

AYAKULIK, INC.

IBLA 84-67

Decided July 17, 1984

Appeal from the decision of the Alaska State Office, Bureau of Land Management, designating 442 acres of land for conveyance pursuant to the Alaska National Interest Lands Conservation Act.

Affirmed.

1. Alaska National Interest Lands Conservation Act: Special Land Settlements -- Alaska Native Claims Settlement Act: Conveyances: Village Conveyances

Under sec. 1427(e)(3)(A) of the Alaska National Interest Lands Conservation Act, 94 Stat. 2525, Ayakulik, Inc., a village corporation, is entitled only to the available lands within the "one mile square" exclusion of Public Land Order No. 1634.

APPEARANCES: John H. Bradbury, Esq., Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Ayakulik, Inc., an Alaska village corporation, has appealed the decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 14, 1983, designating approximately 442 acres of lands in T. 34 S., R. 33 W., Seward meridian, for conveyance to the village corporation pursuant to section 1427(e) of the Alaska Native Interest Lands Conservation Act (ANILCA), 94 Stat. 2525.

Section 1427(e) provides generally that certain Native villages, including Ayakulik, that release the United States from all claims to lands and interests in lands arising under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1982), in exchange for benefits provided by section 1427, will be considered an eligible village under ANCSA. In addition to other benefits, section 1427(e) provides that, upon execution of the releases by Ayakulik and two other villages, the Secretary of the Interior shall convey "the surface estate of the one square mile of land excluded from

the Kodiak Island National Wildlife Refuge by Public Land Order Number (PLO) 1634 on account of the village it represents." ANILCA, section 1427(e)(3)(A), 94 Stat. 2525-2526. 1/

PLO 1634, dated May 9, 1958 (23 FR 3350 (May 17, 1958)), withdrew certain lands from all forms of appropriation for the Kodiak Island National Wildlife Refuge. Paragraph 4 of the order stated, however, that "[t]here is excepted from the withdrawal made by Paragraph 1 of this order an area one mile square surrounding each of the native villages of Old Habor, Akhiok, Larsen Bay, Uganik, Uyak, Alitak, Ayakulik, and Kaguyak."

In its statement of reasons, appellant argues that it is entitled to 640 acres (1 square mile) of land rather than just the 442 acres approved for conveyance by BLM and that the conveyance as approved reflects a significant diminution of the village corporation's assets. Appellant urges that the language of section 1427(e)(3)(A) must be read to require the conveyance of the entire square mile excluded from the wildlife refuge by PLO 1634, notwithstanding the existence of three previous patents and a pending Native allotment application, or it should be allowed to select additional adjacent lands within the refuge to make up the deficiency in its 640-acre entitlement. 2/ Appellant contends also that the submerged lands under the Ayakulik River, excluded from its conveyance because BLM considers the river to be navigable, 3/ should not be counted as part of the area excluded by PLO 1634 and that it should be given additional acreage in lieu of the submerged lands.

Appellant directs attention to the legislative history of section 1427, in particular, that of subsection (j):

Subsection (j) deals with one of the incidents of the settlement of the village eligibility dispute which is the subject of subsection (e). Its effect is, with the minor exception therein provided for amounting at the most to 1920 acres, to preclude diminution of land allocations to other Alaska regional

1/ The corresponding Native regional corporation, Koniag, Inc., receives title to the subsurface of the lands conveyed to the three villages. Section 1427 generally resolves the selection rights of Koniag, Inc., and the Koniag village corporations.

2/ The lands in dispute are bordered on the west by the Pacific Ocean and are otherwise surrounded by the wildlife refuge. See Exh. D, BLM Response, Master Title Plat for T. 34 S., R. 33 W., Seward meridian.

3/ The title to submerged lands under navigable bodies of water vested in the state upon statehood pursuant to the Submerged Lands Act, 43 U.S.C. §§ 1301-1343 (1982). Appellant has reserved the right to challenge BLM's navigability finding if it does not receive a 640-acre conveyance (Statement of Reasons at 2). We note that under 43 U.S.C. § 1631(b)(1982), Congress deprived the Board of

"authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to [ANCSA] unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to [the Board] prior to December 2, 1980."

corporations under subsection 12(b) of ANCSA because of resolution of the village eligibility dispute.

S. Rep. No. 416, 96th Cong., 1st Sess. 325, reprinted in 1980 U.S. Code Cong. & Ad. News 5269. Appellant argues that the three villages were free to accept or refuse the release and conveyance provisions of subsection (e) and thus the phrase, "at the most 1,920 acres" reflects the possibility that one or more of them would refuse settlement under section 1427(e), but that if all accepted, 1,920 acres would be conveyed. Appellant urges that under BLM's approach the total could never be 1,920 acres because of prior patents and Native allotments.

In response, BLM maintains that appellant will be entitled to any of the 123 acres subject to a pending Native allotment application which are not approved for that purpose, 4/ but not any of the other disputed acreage as it has previously passed out of Federal ownership.

BLM points out that PLO 1634 did not specify legal descriptions for the "one mile square" exclusions and reports that most of those exclusions, with the exception of the one at issue, have been surveyed and in no instance was the exclusion actually one mile square. 5/ Rather because the villages are on the coast, BLM attempted to include all village improvements in the surveyed area. In the case of the Ayakulik exclusion, BLM notes that, as depicted on BLM's master title plat and as described in special survey instructions issued April 25, 1963, the acreage excluded for Ayakulik encompassed the prior patents and the Ayakulik River. BLM contends that when Congress directed conveyance of the lands excluded from the wildlife refuge, it must have had this longstanding depiction of the area in mind, since there are no others.

BLM argues that section 1427(e) was meant to set definite limits upon the villages' land benefits, the upper limit of which would be 640 acres each or a total of up to 1,920 acres. BLM urges that there is no indication in the legislative history that there were to be three conveyances of exactly 640 acres each; rather, since Congress used the phrase "amounting at the most to 1,920 acres," it can be presumed that Congress knew the total acreage conveyed would be less than 1,920 acres because of the prior patents and claims depicted on existing public land records. BLM adds that it has been the uniform interpretation of the Fish and Wildlife Service and the Bureau that the villages designated by PLO 1634 are entitled to unpatented lands only and that the designation "one square mile" defines the boundary rather than the amount of land. See BLM Response, Exhs. E, F, G.

Finally, BLM asserts that it has no authority to convey other lands to appellant. BLM-points out that appellant released its claim to lands and interests under ANCSA (see BLM Response, Exh. H) and in any case the time for filing further land selections under ANCSA has expired. 43 CFR 2651.3.

4/ Native allotment application of Jack Rartopsoff, AA 7538.

5/ The village of Ayakulik had apparently been abandoned and thus was not a high priority for survey. Special survey instructions were issued, however, and the exclusion has been platted on the master title plat for unsurveyed T. 34 S., R. 33 W., Seward meridian. See BLM Response at 3, Exhs. B, C, D.

Furthermore BLM adds that under 16 U.S.C. § 668dd (1982), absent direction from Congress, it has no authority to remove lands from the wildlife refuge, that it does not have the power to condemn the patented lands, 6/ and that it lacks jurisdiction to address appellant's claims to patented lands. 7/

In response to BLM, appellant asserts that the legislative settlement provided in section 1427(e) is at a minimum ambiguous and such ambiguity must be construed against the Federal Government. Appellant argues that BLM's arguments are inconsistent because if Congress knew that the excluded areas encompassed patented lands, it knew that the total acreage could not have amounted to 1,920 acres. Appellant also challenges BLM's argument that uniform Federal agency interpretation supports its view because two of the Departmental letters were dated 1983, after appellant filed its release. See Exhs. F, G, H to BLM response. Appellant suggests further that use of the term "exclusion" in PLO 1634 contemplates the possibility of inclusion, and since the patented lands could not have been included in the refuge they should not have been counted as lands excluded. Thus, according to appellant, BLM's interpretation and survey instructions are erroneous.

Appellant also contends that under 16 U.S.C. § 668dd(b)(3) (1982), the Secretary of the Interior does have the authority to exchange public lands or interests therein in order to acquire other lands or interests. It asserts that in order to carry out the congressional purpose of section 1427(e) the Secretary must exchange lands within the Kodiak Island National Wildlife Refuge for its potential claim and entitlement to substantial acreage in the refuge under ANCSA. Appellant urges that the time limits on selections are irrelevant where the continuing eligibility dispute has made it impossible to comply with the time limits.

Finally, appellant suggests that BLM has the implied power of eminent domain by virtue of Congress' directive to convey one square mile of land encompassing patented lands. Appellant does not dispute the validity of those patents, only whether it is entitled to the land by Act of Congress. Appellant notes that the public purpose served by an exercise of eminent domain is the preservation of a large tract of the wildlife refuge, which could have been claimed as an entitlement by appellant.

[1] We have thoroughly reviewed the record in this case, the relevant statutes and the parties' briefs and we find that we agree with BLM's position that appellant is only entitled to the available lands within the long-recognized "one mile square" exclusion provided by PLO 1634.

Section 1427 of ANILCA is one of several sections designed to deal with specific controversies that have arisen in determining the lands to which several Native corporations are entitled under ANCSA. See generally Title XIV, Part B, ANILCA, 94 Stat. 2499-2548. 8/ In order to resolve these controversies in the detail that is presented in ANILCA, Congress must have

6/ Citing Commissioners of Highways of the Town of Annawan v. United States, 466 F. Supp. 745, 761 (N.D. Ill. 1979).

7/ Citing Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897), among other cases.

8/ The Senate Report on ANILCA states about Title XIV:

"During consideration of the Alaska National Interest Lands legislation, the Committee agreed to adopt Title XIV of S. 9, which contained

been aware of the official status of the lands in question as reflected on this Department's land records, as well as the law applicable to them. Accordingly, we must conclude that Congress was aware that some of the lands excluded from the wildlife refuge by PLO 1634 had passed from Federal ownership. This Department has no jurisdiction over such land (Germania Iron Co. v. United States, *supra*), except in the narrow instance where patent has been issued in error in violation of the rights of a party claiming rights in the land through the United States. Dorothy H. Marsh, 9 IBLA 113 (1983). There is no evidence in the record showing that the patents in question in this case were issued in error and appellant's rights did not arise until long after their issuance. In addition, the ANCSA scheme for settling Native land claims made all conveyances subject to valid existing rights. 43 U.S.C. § 1613 (1982); H.R. Rep. No. 746, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad. News 2250. Section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), specifically recognized the right of pending Native allotment applications to proceed to patent. Since Congress in section 1427(f) of ANILCA makes all conveyances in settlement of Koniag corporations' claims subject to the terms and conditions of ANCSA, we must conclude that appellant's conveyance is subject to the Native allotment applicant's rights as well.

Finally we conclude that section 1427 was intended to encompass the final settlement for Koniag, Inc., and the Koniag village corporations as opposed to authorizing alternative land selections. This is illustrated by section 1427(n) which provides that section 22(j)(2) of ANCSA, 43 U.S.C. § 1621(j)(2) (1982), shall not apply to Koniag, Inc., or any Koniag village corporation. That provision permits additional land selections where a village corporation's original selections are insufficient to fulfill the corporation's entitlement under ANCSA.

BLM's decision must be affirmed. As BLM notes, if any of the acreage designated in the Native allotment application is not approved for conveyance to the Native applicant, it would be conveyed to appellant. 9/

fn. 8 (continued)

several amendments to the Alaska Native Claims Settlement Act, as well as additional provisions relating to Alaska Native Corporations and their lands. Many of the provisions originated in legislation pending before the Committee during the 95th Congress, proposed by the Administration (S. 3303) and Senators Gravel and Stevens (S. 3106). The amendments would improve the implementation of the Settlement Act or provide clarifications to the provisions of that Act. In general, the Committee adopted those provisions supported by at least three of the four parties primarily affected by or concerned with the Settlement Act -- the Natives, the State of Alaska, the Administration, and the Alaska Coalition. The Committee also considered and adopted on that basis, several proposals authorizing specified Native Corporations to exchange lands or selection rights to lands within Alaska, or to negotiate for such exchanges. These Native land exchange amendments were adopted in order to further and fulfill the purposes of the Settlement Act; in addition, the exchanges would, in some cases, allow national interest lands to remain in public ownership, consolidate and rationalize land ownership patterns in Alaska and resolve or obviate the need for litigation."

S. Rep. No. 413, 96th Cong., 2d Sess. 255-56, reprinted in 1980 U.S. Code Cong. & Ad. News 5199-200.

9/ See note 4.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

Chief Administrative Judge

Wm. Philip Horton

We concur:

C. Randall Grant, Jr.
Administrative Judge

R. W. Mullen
Administrative Judge.

