

COOK INLET REGION, INC.

IBLA 82-1159

Decided December 9, 1983

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting selections under section 14(h)(1) of the Alaska Native Claims Settlement Act for cemetery sites and historical places.

Affirmed in part, reversed in part, set aside in part, and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Generally--Applications and Entries: Generally

A decision rejecting an application, filed at a time when the land was withdrawn, pursuant to the tract book or notation rule may be reversed where the application remained pending unadjudicated until after termination of the withdrawal (and thus no administrative burden would be avoided by rejection) and where consideration of the application would not give the applicant any preference right in the land over the general public to which he was not otherwise entitled.

2. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act authorizes the Secretary to withdraw and convey historical places and cemetery sites to the appropriate regional corporation. Although lands withdrawn under sec. 11 of the Alaska Native Claims Settlement Act for village selection may not be conveyed under sec. 14(h), after Dec. 18, 1975, lands withdrawn under sec. 11 for village selections which have not been selected or lands embraced in village selections which have been

relinquished lose their status as lands withdrawn under sec. 11 and may be conveyed under sec. 14(h)(1).

APPEARANCES: Russ Winner, Esq., Anchorage, Alaska, for appellant; James Vollintine, Esq., Anchorage, Alaska, for intervenor; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Cook Inlet Region, Inc. (CIRI), from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting certain land selection applications filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1613(h)(1) (1976). The basis for the rejection was the fact that the lands at issue had been withdrawn by Public Land Order No. (PLO) 5174 and PLO 5425 under section 11(a)(3) of ANCSA, 43 U.S.C. § 1610(a)(3) (1976), and were embraced in village selections made under section 12 of ANCSA, 43 U.S.C. § 1611 (1976), at the time of appellant's section 14(h)(1) selections. BLM held that since the land was covered by outstanding applications of record at the time that appellant's selections were made, rejection of appellant's applications was mandated by 43 CFR 2091.1(b). 1/

1/ Appellant's applications were also rejected in part because of conflict with patented lands, certain Native allotment applications, and the homesite application of Vernard E. Jones, AA-85. Counsel for appellant acknowledges on appeal that patented land must be excluded from CIRI's selection application. Counsel for BLM concedes error in the decision below to the extent that it rejected appellant's application for lands within unpatented Native allotment applications or the homesite application which is currently the subject of a Departmental contest. Therefore, these aspects of the decision below are no longer at issue in the appeal before the Board.

The decision recited that CIRI filed selection applications AA-11094, AA-11103, and AA-11107 on December 18, 1975. Selection applications AA-11838, AA-11839, and AA-11840 were filed by CIRI on June 30, 1976. The BLM decision noted that appellant's section 14(h)(1) selection applications conflicted with prior village selection applications filed under section 12 of ANCSA on December 17, 1974, and December 15, 16, and 17, 1975. BLM also noted that conflicting village selection applications were all relinquished on March 17, 1978.

CIRI contends in its statement of reasons for appeal that the regulation at 43 CFR 2091.1(b) is a regulation of general applicability which is superseded in this case by the more specific regulations governing ANCSA selections. Counsel for appellant asserts that the ANCSA regulations contemplate topfiling by Native groups and adjudication of conflicting applications. Specifically, counsel cites 43 CFR 2652.3(b) which provides that village selections within areas withdrawn under sections 11(a)(1) and 11(a)(3) of ANCSA shall be given priority over regional selections for the same land. CIRI argues that lands for which a village selection was filed, which selection is later relinquished or disapproved, are "not selected" within the meaning of 43 CFR 2653.3(a), thus permitting section 14(h)(1) selections after December 18, 1975, from lands formerly withdrawn under section 11(a)(3) and not selected.

Further, CIRI contends that even assuming 43 CFR 2091.1(b) is relevant, BLM has erroneously applied the regulation. Appellant argues that the regulation only precludes holding an application pending possible future availability of the land where approval of the application is prevented by an allowed

entry or selection of record. Appellant contends the regulation is not applicable where, as here, BLM waits until after relinquishment of the conflicting applications to reject the junior applications. CIRI asserts that an equitable construction of the regulation bars rejection of a premature filing in circumstances where to do otherwise would not create an administrative burden and would not give applicant a preference right to which he is not otherwise entitled. Appellant contends that neither is the case here.

Further, CIRI argues that the deadline of July 1, 1976, imposed for section 14(h)(1) selections by 43 CFR 2653.1(a) 2/ coupled with the fact that the village selections were not relinquished until March 17, 1978, requires an interpretation that topfiling is permitted under 43 CFR 2653.3(a) authorizing selection after December 18, 1975, from lands withdrawn under section 11(a)(3) and not selected under section 12. Counsel cites the Appeal of William Thomas Woolard, 2 AN CAB 150, 84 I.D. 891 (1977), as supporting this result.

Counsel for BLM has responded to appellant's brief. Counsel asserts that the notation or tract book rule expressed in the regulation at 43 CFR 2091.1 requires rejection of an application for land filed "while" BLM records show the land to be selected or otherwise unavailable for disposal. BLM argues that the applicability of the rule is strengthened by the recognition in the regulation of certain exceptions relating to Native selections where topfiling is permitted, none of which are relevant to appellant's selections. Counsel further notes that the regulation at 43 CFR 2653.3 expressly limits

2/ This deadline was extended to Dec. 31, 1976. 43 CFR 2853.4(b), 41 FR 44040-41 (Oct. 6, 1976).

section 14(h)(1) selections on land withdrawn under section 11(a)(1) to land "not selected under sections 12 or 19 of the Act." The preamble to publication of the regulation is cited wherein it indicates that BLM declined to amend the regulation from its proposed form to permit overselection. 41 FR 14735 (Apr. 7, 1976).

Counsel for BLM also contends that the terms of ANCSA preclude appellant's application. Section 14(h)(1), 43 U.S.C. § 1613(h) (1976), authorized the Secretary to withdraw and convey only lands outside those withdrawn under section 11, 43 U.S.C. § 1610 (1976). Further, although section 22(h), 43 U.S.C. § 1621(h) (1976), provides for automatic termination of withdrawals under section 11 for lands which are not selected by December 18, 1975, it provides for continued withdrawal of selected lands. BLM asserts that the land could have been subject to section 14(h)(1) selection only after relinquishment of the village selections on March 17, 1978. Counsel contends that a waiver could have been obtained by CIRI of the regulatory deadline December 31, 1976, for section 14(h)(1) selections as this deadline was not mandated by statute. However, counsel contends selection is now precluded by the terms of the Alaska National Interest Lands Conservation Act (ANILCA), § 201(7), P.L. 96-487, 94 Stat. 2371, 2380 (1980), establishing the Lake Clark National Park and National Preserve.

CIRI has filed a reply brief in which it asserts that application of the notation rule by BLM to selections under ANCSA will produce an incongruous result. Since village corporations were allowed to select acreage in excess of their entitlement, 43 CFR 2651.4(f), subsequent disallowance of excess

acreage embracing historical sites after the deadline for regional selections would preclude Native selection of the sites.

Amici curiae, the Nondalton Native Corporation, the Nondalton City Council, and the Nondalton Village Corporation, have filed a brief in support of CIRI's appeal. Amici point out that three of the CIRI applications under section 14(h) embrace the historic Kijik village site and cemetery and that Kijik is the former village site of the Nondalton Indians. Counsel argues that under section 22(h) of ANCSA all withdrawals made under ANCSA terminate on December 18, 1975, except that any lands selected by a Native corporation shall remain withdrawn until conveyed. It is alleged that, in essence, selection merges with the withdrawal and, if the Native selection is relinquished or rejected, the underlying withdrawal is simultaneously terminated retroactively as of the date of selection. Thus, counsel contends that CIRI's selections are properly regarded as not being barred by the withdrawals and the selections which were subsequently relinquished.

Further, counsel for amici contends that section 14(h)(1) does not require that the selected lands be unreserved or unappropriated when they are selected, but only before they are withdrawn and conveyed by the Secretary. Finally, counsel for amici points out that the contest proceeding concerning the homesite application of Vernard E. Jones has been stayed by order of the Administrative Law Judge pending the outcome of this appeal. Amici advise that an agreement has been reached between the homesite applicant (contestee), the Nondalton Native Corporation, and CIRI to settle the contest, contingent upon approval of the CIRI selections which are the subject of this appeal. Pursuant to the settlement agreement, the homesite applicant would relinquish

his claim in return for the grant by CIRI to applicant of an estate in the subject land for his life or 12 years (whichever is longer).

Appellant requested that the parties to this appeal be allowed to make an oral presentation of the arguments in support of their position. See 43 CFR 4.25. The request was granted and oral argument was held before the Administrative Judges deciding this case on September 8, 1983.

Two essential issues are raised by this appeal. First, whether the tract book or notation rule as embodied in the regulations at 43 CFR 2091.1 is properly applied to reject the CIRI applications. A further question is whether ANCSA and the regulations promulgated thereunder preclude topfiling and require rejection of the CIRI applications.

[1] The regulation at 43 CFR 2091.1 provides in pertinent part:

[A]pplications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land * * * when approval of the applications is prevented by:

(a) Withdrawal or reservation of lands; except that this does not prevent the filing of applications by village and regional corporations under 43 CFR Parts 2561 [land in Native allotment applications] and 2652 [regional selections] for public lands withdrawn under section 11(a)(1) of the Alaska Native Claims Settlement Act.

Neither of these exceptions to the notation rule provided in the regulation for ANCSA selections expressly applies to appellant's applications. 3/ In a recent case this Board examined the rationale for the notation rule:

3/ The exception regarding regional selections, 43 CFR Subpart 2652, could be read to support appellant's topfiled applications. The regulations at

In State of Alaska, 73 I.D. 1 (1966), aff'd sub nom. Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969), the rationale for the general rule that application made for land while it is withdrawn is invalid and does not become valid upon revocation of the withdrawal was set forth. Two major considerations were recited: avoidance of burdening land records with applications for land which is unavailable for the foreseeable future; and the equitable consideration of assuring the public an equal opportunity to file for the land and avoiding giving an applicant a preference to which he has no right. State of Alaska, supra at 9. The Department held that where these considerations were not thereby compromised an application for land filed while the land was withdrawn could be considered after restoration of the land. This holding was clarified in David W. Harper, 74 I.D. 141 (1967), where it was noted that the refusal to accept applications for land before it is open to disposition is primarily a matter of policy which need not absolutely preclude acceptance of applications for land filed prior to the time the land becomes available for disposition where no rights are vested in an applicant by the filing of his application other than the right to have the application considered, if no undue administrative burden is placed upon the Department in accepting such premature application, and if the application can be adjudicated in such a manner that no applicant can obtain an advantage over another applicant by virtue of premature filing.

David W. Harper, supra at 149-50.

Vaughn K. Leavitt, 55 IBLA 59, 62 (1981).

The land within CIRI's applications was withdrawn at the time the applications were filed by PLO 5174, 37 FR 5576 (Mar. 16, 1972), as amended by PLO 5425, 39 FR 24902 (July 8, 1974). These lands were withdrawn from all forms of appropriation under the public land laws, including state selection, location under the mining laws, and mineral leasing, pursuant to

fn. 3 (continued)

43 CFR 2652.0-3 references section 14(h)(1) selections. Another regulation provides for priority of village selections over regional selections for the same lands. 43 CFR 2652.3(b). Thus, topfiling is clearly contemplated by this regulation. Despite the reference to section 14(h)(1), it appears as argued by counsel for BLM at the oral argument, that 43 CFR Subpart 2652 is properly construed as applying to village selections under section 12 of ANCSA. Selections under section 14(h) of ANCSA are the subject of the regulations at 43 CFR Subpart 2653.

section 11(a)(3) of ANCSA and reserved for village selection under section 12 of ANCSA. Paragraph 2 of PLO 5174 further provided that after each village corporation has exhausted its rights of selection under section 12(a) and 12(b) of ANCSA in the area withdrawn by the order, the regional corporation for the area (now CIRI) may select any of the remaining lands under section 12. ^{4/} Thus, it is clear that the lands at issue were withdrawn from operation of the public land laws for Native selection and that, to the extent that the lands were not selected by the village corporations, the lands were subject to selection by CIRI. Clearly, appellant was not in the position of seeking a preference right to which it was not entitled when it filed its applications while the land was withdrawn under section 11(a)(3).

Further, no undue administrative burden was avoided by the BLM decision rejecting the CIRI applications. The terms of the PLO by which the lands were withdrawn for Native selection contemplated that CIRI would have the right to select the lands (pursuant to section 12 rather than section 14(h)) subject to prior village selections. As noted previously, the regulations contemplated topfiling by regional corporations of village selections with the latter having priority. 43 CFR 2652.3(b); see discussion at note 3, supra. To the extent that the topfiled CIRI selections involved any administrative burden, it was certainly not alleviated by rejecting the applications after the conflicting village selections had been withdrawn and after the lands were no longer subject to selection by the regional corporation. In these circumstances it was error to reject appellant's selections, filed

^{4/} Section 12(c) of ANCSA, 43 U.S.C. § 1611(c) (1976), provides for selection by the regional corporations of their share (allocated pursuant to a statutory formula) of the difference between 38 million acres and the 22 million acres selected by the village corporations pursuant to sections 12(a) and 12(b).

while the land was embraced in village selections, subsequent to the relinquishment of the conflicting village selections on the basis of the notation or tract book rule.

[2] This raises the question of whether ANCSA and the regulations promulgated pursuant thereto preclude topfiling and require rejection of appellant's applications. Section 14(h) of ANCSA, 43 U.S.C. § 1613(h) (1976), provides that the Secretary of the Interior is authorized to withdraw and convey 2 million acres of "unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title" for the various purposes described therein. Section 14(h)(1) authorizes the Secretary to "withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places."

Although the land in appellant's applications was originally withdrawn under section 11, 43 U.S.C. § 1610 (1976), for village selection, this is not necessarily dispositive of whether the applications may be considered favorably after relinquishment of the village selections. All withdrawals under ANCSA terminated as of December 18, 1975, with the exception of lands selected by village or regional corporations which remain withdrawn until conveyed. 43 U.S.C. § 1621(h) (1976). At the time the village selection applications in this case were relinquished on March 17, 1978, the withdrawal pursuant to section 11 terminated simultaneously. Consequently, the lands fall within the purview of the regulation permitting section 14(h)(1) selections after December 18, 1975, from lands formerly withdrawn under section 11(a)(1) or 11(a)(3) and not selected under section 12. 43 CFR 2653.3(a). This is consistent with the terms of section 14(h) itself which authorizes the Secretary

to withdraw and convey unreserved and unappropriated public lands outside the areas withdrawn by sections 1610 and 1615 for village selection. Although the Secretary could not withdraw and convey the lands pursuant to section 14(h)(1) at the time the CIRI applications were filed, this was no longer the case once the conflicting village selection applications were relinquished.

The view of Departmental officials at the time that the deadline for section 14(h)(1) applications was extended to December 31, 1976, as expressed in the preamble to the regulatory revision, was that the land must be available for section 14(h)(1) selection at the time the selection application was filed. See 41 FR 44041 (Oct. 6, 1976). The selection deadline was moved back to permit refileing of prior selections erroneously filed. Obviously this extension would not benefit CIRI as the conflicting village selections were not relinquished until 1978. However, we do not read the terms of section 14(h) to require rejection of appellant's applications after the village selection applications have been relinquished. The Department has held that under section 14(h) the withdrawal of land for village selection pursuant to sections 11(a)(1) and 11(a)(3) does not preclude the filing of section 14(h) selections while the land is withdrawn where the withdrawal later terminates and the land has not been selected by a village corporation. Appeal of William Thomas Woolard, supra. It is true that at least a part of the land selected by Woolard was not embraced in any village selection application filed prior to the December 18, 1975, statutory deadline. However, this distinction from the CIRI case became irrelevant when the village selection applications conflicting with the CIRI applications were relinquished in 1978 and the lands were no longer either withdrawn under section 11 or

selected under section 12. Accordingly, the decision appealed from is in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as to the land rejected because it was previously embraced in relinquished village selection applications, affirmed as to patented lands, set aside as to land in Native allotment and homesite applications not finally adjudicated, and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Will A. Irwin
Administrative Judge

