

ALASKA POWER ADMINISTRATION  
(ON RECONSIDERATION)

IBLA 89-127  
119 IBLA 301

Decided May 18, 1992

Petition for reconsideration in part of Alaska Power Administration, 119 IBLA 301 (1991).

Petition granted; prior decision reversed in part; BLM decision affirmed without modification.

1. Alaska Native Claims Settlement Act: Native Land Selections: Village Selections--Powersite Lands

The Secretary has determined that lands involved in powersites were withdrawn by sec. 11(a)(1) of ANCSA, 43 U.S.C. § 1610(a)(1) (1988), and are selectable by Native corporations without the reservation provided under sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1988). This determination applies to lands within previously opened powersites and to land remaining in powersite withdrawals when ANCSA was enacted.

APPEARANCES: James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Robert J. Cross, Administrator, Alaska Power Administration, Department of Energy, Juneau, Alaska, for the Alaska Power Administration; David P. Wolf, Esq., Anchorage, Alaska, for Eklutna, Inc.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

By decision dated October 25, 1988, the Alaska State Office, Bureau of Land Management (BLM), approved the conveyance to Eklutna, Inc., of lands selected in Native Village selections AA-6661-B and AA-6661-G under the provisions of section 12 of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601, 1611 (1988). Identified for conveyance were lands surrounding Eklutna Lake, a body of water created by implementation of the Eklutna Project Act of July 31, 1950, that authorized construction of a dam on the Eklutna River. BLM's decision stated that the "bed of Eklutna Lake shall be excluded from the conveyance" and excluded submerged lands up to the ordinary high watermark.

The Alaska Power Administration (APA), U.S. Department of Energy, maintains a hydroelectric project at the lake and filed an appeal from

BLM's decision. APA contended that description of land above the high water mark in the conveyance to Eklutna is vague and should be made more precise by using a description based on the elevation of the water level behind the dam at 871 feet. APA argued that the conveyance should include references to: (1) specific rights to store water up to 871 feet; (2) flood easements for periodic flooding above 871 feet, including debris or erosion problems that may occur; (3) prohibitions against shoreline development that would be incompatible with periodic flooding; and (4) restrictions on shoreline development with potential to pollute the lake or introduce significant amounts of debris.

In Alaska Power Administration, 119 IBLA 301 (1991), we rejected these arguments. We found that the lands immediately surrounding the reservoir were the subject of Public Land Order No. (PLO) 4022, issued on May 20, 1966, which opened to entry land previously withdrawn for powersite purposes. 31 FR 7626-27 (May 27, 1966). Because the Federal Power Commission (FPC) had thus determined that the Eklutna Lake power project would not be compromised by conveyance of these lands, we found no basis for the restriction sought by APA, and we affirmed BLM's use of the high water mark to describe the edge of the lake. Nevertheless, we concluded that paragraph 4 of PLO 4022 provided that any disposal of the lands opened by the order shall be subject to the provisions of section 24 of the Federal Power Act, as amended, 30 U.S.C. § 818 (1988), under which the United States and its licensees are relieved from liability for damage to any improvements on the conveyed land due to the operation of the power project. Accordingly, we modified BLM's decision to require inclusion of a reservation pursuant to section 24 for affected lands and remanded the case to BLM to identify those lands in the conveyance formerly withdrawn under section 24.

Our research disclosed no published document requiring a different result. We noted that, in implementing an agreement among the United States, the State of Alaska, Cook Inlet Region, Inc. (CIRI), and other interested parties to resolve the difficulties CIRI had in satisfying its entitlement, Congress authorized the Secretary to convey lands to Native corporations within the exterior boundaries of Powersite Classification 443 (Powersite 443) subject to the reservations required by section 24 of the Federal Power Act. Section 12(e) of P.L. 94-204, 89 Stat. 1153, 43 U.S.C. § 1611 note (1982); see also Cook Inlet Region, Inc., 90 IBLA 135, 140-41, 92 I.D. 620, 622-23 (1985) (affirmed in part on reconsideration, 100 IBLA 135, 92 I.D. 422 (1987)). We found nothing to prohibit a similar result in this case.

[1] BLM has petitioned the Board for reconsideration of our requirement that the section 24 reservation be included in the conveyance, contending that our decision was not consistent with Departmental policy established by the Secretary. BLM contends that our reliance on section 12(e) of CIRI settlement legislation was misplaced and has provided a copy of a document approved by Secretary Andrus on March 3, 1978, that states the effect of powersite projects, classifications, and reserves upon conveyances to Native corporations:

Lands involved in power sites were withdrawn by sections 11(a)(1) and 16(a) (except Klukwan special provisions) [43 U.S.C. §§ 1610(a)(1) (1988)] except when a determination under section 3(e)(1) [43 U.S.C. § 1602(e) (1988)] is made concerning a Federal development. Such lands are selectable by Native corporations without the section 24 Federal Power Act reservation. Lands involved in the Cook Inlet situation involving Power Site Classification 443 are subject to the Sec. 24 reservation (P.L. 94-204, as amended).

Existing private developments (FPC licenses), if any, are considered valid existing rights under Section 14(g).

Lands involved in power sites were not withdrawn by Secretarial action under sections 11(a)(3), 14(h), or the Klukwan provisions of section 16(a) since those sections require the lands to be unappropriated and unreserved. For these sections, powersite lands are either or both reserved and appropriated. [Emphasis supplied.]

Thus, CIRI settlement legislation upon which we relied was considered to be a special circumstance that could not be looked to for future guidance in other selection cases.

The reasoning that supports the Secretary's decision is complex. Under 43 U.S.C. § 1610(a)(1) (1988), all public lands with certain exceptions were withdrawn, subject to valid existing rights: under section 1610(a)(1) (A) in each township enclosing all or part of a Native village; under section 1610(a)(1) (B) in each township contiguous to or cornering on a township in (A); and under section 1610(a)(1) (C) in each township contiguous to or cornering on a township in section 1610(a)(1) (B). The lands so withdrawn were made available for selection by Native corporations, and the withdrawal applied to land withdrawn for powersite purposes. If the lands withdrawn under subsections (a)(1) and (a)(2) of section 1610 were insufficient to satisfy a corporation's acreage entitlement, subsection (a)(3) of section 1610 required the Secretary to withdraw public lands of a similar character from the "nearest unreserved, vacant and unappropriated public lands." Although land within a powersite withdrawal was withdrawn under subsection (a)(1) and made available for selection, powersite land could not be withdrawn and made available for selection under subsection (a)(3) because such land was already reserved or appropriated.

Because the section 1610(a)(1) and (a)(2) withdrawals were insufficient to satisfy CIRI's acreage entitlement, CIRI was required to select from land withdrawn under subsection (a)(3). Because the subsection (a)(3) withdrawal, unlike the subsection (a)(1) withdrawal, did not affect land already appropriated or reserved, it could not extend to land already withdrawn for Powersite 443. Therefore, special legislation was needed to authorize the Secretary to convey lands within the exterior boundaries of Powersite 443 to CIRI, subject to the reservations required by

section 24 of the Federal Power Act. BLM contends that this special legislation provides no guidance in deciding APA's appeal, which pertains to land made available for selection under subsection (a)(1) rather than subsection (a)(3) of section 1610.

The policy adopted by Secretary Andrus appears to be based on a memorandum opinion dated October 27, 1977, by the Associate Solicitor, Division of Energy and Resources, to the Assistant Secretary, Land and Water Resources, reasoning that if a powersite was included in land opened to Native selection under section 1610(a)(1), Congress itself made the land available for Native selection without the determination by FPC required under section 24. The procedures for selecting land made available under subsection (a)(1) were perceived to conflict with procedures for opening land under section 24 of the Federal Power Act. To resolve such conflicts, BLM points to the "preemption section" of ANCSA, P.L. 92-203, § 26, 85 Stat. 715 (1971), which provides: "To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern." Because no action by FPC was contemplated, the section 24 reservation was not applicable. The Associate Solicitor also stated:

As we have indicated previously, any selection by the Natives will be conveyed subject to all the rights, privileges, and the obligations of any outstanding permit or license issued by the FPC. Any lands actually being used by the APA or COE [Corps of Engineers] will not be conveyed. Any lands needed for the future use of the APA or COE for easements may be reserved by the Secretary under the procedures of 43 U.S.C. 1616(b).

Id. at 6.

Ordinarily, the existence of a Secretarial policy limits our review to the question of whether the action under review is consistent with that policy. See Kenneth H. Bunch, 37 IBLA 346 (1978). The policy cited by BLM was established in a document previously unavailable to us because it was not published in a format calculated to facilitate its discovery. <sup>1/</sup> Nor did BLM's decision refer to this document in support of its conclusion that no other reservation was required. Because of BLM's failure to notify us of the existence of this document, the parties and this Board expended considerable unnecessary effort in trying to identify some authority discussing the relationship of section 24 to Native village conveyances.

<sup>1/</sup> It is noted that 5 U.S.C. § 552(a)(2) (1988), provides in part as follows:

"A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof."

The document approved by Secretary Andrus refers to land subject to powersite withdrawals at the time ANCSA was enacted. BLM recognizes that the lands in question in this appeal were no longer within a powersite withdrawal when section 1610(a)(1) became effective and that they had been restored on the condition that subsequent disposal would be subject to a section 24 reservation.

Nevertheless, BLM contends that we should recognize section 26 of ANCSA as giving subsection (a)(1) the same preemptive effect upon the section 24 reservation in lands within previously opened powersites as to land remaining in powersite withdrawals when ANCSA was enacted. BLM states that requiring a section 24 reservation in this case would create an anomalous situation in which land already opened to entry by FPC would carry the reservation while land within a powersite withdrawal would not, even though the justification for the reservation would appear to be greater in the case of lands retained in the powersite withdrawal. If the powersite withdrawal on Eklutna Lake had remained in effect so that the land was not opened to entry prior to the enactment of ANCSA, Eklutna's section 1610(a)(1) withdrawal would have embraced the powersite, subject to valid existing rights, and the reservations required by section 24 of the Federal Power Act would not apply. No greater protection should be afforded to land previously opened by FPC. We find that the policy approved by the Secretary is properly extended to the situation presented in this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's petition for reconsideration is granted, our prior decision Alaska Power Administration, supra, is reversed in part, and BLM's decision is affirmed without modification.

Franklin D. Arness  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

For the reasons set forth below, I agree that our prior decision in this matter, Alaska Power Administration, 119 IBLA 301 (1991), must be set aside to the extent that it held that the land surrounding Eklutna Lake between the ordinary high watermark and the 900-foot mean sea level (MSL) elevation, which was being conveyed to Eklutna, Inc., was subject to the reservations provided in section 24 of the Federal Power Act (FPA), 16 U.S.C. § 818 (1988).

In our original decision, we generally rejected challenges brought by the Alaska Power Administration (APA) to the failure of the Bureau of Land Management (BLM) to provide specific references in the conveyancing of lands surrounding Eklutna Lake to Eklutna, Inc., to rights asserted by APA as attendant to its operation of the Eklutna hydroelectric project. But, while we did reject the imposition of various specific limitations which APA sought (e.g., prohibitions against shoreline development which might be incompatible with periodic flooding), we also held that the conveyance of the land between the ordinary high watermark and 900 MSL should be expressly made subject to the restrictions set forth in section 24 of FPA.

In support of this conclusion, we noted that the land surrounding Eklutna Lake below 900 MSL had been opened to location, entry, and selection by Public Land Order No. 4022, 31 FR 7626-27 (May 27, 1966), pursuant to a finding by the Federal Power Commission under section 24 of FPA that such lands would not be injured or destroyed for the purposes of power development by such location, entry, and selection. The opening of these lands, however, was expressly made subject to the condition that the United States, its permittees, and licensees would not be held liable for any damage to improvements placed on such lands resulting from the construction, operation, and maintenance of any power project works. Finding nothing in the language of the Alaska Native Claims Settlement Act (ANCSA) which would defeat application of this reservation to lands being conveyed under its provisions, we drew further sustenance in our conclusion that this reservation was properly applied to the instant conveyances from the actions of Congress in adopting section 12(e) of P.L. 94-204, 89 Stat. 1153, 43 U.S.C. § 1611 note (1988), which had authorized the selection by Cook Inlet Region, Inc. (CIRI), of lands within Power Site Classification (PSC) 443, but made such selection expressly subject to the reservations set forth in section 24 of FPA. See Alaska Power Administration, *supra* at 305-07.

Subsequent to the issuance of our decision, BLM sought reconsideration of the above holding. First, BLM argued that the decision was contrary to Secretarial policy pronouncements with respect to the imposition of section 24 reservations in the conveyances to Native village corporations of lands withdrawn by section 1610(a)(1) and (a)(2) of ANCSA. Second, BLM asserted that the Board's reliance on the language of section 12(e) of P.L. 94-204 was misplaced as that provision is inapposite to the issues presented in the instant appeal. Upon reflection, I must conclude that BLM is substantially correct in both of its contentions.

BLM has provided the Board with a copy of Secretary Cecil D. Andrus' March 3, 1978, policy pronouncement on this issue. It was part of a number of policy determinations made by Secretary Andrus in 1978 on a variety of questions which had arisen with respect to the implementation of ANCSA. Insofar as the instant matter is concerned, the Secretary concluded that lands within powersites which had been withdrawn by section 1610(a)(1) "are selectable by Native corporations without the section 24 Federal Power Act reservation."

The reasoning behind the Secretary's policy pronouncement appears to find its genesis in a memorandum opinion, dated October 27, 1977, by the Associate Solicitor, Energy and Resources, to the Assistant Secretary, Land and Water Resources. As this memorandum noted, under 43 U.S.C. § 1610(a)(1) (1988), all public lands, with certain exceptions, located within core and concentric ring townships of Native villages were withdrawn, subject to valid existing rights. Under 43 U.S.C. § 1610(a)(2) (1988), all lands within such townships which had been selected by, or tentatively approved to, but not yet patented to, the State of Alaska were similarly withdrawn. The lands so withdrawn were made available for selection by Native corporations pursuant to 43 U.S.C. § 1611(a) (1988). However, if these lands proved insufficient to satisfy a Native corporation's acreage entitlement, subsection (a)(3) of section 1610 directed the Secretary to withdraw additional lands of similar character from the "nearest unreserved, vacant and unappropriated public lands."

Noting that lands within powersites were not among those lands specifically excepted from the scope of the withdrawals effectuated by section 1610(a)(1) and (a)(2), the Associate Solicitor concluded that such lands were subject to these withdrawals and were, therefore, available for selection under section 1611(a). The Associate Solicitor recognized that there was an apparent conflict between the provisions of section 1610(a)(1) and (a)(2) and the procedures for opening lands within powersites set forth in section 24 of FPA, but resolved this conflict in favor of section 1610 specifically advertent to the language of section 24 which provided that all lands included in any proposed project were, from the date of filing of the proposal, reserved from entry, location, or other disposal, "until otherwise directed \* \* \* by Congress." Since the procedures for opening lands withdrawn under section 24 of FPA were not reconcilable with the provisions of section 1610(a)(1) and (a)(2) permitting the selection of such land, the Associate Solicitor determined that Congress had "otherwise directed" that such land be made available. 1/ Thus, the Associate Solicitor concluded that, not only was land within powersites withdrawn and generally available for selection by Native corporations pursuant to section 1610(a)(1), but that those provisions of section 24 of FPA which required the express reservation in any patent of the right of the United States, its permittees

1/ In its present brief, BLM points to section 26 of ANCSA, 85 Stat. 715, as providing additional support for this conclusion, noting that it expressly provided that "[t]o the extent that there is a conflict between any provisions of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern."

or licensees, to enter upon, occupy, and use any part of the premises were also inapplicable to these lands when conveyed under section 1611. 2/

The Associate Solicitor, however, contrasted the provisions of section 1610(a)(3) with those of section 1610(a)(1) and (a)(2). Particularly, he noted that section 1610(a)(3) expressly limited withdrawals to the nearest "unreserved, vacant, and unappropriated public lands." Since lands within powersite withdrawals were clearly reserved under section 24 of FPA, such lands could not be withdrawn under section 1610(a)(3) and thereby made available for selection.

In its petition for reconsideration, BLM argued that it was this latter limitation which was involved in the CIRI legislation and that, therefore, the Board's reliance on this legislation as supportive of its original holding was mistaken. Here, too, BLM's contentions appear well-based.

As BLM noted, the problems which Congress sought to remedy in section 12(e) of P.L. 94-204 related to difficulties arising from land selections within the Cook Inlet Region. As part of a general settlement of selection problems in the region, Congress permitted the selection of lands within PSC 443, lands which had not been withdrawn under either section 1610(a)(1) or (a)(2) and which would not have been available under section 1610(a)(3) because those lands were not unreserved as required by that section. The fact that Congress also expressly provided that any conveyance of such lands would be subject to the reservations required by section 24 of FPA could actually be seen as congressional recognition of the Department's position that lands within powersites which had been withdrawn under section (a)(1) or (a)(2) were not conveyed subject to such restrictions coupled with a congressional desire that a different result obtain with respect to the selections being permitted under section 12(e).

In retrospect, I must agree that our reliance on section 12(e) of P.L. 94-204 for the proposition that the reservations required by section 24 of FPA were applicable to lands withdrawn by section 1610(a)(1) and (a)(2) was misplaced. Secretary Andrus had clearly adopted the policy position that the restrictions of section 24 of FPA were not applicable to withdrawals and selections under section 1610(a)(1) and (a)(2), and P.L. 94-204 should have been examined in light of this interpretation. Our initial review of this question was hindered both by the fact that the Secretarial

2/ The Associate Solicitor noted that, even though lands within powersite withdrawals would be generally available, such availability was not without limitations:

"As we have indicated previously, any selection by the Natives will be conveyed subject to all the rights, privileges, and the obligations of any outstanding permit or license issued by the FPC. Any lands actually being used by the APA or COE [Corps of Engineers] will not be conveyed. Any lands needed for the future use of the APA or COE for easements may be reserved by the Secretary under the procedures of 43 U.S.C. 1616(b)."

pronouncements on this matter were not published and indexed so as to be readily accessible (see 5 U.S.C. § 552(a)(2) (1988)), and by the failure of any party to specifically advert to this policy during our earlier consideration of this matter. Be that as it may, having finally been apprised of these policy determinations, determinations which are clearly not inconsistent with any express statutory provision, our review of the issues presented herein is properly limited to the question whether the action under review is consistent with the Secretarial policy. Clearly, BLM's refusal to make the conveyances herein expressly subject to the section 24 limitations is consistent with this policy. Therefore, to the extent that our prior decision dictated a different result, it must be set aside. For these reasons, I agree with the result reached in the lead opinion.

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James L. Burski  
Administrative Judge