STATE OF ALASKA

182 IBLA 396 Decided September 10, 2012

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

STATE OF ALASKA

IBLA 2011-178 through 2011-180 Decided September 10, 2012

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Alaska Native Veteran allotment applications, AA-83720, AA-84033-A, and AA-84033-BA, and rejecting State selection applications, AA-21209, AA-21205, and AA-60353.

Affirmed.

1. Alaska National Interest Lands Conservation Act: State Selections

   Section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(e) (2006), allows the State to file new selection applications that will automatically apply to any lands that become available in the future without amending the applications when the lands become available. Under section 906(e), a selection by the State of Alaska takes effect if and when the lands become available for selection. Until the selection takes effect, the selection has no present segregative effect.

2. Alaska: Native Allotments

   Until a State selection made under section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(e) (2006), is effective, it cannot render the affected lands excluded from allotment to an Alaska Native Veteran, under the Alaska Native Veterans Allotment Act, 43 U.S.C. § 1629g(a)(3)(B) (2006), as being "selected by, but not conveyed to, the State of Alaska," within the meaning of the Alaska Native Veterans Allotment Act, or "presently selected by" the State, within the meaning of 43 C.F.R. § 2568.91.

3. Alaska: Native Allotments

A decision by BLM to approve an Alaska Native Veteran allotment application under the Alaska Native Veterans Allotment Act, 43 U.S.C. § 1629g (2006), and to reject a State selection application under section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(e) (2006), for the same lands will be affirmed where the State selection was not effective due to a withdrawal before the filing of the Native Veteran allotment application, at which time the Native Veteran applicant's inchoate preference right vested and related back to the date of initiation of qualifying use and occupancy prior to the withdrawal.

APPEARANCES: John T. Baker, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The State of Alaska has appealed from and petitioned for a stay of the effect of three separate May 19, 2011, decisions of the Alaska State Office, Bureau of Land Management (BLM), approving the Alaska Native Veteran allotment applications of Willard C. Hash, Jr., and William F. Smith, Jr., AA-83720, AA-84033-A, and AA-84033-BA, and rejecting State selection applications, AA-21209, AA-21205, and AA-60353, to the extent they sought the same land.[1] By order dated August 2, 2011, we granted the request by the State and BLM to consolidate the three appeals, since they present a common question of law, arising from similar facts.

We now consider the common legal question presented by all three appeals: whether "lands selected by, but not conveyed to, the State of Alaska" (lands "top-filed" by the State), pursuant to section 906(e) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(e) (2006), are excluded from allotment to an Alaska Native Veteran, under the Alaska Native Veterans Allotment Act (ANVAA), 43 U.S.C. § 1629g (2006). BLM's decisions determined that top-filed lands are not so excluded from allotment, and approved the Alaska Native Veteran allotment applications at issue. As discussed below, the State has failed to establish

[1] We docketed the State's appeals as IBLA 2011-178 (Hash (AA-83720)), IBLA 2011-179 (Smith (AA-84033-A)), and IBLA 2011-180 (Smith (AA-84033-BA)).

any error of law or fact in BLM's decisions, and thus we affirm them, and deny the State's petitions for a stay as moot.

BACKGROUND

On November 14, 1978, and November 12, 1986, prior to the filing of the Native Veteran allotment applications at issue, the State filed selection applications for all vacant, unappropriated, and unreserved public lands in T. 13 N., R. 1 W., and T. 9 N., R. 2 W., Copper River Meridian, and T. 22 S., R. 4 E., Fairbanks Meridian, Alaska, and elsewhere, pursuant to section 6(b) of the Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, 340.[2]

At the time of the State selections, the lands sought by Hash, under AA-83720, and by Smith, under AA-84033-A, were withdrawn, *inter alia*, from State selection by Public Land Order (PLO) No. 5150, 36 Fed. Reg. 25410, 25412 (Dec. 31, 1971), and PLO No. 5151, 37 Fed. Reg. 142 (Jan. 6, 1972), for a utility and transportation corridor,[3] and the lands sought by Smith, under AA-84033-BA, were withdrawn, *inter alia*, from State selection by section 22(h) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1621(h) (2006), due to the December 12, 1975, filing of Native regional corporation application AA-8104-03, by Ahtna, Incorporated (Ahtna).[4] Both withdrawals were subject to valid existing rights. *See* 36 Fed. Reg. at 25410; 37 Fed. Reg. at 142; 43 U.S.C. § 1610(a) (2006).

Although the State's selections, when filed, were precluded by the withdrawals, Congress, on December 2, 1980, enacted section 906(e) of ANILCA, which authorized the State to refile, or "top-file," its selection applications on

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[2] The State filed AA-21205 and AA-21209 on Nov. 14, 1978. The State filed AA-60353 on Nov. 12, 1986.

[3] By decision dated May 16, 1980, BLM notified the State that lands covered by AA-21205 and AA-21209, along with other selections, were withdrawn from selection at the time of application, and thus were not available for selection under the Statehood Act. *See generally State of Alaska*, 108 IBLA 181 (1989).

[4] We note that BLM, by decision dated Jan. 30, 2007, rejected Ahtna's Native regional corporation application, to the extent it encompassed the lands at issue and other lands withdrawn pursuant to section 11(a)(3) of ANCSA, 43 U.S.C. § 1610(a)(3) (2006), and that decision was affirmed by the Board on May 14, 2008. *See Ahtna Inc.*, 174 IBLA 303 (2008). That rejection rendered the lands at issue no longer "selected by, but not conveyed to, a . . . Regional Corporation," and thus available for allotment under ANVAA, pursuant to AA-84033-BA, at the time of the May 2011 BLM decision now at issue. 43 U.S.C. § 1629g(a)(3)(C) (2006).

withdrawn or other unavailable lands, pending their potential future availability.[5] Thus, on October 29, 1981, and again on December 20, 1993 (AA-21209 and AA-21205), and on December 20, 1993 (AA-60353), the State "top-filed" the three selection applications at issue.[6]

Thereafter, Hash and Smith filed Native Veteran allotment applications, pursuant to the newly-enacted ANVAA, on January 29, 2002 (AA-83720), and February 1, 2002 (AA-84033).[7] They alleged the initiation of use and occupancy in 1956 (AA-83720) and 1967 (AA-84033-A and AA-84033-B). BLM concluded, in its field examinations, which included interviews with the applicants, that qualifying use and occupancy under the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), began in 1966 (AA-83720) and 1967 (AA-84033-A and AA-84033-B), all at a time when the lands were vacant, unappropriated, and unreserved.[8] *See* Native

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[5] Section 906(e) provides, in relevant part, that, subject to valid existing rights and Native selection rights under ANCSA,

> the State, at its option, may file *future selection applications* [pursuant to section 6(b) of the Statehood Act] . . . *for lands which are not, on the date of filing of such applications, available [for selection under section 6(b) of the Statehood Act]* . . . . Each such selection application, if otherwise valid, shall become an effective selection without further action by the State upon the date the lands included in such application become available [under section 6(b) of the Statehood Act] . . . regardless of whether such date occurs before or after expiration of the State's land selection rights. [Emphasis added.]

43 U.S.C. § 1635(e) (2006). The statutory provision was expressly applicable to any selection application "heretofore filed by the State," which, once refiled, would "become subject to the provisions of this subsection[.]" *Id.*

[6] By decision dated Apr. 2, 1993, BLM notified the State that, owing to "pre-existing withdrawals," its top-filed selections AA-21205, AA-21209, and other selections were not effective, but were recognized as "future interest applications" that "do not become effective until such time as the lands are made available for State Selection." *Id.* at 1. By decision dated Aug. 22, 1994, BLM notified the State that, owing to "pre-existing Native Corporation selections," its top-filed selection AA-60353 and other selections were not effective, but were recognized as "future interest applications" that "will not be effective until the lands become available for State selection." *Id.* at 1.

[7] Smith sought two parcels of land (A and B), prompting BLM to identify his allotment application as AA-84033-A and AA-84033-B.

[8] The 1906 Act had provided for the allotment of up to 160 acres of vacant,

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Allotment Field Report (AA-83720), dated July 27, 2005, at 1; Native Allotment Field Report (AA-84033-A), dated July 14, 2008, at unpaginated (unp.) 2; Native Allotment Field Report (AA-84033-B), dated Aug. 15, 2005, at unp. 2; BLM Decision (AA-84033-B), dated Mar. 14, 2007, at 3. The effect of the filing of the allotment applications was to segregate the affected lands from the operation of the public land laws, subject to valid existing rights. *See* 43 C.F.R. §§ 2091.0-5(b), 2091.0-7, and 2568.78; *Ron Wilcher*, 178 IBLA 109, 113 (2009); *Andrey Mandregan, Jr.*, 170 IBLA 19, 23 (2006).

ANVAA allows certain Alaska Natives who were on active military duty during the period from January 1, 1969, to December 31, 1971, to apply for an allotment of not more than two parcels of Federal land, totaling 160 acres or less, under the 1906 Act, as that Act was in effect before December 18, 1971. 43 U.S.C. § 1629g(a)(1) and (b)(1) (2006). The Act thus afforded an opportunity to qualifying Native veterans who were precluded from obtaining an allotment under the 1906 Act, where they may not, by virtue of their military service, have had an allotment application pending on the December 18, 1971, repeal of the 1906 Act, but who otherwise might be eligible for an allotment under the 1906 Act, to apply for an allotment.[9] *See, e.g.*, *George F. Jackson*, 158 IBLA 305, 307 (2003) ("The statute . . .

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[8] (...continued)
unappropriated, and unreserved nonmineral land in Alaska which had been subject to substantially continuous use and occupancy by an Alaska Native applicant for a period of 5 years. It was repealed, effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2006).

[9] Applications pursuant to ANVAA were required to be filed within the 18-month period following the Department's July 31, 2000, promulgation of implementing regulations. 43 U.S.C. § 1629g(a)(1) (2006); *see* 65 Fed. Reg. 40953, 40954 (June 30, 2000). Hash and Smith timely filed applications, AA-83720 and AA-84033-A, respectively, within the 18-month period. Regarding Smith's remaining application, AA-84033-B, the record indicates he had originally applied for 80 acres of land in sec. 32, T. 21 S., R. 9 E., Fairbanks Meridian, Alaska, on Feb. 1, 2002, within the 18-month period, but that BLM, in a Jan. 17, 2006, decision, determined that Smith was entitled, under 43 U.S.C. § 1629g(a)(5) (2006), to choose an alternate allotment location under ANVAA, within 12 months of receipt of the decision, since allotment was deemed to be inconsistent with the status of the land as part of the Delta National Wild and Scenic River, a Conservation System Unit (CSU). *See* 43 C.F.R. § 2568.115. Smith filed an application for an alternate allotment, AA-84033-BA, on Feb. 15, 2007, within the 12-month period, seeking land in sec. 1, T. 22 S., R. 4 E., Fairbanks Meridian, Alaska. BLM thereafter concluded, in its Mar. 14, 2007, decision, that, but for the CSU inconsistency, Smith had been fully
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reopened the application period to those persons who had military service during the last two years during which applications could be filed under the Native Allotment Act [of 1906] and may have missed the opportunity to timely apply for that reason").

Importantly, ANVAA prohibits the conveyance of allotments of, *inter alia*, "lands selected by, but not conveyed to, the State of Alaska pursuant to the Alaska Statehood Act or any other provision of law[.]" 43 U.S.C. § 1629g(a)(3) (2006); *see Bart G. Ahsogeak*, 167 IBLA 148, 154 (2005) ("The intent of subsection (a)(3) was expressly to exclude certain lands from *conveyance*"). The Department's implementing regulation, 43 C.F.R. § 2568.91, essentially repeats the statutory prohibition, stating, in relevant part, under subsection (b), that it applies to "[l]and *presently selected* by, but not conveyed to, the State of Alaska." (Emphasis added.) *See* 65 Fed. Reg. at 40957 ("Congress limited the types of land that BLM can convey to Native veterans and the language in the proposed rule [carried over into the final rule] reflected the limitations in the law itself"); 65 Fed. Reg. 6260, 6262 (Feb. 8, 2000).[10] It adds, however, that "[t]he State may relinquish up to 160 acres of its selection to allow an eligible Native veteran to receive an allotment[.]" 43 C.F.R. § 2568.91(b). Here, however, despite specific requests by BLM, the State declined to relinquish any of the lands at issue. *See* Letter to BLM, dated July 21, 2009 (AA-83720); Letter to BLM, dated Aug. 13, 2009 (AA-84033-A); Letter to BLM, dated July 9, 2009 (AA-84033-BA).

In its May 2011 decisions, BLM approved Hash's one and Smith's two Native Veteran allotment applications, and rejected the State selection applications to the extent they conflicted with the allotment applications.[11] It held that the Native

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[9] (...continued)
entitled to an allotment of the land sought in his original application.

[10] We note that the Department stated, in promulgating 43 C.F.R. § 2568.91, that "[t]he most common objection" raised concerned subsection (b), which provided that "land *selected by* the State of Alaska . . . was not available for allotment, even when the applicant's use and occupancy predated the State selection application." 65 Fed. Reg. at 40957 (emphasis added). It stood by that result, since it followed the dictates of 43 U.S.C. § 1629g(a)(3) (2006). *See id.* However, what is critical in the present case is that the State selections here were *not effective* at any time before the filing of the Native Veteran allotment applications at issue.

[11] The State selection applications were rejected to the full extent of lands encompassed by Hash and Smith's allotment applications, and thus as to the 160 acres of land in sec. 17, T. 13 N., R. 1 W., Copper River Meridian (AA-21209), the 80 acres of land in sec. 25, T. 9 N., R. 2 W., Copper River Meridian (AA-21205), and the 79.99 acres of land in sec. 1, T. 22 S., R. 4 E., Fairbanks Meridian
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applicants were entitled to allotments, having satisfied the eligibility criteria for an allotment under ANVAA, including engaging in qualifying use and occupancy under the 1906 Act.[12]

Specifically concerning the legal question now before us, BLM held, in its May 2011 decisions, that the fact that the lands at issue were subject to "top-filed" State selection applications at the time of the filing of the Native Veteran allotment applications, did not trigger the prohibition on allotment under ANVAA for lands selected by, but not conveyed to, the State, concluding that

> *[A] top filing selection* under [section] 906(e) of the ANILCA, 43 U.S.C. [§] 1635(e) [(2006)], is a future interest that has no present segregative effect. Such a top filing *is not a present selection within the meaning of 43 C.F.R. [§] 2568.91(b)*[,] and does not require relinquishment prior to approval of a Native Veteran Allotment application. [Emphasis added.]

Decision (Hash (AA-83720)) at 2.[13]

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[11] (...continued)
(AA-60353). In the case of AA-83720 and AA-84033-BA, the lands sought by the Native applicant had been surveyed, and BLM provided, in each of its May 2011 decisions, for conformance to a plat of survey. In each case, it stated that, absent the submission of notice and contrary evidence within 30 days of receipt of the decision, the land would be allotted in accordance with the applicable survey. In the case of AA-84033-A, BLM provided, in its May 2011 decision, that, following a survey of the land sought by the Native applicant, it would issue a similar conformance to a plat of survey, followed by an allotment.

[12] In the case of AA-83720 and AA-84033-A, Hash and Smith were held to have engaged in qualifying use and occupancy on the parcels of land originally applied for, and, in the case of AA-84033-BA, Smith's qualifying use and occupancy on the parcel of land originally applied for carried over to the alternate parcel. *See* 43 C.F.R. § 2568.113.

[13] BLM's legal position on the question of the effect of a top-filed State selection on an ANVAA allotment was based on a Mar. 6, 2006, legal memorandum prepared by the Deputy Regional Solicitor, Alaska Region, which concluded at page 1 that "a top filing is not a present selection within the meaning of 43 C.F.R. [§] 2568.91(b)," and thus does not, even absent a relinquishment of the selection by the State, preclude an allotment of the lands at issue.

The State appealed timely from BLM's decisions, challenging the rejection of its State selection applications, and requesting a stay of the effect of the decisions during the pendency of its appeals.

Since we decide the appeals on their merits, the stay petitions are denied as moot.

APPELLANT'S ARGUMENTS ON APPEAL

The State contends that BLM, by approving the Native Veteran allotment applications and rejecting the conflicting State selection applications, has exceeded its authority under ANVAA. The State argues that ANVAA precludes an allotment of any lands selected by, but not conveyed to, the State, and does not require that the lands must be presently selected by the State and thus presently segregated by a State selection application, at the time of adjudication of the Native Veteran allotment application at issue. *See, e.g.*, Statement of Reasons (SOR) at 5. It argues that BLM, in effect, is improperly "treating State [section] 906(e) selections as if they are not 'selections' at all," within the meaning of ANVAA, noting: "[T]here is absolutely nothing to suggest an intent by Congress to treat the State's ANILCA § 906(e) selections as something other than 'selections' under the ANVAA." *Id.* at 9, 10-11.

In addition to finding no reference in the statute to "present" or "presently" when referring to the preclusion of Native Veteran allotments in lands selected by the State, the State finds no requirement that a State selection or any one of the other statutory circumstances where an allotment is precluded requires that the selection or other circumstance have a "present segregative effect[.]"[14] 43 C.F.R. § 2568.91(b); Decision (AA-83720 (Hash)) at 2. The State concludes:

> *There is thus absolutely no basis to infer, and BLM cites no authority suggesting, that Congress intended that only interests with 'present segregative effect' would preclude selection and conveyance of land under the ANVAA*. BLM has determined that[,] while campsites or structures -- which may be unattached to any authorization whatsoever and cannot conceivably be viewed as segregating the land against entry -- will preclude approval and conveyance of a Veterans Allotment,

[14] In terms of other statutory circumstances, the State refers to preclusion, *inter alia*, where lands have "a native or non-native campsite" of a third party or contain "a building, permanent structure, or other development" owned or controlled by the United States, the State, or a third party, none of which, by operation of law, segregates the affected lands from State selection or any other appropriation under the public land laws. 43 U.S.C. § 1629g(a)(3) (2006); *see* SOR at 6-7, 11.

> a State top-filed selection under the direct authority of § 906(e) of ANILCA will not. [Emphasis added.]

SOR at 7. The State, therefore, asks the Board to reverse BLM's May 2011 decisions, thereby upholding its contention that "the State of Alaska's top-filed selections under § 906(e) of ANILCA preclude conveyance of the lands [at issue] selected for allotments under the Alaska Native Veterans Allotment Act."[15] *Id.* at 13.

ANALYSIS

[1] When originally filed, the State selection applications at issue were not, by virtue of withdrawals of the selected lands, *effective under the Statehood Act*. When enacted in 1980, section 906(e) of ANILCA permitted the State to refile its selection applications. However, it provided that, if otherwise valid, each such application would only "*become an effective selection* without further action by the State *upon the date the lands included in such application become available [under section 6(b) of the Statehood Act]*." 43 U.S.C. § 1635(e) (2006) (emphasis added). As we stated in *State of Alaska*, 113 IBLA 86, 95 (1990):

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[15] The State also argues that BLM has "until now" held that top-filed State selections preclude conflicting Native Veteran allotments. SOR at 12 (citing BLM Decision, dated June 4, 2007 (Ex. 4 attached to SOR); and BLM Decision, dated Jan. 31, 2008 (Ex. 5 attached to SOR)). It states that, in each case, "the State selection which BLM recognized as precluding conveyance of the Veteran allotment *was a top-filed selection under § 906(e) of ANILCA*." SOR at 12 (emphasis added). The State provides an Aug. 23, 2007, letter to BLM, in which the State, having completed its review of Native Veteran allotment applications provided by BLM, set forth "the State's position regarding relinquishment of valid state selection and 906(e) topfilings" vis-a-vis the listed allotment applications. Letter to BLM from State, dated Aug. 23, 2007 (Ex. 6 attached to SOR).

The State correctly states that, in the case of the two allotment applications (AA-83711-B and AA-83310) at issue in the cited June 2007 and January 2008 BLM decisions, the conflicting State selections were reported by the State as having been "Top Filed[.]" Ex. 6 at 6. This is at odds with the two BLM decisions, which disclosed the filing of "state selection application[s]" "under the Alaska Statehood Act" on Feb. 5, 1990 (F-86875) and June 16, 1975 (F-26955). BLM Decision, dated June 4, 2007, at 2; BLM Decision, dated Jan. 31, 2008, at 2. No mention is made of a top-filing under section 906(e) of ANILCA. Further, the State offers no evidence that any top-filing *specifically concerned the lands at issue* in the case of the two decisions. Importantly, we further note that no top-filing could have occurred in the case of F-26955, since it was reported to have been filed before the Dec. 2, 1980, enactment of ANILCA.

> Section 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), allows the State to file new selection applications that will automatically apply to any lands that become available in the future (following the filing of the new applications), without the necessity of amending the new applications as such lands become available. Section 906(e) provides only that State selection applications filed after ANCSA will automatically embrace lands that "become" available for selection *after* the filing of the new application.

See State of Alaska, 108 IBLA at 183 ("[T]he State's selection automatically falls into place as soon as the land becomes available"). Section 906(e), by providing an exception to the normal requirement that applications should be rejected when filed for lands not available for selection,[16] "*simply does not provide any basis for a finding that it was intended to have any present effect*," adding that the State selection would only "t[ake] effect if and when the lands selected became available for selection," thus giving rise to a present segregative effect. *Id.* at 185, 186 (emphasis added). Thus, we have held that, under section 906(e) of ANILCA, a selection by the State of Alaska takes effect if and when the lands become available for selection. Until the selection takes effect, the selection has no present segregative effect.

By statutory definition, the top-filed State selection applications, which the State now believes preclude the conflicting Native Veteran allotment applications at issue, were, at the time of filing, "*future selection* applications" that sought "lands which are not, on the date of filing . . ., available" under the Statehood Act.[17]

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[16] The regulation at 43 C.F.R. § 2091.1(a) has long provided, in relevant part, that

> applications which are accepted for filing *shall be rejected and cannot be held pending possible future availability of the lands or interests in lands*, except those that apply to selections made by the State of Alaska under section 906(e) of the Alaska National Interest Land Conservation Act and selections made by Alaska Native Corporations under section 3(e) of the Alaska Native Claims Settlement Act, *when approval of the application is prevented by . . . [a] withdrawal . . . .* [Emphasis added.]

[17] The State also argues that BLM ignored the fact that the State selections at issue were selections made under another "provision of law," specifically section 906(e) of ANILCA, and thus come within the express ambit of the statutory prohibition on Native Veteran allotments, in 43 U.S.C. § 1629g(a)(3)(B) (2006). *See* SOR at 7-11. It concludes: "BLM's interpretation of the ANVAA essentially reads an entire clause -- the words 'or any other provision of law' -- out of the statute[.]" *Id.* at 5. We disagree. Section 906(e) of ANILCA facilitated the filing of selection applications where the lands sought were not available under the Statehood Act at the time of

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43 U.S.C. § 1635(e) (2006) (emphasis added). Since, at the time of filing, the land, which the State sought was unavailable, each State selection was not effective when filed, and would only "become an effective selection," pursuant to the further dictates of the statute, "upon the date the lands [sought] . . . become available" under the Statehood Act. *Id.*

Moreover, by the statutory definition, the State top-filed selection applications at issue, when filed in 1981 and 1993, could not have been considered "present[] select[ions]" within the meaning of 43 C.F.R. § 2568.91(b).[18] Therefore, pursuant to the regulation, they could not have precluded conflicting Native Veteran allotment applications. The question is whether, when Hash and Smith filed their original allotment applications in 2002 and 2007, the subject lands could be considered subject to a future or present selection by the State, under the Statehood Act, and thus whether the regulation operated, at that time, to preclude the subsequent allotments.

[2] Despite the top-filing of a State selection application, until termination of the withdrawal of the selected lands, which had precluded the effectiveness of the

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[17] (...continued)
application, but the applications were clearly filed "pursuant to section 6(a) or (b) of the Alaska Statehood Act," and would become effective when the lands became available under the Statehood Act. 43 U.S.C. § 1635(e) (2006).

[18] The State argues that the Department's regulatory emendation in 43 C.F.R. § 2568.91(b), providing that only lands "presently selected" by the State could preclude a Native Veteran allotment was contrary to the statutory reference to lands "selected" by the State, 43 U.S.C. § 1629g(a)(3)(B) (2006) and thus violative of the statute. *See* SOR at 5 ("BLM has exceeded its authority under the ANVAA and essentially imposed an amendment to the ANVAA that Congress has never chosen to adopt").

We find no conflict between the regulation and the statute, since both require that a State selection be effective, as a present matter, in order to preclude an allotment. We consider the regulation duly promulgated, being reasonably adapted to the administration of, and not inconsistent with, the statute, and, therefore, that it has the force and effect of law, and is binding on the Board. *Alamo Ranch Co., Inc.*, 135 IBLA 61, 69, 75 (1996); *ANR Production Co.*, 118 IBLA 338, 343 (1991); *Tucson Electric Power Co.*, 111 IBLA 69, 76 (1989); *Veola Rasmussen*, 109 IBLA 106, 110 (1989). In addition, since we conclude that, in rejecting the State selection applications, BLM is simply following the dictates of 43 C.F.R. § 2568.91, we find no "new interpretation of law," amounting to a "new substantive rule," which, by failing to promulgate through formal rulemaking, BLM violated the Administrative Procedure Act, 5 U.S.C. § 553 (2006). *See* SOR at 12-13.

original application, none of the selection applications at issue would become "effective selection[s]" pursuant to section 906(e) of ANILCA. 43 U.S.C. § 1635(e) (2006). They operated, under section 906(e) of ANILCA, merely as selections that might take effect in the future. If a State selection was not presently effective, it could have no present segregative effect. *See* 43 C.F.R. § 2627.4(b); *Hyak Mining Co.*, 119 IBLA 1, 3 (1991) (citing *David Cavanagh*, 89 IBLA 285, 293, 92 I.D. 564, 568 (1985), *aff'd*, *Cavanagh v. Hodel*, No. 86-041 Civil (D. Alaska Mar. 18, 1988) (State selection application has no segregative effect where lands not available for selection); *James M. Wright*, 95 IBLA 387, 389 (1987); *John C. & Martha W. Thomas (On Reconsideration)*, 59 IBLA 364, 367 (1981); *State of Alaska*, 73 I.D. 1, 6-8 (1966), *rev'd*, *Kalerak v. Udall*, No. A–35–66 (D. Alaska Oct. 20, 1966), *rev'd*, 396 F.2d 746 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969). Thus, until the State selections made under section 906(e) of ANILCA were effective, they could not render the affected lands excluded from allotment to an Alaska Native Veteran, under ANVAA, as being "selected by, but not conveyed to, the State of Alaska," within the meaning of ANVAA, 43 U.S.C. § 1629g(a)(3)(B) (2006), or "presently selected by" the State, within the meaning of 43 C.F.R. § 2568.91.

Therefore, we now examine the status of the withdrawals at the time of the filing of the Native Veteran allotment applications at issue in 2002 and 2007. The administrative record for each of the allotment applications, particularly the Master Title Plat (MTP) and Historical Index (HI), discloses that the lands at issue were still withdrawn by PLO No. 5150/5151 or section 22(h) of ANCSA on the date of filing of the allotment applications in 2002 and 2007. *See* MTP (T. 13 N., R. 1 W., Copper River Meridian), dated Feb. 11, 2004; HI Retrieval (T. 13 N., R. 1 W., Copper River Meridian), dated Feb. 3, 2004; MTP (T. 9 N., R. 2 W., Copper River Meridian), dated June 18, 2004; HI Retrieval (T. 9 N., R. 2 W., Copper River Meridian), dated Jan. 29, 2004; MTP Supplement (Sec. 1, T. 22 S., R. 4 E., Fairbanks Meridian), dated Sept. 3, 2002; MTP Supplement (Sec. 1, T. 22 S., R. 4 E., Fairbanks Meridian), dated Dec. 2, 2010; HI Retrieval (T. 22 S., R. 4 E., Fairbanks Meridian), dated July 15, 2009; BLM Decision (AA-8104-3), dated Jan. 30, 2007; *Ahtna Inc.*, 174 IBLA 303 (2008).[19]

[19] We note that BLM's Jan. 30, 2007, decision rejecting Ahtna's application, AA-8104-3, in accordance with 43 C.F.R. §§ 4.21(a)(1) and 4.411(a), was not effective during the 30-day appeal period, following service of the decision on Ahtna. Even assuming that the decision was served on January 30, the decision did not become effective until Mar. 1, 2007. In the interim however, Smith had filed his Native Veteran allotment application, AA-84033-BA, on Feb. 15, 2007. Although, pursuant to section 22(h) of ANCSA, the land was still withdrawn when the application was filed due to the outstanding Ahtna application, because Smith had inchoate rights that predated the withdrawal, such rights vested upon the filing of the application, and related back to the date of initiation of qualifying use and occupancy (continued...)

Since we have determined that the withdrawals remained in effect at the time of the filing of the Native Veteran allotment applications, we conclude that none of the State selections at issue were "effective" under section 906(e) of ANILCA at that time, and thus none of the subject lands could thereafter be considered "lands selected by, but not conveyed to, the State of Alaska," within the meaning of ANVAA. 43 U.S.C. § 1629g(a)(3)(B) (2006). Thus, none of these lands were properly excluded from allotment to the Alaska Native Veteran allotment applicants, under that statutory provision.

The State argues that the withdrawals, while they remained in effect, barred the effectiveness not only of the State selections, but also of the Native Veteran allotment applications, and that, once the withdrawals terminated, the State selections attached *eo instante*, precluding the Native Veteran allotment: "If the land becomes available *at all*—for selection by *any* party—the State's selection attaches. There is no intervening nanosecond during which BLM may lawfully create new interests on the land or allow new selections for that land." SOR at 10.

The State, however, completely overlooks the relevant facts and applicable principles of Native allotment law. Since Native Veterans, Hash and Smith, initiated their respective qualifying use and occupancy prior to the relevant withdrawals, affording them inchoate preference rights, the 1971 and 1975 withdrawals were subject to these "valid existing rights," which subsequently vested after completion of 5 years of qualifying use and occupancy and the filing of their respective allotment applications, relating back to the date of initiation of the qualifying use and occupancy in 1966 and 1967. *See*, *e.g.*, *State of Alaska v. Babbitt*, 38 F.3d 1068, 1073, 1075-76 (9th Cir. 1994) (upholding Board's application of relation-back doctrine, citing *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985), *aff'd sub nom.*, *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987), and *Aguilar v. United States*, 474 F. Supp. 840, 845 (D. Alaska 1979)); *Heir of Jack Moore*, 174 IBLA 45, 51 (2008) (intervening withdrawal); *State of Alaska*, 125 IBLA 291, 293-94 (1993) (intervening right-of-way application); *Heirs of Howard Isaac*, 63 IBLA 343, 345 (1982) (intervening State selection).[20]

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[19] (...continued)
in 1967. We thus conclude that the filing of Smith's application had the effect, under 43 C.F.R. § 2568.78, of segregating the land from State selection, and thus precluded the top-filing from becoming effective, pursuant to section 906(e) of ANILCA, once the Ahtna application was finally rejected on Mar. 1, 2007.

[20] We stated in *Moore* that a "Native was required to establish the existence of a preference right, arising from occupancy of lands, which predated, and thus survived, a prior withdrawal of the lands [occurring before the filing of an allotment
(continued...)

[3] BLM determined, in its May 2011 decisions, that the Native Veteran applicants fully satisfied the use and occupancy requirements of the 1906 Act (a matter unchallenged by the State). Thus, while Hash and Smith filed their respective Native Veteran allotment applications in 2002 and 2007, well after the original filing of the State selection applications in 1978 and 1986, *the Native Veterans' qualifying use and occupancy of the lands at issue*, which had begun in 1966 and 1967, had been outstanding for close to 10 or 20 years *at the time the State originally filed its selection applications*. Under well-established law, the Native Veteran applicants had long ago acquired inchoate preference rights to the lands at issue, and those rights remained protected against encroachment by parties other than the United States. *See* 43 U.S.C. § 270-1 (1970) ("Any person qualified for an allotment . . . shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres"); *e.g.*, *Aguilar v. United States*, 474 F. Supp. 840, 843-45 (D. Alaska 1979); *Larry M. Evanoff*, 162 IBLA 62, 67-69, 70 (2004); *United States v. Flynn*, 53 IBLA 208, 225-27, 234, 88 I.D. 373, 382-84, 387 (1981). These Native Veteran applicants' inchoate preference rights predate not only the withdrawals effected by PLO No. 5150/5151 in 1971 and the filing of the Native regional corporation application in 1975, but also the original State selection applications in 1978 and 1986 and the subsequent top-filings in 1981 and 1993. Furthermore, with the filing of the allotment applications, the inchoate rights vested.

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[20] (...continued)
application]. *BLM v. Heirs of James Rudolph, Sr.*, 163 IBLA 252, 257 (2004)."
174 IBLA at 51. We also noted that the ability of an established preference right to survive a withdrawal was well settled in the law:

> In the case of a withdrawal which predated enactment of the Native Allotment Act, a Native would be deemed to hold a valid right that survived the withdrawal where, at the time of withdrawal, he was engaged in "notorious, exclusive, and continuous use and occupancy which is also required by the Native Allotment Act[.]" *Forest Service (Heirs of Frank M. Williams)*, 141 IBLA 336, 339 (1997). *Also see United States v. Flynn*, 53 IBLA [208, 227 (1981), 88 I.D. 373, 383 (1981)] ("[P]ermissive Native occupation under the [Native Allotment Act and its predecessors] . . . was required to be 'notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent,'" *quoting United States v. 10.95 Acres of Land in Juneau*, 75 F. Supp. 841, 844 (D. Alaska 1948)).

174 IBLA at 51 n.14.

The State, by contrast, held no such rights. Rather, its original selection applications in 1978 and 1986 and its subsequent 1981 and 1993 top-filings were barred by the 1971 and 1975 withdrawals, throughout the relevant time periods, prior to the filing of Hash and Smith's Native Veteran allotment applications. The State selections never became effective.

Thus, proper application of the State's nanosecond argument works only in favor of the allotment applicants. The State's selection applications can become effective only when the land is vacant, unappropriated, and unreserved. Until State selections are effective, they have no segregative effect. In the case at hand, the State selections were not effective at any time before the filing of the Native Veteran allotment applications at issue, at which point the Native Veterans' inchoate preference rights vested. Hence, there was never a nanosecond in which the land became available for a top-filed State selection application.

CONCLUSION

In sum, ANVAA ensured that, although Hash and Smith had been unable to file allotment applications prior to the 1971 repeal of the 1906 Act due to their military service, they would not be penalized. Having filed their allotment applications in 2002 and 2007, their inchoate preference rights vested and related back to the dates of initiation of qualifying use and occupancy in 1966 and 1967. The State selection applications at issue were future, not present, selections, which never became effective, due to the continuing efficacy of the 1971 withdrawal, and the segregative effect of the filing of Hash's and Smith's allotment applications, AA-83720 and AA-84033-A, in 2002, and the 1975 withdrawal, followed by the segregative effect of the filing of Smith's allotment application, AA-84033-BA, in 2007. Consequently, those State selection applications had not rendered the top-filed lands excluded from Native allotment as lands "selected by, but not conveyed to, the State of Alaska," under 43 U.S.C. § 1629g(a)(3)(B) (2006), at the time of BLM's May 2011 decisions, and BLM was not barred by ANVAA from allotting Hash and Smith the lands for which they had applied.

The State has failed to show error in BLM's May 2011 decisions, approving Hash's and Smith's Alaska Native Veteran allotment applications, AA-83720, AA-84033-A, and AA-84033-BA, and rejecting the State selection applications, AA-21209, AA-21205, and AA-60353, to the extent of the existing conflict.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed, and the petitions for a stay are denied as moot.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge