

**Editor's note: Appealed -- Board decision vacated as part of settlement, sub nom. Toghoththele Corp. v. Lujan, Civ.No. 89-1763 (D.D.C. Aug. 1, 1991) -- See 120 IBLA 324 (Sept. 12, 1991)**

CITY OF NENANA (ON RECONSIDERATION)

IBLA 85-688

Decided December 7, 1988

Petition for reconsideration of City of Nenana, 98 IBLA 177 (1987), which reversed a decision of the Alaska State Office, Bureau of Land Management, dismissing protests filed by the City of Nenana.

Petition for reconsideration granted; prior Board decision sustained as modified.

1. Alaska Native Claims Settlement Act: Native Land Selections:  
Generally--Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

Regulation 43 CFR 2650.6(a) authorizes selection by a village corporation within 2 miles from the boundary of any home-rule or first-class city when the village corporation is organized by Natives of a community which is itself a first-class or home-rule city, unless such selections fall within 2 miles from the boundary of another first-class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan.

City of Nenana, 98 IBLA 177 (1987), sustained as modified.

APPEARANCES: Douglas B. L. Endreson, Esq., Washington, D.C., for petitioner; Julia B. Bockmon, Esq., Steven W. Silver, Esq., Anchorage, Alaska, for the City of Nenana; and Dennis J. Hopewell, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Toghoththele Corporation (Toghoththele) has filed a petition for reconsideration of City of Nenana, 98 IBLA 177 (1987), wherein this Board reversed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 9, 1985, dismissing two protests filed by the City of Nenana (City). In these protests, the City objected to BLM's continued processing of land selections filed by Toghoththele for lands within 2 miles of City boundaries. Toghoththele is the village corporation for the Native village of Nenana and, pursuant to section 12 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611 (1982), is authorized to select land withdrawn for that purpose.

In City of Nenana, the Board reversed the Alaska State Office because it found that Toghothlele did not satisfy the terms of regulation 43 CFR 2650.6(a). This regulation states:

(a) Notwithstanding any other provisions of the act, no village or regional corporation may select lands which are within 2 miles from the boundary of any home rule or first-class city (excluding boroughs) as the boundaries existed and the cities were classified on December 18, 1971, or which are within 6 miles from the boundary of Ketchikan, except that a village corporation organized by Natives of a community which is itself a first class or home-rule city is not prohibited from making selections within 2 miles from the boundary of that first class or home-rule city, unless such selections fall within 2 miles from the boundary of another first class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan. [Emphasis added.]

This regulation may be regarded as a regulatory exception to section 22(l) of ANCSA, 43 U.S.C. § 1621(l) (1982), which states:

Notwithstanding any provision of this chapter, no Village or Regional Corporation shall select lands which are within two miles from the boundary, as it exists on December 18, 1971, of any home rule or first class city (excluding boroughs) or which are within six miles from the boundary of Ketchikan.

Relying on Appeal of Eyak Corp., 1 AN CAB 132, 83 I.D. 484 (1976), the Board found 43 CFR 2650.6(a) to be applicable in those cases where the corporate entity for a first-class city and the Native corporation are essentially one and the same or because a Native corporation has sought and received class I city status. Because the Native community of Nenana existed before the City developed in and around it and because the original Nenana townsite did not encompass the Native townsite, the Board held that Toghothlele was not "a community which is itself a first class or home-rule city." As such, the Board concluded, Toghothlele did not come within the terms of 43 CFR 2650.6(a) and the City's protests were improperly dismissed.

In its petition for reconsideration, Toghothlele contends that there is no textual support for the Board's reading of 43 CFR 2650.6(a). The regulation may be applied, by its terms, by making two inquiries, petitioner states. The first of these is whether the community to which the regulation refers is a first-class or home-rule city; the second is whether the corporation was organized by the Natives of that city. Answering each question in the affirmative, Toghothlele argues that these facts entitle petitioner to a reversal of the Board's decision. Facts found by the Board provide no support for the result reached by it, petitioner argues.

Toghothlele further contends that the City was untimely in protesting BLM's continued processing of land selection F-14903-A. Two BLM decisions

rejecting applications filed by the City under the Recreation and Public Purposes Act (R&PPA), 43 U.S.C. § 869 (1982), are offered by petitioner to establish that "[f]inally it is now clear beyond question that the City had actual formal notice from BLM in April of 1984 that Toghoththele's Village Selection F-14903-A had been upheld."

Departmental regulations 43 CFR 4.21(c) and 43 CFR 4.403 provide that reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an appeals board, sufficient reason appears therefor. A petition will be denied if the petitioner merely renews arguments made in the original appeal and fails to demonstrate extraordinary circumstances. Pathfinder Mines Corp. (On Reconsideration), 76 IBLA 276 (1983).

[1] Toghoththele's arguments focusing on the Board's reading of 43 CFR 2650.6(a) reveal that the Board applied a standard that differed from that enunciated in Eyak Corp., supra. In City of Nenana, the Board made it clear that Eyak Corp. provided "important precedent which provides the basis for our decision in this case." 98 IBLA at 181. In attempting to be "[c]onsistent with Eyak," <sup>1/</sup> the Board quoted from Eyak, but then interpreted 43 CFR 2650.6(a) in such a way as to authorize selections where the corporate entity for a first-class city and the Native corporation are essentially one and the same. We should have said that 43 CFR 2650.6(a) authorized selections in those cases where the community of a Native village corporation was essentially one and the same as the community of the municipality.

Although we now alter our language to conform more closely to Eyak Corp., we make no changes in our finding that Toghoththele is not qualified to select under 43 CFR 2650.6(a). Petitioner's arguments provide no new case law, legislative history, or regulatory history on this issue. <sup>2/</sup> Though it is necessary to grant the petition for reconsideration in order to conform our reading of 43 CFR 2650.6(a) to that set forth in Eyak Corp., we sustain as modified our decision in City of Nenana.

With respect to the issue of timeliness, the decisions offered by petitioner evidencing rejection of the City's R&PPA applications do not indicate BLM had approved application F-14903-A for lands within the City's 2-mile radius. These decisions reveal only that the City applied for lands withdrawn under 43 U.S.C. § 1610(a)(1) (1982). The fact that Toghoththele had selected these same lands, an express finding in BLM's decisions of April 10, and August 1, 1984, is relevant to show that the withdrawal under 43 U.S.C. § 1610(a)(1) (1982), had been extended under 43 U.S.C. § 1621(h) (1982). The BLM decisions do not support the proposition for which petitioner offers them.

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<sup>1/</sup> 98 IBLA at 181.

<sup>2/</sup> The dissent states an opinion that a hearing is necessary because the majority has relied on certain facts. However, the facts relied upon are not in dispute, and thus a hearing is not required. See Marie M. Bunn, 100 IBLA 1 (1987).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and City of Nenana is sustained as modified.

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R. W. Mullen  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge

## ADMINISTRATIVE JUDGE VOGT DISSENTING:

Because the majority's disposition of this petition for reconsideration does little to correct the errors in the initial decision, I must again dissent. I incorporate by reference my dissent from the initial decision. City of Nenana, 98 IBLA 177, 183 (1987).

The majority has revised the language of its earlier decision to state that 43 CFR 2650.6(a) requires that "the community of a Native village corporation [be] essentially one and the same as the community of [a home rule or first-class city]" in order for the village corporation to select lands within 2 miles from the boundary of the municipality. This language more nearly comports with the language of Appeal of Eyak Corp., 1 ANCAB 132, 83 I.D. 484 (1976), than did the majority's previous requirement that the two corporate entities be essentially one and the same. The new language, however, gives rise to the need for a factual inquiry not previously made by the Board in this appeal. While it was readily apparent that the two corporate entities were not, and indeed could not have been, one and the same, the question of whether the communities of the two entities are "essentially one and the same" requires more analysis. As I noted in my earlier dissent, the factor considered critical to this determination in Eyak Corp. was whether the city was comprised of a majority of Native residents on December 18, 1971. <sup>1/</sup> The record in this appeal indicates there is a factual dispute as to whether the City of Nenana (City) had a majority-Native population on that date. The parties also assert that other factors not addressed in Eyak Corp. are relevant to the determination of Toghoththele's selection rights under 43 CFR 2650.6(a). <sup>2/</sup> In relying on Eyak Corp., the majority necessarily acknowledges the need to make a factual finding concerning the population of the City on December 18, 1971, although it does not explicitly make such a finding. On the record as presently constituted, it cannot make such a finding. A hearing is necessary to resolve the factual dispute on the population issue. In addition, in

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<sup>1/</sup> The Alaska Native Claims Appeal Board (ANCAB) there stated:

"The exception described in 43 CFR 2650.6(a), in the opinion of the Board, was intended to take cognizance of a factual circumstance wherein the community of a Native Village Corporation is essentially one and the same as community of the municipality being comprised of a majority of Native residents and being also a first class or home-rule city as of Dec. 18, 1971."

1 ANCAB at 148, 83 I.D. at 492.

<sup>2/</sup> Because it found that the Native Village of Eyak was outside the boundaries of the City of Cordova on Dec. 18, 1971, ANCAB was not required in Eyak Corp. to determine what factors might be relevant to a determination of whether the community of a Native village located within a city is "essentially one and the same" as the community of the city. Only the majority-Native requirement was specifically mentioned. I am unaware of any other case law shedding light on this question.

light of the dearth of case law analyzing the factors appropriate for consideration in such determinations, a hearing is also necessary to focus the analysis of the issues and resolve any incidental factual questions.

Thus I believe the majority errs, even under its own analysis, in failing to refer this matter for a hearing.

I continue to believe that the City's challenge to Toghotthele's selection should be rejected as untimely. In its petition for reconsideration, Toghotthele has offered, as evidence that the City had actual notice of BLM's approval of its selections, two BLM decisions which were not before the Board during its initial consideration of this appeal. The decisions, issued in April and August 1984, rejected applications filed by the City under the Recreation and Public Purposes Act (R&PPA), 43 U.S.C. § 869 (1982), on the grounds that the lands applied for had been selected by Toghotthele (in the same selection application at issue in this appeal), and were therefore withdrawn from appropriation under the public land laws. The majority notes that these decisions do not state that BLM had approved the selection. It concludes therefore that they do not support the proposition for which Toghotthele offers them.

It is true that the decisions do not refer to BLM's 1980 decision approving the selection, but only to Toghotthele's 1974 selection of the lands. Standing alone, the decisions may not be compelling evidence that the City had actual notice of BLM's approval of Toghotthele's selection. However, they augment the evidence of that notice already before the Board, evidence which earlier led me to conclude that the City had willingly foregone its opportunity to challenge the 1980 BLM decision. The two newly discovered decisions lend additional support to that conclusion.

Toghotthele also argues in its petition for reconsideration that the two decisions, not having been appealed, are final as to the issue of Toghotthele's right to select the lands at issue here. I agree. Because the City's R&PPA applications were rejected on the grounds that Toghotthele had selected them, the issue raised by the City in this appeal, i.e., whether Toghotthele was prohibited by section 22(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1621(1) (1982), from selecting them, was necessarily decided by BLM in those decisions. Both decisions specifically gave the City the right to appeal, but no appeal was filed. Relitigation of the issue should be precluded by the Board's rule of administrative finality. See, e.g., Turner Bros., Inc. v. OSMRE, 102 IBLA 111, 121 (1988); P&K Coal Co. v. OSMRE, 98 IBLA 26, 32 (1987); Village of South Naknek, 85 IBLA 74, 76 (1985); Ida Mae Rose, 73 IBLA 97, 99 (1983).

The Board has enunciated an exception to its rule of administrative finality for cases where there is a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice. Turner Bros., supra. Application of the exception is clearly not warranted in this case, where the failure of the City to appeal the two decisions was merely one of a series of events evidencing a conscious decision on its part not to challenge Toghotthele's land selections. See 98 IBLA at 183-84.

Thus, in my opinion, this appeal should be dismissed either on the grounds of untimeliness or on the grounds that the issue raised has already been decided finally for the Department.

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Anita Vogt  
Administrative Judge  
Alternate Member

106 IBLA 32

