money judgment, attorney's claim for share of proceeds rejected in Law Offices of Vincent Vitale v. Tabbytite, 942 P.2d 1141 (Alaska 1997), based on 25 U.S.C. § 410. Administrative claim for payment from IIM funds also rejected in Vitale v. Juneau Area Director, BIA, 36 IBIA 177 (2001). See 25 C.F.R. Part 115, esp. section 115.601.
g. The Internal Revenue Service will not place a tax lien on restricted Native property for unpaid income taxes owed. 26 C.F.R. § 301.6321-1.

B. Voluntary Sales Are Permissible, Subject to Certain Conditions

1. Restricted Native townsite lot sales are governed by 43 CFR § 2564.5 and 25 CFR Part 152, latter regulations in process of revision.

2. Native allotment sales are governed by 43 CFR § 2561.3 and 25 CFR Part 152.

3. A sale of a restricted townsite lot always transfers unrestricted fee simple title, even if the purchaser is a Native; a Native purchaser of an allotment can receive restricted title if the Secretary determines the purchaser is unable to manage the land without federal protection, and the deed so provides.

4. Presumption in favor of advertised sale. Negotiated sale permissible in limited circumstances. 25 CFR 152.25.

5. Appraisal normally required. 25 CFR 152.24. Usually furnished by the Office of the Special Trustee (OST) at no cost to seller/owner. Appraisal is confidential, and cannot be obtained pursuant to Freedom of Information Act (FOIA). See Solicitor's Memorandum of March 27, 1989, rejecting FOIA Appeal of E. John Athens (No. 88-51). Appraisals can be released at owner's and BIA's discretion to facilitate negotiation.

6. Gift or sale at less than fair market value only in limited circumstances to limited class of transferees. 25 CFR § 152.25.

7. Federal approval of sales and other transactions requires compliance with applicable federal laws, including, e.g., the National Historic Preservation Act, 16 U.S. C. §§ 470f, 470cc; and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

8. Installment or deferred payment sales (i.e., owner-financed) are permitted by 25 CFR § 152.35. However, title does not pass until payment in full is made, and all prior payments are forfeited in the event of default and cancellation.

9. Sale not approved by Secretary of the Interior is null and void, and purchaser may not even be able to recover price paid. See Bacher v. Patencio, 232 F. Supp 939, supra. Retroactive approval is authorized, but discretionary and dependent on the equities. See U.S. ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984), Wesley Wishkeno v. Deputy Assistant Secretary – Indian Affairs – Operations, 11 IBIA 21, 89 I.D. 655 (1982); and related decisions.

C. Leasing and Use Permits

1. Governing statute and regulations are 25 U.S.C. § 415 and 25 CFR Part 162. The Part 162 regulations were significantly rewritten in 2001, and a further re-write has been published for public comment at 69 Federal Register 6500 (February 10, 2004). The new regulations will deal separately with leases for agricultural, residential, and business purposes. Increased emphasis will be placed on the use of bonds, insurance, and other mechanisms to protect the interests of restricted land owner lessors.

2. As with other forms of alienation, leases and permits are void without approval of the Secretary of the Interior.

D. Easements and Rights-of-Way. Governing statutes and regulations found at 25 U.S.C. §§ 323-25 and 25 CFR Part 169. Note that grantor is the Secretary of the Interior even if title is held by individual Alaska Natives subject to restrictions against alienation. Also note that consent of the owner is an absolute requirement.

1. The Golden Valley Electric Ass'n. issue; priority as between allottee and holder of government-granted right of way to third party.

   a. The present rule: an allottee's "preference right" relates back to the time of commencement of use and occupancy. Therefore even rights of way innocently applied for and granted by the government after the allottee's use began, but before an application was filed, are void. This rule was first announced in Golden Valley Electric Ass'n. (On Reconsideration), 98 IBLA 203, 205 (1987), affirmed after remand, 110 IBLA 224 (1998), and has been reaffirmed by the IBLA on numerous occasions, including, e.g., State of Alaska, 125 IBLA 291 (1993). But compare State of Alaska DOT/PF, 140 IBLA 205 (1997).
   b. Judicial authority for the GVEA rule includes Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985), aff'd. sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987), and Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).
   c. Several court decisions have rejected, on jurisdictional grounds, the State of Alaska's attempts to overturn the "relation back" doctrine: Alaska v. Babbitt (Albert Allotment), 38 F.3d 1068 (9th Cir. 1994); Alaska v. Babbitt (Foster I), 67 F.3d 864 (9th Cir. 1995) (amended and superseded by Alaska v. Babbitt (Foster II), 75 F.3d 449 (9th Cir. 1996); Alaska v. Babbitt (Bryant Allotment), 182 F.3d 672 (9th Cir. 1999).
   c. The State of Alaska still refuses to acquiesce in BLM actions finding State rights of way void in part, and continues to litigate in the hopes of securing administrative or judicial reversal of the GVEA rule, which has been applied by BLM to invalidate a number of State rights of way. Thus far, the State's lawsuits have been dismissed on jurisdictional grounds, based on the lack of a waiver of sovereign immunity under 28 U.S.C. § 2409a.
   d. See U.S. Government Accountability Office Report No. GAO-04-923 (September 2004), "Alaska Native Allotments, Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies." Legislation to resolve disputes is presently pending as S. 205 and H.R. 865 (2007).

2. Public Roads and Trails

a. Allotments are supposed to be granted subject to known public roads and trails which cross them; provided that such public use predated the applicant's own use and occupancy. See e.g., Leo Titus, Sr., 89 IBLA 323, 335 (1985); Edward A Nickoli, 90 IBLA 273, 276 (1986).

b. R.S. 2477, formerly codified at 43 U.S.C. § 932, and repealed in 1976 by the Federal Land Planning and Management Act (FLPMA) § 706(a), 90 Stat. 2793, stated simply:
"The right of way for construction of highways over public lands, not reserved for public uses, is hereby granted."

1) When an allotment is being conveyed, the patent may or may not note that the land title is subject to a ROW for a public road or trail. BLM does not have authority to conclusively determine whether or not a claimed ROW is validly established, so neither silence nor specific mention of a ROW is conclusive. Reacting to Department of the Interior efforts to develop an adjudicatory process, Congress in 1997 expressly prohibited Federal agencies from placing into effect any regulations on the subject, unless expressly authorized in future legislation. Omnibus Interior Appropriations Act for FY 1997, Pub. L. 104-208, 110 Stat. 3009-200, Sec. 108.

2) In general, Department of the Interior now has an alternative process in place, though not useful relative to allotments. See 43 CFR Part 1860, governing issuance of "Recordable Disclaimers of Interest." See also 68 Fed. Reg. 494 (1/6/03). There is also a detailed Secretarial Policy Memorandum regarding implementation of Southern Utah Wilderness Alliance v. BLM, 425 F.3d 735 (10th Cir. 2005).

3) State law addresses R.S. 2477 in A.S. 19.30.400 et seq.

4) In practical terms, the only available means of determining allotment ROW validity, scope, or location, in the event of a dispute are by negotiation or litigation. See e.g., Fitzgerald v. Puddicombe 918 P.2d 1017 (Alaska 1966) (R.S. 2477 case not involving allotment).

5) Special jurisdictional challenges. State courts have no jurisdiction over land at issue. If State claims ROW, Federal courts may not have jurisdiction over land owner suit, given State's 11th Amendment sovereign immunity. Harrison v. Hickel 6 F. 3d 1347 (9th Cir. 1993) (not an R.S. 2477 case). Also, Federal courts may not have jurisdiction under Quiet Title Act, 28 U.S.C. 2409a or due to Indian lands exception. Most likely solutions: (a) State can sue for condemnation in Federal Court under 25 U.S.C. § 357; (b) United States can sue on allottee's behalf in Federal Court; (c) allottee can sue a private party trespasser in Federal Court.

c. Roads platted in townsite subdivisional surveys are reserved to the public, and may only be vacated by affirmative governmental act. When and if vacated, title to such a road ROW attaches proportionally to adjoining lots. A.S. 29.40.160.
d. The State of Alaska, and on occasion interested third parties, may maintain that an allotment is subject to a right of way authorized under R.S. 2477 that is not expressly reserved in the allotment.
e. Limited Scope of Rights-of-Way. An allottee can give, and be compensated for, multiple non-exclusive private easements, including easements for different purposes. The scope of a federal grant of right-of-way is a question of federal law, and a right-of-way for road or highway purposes does not include a right to install or maintain utility lines. United States v. Gates of the Mountain Lake Shore Homes, Inc., 732 F. 2d 1411, 1414 (9th Cir. 1984).

E. Timber, Gravel, and other Resource Extraction Activities. An allottee's use of his resources for his own purpose requires no approval, but any alienation of an interest in the allotment does require approval of the Secretary of the Interior.

1. Timber sales are governed by 25 U.S.C. § 406 and 25 CFR Part 163. Under current practice commercial timber sales are actually administered by the BIA.

2. Gravel sales are usually authorized by permits pursuant to 25 CFR Part 162. Though lands with valuable gravel were not originally available for allotment as nonmineral lands, law was changed in ANILCA § 905 (a)(3) in 1980.

3. Allotments are supposed to be nonmineral in character, and are issued subject to the United States reservation of oil and gas rights, so there is little if any occasion for application of 25 CFR Part 212 in Alaska. See 43 U.S.C. §§ 270-11 through 270-13 (1970).

4. Income from the sale of timber, gravel, or other natural resources is not taxable for federal income tax purposes. Squire v. Capoeman, 351 U.S. 1 (1956).

F. "Land Exchanges." 25 U.S.C. § 409a. Proceeds from the sale of trust or restricted land can be "reinvested" in the purchase of other lands which may be acquired in restricted status. But the funds must be traceable, Dora Joyce Prieto v. Acting Area Director, Sacramento Area Office, BIA, 11 IBIA 124 (1983), and the restricted status of the newly acquired parcel must appear on the face of the deed, Leading Fighter v. Gregory County, 230 N.W.2d 114 (S.D. 1975), cert. denied 423 U.S. 1032 (1975).

G. Mortgages and Deeds of Trust. 25 U.S.C. § 483a permits a restricted property owner, with the approval of the Secretary of the Interior, to grant a security interest in his property.

- If the loan secured by the restricted property is paid off, the restrictions continue unaffected.
- But in the event of a default the land "shall be subject to foreclosure. . . in accordance with the laws of the tribe which has jurisdiction . . . or the laws of State."
- The Indian owners shall be regarded as vested with unrestricted fee simple title, and the U.S. shall not be a necessary party to a foreclosure action.
- The proper forum is in doubt. Compare Crow Tribe of Indians v. Deernose, 487 P.2d 1133 (Mont. 1971) (no state court jurisdiction over foreclosure action) and Northwest South Dakota Production Credit Association v. Smith, 784 F.2d 323 (8th Cir. 1986) (no state or federal jurisdiction) with Federal Land Bank of Wichita v. Burris, 790 P.2d 534 (Okla. 1990) (holding that state court has jurisdiction over foreclosure action pursuant to 25 U.S.C. § 483a).
- In In Re Emerald Outdoor Advertising, LLC, 444 F. 3d 1077 (9th Cir. 2006) recording of deed of trust in state recorder's office perfected interest vis-à-vis later approved lease.

H. Subdivisions.

1. Informal. An allottee can sell or otherwise transfer a portion of his allotment under exclusive Federal authority, so long as an adequate legal description (usually by survey) is available. However, absent an approved plat, such an informal "subdivision" transaction is not recognized or recordable under State law. A.S. 40.15.010. While a BIA approved conveyance is still valid as between grantor and grantee, absence of state/local platting authority approval or state recordation can adversely affect marketability or value.

2. Formal Subdivisions and Dedications. To confirm legal authority for allotment owner compliance with state and local subdivision platting rules, Congress has passed the Alaska Native Allotment Subdivision Act of 2004, Pub. L. 108-337, 118 Stat. 1357.

- Subject to the approval of the Secretary of the Interior, Section 3(a) authorizes – but does not require – Alaska Native restricted land owners to subdivide and/or dedicate land in accordance with state or local law.

- Section 3(b) ratifies past subdivisions and dedications which were approved by the Secretary and the relevant platting authority.

- Section 4 clarifies that subdivision alone – without dedication, sale, or other conveyance – does not alter or diminish protections of restricted status.

I. Condemnation.

- Restricted Native real property can be condemned in accordance with normal State statutory standards and procedures. 25 U.S.C. § 357.
- Federal Court jurisdiction. Minnesota v. United States, 305 U.S. 382, 389-90 (1939).
- United States is an indispensable party. Minnesota v. U.S., 305 U.S. 382 (1939); U.S. v. City of MacAlester, Okla., 604 F.2d 42 (10th Cir. 1979).
- Condemnation in Federal Court pursuant to 25 U.S.C. 357 may be the only way for a State to quiet title to disputed interests, because there is no other basis for jurisdiction, given the Indian lands exception to the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a. A condemning authority can confirm title and argue that no just compensation, or little, is due and owing on account of prior title.
- However, title to restricted property cannot be acquired by inverse condemnation. U.S. v. Clarke, 445 U.S. 253 (1980). If "taking" precedes formal condemnation, trespass damages are recoverable. See, e.g., Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985), aff'd. sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987).
- Tribal authority to condemn individually-owned restricted land. This is an open question, analyzed in some detail in a Regional Solicitor's Office memo dated September 13, 2002.

J. Co-tenancy and Partition.

1. Co-tenancy

- Townsite lots can originally be acquired by husband and wife as tenants by the entirety. Allotments are granted only to individuals.
- Multiple owner parcels, typically created by inheritance, are becoming increasingly burdensome administratively. Undivided shares of a single parcel can include both restricted and unrestricted interests.
- Normal principles governing rights of tenants in common apply to co-owners of restricted property.

2. Partition

- Statutory authorities for partition with less-than-unanimous consent of all co-owners are limited to trust lands, and do not authorize Secretarial action to partition Alaska Native Allotments or townsite lots. See: 25 U.S.C. §§ 372, 378, 483; Sampson v. Andrus, 483 F. Supp. 240 (D.S.D. 1980); F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 623, n. 124. See also 25 CFR § 152.33(b).
- Existence of private right of action to sue for partition is not entirely clear, but action for partition may be maintainable in federal district court. However, absent agreement between owners, sale of property and division of proceeds is most likely result. See, e.g., Fritz & Leonard v. United States, et al., Case No. A87-418 Civil (U.S. Dist. Ct. for Alaska).

- In event of agreement on how to physically divide land, restricted interest owners can achieve practical effect of partition by reciprocal sales of undivided interests and reinvestment of proceeds pursuant to 25 U.S.C. § 409a.

3. Fractionation.

- This is a growing problem. Management of restricted lands is made more complex when the number of owners of a single parcel multiplies. Sale requires unanimous consent, though leasing with majority interest consent may be authorized when the heirs are unable to agree on the terms of a lease after 90 days. 25 CFR 162.601(a)(4).
- Indian Land Consolidation Act (ILCA), Pub. L. 97-459, 96 Stat. 2517 (1983), amended by Pub. L. 106-462, 114 Stat. 1992 (2000), now codified at 25 U.S.C. §§ 2201 et seq., represents an effort to ameliorate effects of excessive fractionation while recognizing extensive tribal governmental role. However, Alaska is explicitly excluded from coverage of ILCA. 25 U.S.C. § 2219.

4. Rights of tenants in common. Basically follow common law rules, except where specific regulation addresses issue. For example, 25 C.F.R. § 162.104(b) states that in absence of unanimous co-owner permission, a tenant in common fractional interest owner must obtain a lease from other fractional owners to support his possession.

K. Improvements

- There are no special federal limitations on use to which restricted property owner may put his own property, and no requirements for Secretarial approval.
- No special permission is necessary for restricted owner's construction of improvements, and normal rules govern whether such improvements themselves become part of the restricted real property.

L. Trespass and Adverse Possession

1. Adverse Possession

- A Native owner's interest in restricted property cannot be lost by adverse possession.
- In the case of a restricted townsite lot, the protection is made explicit in the statute. 43 U.S.C. § 733 (1970).
- In the case of a Native allotment, the protection flows from the statutory inalienability. See: Haymond v. Scheer, 543 P.2d 541 (Okla. 1975); Ewart v. Bluejacket, 259 U.S. 129 (1922).
- But cf. United States v. Mottaz, 476 U.S. 834 (1986) holding that 12-year Quiet Title Act limitations period, found at 28 U.S.C. § 2409a, barred an Indian allottee's suit to recover title from the United States.

2. Trespass

- As holder of legal title, a restricted Native allotment or townsite lot owner can maintain his or her own trespass action, seeking ejectment, damages, or other appropriate relief. It is not necessary that the action be filed by the United States, or that the United States be a party. Private attorney contracts do not require Federal approval.
- The Department of Justice has authority and discretion to bring an action on behalf of the restricted landowner. 25 U.S.C. § 175.
- There is no limitations period applicable to actions for recovery of Indian land brought by the United States. Cramer v. United States, 261 U.S. 219 (1923).
- There is a time limitation on recovery of trespass damages, whether the action is brought by the United States, 28 U.S.C. § 2415, or by the landowner, AS 09.10.050. See e.g., Alaska v. 13.90 Acres, 625 F. Supp. 1315, 1321-22 (D. Alaska 1985).
- There is no statute or regulation imposing a general trespass abatement or damage recovery duty on the United States. The only explicit regulatory requirement relates to timber trespass. 25 CFR 163.29.
- There is one circumstance where U.S. representation is strongly indicated; i.e., where the State is a continuing trespasser, the restricted property owner cannot proceed against the State in State court (no jurisdiction over res under 28 U.S.C. § 1360(b)) or in federal court (jurisdiction over defendant barred by 11th Amendment).

M. Removal of Restrictions/Issuance of Certificates of Competency

- Restrictions on alienation and taxation are perpetual, for the Native owner's life, and for the benefit of his Native heirs.
- Such restrictions terminate upon sale to or inheritance by a non-Native.
- If the Native owner for some reason wishes to retain ownership but to convert the land to fee simple status, he may do so, assuming the Secretary of the Interior determines he is capable of managing his own affairs.
- For restricted townsite lots, the governing regulation is 43 CFR § 2564.7. Note that the townsite lot does not become liable for satisfaction of any debt pre-dating the removal of restrictions.
- For Alaska Native allotments, the owner may apply for a certificate of competency pursuant to 2.5 CFR §§ 152.7 et seq., or an order removing restrictions, under 25 CFR §§ 152.10 et seq. These regulations are in the process of being revised.
- These sorts of requests are rare, because the restrictions are rightfully regarded on balance as beneficial to the owner.

N. Roles of the BIA, the Office of the Special Trustee (OST), Indian Self-Determination Act (ISDA) Contractors, and others

1. The Bureau of Indian Affairs is the agency to which most authorities and duties of the United States and the Secretary of the Interior are delegated and assigned.

- A BIA official, typically the Regional Director or Agency Superintendent, normally approves or disapproves a conveyance of restricted property.
- Superintendent's decisions are subject to administrative appeal to the Regional Director under 25 CFR Part 2. Regional Director's decisions may be appealed to the Interior Board of Indian Appeals under 25 CFR Part 2 and 43 CFR Part 4.
- BIA employees ordinarily assist restricted property owners with transactions;
- The government's acts or omissions are actionable as breaches of a fiduciary duty to a land owner only when specific statutes or regulations impose specific management duties. United States v. Mitchell, 463 U.S. 206, 216-18 (1983). The Native Allotment and Native Townsite Acts alone, although they impose restrictions and create some sort of limited fiduciary relationship, do not alone establish a landowner's right to recover damages from the United States. U.S. v. Mitchell, 445 U.S. 535, 538 (1980).

2. Indian Self-Determination Act (ISDA) contractors

- Under the ISDA, 25 U.S.C. §§ 450 et seq., often referred to as P.L. 93-638, Indian tribes and tribal organizations are given the right to contract "to plan, conduct, and administer programs . . . for the benefit of Indians," including programs relating to restricted Native lands. 25 U.S.C. § 450f(a). Extensive regulations at 25 CFR Part 900 govern ISDA contracting.
- The Secretary of the Interior retains the ultimate transaction approval/disapproval authority and responsibility, but the ISDA contractor may provide supportive documentation, research and analysis, options and recommendations. See S. Rep. No. 274, (100th Cong. 1st Sess.) at 25 (1988) (tribes operate the technical functions and Secretary remains responsible for the protection of resources).
- As a practical matter this means that the first point of contact for many Native restricted property owners will be the ISDA contractor for the area where their land is located. See Directory of Realty Service Providers, included with materials.

3. Compacting Tribal Consortia. Under Title IV of the ISDA, covering Tribal Self-Governance, codified chiefly at 25 U.S.C. §§ 458aa et seq., large tribal consortia, originally organized as regional non-profit Native corporations, carry out many BIA functions including serving as front line realty service providers. Regulations governing the BIA Self-Governance entity relationship are found at 25 CFR Part 1000.

- Both ISDA contractors and Self-Governance compact entities are obliged to follow and apply federal statutes and regulations relating to restricted Indian land. The BIA retains the authority to exercise the inherently federal function of approving or disapproving a property transaction.

4. Office of the Special Trustee (OST). Created by the American Indian Trust Fund Management Reform Act of 1994, Pub. L. 103-412, 108 Stat.4239, codified at 25 U.S.C. §§ 4001-4061. After years of litigation in the case of Cobell v Norton, No. 96-1285 CV (RCL) (D.D.C.), the OST includes both the Office of Trustee Fund Management, which handles Individual Indian Money (IIM) accounts, and the Office of Appraisal Services.

5. BIA Title Plant (Alaska Title Services Center) maintains all restricted property title records relied upon by BIA & ISDA service providers. See 25 CFR Part 150.

II. WILLS AND PROBATE

A. Department of the Interior Jurisdiction

1. Unlike other forms of property which are subject to the probate jurisdiction of State courts, Native property subject to restrictions on alienation is subject to exclusive Interior Department jurisdiction. Arenas v. United States, 95 F. Supp. 962 (S.D. Cal. C.D. 1951). State courts do not have jurisdiction. Hanson v. Hoffman, 113 F.2d 780 (10th Cir. 1940); 28 U.S.C. § 1360(b).
   a. 25 U.S.C. § 373 authorizes a restricted property owner to make a testamentary devise of that property (i.e., a will), subject to the review and approval of the Secretary of the Interior. Approval is essential. Atewooftakewa v. Udall, 277 F. Supp. 464 (W.D. Okla. 1967).
      - That review is limited to technical deficiencies and apparent irrational testamentary schemes. Toahnippah v. Hickel, 397 U.S. 598 (1978); Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. den. 423 U.S. 831 (1975).
   b. 25 U.S.C. § 372 authorizes the Secretary to determine succession according to State intestate succession laws if the deceased restricted property owner died without a will, or with a will that cannot be approved and admitted to probate.
      - Although lower 48 Indian tribes are now authorized to enact their own probate codes and intestate succession schemes, 25 U.S.C. § 2205, that authorization does not extend to Alaska tribes, 25 U.S.C. § 2219.
      - In the absence of any heirs, the property will not escheat to the State, but to a tribe or the federal government according to 25 U.S.C. § 373b; 43 CFR § 4.205.
   c. Special Departmental rules governing wills are found in 43 CFR Part 4, Subpart D.
      - Attestation by two disinterested adult witnesses is required.
      - Typically, a testator will dispose of both his restricted and unrestricted estate in a single will, although multiple wills are premissable. The formalities of execution would have to satisfy both State and Department of the Interior requirements.

- Self-proved wills are desirable and encouraged. See 43 CFR § 4.233(a), setting forth required affidavit language.
- Wills represent an underutilized opportunity to minimize fractionation by use of life estates or other strategies to preserve unitary ownership.
- In the common situation of non-Native spouse and Native children, use of life estate and remainder interest devises can preserve restricted status of interests. Inheritance by non-Native terminates restricted status by operation of law, and it is not restored when interest passes to Native successor.
- Timely renunciation under 43 CFR § 4.208 presents a last opportunity to preserve restricted status.
- Watch out for different federal rule re effect of divorce. 43 CFR § 1.260(c).

2. A significantly expanded tribal role in the probate arena is provided for by the most recent amended version of the Indian Land Consolidation Act (ILCA), enacted as Pub. L. 106-462, signed into law on November 7, 2000. Codified at 25 U.S.C. §§ 2201-2219, ILCA is explicitly made *inapplicable* in Alaska. 25 U.S.C. § 2219.

B. Solicitor's Office Review of Wills

1. 43 CFR § 4.260(b) calls for wills to be examined by the Office of the Solicitor for adequacy of form, and "any appropriate comments."

- The Regional Solicitor's Office in Anchorage used to review up to 500 wills a year. However, in 2005 the Department of the Interior did away with a policy and practice under which BIA and ISDA personnel assisted restricted landowners with drafting and execution of wills. The volume of wills being written or reviewed is down dramatically.
- The review is essentially a preventative measure, to identify errors, deficiencies, or ambiguities while the testator is alive, and it is still possible to correct them.
- Approval or disapproval by the Regional Solicitor's Office is advisory.
- The legally conclusive determination of the validity of a will purporting to devise restricted Indian property, and the interpretation of its provisions, lies with either: (1) the administrative law judge presiding over the probate proceeding; or (2) the Interior Board of Indian Appeals, on appeal from the judge's decision; or (3) the Secretary of the Interior, if he exercises discretion to assume jurisdiction; or (4) the federal courts on A.P.A. judicial review of final agency action. (See 43 CFR § 4.21(b))

C. Probate of Restricted Estates. See generally, 25 CFR Part 15 and 43 CFR Part 4, Subpart D.

1. Preliminary matters

- Upon the death of a restricted property owner, the BIA Agency Superintendent (or ISDA contractor or compacting entity) has information gathering and estate protection and preservation responsibilities. See 25 CFR Part 15, 43 CFR §§ 4.210 et seq. and 4.270 et seq.
- The BIA is to promptly notify the administrative law judge (ALJ) of the death of a restricted property holder, and commence the probate within 90 days by a filing with the ALJ of data specified in 43 CFR § 4.210.
- Beginning in 2006, Alaska now has two locally based Indian Probate Judges, Regina Sleater and Paul Tony, Office of Hearings and Appeals, 420 L Street, Suite 300, Anchorage, AK 99501.

2. Probate Administration

- Detailed rules governing the conduct of probate proceedings, including notice, claims, will contests, discovery, hearings, and distribution of property are set forth in 25 CFR Part 15 and 43 CFR §§ 4.200 – 4.282. Watch out for deadline on creditor's claims, Estate of Bertha Mae Tabbytite, 45 IBIA 10 (2007).

3. Appeals

- Appeals to the Interior Board of Indian Appeals (IBIA) are governed by 43 CFR §§ 4.320 – 4.323.
- An IBIA appeal must be taken in order to exhaust administrative remedies, and allow for judicial review. 43 CFR § 4.21(b)

III. TAXATION

A. Real Property Taxes

1. Explicit statutory language exempts both allotments and restricted townsite logs from real property taxes. 43 U.S.C. § 270-1 (1970 ed.) and 43 U.S.C. § 733 (1970 ed.). See People of South Naknek v. Bristol Bay Borough, 466 F. Supp. 870 (D. Alaska 1979).

- Note that Judge von der Heydt also held in People of South Naknek that personal property taxes on items kept or used on restricted property could be collected. This holding may be undercut by recent Supreme Court cases such as Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993), suggesting that State taxing power over Indian country consisting of scattered allotments may be no greater than that exercisable within reservation boundaries.

2. Potential confusion over installment sales pursuant to 25 CFR § 152.35.

- A state or local taxing authority may draft its property tax ordinance so as to reach the possessory interest of the installment purchaser.

- But since purchaser does not own the property until it's completely paid off, the land cannot be foreclosed on to enforce the tax, which is only a personal liability of the buyer-occupant. (Typically, an installment buyer would be in default under his contract if he failed to pay the tax, and his contract rights could be forfeited.) Compare United States v. Russell, 261 F. Supp. 196, 199 (E.D. Okla. 1966).
- Consider also that the state court has no jurisdiction over the restricted property holder's interest for purposes of foreclosure action. 28 U.S.C. § 1360(b); Heffle v. Alaska, 633 P.2d 264 (Alaska 1981).

3. Potential confusion over taxation of leasehold interests.

- Again, artfully drafted property tax ordinance may apply to leasehold interests.
- But restricted owner/lessor's interest cannot be foreclosed on as remedy for delinquent taxes owed by lessee.

B. Federal Income Taxes

1. Outright Sale

- Neither original receipt of an allotment or a townsite lot, nor receipt of proceeds from sale of part or all of restricted real property, is income subject to federal income taxation. Rev. Ruling 67-284, Squire v. Capoeman, 351 U.S. 1 (1956).
- There is no need to calculate capital gain from appreciation in value between the time the land was allotted and the time it was sold, unless restrictions were removed prior to sale.
- Once sale proceeds are received, interest or other investment income derived from such funds is taxable, whether in Individual Indian Money (IIM) account or not. Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935).

2. Timber, Gravel, or other Resource Sales

- Income "directly derived" from an allotment is not taxable. Squire v. Capoeman. See also Revenue Ruling 56-342, holding that exempt income includes: "rentals (including crop rentals), royalties, proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes." See also, Rev. Ruling 62-16.

3. Income from improved and unimproved leases, and other payments with respect to land.

   a. Leases of raw land (in contemplation of tenant improvements or not).
      - Seem to meet the "directly derived" test.
      - Seem to be exempt under Rev. Ruling 56-342.

- But tax exemption thrown into doubt by rulings such as Saunooke v. United States, 9 Cl. Ct. 537, aff'd., 806 F.2d 1053, 1056 (Fed. Cir. 1986). Both Saunooke decisions held that the portion of lessor's income from rent of buildings and land which represented the fair rental value of the land was not "directly derived" from the land and not tax exempt.
- The alternative rationale under which fair rental value of the land is not tax exempt, is an "exploitation" test, where the activity generating income has to "use up" or consume part of the property or diminish its value. See also Cross v. Commissioner of Internal Revenue, 83 Tax Court 561 (1984). But rationale criticized by dissent, and by the Ninth Circuit in Dillon v. United States, 792 F.2d 849 (9th Cir. 1986).

b. Lease of land with owner-furnished building or other improvements.
- None of the cases squarely hold that any part of such lease income is tax exempt as attributable to rent of land alone. See: Critzer v. United States, 597 F.2d 708, cert. den. 100 S.Ct. 239 (1979); Hale v. United States, 579 F. Supp 646 (E.D. Wa. 1984); Cross, supra; both Saunooke decisions, supra, and Dillon, supra.
- Only Dillon has dicta supporting an argument that income principally derived from rent of land rather than buildings would be tax exempt.
- The Alaska experience, involving a Barrow lease of office buildings on a restricted townsite lot to the North Slope Borough, led to an outcome adverse to the taxpayer/lessor (i.e., all the rental income was taxable).

C. Business Taxes

- There is no local caselaw supporting the proposition that a restricted property owner's income or revenue from any kind of business is exempt from either federal income tax or state or local gross receipts or other forms of business taxes because the business is conducted on restricted property.
- By analogy to tribal smoke shop cases, if the "minimal burden" of collection of taxes from non-tribal member customers can be imposed on tribes in Indian country, then it can certainly be imposed on non-sovereign, off-reservation businesses as well, especially where incidence of tax in no way falls upon the restricted property itself. Compare, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 159-160 (1980); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463-482 (1976).
- However, if recognization of enclaves of primary tribal jurisdiction evolves in the future as a result of legislative or judicial developments, a restricted property owning tribal member might be able to construct a plausible argument that his activities are outside of state or local taxing jurisdiction. At present, such a position is highly speculative.

D. Disclaimer

- Neither the BIA nor the Department of the Interior speaks for the United States on tax matters. Reliance on BIA tax advice will not excuse taxpayer liability for taxes, penalties, or interest. See United States v. Stewart, 311 U.S. 60 (1940), and authorities collected and discussed in Graff v. Commissioner, 74 Tax Court 743, 760-765 (1980).

IV. JUDICIAL AND REGULATORY JURISDICTION

A. Public Law 83-280: State Court Civil Jurisdiction

- In 1958, Congress amended 28 U.S.C. § 1360(a) to extend to the Territory (and later the State) of Alaska "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . all Indian country within the Territory [now the State]."
- Allotments (and also presumably restricted townsite lots) may be included within the 18 U.S.C. § 1151 definition of "Indian country." See Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527, n. 2 (1998).
- The congressional grant of jurisdiction to the state courts did not necessarily deprive tribal courts of jurisdiction, if any, which they already had, but made State jurisdiction at least concurrent.
- In Bryan v. Itasca County, 426 U.S. 373 (1976), the Supreme Court clarified that Pub L. 280 granted only adjudicatory jurisdiction, and not broad general regulatory jurisdiction, including the power to tax.
- Exceptions to State court civil jurisdiction.

1. Title and right to possession of trust and restricted property.
   - U.S. District Court has jurisdiction over suit claiming entitlement to allotment, or to vindicate interest included therein. 25 U.S.C. § 345; 28 U.S.C. § 1353. Covers restricted townsite lots as well. Carlo v. Gustafson, 512 F. Supp. 833, 836 (D. Alaska 1981). As to rights in allotment already acquired, see Seldovia v. U.S., 428 F.2d 1123 (9th Cir. 1970) and U.S. v. Pierce, 235 F.2d 885 (9th Cir. 1956).
   - 28 U.S.C. § 1360(b) disclaims any intent to "confer jurisdiction upon the State to adjudicate the . . . ownership or right to possession of such property [subject to a restriction against alienation] or any interest therein."
   - The Alaska Supreme Court has recognized this limitation on its jurisdiction. Heffle v. Alaska, 633 P.2d 264 (Alaska 1981).

2. Divorce
   - In Foster v. Foster, 883 P.2d 397 (Alaska 1994), the Alaska Supreme Court ruled that a superior court in dividing marital property should determine and take into account the value of the separate restricted property of a Native owner spouse when assessing the relative economic positions of the divorcing parties for purposes of dividing marital property. Accord, Landauer v. Landauer, 975 P.2d 577 (Wash. App. 1999).
   - State courts, including Alaska trial courts, have recognized that they lack authority to order the transfer of title or the sale of restricted Native property belonging to a divorcing Native spouse. See, e.g.: Wellman v. Wellman, 668 P.2d 1060 (Mont. 1993), 20 ILR 5102; Fisher v. Fisher, 656 P.2d 129 (Id. 1982); Sheppard v. Sheppard, 695 P.2d 895 (Id. 1982); Ducheneaux v. Secretary of the Interior, 645 F. Supp. 930, 932 (W.D. S.D. 1986), rev'd. on other grnds., 837 F.2d 340 (8th Cir. 1988), cert den., 486 U.S. 1055 (1988).
     - Alaska decisions include: Shade v. Shade, No. 3K0-80-385 Civil; Clark v. Clark, No. 3AN-78-1890 Civil; and Noal B. Wilson, U.S. Bkcy. Ct. No. 3-79-00310.
     - Prior to Foster v. Foster, the more controversial question was whether the value of restricted property could be taken into account at all in dividing the marital property, even when the owner spouse is not being specifically ordered to sell the land, or transfer to the other party any interest in it. Wellman and Noal B. Wilson specifically reject that approach; the Wellman court reasoned that figuratively bringing the property into court for appraisal is an impermissible exercise of jurisdiction over it.
     - Tribal court jurisdiction has been recognized in limited circumstances, probably not present in Alaska. Conroy v. Conroy, 369 F. Supp. 179 (D. S.D. 1973); Conroy v. Frizzell, 429 F. Supp. 918 (D. S.D. 1977), aff'd. Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978).

3. Foreclosure
   - As noted in Section IV above, the State and its political subdivisions have no authority to tax restricted Native property, and therefore no authority to foreclose on it for nonpayment of taxes. The State Courts also lack jurisdiction over any such foreclosure action.

- As noted in Section II above, a mortgage or deed of trust properly approved under 25 U.S.C. § 483a can be foreclosed in the event of default. Although the authorities are split, the Oklahoma decision finding that the State courts do have jurisdiction probably makes the most sense. Federal Land Bank of Wichita v. Burris, 790 P.2d 534 (Okla. 1990). Somewhat indirectly, that position was upheld with regard to an Alaska foreclosure in a February 4, 2000 decision on remand from Estate of Donna Gottschalk, 30 IBIA 82, 86 (1996).

B. Police Power Regulations

1. Criminal law. The state has complete criminal law enforcement jurisdiction over all Indian Country in Alaska, including allotments, pursuant to 18 U.S.C. § 1162. A restricted property owner is not excused from compliance with State criminal laws while within the boundary of his restricted property. An example of a case upholding enforcement of state criminal law where the conduct occurred on an Alaska Native allotment is Jones v. State, 936 P.2d 1263 (Alaska 1997). State conviction for shooting deer out of season was not overturned because shooting occurred on an allotment, even assuming it was Indian country under 18 U.S.C. § 1151 definition. It remains an unresolved question whether Alaska Native allotments or restricted Native townsite lots are Indian country within this definition. See Alaska v. Native Village of Venetie Tribal Government. 522 U.S. 520 (1998) at 527, n.2, where the Supreme Court identifies but does not decide the question.

2. State taxation and regulation of personal conduct on restricted property. There are no reported cases where an Alaska Native restricted property owner has been relieved of the obligation to comply with civil laws of general applicability regulating personal conduct because his conduct occurred on restricted property.

3. Tribal jurisdiction and infringement of tribal self-government.

- If villages are self-governing tribes and if they exercise governmental authority over restricted property, an argument could be made that certain state authorities do not extend to activities of tribal members in such Indian country subject to tribal jurisdiction. See e.g., Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993) (presumption against state taxing authority applies to all Indian country, not just formal reservations).
- However, Solicitor's Opinion M-36975, issued January 11, 1993, concludes that Native villages do not as a general matter have governmental jurisdiction over allotments or restricted townsite lots. Id. At 124-130.
- As the M-Opinion points out, the Alaska Native Allotment Act differs substantially from the General Allotment Act in that tribal membership was not a qualification for entitlement to an allotment, and allotments were not created out of, or limited to, former reservation lands.

- Location on or off-reservation is often regarded as a key factor in determining the extent of State authority over Native activities. See e.g., Kake v. Egan, 369 U.S. 60 (1962) ("State authority over Indians is yet more extensive over activities, such as in this case [operating fish traps], not on a reservation." Id. at 75.
- Alaska Native allotments resemble so-called public domain allotments issued under 25 U.S.C. § 334. A provision of the Indian Reorganization Act (IRA), 25 U.S.C. § 468, makes the IRA inapplicable to off-reservation allotments.

4. Federal pre-emption. Under the Supremacy Clause of the U.S. Constitution (Art. VI, Cl. 2), federal laws relating to restricted Native property "pre-empt" (or override or supplant) otherwise applicable State and local laws. "State jurisdiction is pre-empted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal laws, unless the state interests at stake are sufficient to justify assertion of state authority." New Mexico v Mescalero Apache Tribe, 467 U.S. 324, 334 (1983).
   For example:
   - The explicit federal statutory prohibition of taxation pre-empts state or local property tax laws with respect to both allotments and townsite lots. People of South Naknek v. Bristol Bay Borough, 466 F. Supp. 870 (D. Alaska 1979).
   - Exclusive federal jurisdiction over the probate of restricted Indian property is statutorily mandated by 25 U.S.C. § 372 and 28 U.S.C. § 1360(b).
   - Deciding whether other federal statutory and regulatory schemes which less explicitly address the issue have a pre-emptive effect is a job for judges.

5. State land use regulation.
   a. There is substantial caselaw supporting the proposition that state land use regulations are inapplicable to trust and restricted Indian property. See, e.g.: Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987) (city rent control ordinance unenforceable on account of 25 CFR § 1.4); United States v. County of Humboldt, 615 F2d 1260 (9th Cir. 1980) (county lacked authority to enforce zoning and building codes on Indian reservation); and Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) (25 CFR § 1.4 validly issued and prohibits county from enforcing zoning ordinances on rancheria created pursuant to 25 U.S.C. § 465); Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002) cert. den., 538 U.S. 908 (2003). (tribal rather than county zoning law applied to subdivision of on-reservation allotment)
   b. A variety of legal theories are cited in support of this conclusion.
      1. One theory would be that state regulation would impermissibly infringe on tribal self-government, Santa Rosa Band, supra, 532 F.2d at 662, Gobin 304 F. 3d at 918.

2. Another argument is that state or local regulation is pre-empted by 25 CFR § 1.4, which is a valid regulation under 25 U.S.C. §§ 2, 9, 415, and 465. Santa Rosa Band, supra, 813 F.2d 1387 at 1391
3. A third argument is that Pub. L. 280, 28 U.S.C. § 1360(b), disclaims congressional intent to authorize any "encumbrance" of trust or restricted Indian property, and zoning and land use regulations constitute such prohibited encumbrances. Santa Rosa Band, supra, 532 F.2d at 677-68.

c. There are grounds for questioning applicability of these theories to individually owned restricted Native property in Alaska:
   - There is a question as to whether or not there is any tribal jurisdiction in the first place. Solicitor's Opinion M-36,975.
   - There is Supreme Court language, albeit dicta, supporting the possibility of concurrent state and tribal or state and federal zoning jurisdiction. Brendale v. Confederated Yakima Nation, 106 L.Ed.2d 343, 368-69, n.3 (1989).
   - Pub. L. 280 is not literally a prohibition of state jurisdiction, but rather only a disclaimer of any congressional extension of such jurisdiction to the states affected.
   - 25 CFR § 1.4 is in fact extremely narrow in its coverage, relating only to leased lands. See: 30 Fed. Reg. 6438 (5/4/65); 30 Fed. Reg. 7520 (6/7/65); 30 Fed. Reg. 8172 (6/25/65); March 24, 1982 Opinion of Associate Solicitor for Indian Affairs; May 2, 1989 Opinion of Alaska Regional Solicitor's Office.
   - The better interpretation of "encumbrance" as used in 28 U.S.C. § 1360(b) is "one denoting a burden on the land and affecting the title thereto or one impairing the power of alienation such as a mortgage, lien, easement, or other disability to fee ownership." Snohomish County v. Seattle Disposal Co., 425 P.2d 22, 28 (Wash. 1967), cert. den. 389 U.S. 1016 (Douglas & White, JJ., dissenting), see also: Agua Caliente Band v. City of Palm Springs, 347 F. Supp. 42 (C.D. Cal. 1971), rev'd. on other grnds., 495 F. 2d 1 (9th Cir. 1974) cert. den., 419 U.S. 108 (1974); and People v. Rhoads, 90 Cal. Rptr. 794 (Cal. App. 1970).
   - Historical footnote. In 1947 Congress expressly granted zoning power over Alaska townsites, apparently including restricted lots, to the Territorial Legislature. 43 U.S.C. § 738 (1970), 61 Stat. 414, repealed in FLPMA § 703, 90 Stat. 2743, 2791 (1976).
   - Enforcement of state health, sanitation and quarantine regulations under 25 U.S.C. § 231.
     1) Under statutory wording, the Secretary shall allow state agents to enter upon allotments to inspect and to enforce regulations.
     2) There are no implementing federal regulations. Whether they are necessary is debatable. See: F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 377; Solicitor's Opinion M-36768, 2 Op. Sol. On Indian Affairs, 1986 (U.S.D.I.1979).

3) Judicial references to 25 U.S.C. § 231 provide little clarification as to its scope or applicability. Snohomish County v. Seattle Disposal Co., supra, 389 U.S. 1016, 1019 (1967); Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 687 n.3 (1965); Organized Village of Kake v. Egan, supra, 369 U.S. at 73 (1962); Thomsen v. King County, 694 P.2d 40, 44-45 (Wash. App. 1985).

d. The Santa Rosa line of federal cases is not binding on the state courts. Compare, e.g., contradictory state and federal judicial decisions on tribal sovereign immunity.
e. As a practical matter, compliance with state and local land use regulations may be in the best interest of the restricted property owner for health and safety or commercial reasons.
f. Some state regulations may be made applicable as a matter of federal law; e.g., BIA administered timber harvest activities on many Native allotments are made subject to the State Forest Practices Act, A.S. 41.17, by virtue of the § 307 consistency requirements of the Coastal Zone Management Act, 16 U.S.C. §§1451 et seq.
g. The less directly a particular regulation or ordinance relates to the land, and the more it resembles a rule of conduct unrelated to a particular piece of land, the more likely it is to be enforceable. See Alaska Attorney General's January 23, 1985 memorandum on state regulatory jurisdiction over restricted Native property.
h. The new Alaska Native Allotment Subdivision Act permits the restricted land owner to comply with state or local subdivision and platting requirements, at his option. Once he chooses to get platting authority and BIA approval, the rules become binding. In a sense, this new explicit federal statutory authorization implies the absence of state or local authority in its absence.

6. Gambling

- A gaming ordinance was approved for the Klawock Cooperative Association, for conduct of Indian Gaming Regulatory Act (IGRA) Class II gaming on acreage held in trust by the U.S. for the IRA tribal government. Klawock is one of only four Alaska tribes for which any land is held in trust.
- Under the definition of "Indian lands" contained in the IGRA, 25 U.S.C. § 2703(4), an allotment or townsite lot would qualify if it is land "over which an Indian tribe exercises governmental power."
- To date, the Department of the Interior has not approved a gaming ordinance submitted by an Alaska tribe, other than Klawock, or concluded that such a group exercises governmental power over individually-owned restricted Indian land.

- Two prior judicial tests as to whether Alaska tribes could pursue Indian gaming on restricted allotment or townsite land were disposed of without resolving the Indian lands/tribal governmental power issue: (Akiachak Native Community, et al v. Monteau, Civ. No. 99-CV-2302 (RWR) (D.D.C.); Native Village of Barrow v. National Indian Gaming Commission, Civ. No. 99-886 (RWR) (D.D.C.).
- The Native Village of Eklutna has a pending proposed gaming ordinance before the National Indian Gaming Commission, and contends that it may conduct gaming on a leased Native allotment parcel because such a site qualifies as Indian lands over which it exercises governmental power.

C. Tribal Courts and Jurisdiction
- To the extent that tribal governments are validly established and invested with jurisdiction over tribal members and their property, the tribe and its courts may impose and enforce their own rules relating to restricted Native real property.
- The only procedural limits on tribal action are the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 and self-imposed tribal limitations.
- Substantively, tribal laws inconsistent or incompatible with applicable federal laws are pre-empted.