

COOK INLET REGION, INC., ET AL.

IBLA 84-149

Decided December 24, 1985

Appeals from a decision of the Alaska State Office, Bureau of Land Management, which approved for conveyance in part and rejected in part Native land selection applications AA-13358 and AA-11153-20 and reserved easements on the conveyed lands.

Affirmed in part, remanded in part, and set aside in part and referred for hearing.

1. Act of January 2, 1976 -- Alaska: Alaska Native Claims Settlement Act -- Alaska: Land Grants and Selections -- Alaska: Navigable Waters: Generally -- Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances -- Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Alaska Native Claims Settlement Act: Navigable Waters -- Indians: Alaska Natives: Generally -- Navigable Waters -- Submerged Lands  
  
Sec. 12(e) of the Act of January 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.
2. Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Public Easements -- Evidence: Sufficiency -- Hearings

Where the record does not contain sufficient evidence to determine whether the use of certain waterways is "significant" or is for purposes of "access to publicly owned lands or between communities," a hearing will be

ordered on the question of whether they are "major waterways" within the meaning of 43 CFR 2650.0-5(o).

APPEARANCES: Russ Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; Michael W. Sewright, Esq., and M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; William R. Elam, president, for Silver Dome Mining Company; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE IRWIN

Cook Inlet Region, Inc. (CIRI), a regional corporation organized pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1606 (1982), the State of Alaska, and Silver Dome Mining Company have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 30, 1983, which approved for conveyance in part and rejected in part certain lands applied for by CIRI and which reserved certain easements. 1/

Silver Dome Mining Company appealed because it has unpatented mining claims on the lands to be conveyed and seeks to have the decision amended to recognize these claims. In its answer to Silver Dome's appeal, BLM requested the Board to remand the case so BLM may exclude the lands encompassed by the claims from the conveyance. If the claims are eventually determined to be

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1/ The lands applied for in selection application AA-13358 were conveyed in accordance with section 4(a) of P.L. 94-456, 90 Stat. 1935, and therefore application AA-11153-20, filed for these same lands in accordance with 43 U.S.C. § 1611 (1982), was rejected (Decision at 4).

valid, then the lands they include would not be unappropriated and thus not available for selection under 43 U.S.C. § 1610(a)(3) (1982), the provision under which they were withdrawn. BLM's request is hereby granted.

CIRI and the State of Alaska originally presented several reasons for appealing the decision. After several rounds of briefing, the first question remaining to be resolved, in the view of these parties, is whether, assuming the Susitna River is navigable, 2/ Power Site Classification 443 3/ effectively withdrew the bed of the river so that it did not pass to the State of Alaska upon statehood (or thereafter) and is therefore available for conveyance to CIRI. 4/

September 30, 1983, decision states in part:

2/ CIRI objects to BLM's determination that the upper portion of the Susitna River is navigable but, in accordance with Bristol Bay Native Corp., 71 IBLA 318 (1983), and section 901(b) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1631(b) (1982), reserves its right to appeal BLM's navigability determination in Federal court after issuance of an interim conveyance of the lands.

3/ Dated Feb. 13, 1958, and published at 23 FR 1124 (Feb. 21, 1958), the classification was issued by the Director of Geological Survey and stated: "Pursuant to authority vested in me by the act of March 3, 1879 (20 Stat. 394; 43 U.S.C. 31) and by Departmental Order No. 2333 of June 10, 1947 (43 C.F.R. 4.623; 12 F.R. 4025), the following described lands are hereby classified as power sites insofar as title thereto remains in the United States and subject to valid existing rights; and this classification shall have full force and effect under the provisions of section 24 of the Act of June 10, 1920, as amended by section 211 of the Act of August 26, 1935 (16 U.S.C. § 818)."

16 U.S.C. 818 (1982) provides, in pertinent part:

"Any lands of the United States included in any proposed projection [sic] under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress."

4/ CIRI withdrew its other reasons for appeal on June 19, 1984.

Sec. 12(e) of P.L. 94-204 authorizes the Secretary to convey those lands and interests in lands selected by the Native corporations within the exterior boundaries of Power Site Classification No. 443, subject to Sec. 24 of the Federal Power Act of June 10, 1920 (16 U.S.C. 791, 818). Therefore, this decision includes the lands and interests in lands within the exterior boundaries of Power Site Classification No. 443, February 13, 1958. This conveyance shall be considered and treated as a conveyance under ANCSA. 5/

Because the decision also states that within the area to be conveyed the Susitna River is considered to be navigable (except from the mouth of Portage Creek to the mouth of Devil Creek) and because 43 CFR 2650.5-1 provides that the beds of all bodies of water determined to be navigable shall be excluded from the gross area of the surveys of the selected areas and not charged to the total acreage subject to Native lands selection, CIRI says the decision "must be read as failing to convey to CIRI the submerged lands beneath this portion of the river." 6/ Either the decision should be revised to declare the upper portion of the river nonnavigable or "to state explicitly that, by virtue of Federal Power Classification 443, these submerged lands pass to CIRI." 7/ The State of Alaska, for its part, provides an October 3, 1983, letter from BLM to CIRI which, it says, correctly concluded that a power site classification is not a withdrawal or reservation of land which would have precluded the ownership of the Susitna River bed from vesting in the State of Alaska upon its admission to the Union in 1959. 8/ BLM does not discuss the issue in its answer to the statement of reasons of CIRI.

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5/ Decision at 5.

6/ Statement of Reasons and Standing of Cook Inlet Region, Inc., filed Dec. 28, 1983, at 6-7.

7/ Id. at 7.

8/ Response of the State of Alaska to Statement of Reasons and Standing of Cook Inlet Region, Inc., filed Mar. 30, 1984, at 4. The letter of Oct. 3, 1983, to the Land Management Officer of CIRI from BLM's Assistant Deputy State Director for Conveyance Management reads:

"This is to clarify a question that was raised in your September 12 meeting with the staff of the Navigability Section regarding the status of

[1] In our view the September 30, 1983, decision did not exclude the submerged lands as CIRI fears and the State of Alaska claims, and the October 3, 1983, BLM letter neither amends that decision nor correctly interprets the applicable law.

Section 12(e) of P.L. 94-204, 89 Stat. 1153, 43 U.S.C. § 1611 note (1982), enacted on January 2, 1976, provides:

The Secretary may, notwithstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered and treated as a conveyance under the Settlement Act.

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the bed of the Susitna River as of the date of Statehood. The question is whether the bed of the river was withdrawn by Power Site Classification 443 of February 13, 1958, which was published in the Federal Register on February 20, 1958 [sic]. A copy is attached.

"The classification was made by the United States Geological Survey (USGS). The position of the USGS is that water power 'classifications' are not considered to be withdrawals. A copy of the page containing this position is attached. A distinction is made as to 'public lands which are classified, withdrawn, or reserved for power purposes.' This distinction is cited in the first paragraph of a Memorandum of Understanding Between the Federal Power Commission and the Department of the Interior, a copy of which is attached.

"The effect of a Power Site Classification is spelled out in the first paragraph of the second page of a memorandum dealing with Proposed Power Site Classification No. 452, Copper River, Alaska. A copy of this is also attached.

"Since the position of the U.S. Department of the Interior is that a 'Power Site Classification' is not a withdrawal, it follows that the beds of the Susitna River and other water bodies, if navigable, passed to the State of Alaska on the date of Statehood." (Emphasis in original.)

Section 12 of P.L. 94-204 was designed to implement an agreement among the United States, the State of Alaska, CIRI, and other interested parties to resolve the difficulties that CIRI had in realizing its entitlements under section 12(c) of ANCSA, enacted December 18, 1971, 43 U.S.C. § 1611(c) (1982). <sup>9/</sup> The section ratifies and incorporates by reference the agreement among the parties. <sup>10/</sup> The Congress intended that section 12 and the agreement "be construed together to give effect to the settlement of the Cook Inlet problem in a manner that is fair and equitable to the Cook Inlet Regional Corporation and the other parties." <sup>11/</sup> It added: "The Committee feels that the Cook Inlet Region was under some constraints in the negotiations resulting in this agreement. It is expected that ambiguities and uncertainties in the complex, delicately balanced settlement will be resolved favorably, where appropriate, to the Cook Inlet Region." <sup>12/</sup>

The agreement defines "lands" as excluding "properties owned by the State of Alaska under section 6(m) of the Alaska Statehood Act and the Submerged Lands Act." <sup>13/</sup> Paragraph V of the agreement, however, indicates \_\_\_\_\_

<sup>9/</sup> H. Rep. No. 729, 94th Cong., 2d Sess. 30-33, 35, reprinted in 1975 U.S. Code Cong. & Ad. News 2397-99, 2401-02.

<sup>10/</sup> Section 12(b), 89 Stat. 1151; see also, section 3, P.L. 94-456, 90 Stat. 1935. The agreement is entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area."

<sup>11/</sup> H. Rep. No. 729, supra note 9, at 35, 1975 U.S. Code Cong. & Ad. News at 2402.

<sup>12/</sup> Id. at 32-33, 1975 U.S. Code Cong. & Ad. News at 2399.

<sup>13/</sup> Id. at 46, 1975 U.S. Code Cong. & Ad. News at 2413. Section 6(m) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 343, 48 U.S.C. note preceding Section 21 (1982), provides: "The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." The provisions of the Submerged Lands Act are codified at 43 U.S.C. §§ 1301, 1311-1315 (1982).

the parties' intention to seek the legislative authority enacted as section 12(e) of P.L. 94-204:

The Secretary, CIRI, and the State shall seek legislation authorizing the Secretary to convey title to those selections by Native Corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, provided however, that the patents conveying the above described lands shall contain the reservations required by section 24 of the Federal Power Act, 16 U.S.C. 818. 14/

It is thus apparent that the parties to the agreement intended to seek Secretarial authority to convey the specific lands within Power Site Classification 443 to CIRI and that the Congress intended to provide this authority when enacting section 12(e) "notwithstanding any other provision of law," including section 6(m) of the Alaska Statehood Act and the Submerged Lands Act. For purposes of this appeal, therefore, we need not determine whether a powersite classification before 1959 prevents title to lands under navigable waters from passing to the State of Alaska upon statehood. Congress eliminated any uncertainty about the answer to that question in this case by enacting the specific authorization in section 12(e). 15/ In including, without excepting lands beneath navigable waters, "lands and interests in lands within the exterior boundaries of Power Site Classification No. 443," BLM's September 30, 1983, decision properly conveyed all of these lands applied for by CIRI, in accordance within section 12(e) of P.L. 94-204.

In its appeal the State of Alaska objects that BLM failed to determine that Prairie Creek, Murder Lake, and the Talkeetna River are "major

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14/ Id. at 43-44, 1975 U.S. Code Cong. & Ad. News at 2410.

15/ See Sutherland Stat. Const. § 51.05 (4th Ed., 1984).

waterways" and to reserve public easements that would enable travel along these waterways to public lands. 16/ Prairie Creek flows southwest from Stephan Lake (which was determined to be a major waterway by BLM), widens briefly into Murder Lake, then joins the Talkeetna River, which crosses and flows out of the southern portion of the conveyed lands. Alaska argues BLM ignored information in the record demonstrating that "significant use" is made of these waterways and offers to present supporting evidence at a hearing. 17/

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16/ Section 17(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(b) (1976), authorizes public easements at periodic points along the courses of major waterways which are reasonably necessary to guarantee a full right of public use and access for recreation, hunting, transportation, utilities, docks, and other public uses.

"Major waterway" is defined in 43 CFR 2650.0-5(o) as:

"[A]ny river, stream, or lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft, including floatplanes, but does not include use of the waterbody in its frozen state by snowmobiles, dogsleds or skiplanes. Designation of a river or stream as a major waterway may be limited to a specific segment of the particular waterbody."

The comment on this definition states:

"Major waterway: The definition of major waterway elicited many comments which ranged from 'unworkable' and 'confusing,' to a reasonable interpretation' of a Act. The majority of the comments, however, clearly indicated that application of the multi-faceted test of the proposed definition would result in more problems than it would resolve. One group of commentators suggested that 'major waterways' should be synonymous with 'navigable waterways.' The Department has never accepted this interpretation, and in light of the holding in Calista, et al. v. Andrus, et al., 435 F. Supp. 664 (D. AK 1977) that 'it would be [an] unduly restrictive construction to equate the term waterways to navigable waterways,' a major waterway does not have to be a navigable waterway. The final regulations consequently reflect a definition which is a straightforward, one-factor test and which used the concept of access to publicly owned lands or between communities as the primary standard for determining which waterways are, in face, [sic] 'major.'"

43 FR 55326 (Nov. 27, 1978). (For the proposed definition, see 43 FR 22621 (May 25, 1978).

17/ The Sept. 26, 1983, memorandum, entitled Final Navigability Determination for Cook Inlet Region, Inc., Selections in the Talkeetna Mountains, states at pages 7-8:

"Several lakes within the selection area are utilized for recreational pursuits. The air taxi services in Talkeetna fly kayakers, rafters, hunters,

In its answer to the State of Alaska's statement of reasons BLM states that it "correctly concluded that the proposed waterway does not access

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and fishermen into these lakes to access the surrounding country or float a stream \* \* \*. These air service businesses fly kayakers and rafters to Stephan Lake to float to Talkeetna on Prairie Creek and Talkeetna River. Stephan Lake is a put-in point for floaters and hunters and fisherman. There is a lodge on the lake with an airstrip \* \* \*. Dennis P. Daigger, [sic] Natural Resource Manager, Alaska Department of Natural Resources. He supplied information documenting use of the Stephan Lake, Murder Lake, Prairie Creek, and Talkeetna River for commercial and recreational kayaking and rafting (see attachment) \* \* \*. The Talkeetna River and Prairie Creek are used for floating, hunting, fishing, and sightseeing."

At page 3 it states: "Small recreational watercrafts may also be used on the upper Talkeetna River, Prairie Creek, and Fog Creek."

A letter dated Aug. 31, 1983, from Dennis P. Daigger of the State of Alaska Department of Natural Resources states: "Travelers can \* \* \* travel on Stephan Lake, Murder Lake, down Prairie Creek, down the Talkeetna River to the town of Talkeetna. Although Prairie Creek is rather shallow and narrow, it presents no difficulties to the large rafts and kayaks which regularly travel this route."

An Aug. 30, 1983 letter from Jerry Jacques of Adventure River Company states in part:

"Dear Sir,

"Recreational float trips down Prairie Creek began with Oscar Vogel in the early 1950's, if not before. Prairie Creek is a major trout and salmon stream which is very popular with fishermen, wildlife photographers and hunters. Prairie Creek is shallow and slow moving in many places, this enables raft parties to fully enjoy the natural scenery and observe the numerous kinds of wildlife that abound in this area. Raft parties traveling Prairie [sic] Creek generally stop at several locations for sightseeing, photography and fishing. There are several excellent locations for campsights [sic] along the route and most parties will camp overnight on Prairie Creek before entering the Talkeetna River.

"Since 1970 Stephan Lake Lodge has utilized Prairie Creek for fishing and wildlife photography. The Lodge has an average of two fishermen or photographers per week on the creek during the months of June, July, and August.

"Adventure River Company began utilizing Prairie Creek for commercial raft trips in 1975. A.R.C. runs an average of six trips per season with approximately twelve clients per trip. These trips will also include up to four guides and support personnel. Photography and wildlife observation the main interests, with fishing being an added plus. A.R.C. trips generally camp halfway between Stephan [sic] Lake and the confluence of the Talkeetna River. We also have an established camp site just below the confluence. A third campsite in established approximately ten miles down river.

"Some of the other common users of Prairie Creek are listed on the attached page. This list is no way is meant to be complete, it only reflects the individuals that we personally know. The Creek is also utilized by many individuals that we do not know."

public lands nor is it used as a means of travel between communities as is required by 43 CFR 2650.0-5(o)." To Alaska's argument that the failure of the September 26, 1983 navigability report to mention the major waterway and site easements indicates they were ignored, BLM responds that it is "equally probable" that BLM examined them and rejected them after full consideration and concludes: "BLM is not required to formally examine and reject every proposed major waterway and easement designation." 18/

CIRI disputes Alaska's claim that the waterways receive significant use and offers to support its position with evidence. Because they are not major waterways, the provisions for site easements in 43 CFR 2650.4-7(b)(ix) and (x) are not applicable, CIRI argues. Nor is it reasonably necessary to get to public lands via the waterways, because public easements connect Stephan Lake with those lands. 19/ "While proclaiming a need for transportation, the state is in fact seeking easements to permit recreational use of the subject water bodies," CIRI concludes. "This is plainly prohibited by Alaska Public Easement Defense Fund v. Andrus, [435 F. Supp. 644, 674, 679 (D. Alaska 1979)]. See also 43 CFR 2650.4-7(a)(7) \* \* \* 2650.4-7(b)(3) \* \* \*." 20/

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BLM responded to the letter from the State of Alaska by letter dated the same day as its navigability report, saying it had considered the information but concluded it was "insufficient to cause us to change our proposed determination of navigability." Letter of Sept. 26, 1983, from C. Michael Brown, Acting Chief, Navigability Section, to Dennis P. Daigger, Alaska Department of Natural Resources.

18/ BLM Answer, Mar. 23, 1984, at 3. See State of Alaska, 81 IBLA 7 (1984).

19/ BLM reserved 50-foot easements for trails running to public lands from the western and eastern shores of Stephan Lake and 1-acre site easements at the beginning of these trails on the lakeshores (Decision at 11). It also reserved a 25-foot easement for a trail to public lands along the reaches of the Talkeetna River within the lands to be conveyed. Id. at 12.

20/ CIRI Answer Mar. 23, 1984, at 8.

[2] It is evident from the record that before BLM's September 30, 1983 decision the parties' interest in Prairie Creek, Murder Lake, and the Talkeetna River was focussed on whether these waterways were navigable. Alaska's August 31 letter from Dennis Daigger was a response to BLM's request for comments on the draft navigability report. It did not mention considering these waterways as major waterways or reserving public easements. BLM's September 26, 1983 answer to that letter stated in turn that the information provided did not persuade it that these waterways were navigable. Whether a waterway is a "major waterway," however, is a different question than whether it is navigable, as the comment on the definition of that term makes clear. <sup>21/</sup> Although the record contains evidence of use of these waterways, whether this use is "significant" and whether it is for purposes of "access to publicly owned lands or between communities" are controverted. We cannot determine the answers to these questions from this record, nor can we regard BLM's silence to be a satisfactory answer. Therefore, we must refer this aspect of the case to the Hearings Division for a hearing and decision on these issues in accordance with 43 CFR 4.415. See State of Alaska, 71 IBLA 256 (1983). If it is determined that the waterways are major within the meaning of the regulation, then the Administrative Law Judge shall receive evidence on and decide what public easements are authorized and justified. Absent timely appeal to the Board by one of the parties, the Administrative Law Judge's decision will be final for the Department.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the case is remanded \_\_\_\_\_

<sup>21/</sup> See note 16, supra.

in part and BLM is granted authority to amend its decision to exclude the lands encompassed by the Silver Dome Mining Company claim; the matter is referred to the Hearings Division for a determination as to major waterways in accordance with this decision; and the BLM decision is affirmed in all other respects.

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Will A. Irwin

Administrative Judge

We concur:

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Gail M. Frazier

Administrative Judge

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R. W. Mullen

Administrative Judge



