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107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–744

ALASKA NATIVE VETERANS LAND ALLOTMENT EQUITY ACT

OCTOBER 11, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HANSEN, from the Committee on Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3148]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3148) to amend the Alaska Native Claims Settlement Act to provide equitable treatment of Alaska Native Vietnam Veterans, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Alaska Native Veterans Land Allotment Equity Act".

SEC. 2. AMENDMENT TO ALLOW CERTAIN ALASKA NATIVE VETERAN LAND ALLOTMENTS.

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

(1) Paragraphs (1) and (2) of subsection (a) are amended to read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(3) Not later than January 31, 2007, the Secretary shall—

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

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

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

SEC. 3. REGULATIONS.

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

PURPOSE OF THE BILL

The purpose of H.R. 3148 is to amend the Alaska Native Claims Settlement Act to provide equitable treatment of Alaska Native Vietnam veterans, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

In 1998, Public Law 105–276 amended the Alaska Native Claims Settlement Act (ANCSA) to provide Alaska Native Vietnam veterans an opportunity to obtain an allotment of up to 160 acres of land under the Native Allotment Act. Approximately 2,800 Alaska Natives served in the military during the Vietnam conflict and therefore did not have an opportunity to apply for their Native al-

lotment. However, Public Law 105–276 contains three major obstacles that prevent Alaska Native Vietnam veterans from selecting and obtaining their Native allotment. First, Alaska Native Vietnam veterans can only apply for land that was vacant, unappropriated, and unreserved when their use first began. Second, Alaska Native Vietnam veterans can only apply if they served in active military duty from January 1, 1969 to December 31, 1971 (even though the Vietnam conflict began August 5, 1964 and ended May 7, 1975). Third, Alaska Native Vietnam veterans must prove they used the land (applied for in their native allotment application) in a substantially continuous and independent manner, at least potentially exclusive of others, for five or more years. This requirement was not in the original Native Allotment Act, nor has it been required of other Alaska Native applicants in applying for their native allotment. Further, adjudication of use and occupancy issues will take years and will be very costly.

H.R. 3148 will increase the available land by authorizing Alaska Native Vietnam veterans to apply for land that is federally owned and vacant. The lack of available land under existing law nullifies the very purpose of granting Alaska Native Vietnam veterans an allotment benefit. H.R. 3148 will also expand the military service dates to coincide with the entire Vietnam conflict: August 5, 1964 through May 7, 1975. The expansion of military service dates to include all Alaska Natives who served in the military during the Vietnam conflict is consistent with the federal government's policy of providing benefits to veterans of the Vietnam war. In addition, H.R. 3148 will also replace existing use and occupancy requirements with legislative approval of allotment applications. Use and occupancy requirements would be replaced for several reasons: (1) Congress has made legislative approval available to all other allotment applicants under 43 U.S.C. 1634(a)(1)(A); (2) legislative approval of allotments prevents costly and lengthy adjudication of use and occupancy issues; and (3) many Alaska Native Vietnam veterans could not meet use and occupancy requirements as a result of military service.

The bill would also extend the deadline of the allotment application to three years after the Secretary of the Interior issues final regulations under section 3 of the bill. H.R. 3148 would also correct the dates of approval of allotments to accommodate the extension of the application process of an Alaska Native Vietnam veteran. Language has also been added to assure ANCSA native corporations that their land entitlement would remain intact when a veteran makes his or her allotment land selection on corporation lands. For security reasons, H.R. 3148 prohibits an Alaska Native Vietnam veteran from selecting lands within the right of way granted for the TransAlaska Pipeline (or the inner or outer corridor of that right-of-way) and lands withdrawn or reserved for national defense purposes. Section 2(g) would allow a person who made an allotment selection under this section, before the date of enactment of this bill, to withdraw that selection and reselect lands under this section if the lands originally selected were not conveyed to that person prior to enactment of this bill. H.R. 3148 also directs the Secretary of the Interior to develop final regulations to implement the bill.

COMMITTEE ACTION

H.R. 3148 was introduced on October 16, 2001, by Congressman Don Young (R–AK). The bill was referred to the Committee on Resources. On June 5, 2002 the Committee held a hearing on the bill. On September 12, 2002, the Committee met to mark up the bill. Congressman Don Young offered an amendment in the nature of a substitute to make several changes recommended by Doyon Limited, CIRI, several Alaska Native Corporations and Alyeska Pipeline Company. It was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by voice vote.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in tax expenditures. According to the Congressional Budget Office, H.R. 3148 could increase direct spending, but they estimate that any such impact would not be significant.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Alaska Native Claims Settlement Act to provide equitable treatment of Alaska Native Vietnam Veterans, and for other purposes.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 3, 2002.

Hon. JAMES V. HANSEN,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3148, the Alaska Native Veterans Land Allotment Equity Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 3148—Alaska Native Veterans Land Allotment Equity Act

Summary: H.R. 3148 would amend current law to authorize the Secretary of the Interior to grant allotments of federal lands to certain Alaska Natives or their heirs. CBO estimates that implementing H.R. 3148 would cost $11 million over the 2003–2007 period, assuming appropriation of the necessary amounts. The bill could increase direct spending, but we estimate that any such impact would not be significant.

H.R. 3148 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would have no significant impact on the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3148 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—				
	2003	2004	2005	2006	2007
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	1	2	3	4	1
Estimated Outlays	1	2	3	4	1

Basis of estimate: Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 3148 would cost $11 million over the next five years. We also estimate that the bill could reduce offsetting receipts (a credit against direct spending), but by less than $500,000 a year. For this estimate, CBO assumes that H.R. 3148 will be enacted early in fiscal year 2003 and that the necessary funds will be provided near the start of each fiscal year. Estimates of outlays are based on historical spending patterns for similar activities.

Spending subject to appropriation

H.R. 3148 would amend current law to authorize the Secretary of the Interior to grant allotments of federal lands to certain Alaska Natives who served in the armed forces in Vietnam during the period from August 5, 1964, to May 7, 1975. The bill also would

authorize the Secretary to grant allotments to the heirs of eligible deceased veterans, and, under certain circumstances, would allow certain other Alaska Native individuals and organizations with existing allotments to withdraw those allotments and select other lands instead. H.R. 3148 would direct the Secretary to promulgate regulations to implement the proposed program and specifies that applications to participate could be submitted until three years after the date when those regulations are published. Under the bill, any application still pending as of January 31, 2007, would be automatically approved at that time, provided that no other party has contested the application.

Based on information from the Department of the Interior (DOI), CBO estimates that issuing regulations pursuant to H.R. 3148 would cost about $1 million in 2003. We also estimate that eligible Alaska Natives would file up to 2,000 new applications for allotments. Assuming that, on average, the department spends $5,000 to review each application permit, we estimate that the costs of processing those applications would total $10 million over the 2004–2007 period.

Direct spending

Under H.R. 3148, eligible Alaska Natives could apply for allotments on a wide variety of federal lands in Alaska, including those that might produce offsetting receipts from programs to develop natural resources. According to DOI, the Secretary is unlikely to approve applications for allotments on lands that are expected to generate significant receipts over the next 10 years. Under the bill, it is possible that some applications may be automatically approved on January 31, 2007, even if the Secretary has not had sufficient time to review them. However, any applications so approved would be subject to valid existing rights; hence, we estimate that any forgone offsetting receipts under H.R. 3148 would likely be insignificant.

Intergovernmental and private-sector impact: H.R. 3148 contains no intergovernmental or private-sector mandates as defined in UMRA and would have no significant impact on the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Megan Carroll; Impact on State, Local, and Tribal Governments: Marjorie Miller; and Impact on the Private Sector: Cecil McPherson.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 41 OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

OPEN SEASON FOR CERTAIN ALASKA NATIVE VETERANS FOR ALLOTMENTS

SEC. 41. (a) IN GENERAL.—[(1) During the eighteen month period following promulgation of implementing rules pursuant to subsection (e), a person described in subsection (b) shall be eligible for an allotment of not more than two parcels of federal land totaling 160 acres or less under the Act of May 17, 1906 (chapter 2469; 34 Stat. 197), as such Act was in effect before December 18, 1971.] *(1) The period for filing allotments under this Act shall end 3 years after the Secretary issues final regulations under section 3 of the Alaska Native Veterans Land Allotment Equity Act. A person described in paragraph (1) or (2) of subsection (b) shall be eligible for an allotment of not more than two parcels of Federal land totaling 160 acres or less.*

[(2) Allotments may be selected only from lands that were vacant, unappropriated, and unreserved on the date when the person eligible for the allotment first used and occupied those lands.

[(3) The Secretary may not convey allotments containing any of the following—

[(A) lands upon which a native or non-native campsite is located, except for a campsite used primarily by the person selecting the allotment;

[(B) lands selected by, but not conveyed to, the State of Alaska pursuant to the Alaska Statehood Act or any other provision of law;

[(C) lands selected by, but not conveyed to, a Village or Regional Corporation;

[(D) lands designated as wilderness by statute;

[(E) acquired lands;

[(F) lands containing a building, permanent structure, or other development owned or controlled by the United States, another unit of government, or a person other than the person selecting the allotment;

[(G) lands withdrawn or reserved for national defense purposes other than National Petroleum Reserve-Alaska;

[(H) National Forest Lands; and

[(I) lands selected or claimed, but not conveyed, under a public land law, including but not limited to the following:

[(1) Lands within a recorded mining claim.

[(2) Home sites.

[(3) Trade and Manufacturing sites.

[(4) Reindeer sites or headquarters sites.

[(5) Cemetery sites.]

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

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

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

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

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

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

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

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

* * * * * * *

(b) ELIGIBLE PERSON.—(1) [A person] *Except as provided in paragraph (3), a person* is eligible to select an allotment under this section if that person—

(A) * * *

[(B) is a veteran who served during the period between January 1, 1969 and December 31, 1971 and—

[(i) served at least 6 months between January 1, 1969 and December 31, 1971; or

[(ii) enlisted or was drafted into military service after June 2, 1971 but before December 3, 1971.

[(2) The personal representative or special administrator, appointed in an Alaska State court proceeding of the estate of a decedent who was eligible under subsection (b)(1)(A) may, for the benefit of the heirs, select an allotment if the decedent was a veteran who served in South East Asia at any time during the period beginning August 5, 1964, and ending December 31, 1971, and during that period the decedent—

[(A) was killed in action;

[(B) was wounded in action and subsequently died as a direct consequence of that wound, as determined by the Department of Veterans Affairs; or

[(C) died while a prisoner of war.]

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

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

(3) No person who received an allotment or has a pending allotment under the Act of May 17, 1906 may receive an allotment under this section*, except for an heir who applies and receives an allotment on behalf of the estate of a deceased veteran pursuant to paragraph (2).*

* * * * * * *

[(e) REGULATIONS.—No later than 18 months after enactment of this section, the Secretary of the Interior shall promulgate, after consultation with Alaska Natives groups, rules to carry out this section.]

(e) REGULATIONS.—All regulations in effect immediately before the enactment of subsection (f) that were promulgated under the authority of this section shall be repealed in accordance with section

552(a)(1)(E) of the Administrative Procedure Act (5 U.S.C. 552(a)(1)(E)).

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

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

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

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

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

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

DISSENTING VIEWS OF REPRESENTATIVE GEORGE MILLER

While cloaked in a veil of sympathetic beneficiaries, this legislation is fraught with substantive problems. By resurrecting an old homesteading statute, the Allotment Act of 1906—which was repealed by Congress in 1971—H.R. 3148 would allow any Alaska Native (or their heirs) who served in the military anytime between 1964 and 1975 to freely select and receive up to 160 acres of public land in Alaska. As a result, several hundred thousand acres of pristine and valuable lands could be conveyed out of public ownership, with several thousand new private inholdings created in national parks, national wildlife refuges, national forests, military withdrawals and other important public lands in Alaska. Once conveyed, such allotment lands may be developed or even sold without restriction.

In 1971, the Alaska Native Claims Settlement Act granted Alaska Native corporations over 44 million acres of land and over $1 billion to manage on behalf of Native shareholders. In 1958, the Alaska Statehood Act provided the State of Alaska over 104 million acres of land. Yet neither the Alaska Native corporations nor the State have chosen to grant any of their own lands to Native veterans of Vietnam or any other era as a reward for their military service. Instead, H.R. 3148 seeks yet again to make more private withdrawals from the bank of lands that are owned by the United States for the benefit of all the American people.

Congress has twice in recent years addressed the "missed opportunity" equities of Alaska Natives who served in the military just prior to the 1971 repeal of the Allotment Act of 1906 and who may have lost out on their opportunities to apply because of that service. In 1998, a rider on the FY 99 VA–HUD Appropriations bill (Public Law 105–276) restored eligibility for a limited class of military veterans, those who served between 1969 and 1971. In 2000, additional refinements and technical changes were made (Public Law 106–559).

At that time, however, the Department of the Interior stated that "we are opposed to further changes or expansion of the law, which we believe fully and fairly addresses the problem of lost opportunity due to military service for Alaska Native veterans of the Vietnam War to apply for allotments." And the Democratic floor manager stated that "by allowing this bill to proceed, it is our intent that this action is final and that there will be no further extensions of land claims under an act that was passed by Congress at the turn of the century and repealed three decades ago." [See: Congressional Record, October 10, 2000 at page H9616]

Unfortunately, H.R. 3148 would rewrite the 1998 and 2000 negotiated agreements, disregard the "missed opportunity" rationale and eliminate the eligibility criteria of the original Allotment Act. The bill would substantially expand the number of veterans, or

their heirs, who could obtain lands, and open public lands such as wilderness areas or the Tongass and Chugach National Forests that are off-limits under current law. In effect, it would sanction thousands of new claims on virtually any federal lands in Alaska, without even any showing of prior use or occupancy of the lands as was required under the Allotment Act.

The substitute adopted at the committee markup does not remedy any of the fundamental flaws of the legislation. It puts the Trans-Alaska Pipeline corridor off-limits to new allotment land grants, but fails to similarly protect Department of Defense lands or other congressional designated reserves and conservation areas. It allows Native corporations and the State of Alaska to chose to convey lands for Native allotments, but further undercuts and complicates public land management in Alaska by providing that they will be reimbursed by the Untied States with additional lands.

Even the Bush Administration testified in strong opposition to H.R. 3148 at the June 5, 2002 full committee hearing. In a June 21st letter, the Department of the Interior restated their rationale for opposing the bill, noting that it "essentially makes the renewal of the opportunity to apply for an allotment under the 1906 Allotment Act a special bonus or reward for service for one class of Alaska Natives, those who served in the Vietnam war, but no longer has any basis in missed opportunity. * * * This bonus program, available only to Alaska Natives and to no other veterans, also raises the possibility of Constitutional challenge as to whether it may be an impermissible preference." [See: Attachment A] An analysis dated September 24, 2002 by the Congressional Research Service states that "it is possible that the courts might view H.R. 3148's extension of a benefit to Alaska Native veterans not shared by all veterans or non-Alaska Native residents of the State as describing a racial classification subject to strict judicial scrutiny under the Equal Protection Clause." [See: Attachment B]

Regardless of its potential Constitutional defects, H.R. 3148 is fundamentally bad public policy. It reopens and exponentially expands the Allotment Act of 1906 that Congress repealed in 1971 when it enacted the most generous land settlement in United States history. It discards the equitable missed opportunity premise underlying the negotiated agreements of 1998 and 2000 and discards the protections in those laws to expose wilderness areas, national forests and other valuable public lands to privatization.

H.R. 3148 should not have been reported by the Committee on Resources and it should be rejected if it comes before the House of Representatives.

GEORGE MILLER.

[ATTACHMENT A]

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, June 21, 2002.

Hon. JAMES V. HANSEN,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your request for the views of the Department of the Interior on H.R. 3148, which would amend section 1629(g) of the Alaska Native Claims Settlement Act (ANCSA), originally enacted as the Alaska Native Vietnam Veterans Allotment Act of 1998 (Section 432 of Public Law 105–276). The purpose of the 1998 Act was to redress unfairness that may have resulted for certain Alaska Native Veterans of the Vietnam War who may have missed an opportunity to apply for an allotment under the 1906 Native Allotment Act because of service in the armed forces immediately prior to the repeal of the Allotment Act. The Allotment Act was repealed with the enactment of ANCSA on December 18, 1971. The 1998 Act gave qualified Vietnam veterans a renewed opportunity to apply under the Allotment Act. This letter follows and confirms my testimony to the Committee on June 5, 2002.

We certainly support the principle of equitable treatment of Alaska Vietnam Veterans, and we have made every effort at fairness under the 1998 Act. While we have made considerable progress under the 1998 Act, we appreciate that there may be frustrations among many Alaska Native veterans under the current act, frustrations in that there are limitations on eligibility and entitlements under the Act, frustrations about time of administration, and frustrations in that all are not entitled. We believe there may be a misconception among many Native veterans that because they served, they are entitled to an allotment. That was not the purpose of the 1998 Act.

The new bill, H.R. 3148, while it aims at fairness, raises a number of serious new policy, management, and technical concerns, and it would give rise to new issues of fairness with respect to other Alaska Natives and other Vietnam veterans. It would undo the important compromises reached in the passage of the 1998 Act. It would stall, if not negate the progress made so far under the 1998 Act, and it would disrupt ongoing progress, settled land use arrangements under ANCSA and ANILCA, and efforts to finalize land entitlements under ANCSA, the Statehood Act, and the 1906 Allotment Act. Therefore the Administration is opposed to H.R. 3148.

H.R. 3148 is a significant departure from the original "missed oppostunity" concept of the Alaska Native Vietnam Veterans Allotment Act. H.R. 3148 extends the eligibility period of the current Native Vietnam Veterans Allotment Act. H.R. 3148 extends the eligibility period of the current law from a three year period to the entire Vietnam Era, from 1964 to 1975, including four additional years after the 1971 repeal of the Alaska Native Allotment Act, when other Alaska Natives could no longer apply. Essentially, most

if not all Alaska Native Vietnam veterans, or the heirs of deceased veterans, would appear to be eligible to apply for an allotment.

The 1998 Act limited military service eligibility to those individuals who served between 1969 and 1971. The rationale behind this limitation was the fact that that was the period when missed opportunity because of service was likely to occur. Also, there was a major effort by the Bureau of Indian Affairs, Alaska Legal Services Corporation, the Rural Alaska Community Action Program (RurAlCAP) and other entities during this period to solicit the filing of Native allotment applications in anticipation of the repeal of the 1906 Act. Those Alaska Natives who were serving in the military during this period may not have been able to benefit from the outreach effort. Veterans who served prior to January 1, 1969, generally had the same opportunities to learn about the Native allotment program and to apply as any other Alaska Native. Those who served after December 18, 1971, as with all other Alaska Natives, had no further opportunity to apply for allotments because of repeal of the Act. Neither group can be considered to have missed their opportunity to apply for an allotment because of their military service.

The new bill, H.R. 3148, essentially makes the renewal of the opportunity to apply for an allotment under the 1906 Allotment Act a special bonus or reward for service for one class of Alaska Natives, those who served in the Vietnam war, but no longer has any basis in missed opportunity.

H.R. 3148 would thus discriminate and create inequities between Alaska Native Vietnam veterans and Natives who did not serve in the military, between Native veterans and non-Native veterans, and between Native veterans with military service during the Vietnam Era and Native veterans who served in World War II, Korea, or other conflicts. This bonus program, available only to Alaska Natives and to no other veterans, also raises the possibility of Constitutional challenge as to whether it may be an impermissible preference.

Progress under the current law

From the passage of the 1998 Act until the final regulations were published, BLM conducted extensive outreach efforts to reach potential Alaska Native Veteran Allotment applicants. These efforts are detailed on the attached appendix.

Section 432 of Public Law 104–276 required the Secretary of the Interior to promulgate regulations within 18 months to carry out the Alaska Native Veterans Allotment program. The law also provided for an 18-month application filing period to begin when the regulations became effective. On February 8, 2000, following a series of public meetings to gather input from Native groups, State and Federal entities, and private individuals and groups, a proposed rule was published in the Federal Register. Following a 60-day comment period, the final rule was published on June 30, 2000. Revised regulations to implement the terms of a December 2000 amendment to the 1998 Act were published in final form on October 16, 2001.

During development of the regulations to implement the 1998 Act, the BLM estimated that as many as 1,100 Alaska Native vet-

erans might be eligible to apply for allotments under the provisions of that Act. This estimate was based on analysis of the DVA data used to prepare the Department's 1997 Report to Congress, and was inflated somewhat to account for the fact that there were potentially eligible individuals who were not identified by DVA.

The filing period for Native veterans allotment applications began on July 31, 2000, and continued through January 13, 2002. BLM received applications for 991 parcels of land from more than 700 individual applicants. A majority of the applications were received, and approximately 700 parcels were claimed during January 2002, the last month of the filing period. Many of the applications filed in 2000 and 2001 have been rejected because of non-resident status, failure to meet military service criteria, or application for lands that have been conveyed or are not available. For applications involving unavailable lands, BLM made every effort to identify those applications as quickly as possible so that applicants who are otherwise eligible could still have the opportunity to apply for other land.

We do not know at this time how many of the applications filed in January 2002 are legally sufficient or defective, in part because we have had to concentrate our efforts on serializing the large, late influx of new applications and having them noted to the official BLM records. We note that approximately 250 applications received at the end of the filing period contained no land descriptions. Work is ongoing on other veterans applications. Field examination and survey of veterans allotment parcels are mixed in with existing schedules for similar work on original applications filed under the 1906 Act.

Also pursuant to section 432 of P.L. 105–276, the Department has submitted a report to the Congress on the status of Alaska Vietnam veterans who served during a period other than that specified for eligibility under section 432. The report made an extensive survey of circumstances of Alaska Vietnam veterans and reasons why they did not apply under the Allotment Act, but it recommended against expanding the eligibility period and raised no considerations consistent with terms proposed by H.R. 3148.

Other problems with H.R. 3148

In addition to the fairness and potential Constitutional problems noted above, the bill raises other serious concerns.

H.R. 3148 rescinds all regulations promulgated to implement the current law

H.R. 3148 would repeal all regulations promulgated under the Alaska Native Veterans Allotment Act of 1998, which includes the original regulations published in the Federal Register in June 2000 (43 CFR 2568) as well as the amended regulations published on October 16, 2001, to implement the changes made by Public law 106–559 in December 2000 (the amended regulations became effective on November 15, 2001). Eliminating the veterans allotment regulations would not only leave BLM and the other land management agencies without any guidance to implement the program, but it would also leave applicants with no certainty of what is expected of them. These regulations provide, among other matters,

the guidance essential for the processing of veterans allotment applications, the rules governing compatibility determinations for applications in Conservation System Units, the rules governing appeals from different types of decisions, and safeguards to State and ANCSA entitlements.

H.R. 3148 removes protections for certain lands provided under the 1998 act

The change in the definition of available lands for allotments from "vacant, unappropriated, and unreserved" to "vacant lands that are owned by the United States" raises the question whether the prior requirements of the 1906 Allotment Act still apply. Section (b)(1) of the 1998 Act, as kept under HR 3148, would indicate that they do, but the new (a)(2) is conflicting. If the term "vacant land of the United States" controls, then any vacant U.S. lands are open, including parks, refuges, wilderness, and possible defense properties. CSU protections may be rendered moot. Previously withdrawn lands, including, for instance, Tongass National Forest, would presumably become available. Further, H.R. 3148 proposes to repeal 43 U.S.C. 1629g(a)(3), which protected numerous special areas, including acquired lands, lands withdrawn for defense purposes, National Forest lands, wilderness, campsites, trade and manufacturing sites, lands containing buildings or other development, cemetery sites, home sites, and more. Defense and acquired lands would be available. For instance, since 1991, the Fish and Wildlife Service has spent over 150 million dollars acquiring land on Alaska's National Wildlife Refuges, mostly from Native corporations and allotted. These newly acquired lands would be available for Native veteran allotment applications under this bill.

Additionally, H.R. 3148 may eliminate the standard Allotment Act rules concerning use and occupancy of the land. This changes previous tenets of law for occupancy of public lands.

In a related issue, it is unclear whether H.R. 3148 would eliminate the requirement of the 1906 Native Allotment Act that an applicant must be a resident of Alaska. Allowing Native allotments in Alaska for non-residents, many of whom have never lived in Alaska, we believe would be totally contrary to the intent of both the 1906 Act and the 1998 Alaska Native Veterans Allotment Act. While we do not interpret the language in H.R. 3148 as eliminating the residency requirement, we wish to make it clear that we are opposed to any effort to eliminate this requirement and we object to any language which could be interpreted to do so.

H.R. 3148 provides for legislative approval of all applications eighteen months after the filing deadline

This, combined with the rescission of the regulations, virtually assures that most applications will be approved without the regular review process and without the applicants demonstrating that they used and occupied the claimed land in accordance with the 1906 Native Allotment Act and remaining regulations. Persons who do not meet the use and occupancy requirements can apply for land secure in the knowledge that becasue of short time frames and lack of regulations, BLM will not be able to field examine and adjudicate most claims by the deadline and most will ultimately be leg-

islatively approved. This will encourage wrongful claims and result in wrongful conveyance of Federal land. It will also render ineffective the protections provided to conservation system units (CSU's) by Section (1)(a)(5) of the existing law.

Eligibility of all heirs of all decedents

Although the right to file an application under the 1906 Allotment Act did not survive the death of an individual, the 1998 Act, for the first time in the history of public land law, allowed the filing of an allotment application by the personal representative of the estate of a deceased veteran if that veteran died in combat or as a POW during a certain period of time or died later as a result of a service connected wound received during that time. The military service eligibility period for deceased veterans in Section 432 was January 1, 1969, through December 31, 1971; this period was expanded by the December 2000 amendment to include the period beginning August 5, 1964, and ending December 31, 1971. These provisions were a carefully limited compromise from earlier pre-enactment provisions that allowed all heirs to apply, strongly opposed by the Department.

The lack of manageability of allowing all heirs to apply can be illustrated by reference to one word, Cobell. At the core of that now infamous law case is the essential impossibility of tracking multiplying heirs and fractionated heirships. H.R. 3148 would eliminate all reference to a personal representative and would allow "an heir" to apply for an allotment on behalf of the estate of a deceased veteran. Many Native allotment applicants have numerous heirs, and many estates of deceased Natives have never been probated so heirship is unknown. H.R. 3148 would put the Department in the business of attempting to determine eligible heirs, of having to establishing the class of possible eligible heirs in order to grant an allotment, and of risking, after such allotment were granted, facing another claim by some other undiscovered heir. Multiple potential heirs could apply on behalf of a single estate, and if there is a dispute among heirs, BLM would have to engage in the conflict.

When combined with the 18 month legislative approval, a likely result of the heirship provisions is that several claims could be approved for the same decedent, even if conflicting, because necessary review would not be achieved in the 18 months.

Added to this is the inevitable additional difficulty of proof of site and of use and occupancy through heirs, rather than by the original occupant. There is substantial potential for conflict, litigation, and delay of all allotment applications by virtue of any heirship provision. The Department is strongly opposed to any expansion of rights of heirs to apply.

Unrealistic deadlines and impacts on current ANCSA, State, and Allotment Act conveyances and on third party interests

Because the work on new Veterans applications is necessarily mixed in with current work on already pending Allotment, State, and ANCSA applications the bill would result in devastating impacts on BLM's ability to finalize State and ANCSA land transfer

entitlements and to complete conveyances to other Alaska Natives under the 1906 Native Allotment Act.

We estimate that the potential exists for as many as 5200 parcels of land to be claimed under the expanded eligibility provisions of H.R. 3148. H.R. 3148 would create a filing period for applications ending on July 31, 2003. The bill also contains a provision for approval of veterans allotment applications and issuance of certificates of allotment "not later than January 31, 2005, that is, eighteen months after the end of the filing period. This deadline is problematic for two reasons: (1) it is unrealistic to expect as many as 5200 individual parcels of land to be adjudicated, examined, surveyed, and conveyed in an eighteen-month period (survey alone normally takes longer than eighteen months from issuance of survey instructions and contracts to approval of survey plats and field notes and notation of surveys to BLM records); and (2) the deadline would necessitate that the processing of veterans allotment applications be placed ahead of State applications and other Native applications under the 1906 Act and under the Alaska Native Claims Settlement Act.

BLM records show that more than 3100 parcels claimed under the 1906 Allotment Act are still pending and awaiting final disposition. Many of the applicants for these parcels have been waiting for decades to receive title to their allotments.

Third party or adverse interests could be compromised by the application and protest deadlines and automatic approvals of allotment applications, resulting in potential takings, since the Department will not have the time to identify all third party interests in time to meet the protest requirements of the bill and third parties may not be informed and be able to protest and adjudicate their interests before an allotment is approved.

These are some, but not all of the serious concerns raised by the bill. We believe that the bill will cause far more problems than it will solve.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

PAUL HOFFMAN,
Deputy Assistant Secretary for Fish, Wildlife, and Parks.

[ATTACHMENT B]

CONGRESSIONAL RESEARCH SERVICE,
Washington, DC, September 24, 2002.

MEMORANDUM

To: House Committee on Resources, Attention: Jeff Petrick.
From: M. Maureen Murphy, Legislative Attorney, American Law Division.
Subject: Potential Constitutional Issues in Connection with Providing Allotments to Alaska Native Vietnam Era Veterans as Proposed in H.R. 3148.

This responds to your request for information on potential constitutional challenges that could be raised to H.R. 3148, the Alaska Native Veterans Land Allotment Equity Act,[1] whicih the House Committee on Resources voted to report on September 12, 2002. As requested, our response will be limited to identifying potential constitutional claims and describing the standards that the courts might apply in deciding the issues raised by them.

This legislation would amend the Alaska Native Vietnam Veterans Allotment Act of 1998 (hereinafter, the Act),[2] which resurrected a 1906 law repealed by the Alaska Native Claims Settlement Act of 1971 (ANCSA)[3] for the limited purpose of permitting Alaska Native veterans who had been serving in the military during 1969, 1970, or 1971 to receive allotments of public lands in Alaska. The amendment would broaden the class of Alaska Native Vietnam Era veterans able to take advantage of this law and liberalize the conditions under which allotments may be granted.

You are specifically interested in exploring what the Deputy Assistant Secretary of the Interior for Fish, Wildlife, and Parks, may have meant, in a June 21, 2002, memorandum to Chairman Hansen, by stating that the program contemplated by this legislation "raises the possibility of Constitutional challenges as to whether it may be an impermissible preference." We not that the memorandum to Chairman Hansen does not elaborate on the reference to impermissible preference; nor does it assert that such a challenge would succeed. Whether such a challenge could succeed depends upon whether the class that is given a preference is held to be a suspect class, such as a class based on race, and whether in enacting the legislation Congress meets the standard that the courts will apply to the class distinguished for special treatment. Obviously, the group that is given preferential treatment in this legislation is comprised of Alaska Native veterans, who served in the years covered by this amendment. The reference in the memorandum, therefore, refers either to the possibility that the class is race-based because it consists of only Alaska Natives or to the fact that the beneficial treatment is being accorded on an arbitrary or capricious basis, rather than on a rational basis, to a group of Alaska Natives rather than all Alaska Natives; to a group of Vietnam Era Veterans rather than to all Vietnam Era veteran; or to a group

[1] A bill similar to H.R. 3148, as introduced, is S. 2553, introduced by Sen. Murkowski for himself and Sen. Stevens. 148 Cong. Rec. S2553 (May 22, 2002).
[2] Pub. L. 105–276, § 423, 112 Stat. 2516, 43 U.S.C. § 1629g (1998).
[3] Pub. L. 92–203, 85 Stat. 688, 43 U.S.C. §§ 1601 et seq.

of veterans rather than to all veterans. Without further specification, we can only speculate that this comment directs your attention to the possibility that the legislative history of this amendment would not provide a court sufficient information to conclude that Congress has met the appropriate standard for the legislation to survive equal protection scrutiny.

The rationale behind the 1998 Act may not be easily transferable to the current proposal. The 1998 legislation appears to have been an attempt to remedy a perceived injustice visited upon Alaska Natives who were eligible for allotments under the 1906 act but were serving in the military immediately prior to its repeal by ANSCA. The logic is that if they were in military service, they might not have been fully able to take advantage of the widely publicized [4] last opportunity to apply for an allotment.[5] Remedying the situation addressed by the 1998 legislation, therefore, would seem to comport with the test the Supreme Court has applied to legislation that singles out Indians or Indian tribes for preferential treatment in such cases as *Morton* v. *Mancari* [6] and *Delaware Tribal Business Comm.* v. *Weeks*.[7] *Morton* v. *Mancari*, the Supreme Court upheld laws providing preferential BIA hiring for Indians, emphasizing the breadth of Congressional authority in Indian affairs. It indicated that laws providing preferential treatment for Indians wojuld be upheld: "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." [8]

Whether that reasoning may be applied to H.R. 3148 with similar force depends to some extent upon the justification advanced in the legislative process. In enacting H.R. 3148, is Congress remedying failures in the original legislation and, thereby, acting as a trustee for the Alaska Natives whoe opportunities for allotments were foreclosed by their military service? If H.R. 3148 is merely providing an additional benefit to Alaska Native Vietnam Era veterans not made available to any other Alaska Natives, Vietnam veterans, or veterans in general, the legislative history, to be most persuasive to a court, should indicate the reason for singling out those Alaska Native veterans in terms of some trusteeship obligation to them. Even if there is a sufficient showing of why Congress is obligated to provide this type of benefit for these beneficiaries or why Congress, in exercising its trusteeship powers in Indian affairs, has chosen to single this group out for special treatment, there lurks another issue that the courts may choose to address: how the enactment of ANSCA has altered Congress' trusteeship relationship towards Alaska Natives.

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[4] See 65 Fed. Reg. 6259 (February 8, 2000), describing efforts of Alaska Native Advocacy groups to contact eligible Natives who had not applied for allotments.

[5] In introducing the legislation that gave rise to the 1998 Act. Rep. Don Young set forth its remedial purpose: "Alaska Natives, who were in service to their country during the Vietnam War, missed their opportunity to apply for a Native allotment under the Native Allotment Act. Many were in war zones and others had not received their application from the Bureau of Indian Affirs (BIA). It is my firm belief that our Alaska Native Vietnam veterans merit the same rights as other Alaska Natives under this act. It is morally wrong of our country * * * to deny them the basic right afforded to other Alaska Native citizens under this act. This legislation will correct this inequity and give them the opportunity to apply for their allotment under the Native Allotment Act." 143 Cong. Rec. E 2220, E 2221 (November 7, 1997 daily ed.).

[6] 417 U.S. 535 (1994).

[7] 430 U.S. 73 (1977).

[8] 417 U.S. 535, 555.

H.R. 3148 would broaden eligibility for allotments under the 1998 legislation by: extending the time period during which military service would qualify an Alaska Native veteran for an allotment; permitting allotments in some land not covered in the 1998 legislation; removing various requirements in the earlier legislation; and broadening the class of survivors able to claim an allotment on the basis of a decedent. Among the requirements removed are those specifying: (1) that the land be "vacant, unappropriated, and unreserved on the date when the person eligible for the allotment first used and occupied those lands;"[9] and, (2) that the applicant for an allotment provide the Secretary of the Interior with proof of "substantially continuous use and occupancy of the land for a period of five years."[10] Under the amendment, any Alaska Native veteran who served at any time in the Vietnam Era, August 5, 1964 to May 7, 1975, who is determined to meet the qualifications of the 1906 Act as it existed upon repeal, would be eligible. Moreover, survivors of such veterans would be able to apply.[11]

There are other liberalizing features in the proposal, some of which may be viewed as corrections of defects in the earlier legislation and the regulatory regime implementing it. The proposal requires repeal of the entire set of regulations issued under the 1998 law, indicating dissatisfaction with how the earlier remedial legislation had been implemented. Among the changes that might be seen as remedies for the failure of the current regulatory process of issue allotments appropriately is an extension of the time for filing applications. The proposal permits applications for 3 years after the Department of the Interior (DOI) issues final regulations. Current law provided an 18-inch period that ended January 31, 2002.[12] Another is an expansion of the available lands. The current law limits the lands available for allotment. For example, it excludes campsites, wilderness areas, lands containing buildings owned other than by the person selecting the allotment, lands withdrawn for national defense purposes, national forest lands, and lands selected or claimed under a public land law, or lands selected by the State of Alaska or a Native Corporation and not conveyed.[13] H.R. 3148 specifies only that selections of allotments may not be made from lands within the Trans-Alaska Pipeline right-of-way and the inner corridor of that right-of-way withdrawal. The current law provides for limited survivor's benefits for the estates of decedents who served in South East Asia at any time from August 5, 1964 to December 31, 1971, and were killed in action or died from a wound received in action or as a prisoner of war, and requires application be submitted by the administrator or personal representative appointed by an Alaska state court.[14] The proposal would permit heirs of any eligible Alaska Native Vietnam Era veteran to apply for the allotment on behalf of the estate.

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[9] 43 U.S.C. § 1629g(a)(2).

[10] Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended and codified at, 43 U.S.C. §§ 270–1 to 270–3, prior to repeal by Pub. L. 92–203, § 18(a), 85 Stat. 710 (ANSCA) and incorporated by reference into Pub. L. 105–559, § 301. (hereinafter, the 1906 Act).

[11] According to Rep. Young, who introduced this legislation, these are viewed as "obstacles" to the allotment process. 147 Cong. Rec. E 1894 (October 15, 2001).

[12] 43 C.F.R. § 2568.70, as promulgated 65 Fed. Reg. 40954, 40963 (June 30, 2000).

[13] 43 U.S.C. § 1629g(3).

[14] 43 U.S.C. § 1629g(b)(2).

Given that the enlargement of the class of persons who may apply for allotments does not appear to be based upon the rationale behind the original legislation, the legislative history of the current proposal is likely to be scrutinized by a court that uses the *Morton* v. *Mancari* test and attempts to determine whether H.R. 3148 is legislation that is "tied rationally" to a trust obligation to Alaska Natives. It would appear that at least two factors would be important to such an inquiry: (1) any documentation in the legislative history with regard to the intention of Congress and (2) how the court assess the trust obligation of Congress with respect to Alaska Natives in light of the enactment of ANSCA.

At present, without publication of a Report by the Committee, the leading piece of legislative history for H.R. 3148 is Rep. Don Young's statement upon introducing the bill. In it, he identified the problem: "Many Alaska Native Vietnam veterans" who saw the 1998 Act "as their last opportunity to obtain land which had been used by their families for generations for subsistence purposes" "lost" that opportunity because they "were excluded by the terms of * * * [the 1998 Act] * * *"[15] He identified three obstacles to the allotment process that his legislation sought to address. Only two of these appear to be defects in the 1998 legislation with respect to its intended beneficiaries: lack of available land and proof of use of the land continuously for five or more years. Under the amendment, these corrections would modify requirements of the 1906 law as incorporated into the 1998 legislation. Were H.R. 3148 confined to these provisions, the same rationale that serves for the earlier legislation might be applied to it. Increasing the available land and eliminating the continuous usage requirement arguably go to the missed opportunity of those serving in the military before the cut off date. This might be seen as nothing more than fine tuning the earlier legislation to prevent military service from impeding eligibility for an allotment.

The third obstacle is another matter, permitting all Vietnam Era Alaska Native veterans to apply for a missed opportunity allotment. In presenting H.R. 3148, Mr. Young emphasized the expanded dates in terms of veterans' benefits, rather than fairness to those whose military service impeded their applications before the cut off date. He stated:

> The expansion of military service dates to include all Alaska Native Vietnam veterans who served in the military during the Vietnam conflict is consistent with the federal government's policy of providing benefits to all veterans for the Vietnam conflict and not just to some of those veterans. This provision also fulfills the trust obligation to Alaska Natives. The limited military service dates have excluded many Alaska Native Vietnam veterans who bravely served during the Vietnam conflict. Never before has the United States given veteran land benefits to only a portion of those who served their country. The federal government has given public land benefits to all veterans (or their widows or heirs) of every war beginning with the

[15] 147 Cong. Rec. E 1894 (October 16, 2001). The number of veterans so situated was estimated by Rep. Young to be 1,700.

> Indian Wars of 1790 and ending with the Korean conflict in 1955. As Members will recall, Alaska Native veterans were not eligible for these public land benefits until 1924 because the courts had determined Alaska natives were not United States citizens.[16]

The key difference between the 1998 law and H.R. 3148 seems to be that the ending date for military service that determines eligibility in the 1998 law roughly[17] coincides with the date that ANSCA was enacted and the 1906 allotment process was repealed. The dates of military service in the proposal are not coordinated to the repeal of the allotment process but to the Vietnam Era. This difference may open the way for a court to look at the issue of what trust obligation exists toward Alaska Natives following the enactment of ANSCA.

Federal laws granting preference to Indian tribes have been upheld under the *Morton* v. *Mancari* standard provided they are found to be rationally related to the trust obligation of the federal government toward Indians. Until the passage of ANSCA, the existence of that trust obligation was generally unquestioned. Beginning with the treaty by Alaska Natives to the Indian affairs authority of Congress,[18] all branches of the federal government have treated Alaska Natives analogously to Indians as objects of a federal trust relationship. One of those efforts was in the direction of providing land for their occupancy and subsistence in legislation such as the 1906 Alaska Natives Allotment Act and the 1926 Alaska Natives Townsite Act, as well as in instances of administratively established land reserves for Alaska Natives.[19] The courts have been hospitable to the exercise of trusteeship powers by the federal government with respect to Alaska Natives.[20]

The recent case, *Alaska* v. *Native Village of Venetie Tribal Government,*[21] may presage a change in that perspective, however. In *Venetie*, a unanimous Supreme Court rules against an Alaska Native entity, the Native of Village of Venetie Tribal Government, in its assertion of taxing authority. In reaching this conclusion, the Court construed various provisions of ANSCA as well as the federal Indian country statute, 18 U.S.C. § 1151. Although the case did not present the issue of federal trusteeship over Alaska Natives or the existence of a government-to-government relationship between the United States and Alaska Native entities, the Court may have indicated a certain attitude to those issues. For example, it quoted extensively from provisions of ANSCA alluding to a change in the nature of the federal relationship after passage of the claims settle-

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[16] Id., at E 1895.

[17] ANSCA was effective December 18, 1971; military service until December 31, 1971, could be used to determine eligibility under the 1998 Act, provided the veterans had served at least 6 months between January 19, 1969, and December 31, 1971, or enlisted or was drafted after June 2, 1971 but before December 3, 1971. 43 U.S.C. § 1629g(b)(B).

[18] "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Act of March 30, 1867, Art III, 15 Stat. 539, 542.

[19] See U.S. Department of Interior, Alaska Native Claims Settlement Act (ANSCA): ANSCA 1985 Study: June 29, 1984 Draft I–23 (1985).

[20] See, e.g. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); *Territory of Alaska* v. *Annette Island Packing Co.,* 298 Fed. 671 (9th Cir. 1923), *cert. denied,* 26 U.S. 708 (1923); *In Re Sah Quah,* 31 F. 327 (D.Alaska 1886).

[21] 522 U.S. 520 (1998).

ment legislation in 1971. For example, citing 43 U.S.C. § 1601(b), the Court stated:

> In enacting ANSCA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy. ANSCA's text states that the settlement of the land claims was to be accomplished "* * * without establishing any permanent racially defined institutions, rights, privileges, or obligations [and] *without creating a reservation system or lengthy wardship or trusteeship"*[22]

Even before *Venetie,* claims of governmental powers by Alaska Native entities have not received full endorsement by the courts.[23] Central to *Morton* v. *Mancari* is the Court's view of the political, government-to-government relationship between the federal government and the Indian tribes. Although whether such a relationship has been affected by ANSCA has not been determined by the courts, the effect of the *Venetie* decision, if not its precise holding, may be viewed as undermining the notion of Indian sovereignty for Alaska Native entities.[24] Against this backdrop, it is possible that the courts might view H.R. 3148's extension of a benefit to Alaska Native veterans not shared by all veterans or non-Alaska Native residents of the State as describing a racial classification subject to strict judicial scrutiny under the Equal Protection Clause.[25] Strict scrutiny generally requires that challenged legislation serve a "compelling" governmental interest and that it do so by "narrowly tailored" means. The Supreme Court has recognized that the federal government has a compelling interest in remedying "lingering effects" of past discrimination against a protected group. The nature and level of proof that must be advanced by the legislature in support of a remedial racial classification remain largely unsettled, however.[26] Moreover, whether a traditional remedial rationale even applies may be questioned where the reason for preferring all Alaska Native Vietnam Era veterans, regardless of years of service abroad, over other Alaska Natives or other veterans has yet to be fully fleshed out. The bill's preference for Alaska Native Veterans may also call for a showing by the government that it is a necessary and effective vehicle for accomplishing a congressional purpose that may not be accomplished by race neutral means. This "narrowly tailored" aspect of strict scrutiny is generally designed to curb legislative overbreadth and confine the scope of any racial classification to the particular purpose sought to be served

We hope this information assists you and that you will call upon our office should you need further assistance.

M. MAUREEN MURPHY,
Legislative Attorney.

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[22] 522 U.S. 520, 523–524 (emphasis in the original)
[23] See, e.g., *Kake Village* v. *Egan,* 369 U.S. 60 (1962);
[24] See, John R. Bielski, "Comment: Judicial Denial of Sovereignty for Alaskan Natives: An End to the Self-Determination Era", 73 Temple L. Rev. 1279 (2000).
[25] *Adarand Constructors* v. *Pena,* 515 U.S. 200 (1995).
[26] E.g., *Rothe Development Corp.* v. *U.S. Department of Defense,* 262 F.3d 1306 (Fed. Cir. 2001).