United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

May 21, 2024

M-37080

Memorandum

To: Secretary

From: Solicitor

Subject: Adjudication of Alaska Native Village Corporation Land Selections Made under Section 12(b) of the Alaska Native Claims Settlement Act

This Opinion addresses the adjudication of Alaska Native Village Corporation land selections filed under section 12(b) of the Alaska Native Claims Settlement Act (ANCSA)[1] when the selection is filed within the regulatory timeline but after the underlying section 11(a) withdrawal has expired.

I. Introduction

The Bureau of Land Management (BLM) has requested guidance on whether the administrative appeal in *Appeal of Port Graham Corp.*[2] was correctly decided by the Alaska Native Claims Appeals Board (ANCAB or the Board).[3] The BLM is bound by decisions issued by the Board in the adjudication of ANCSA selections. However, following the decision could result in an inequitable outcome in the adjudication of a Village Corporation land selection filed under section 12(b) of ANCSA.

In the *Port Graham* decision, the Board interpreted section 12(b)'s requirement that selections be made from lands withdrawn by section 11(a) to specifically require that the lands remain withdrawn at the time of selection, despite a Departmental regulation allowing selections to occur after expiration of the withdrawals. *Port Graham* would require the BLM to reject selections that are submitted after section 11(a)(2) withdrawals expire, even if the selections are

[1] 43 U.S.C. § 1611.
[2] 83 Interior Dec. 481; 1 ANCAB 125 (1976).
[3] In 1975, the Department created the Alaska Native Claims Appeal Board. *See* 40 Fed. Reg. 33172 (August 6, 1975). The regulations provided, "The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act …" 43 C.F.R § 4.1(5) (1976). The ANCAB operated until 1982 when Secretary Watt abolished the Board and consolidated its functions into the Interior Board of Land Appeals following a decrease in appeals on ANCSA decisions. S.O. 3078 published at 47 Fed. Reg. 22617 (May 25, 1982). This M-Opinion is binding on all other Departmental offices and officials and may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary. M-37003, Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals.

filed within the regulatory deadlines under section 12(b).[4] To avoid this outcome, and better serve the purpose of ANCSA to seek a more equitable adjudication of Native claims, this Opinion overrules the Board's interpretation of section 12(b) in *Port Graham* and directs the BLM to find a Village Corporation selection valid so long as it was filed within the regulatory timelines, selected from within the geographic extent of the section 11(a)(2) withdrawal, and title has not passed to the State of Alaska.

II. Background

A. Statute and Regulations

Congress passed ANCSA in 1971 to settle the aboriginal land claims of Alaska Natives in exchange for the distribution of $962,500,000 and over forty million acres of land.[5] The land would be divided among newly-established Regional and Village Corporations pursuant to a complex formula.[6]

1. Section 11(a) Withdrawals

Section 11(a)[7] of ANCSA sets out three separate types of withdrawals of lands for selection by Village Corporations in settlement of aboriginal land claims.

Section 11(a)(1)[8] withdrew all "public lands" within the township in which the Native Village is enclosed plus two concentric rings of townships around this core township. This withdrawal did not include lands in the National Park System or lands withdrawn for national defense purposes other than Naval Petroleum Reserve Number 4 (renamed the National Petroleum Reserve - Alaska). Under section 3(e)[9] of ANCSA, "public lands" are defined as:

> …all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969 . . .

Pursuant to section 22(h)(1),[10] the section 11(a)(1) withdrawals "terminate within four years of [December 18, 1971]."

Section 11(a)(2)[11] withdrew lands within the townships described in section 11(a)(1) that were validly State-selected or tentatively approved, but not yet patented. This withdrawal allowed

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[4] *Port Graham*, 83 Interior Dec. at 484. *See also* 43 C.F.R. §§ 2651.3 and 2651.4(f) (2023).
[5] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1601 et seq.); *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972, 974 (9th Cir. 2004).
[6] *Id.*
[7] 43 U.S.C. § 1610(a).
[8] § 1610(a)(1).
[9] § 1602(e).
[10] § 1621(h)(1).
[11] § 1610(a)(2).

Village Corporations to file their own selections of lands validly selected by the State under the Alaska Statehood Act, thereby giving the Village Corporation priority to those lands for a specific period of time. In doing so, Congress recognized the special importance of the lands near the Native Villages in the settlement of the Alaska Native land claims.[12] However, due to this special provision allowing the ANCSA corporations' selections to have priority over valid State selections, the 11(a)(2) withdrawals were shorter in duration than the 11(a)(1) and 11(a)(3)[13] withdrawals. Pursuant to section 22(h)(2),[14] the section 11(a)(2) withdrawals "terminate three years from [December 18, 1971]."

2. Section 12 Selections

Sections 12(a) and (b) of ANCSA guide land selections by Village Corporations. Under section 12(a)(1),[15] Village Corporations had three years from the date of enactment of ANCSA (until December 18, 1974), to select the land to which they were entitled under section 14. In addition, section 12(a)(1) requires that, "[t]he selection shall be made from lands withdrawn by section 11(a) of this title."[16] Section 12(b)[17] allowed Village Corporations to make additional land selections in varying acreage amounts based on certain allocations completed by the Secretary and Regional Corporations on an equitable basis. Section 12(b) also requires the selection to be made "from the lands withdrawn by subsection 11(a)."[18] Notably, however, section 12(b), unlike section 12(a), did not contain any deadline for Village Corporations to make selections.

3. BLM Regulations

The BLM's implementing regulations, located at 43 C.F.R. Part 2650, establish additional rules and procedures for ANCSA land selections by Village Corporations. Pursuant to 43 C.F.R. §§ 2651.3 and 2651.4(f), Village Corporations were required to file all section 12(a) selections by December 18, 1974, and all section 12(b) selections by December 18, 1975.[19]

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[12] *Appeal of Eklutna Inc.*, 83 Interior Dec. 619, 644; 1 ANCAB 190 (1976).

[13] § 1610(a)(3). Section 11(a)(3) required the Secretary to withdraw additional lands outside of the townships described in Section 11(a)(1) if the withdrawals in 11(a)(1) and 11(a)(2) were insufficient for the Village Corporation to receive its full entitlement. In such case, the Secretary would withdraw three times the amount of the expected deficiency from the nearest "unreserved, vacant and unappropriated public lands" with the goal of the land being similar in character to the lands of the Native Village. Pursuant to section 22(h)(1), the section 11(a)(3) withdrawals "terminate within four years of [December 18, 1971]." § 1621(h)(1).

[14] § 1621(h)(2).

[15] § 1611(a)(1). The acreage entitlement was determined based on the population of the Village in the 1970 census as follows:

25 and 99 ……... 69,120 acres.
100 and 199 …… 92,160 acres.
200 and 399 …… 115,200 acres.
400 and 599 …… 138,240 acres.
600 or more …… 161,280 acres.

See § 1613(a).

[16] *Id.*

[17] § 1613(b).

[18] *Id.*

[19] This reflected a change from the initially proposed rule, which proposed a December 18, 1974, deadline for all Village selections. 37 Fed. Reg. 19634, 19637 (September 21, 1972).

B. Port Graham Decision

On December 17, 1975, the Port Graham Corporation selected lands pursuant to section 12(b) of ANCSA.[20] The selected lands were tentatively approved for conveyance to the State of Alaska pursuant to a selection made prior to January 17, 1969, under the Alaska Statehood Act.[21] The BLM determined that the lands were withdrawn by section 11(a)(2) of ANCSA until the withdrawal terminated on December 18, 1974.[22] Because the withdrawal had expired, the BLM rejected Port Graham's selection because it determined that section 12(b) required selections to be made from "lands withdrawn by subsec. 11(a)."[23] Port Graham appealed the BLM's decision to the Board, arguing the land remained open for selection "under sec. 12(b) of ANCSA notwithstanding that provision of sec. 22(h)(2)" which terminated the sec. 11(a)(2) withdrawal.[24] The Board found:

> Because sec. 22(h)(2) specifically terminates all sec. 11(a)(2) withdrawals three years from date of enactment and the lands in question were not selected prior to the Dec. 18, 1974 deadline, they are no longer available for selection by the Port Graham Corporation.[25]

Through its decision, the Board established a *per se* rule that 12(b) selections made after December 18, 1974, must be rejected, even when that selection is made before the regulatory deadline for 12(b) selections of December 18, 1975.

III. Analysis

The BLM should consider Village Corporation land selections made under section 12(b) as timely, provided that they were submitted by the regulatory deadline of December 18, 1975. This regulatory deadline was properly promulgated pursuant to the Secretary's broad authority under ANCSA. As a result, the Board's interpretation of section 12(b) in *Port Graham* is hereby overruled.

The statute does not require that section 11(a) lands be withdrawn at the time of a section 12 selection, but rather that section 12 selections be made from lands within the geographic extent of the section 11(a) withdrawals. Moreover, while ANCSA prescribes a specific deadline for section 12(a) selections – December 18, 1974 – it does not prescribe any deadlines for section 12(b) selections.

In addition, while the legislative history of ANCSA provides insight into Congress's general intent behind sections 11(a) and 12, it does not speak to the specific question at issue. Section 11(a) withdrew lands surrounding Native Villages to "[e]nsure that these lands are protected from disposition to other parties pending a determination of the villages eligible for benefits" and "enable the villages to organize as the Act requires and to select the lands to which they are

[20] *Port Graham*, 83 Interior Dec. at 482.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 483.
[25] *Id.* at 484.

found entitled."[26] The purpose of the 11(a)(2) withdrawal was to prioritize Village Corporations' selections over valid State selections that had been filed under the Alaska Statehood Act prior to ANCSA but not yet patented.[27] In settling Native land claims, Congress recognized the special interest of the Native Villages to receive the land they had used since well before statehood.[28] The 11(a)(2) withdrawal, therefore, ensured that Village Corporation selections would not have to compete with the State's prior filed applications during the time period for selections.[29] Congress recognized, however, that "[t]he withdrawal of land to facilitate Native selections will terminate in four years, and State selections will not thereafter be impeded."[30] Congress clearly intended for the withdrawals to aid in Village Corporations' selections, but the statute does not provide that these selections had to cease once the withdrawals expired.

During consideration of an early version of the bill, S. 835, one of the sponsors proposed a land selection process similar to the process envisioned by this Opinion, in that it would allow Native selections to continue for a time specific, even though their priority rights would expire before the selection deadline.[31] Under the early version of the bill, Regional Corporations (as opposed to Village Corporations) would have five years to make their selections. During this time, the relevant lands could not be appropriated under the public land laws. In addition, the State could continue to select land under the statehood act, but no tentative approval was permitted until the five-year period expired. Then, Regional Corporations would have an additional five years to select lands to ensure they received their full entitlement. However, during this second five-year period, the State would no longer be "subject to a prior Native selection right." In addition, "Native selections rights during this latter period should take subject to any valid existing rights that may have arisen after expiration of the first five-year period but prior to Native selection."

In a later version of the bill,[32] Congress considered a one-year deadline for all 12(a) selections and a two-year deadline for all 12(b) selections, expressly providing for the 12(b) selections "within one-year" of the 12(a) selections.[33] Although the 12(a) deadline was ultimately lengthened to three years, and the 12(b) deadline discarded completely, it appears that Congress believed additional time might be necessary for 12(b) selections.

Given ANCSA's silence as to 12(b) selection deadlines, the Secretary exercised his broad authority in implementing ANCSA[34] and established a deadline for their selection in the

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[26] S. Rep. No. 405, 92d Cong., 1st Sess. 136, 137 (1971); *see also* Conf. Rep. No. 581, 92d Cong., 1st Sess. 43 (1971) (The section 11 withdrawals were intended to "insure that the land selection rights of Native Villages and Regional Corporations will be fully protected and will not be frustrated by competing State selections or the creation of new interests in lands under the public land laws.").
[27] *Eklutna*, 83 Interior Dec. at 643-46.
[28] *Id.* at 644.
[29] *Id.*
[30] Conf. Rep. No. 581, 92d Cong., 1st Sess. 39 (1971).
[31] Hearings before the Committee on Interior and Insular Affairs, 92nd Cong., 272 (1971).
[32] S. Rep. No. 405, 92d Cong., 1st Sess. 141 (1971).
[33] *Id.* Section 14(a) of the committee bill provided, "within one year after the date of enactment of this Act, members of the Native Villages approved for benefits under this Act" shall vote for one of two land selection options. Section 14(b) of the committee bill provided that eligible Native Villages were "granted and entitled to select, within one year after the selection authorized under subsection (a)" one of two land selection options.
[34] 43 U.S.C. § 1624.

regulations. Two years after the passage of ANCSA, the Secretary promulgated implementing regulations at 43 C.F.R. Part 2650.[35] These regulations expressly permitted 12(b) selections until December 18, 1975. This deadline was reasonable, given the overall purpose of ANCSA in ensuring Village Corporations were able to select the lands to which they were entitled. In reaching its decision in *Port Graham*, the Board should have considered this deadline, giving weight to the Secretary's interpretation of ANCSA.

Instead, the Board in *Port Graham* took an unnecessarily restrictive reading of section 12(b) when it found that ANCSA requires the BLM to reject a Village Corporation selection when the underlying section 11(a)(2) withdrawal had expired by operation of law prior to the selection. Although section 12(b) requires that selections be made from the lands within the geographic scope of those withdrawn by section 11(a), it does not, by its plain language, prescribe a specific timeline for those selections, nor does it require that the lands be withdrawn at the time of a selection. In upholding the BLM's rejection of the Village Corporation's selection, the Board failed to recognize that it could give effect to both the language of the statute requiring the selection be made from lands withdrawn by section 11(a), as well as the regulatory deadline, which allows selections after expiration of the withdrawal. In addition, the Board appears to have overlooked the deadline prescribed under the regulations.

Overruling the Board's interpretation of ANCSA is also proper given the canon of construction that statutes benefitting Native Americans should be construed liberally in their favor.[36] This canon of construction can be properly applied when interpreting ANCSA as long as it remains in line with the Secretary's lawful exercise of his or her discretion under the statute.[37] Here, this canon would support the Secretary's interpretation, and thus, the canon of construction can be applied. Under this canon, when interpreting the phrase, "select the acreage allocated to it from the lands withdrawn by section 11(a) of this title," it would be proper to construe this language in the way most favorable to the Village Corporations to be simply a geographic area of selection and not a restriction on the filing deadline that conflicts with the regulatory deadline. I note, however, that application of this canon is not necessary to reach this interpretation of ANCSA.

By overruling the Board's interpretation of section 12(b) in *Port Graham*, this Opinion rejects the *per se* rule that 12(b) selections made after 11(a) withdrawals expired must be rejected. To be clear, however, this Opinion does not require categorical approval of a Village Corporation selection. As stated above, the purpose of the 11(a) withdrawals was to protect Village Corporations' ability to select lands from an intervening claimant. If a Village Corporation waited to select land until after the withdrawal expired, it would simply result in the Village Corporation assuming the risk that an intervenor could make an entry under the public land laws and that parcel would no longer be available to the Village Corporation. In the case of the 11(a)(2) withdrawals, filing after the withdrawal expired would negate the statutory priority right of selection over the State's selection provided by the withdrawal.[38] Therefore, the statutory requirement of selecting from lands withdrawn by section 11(a) and the regulatory deadline could be read together to allow for selections up to the regulatory deadline. Those selections, however, could be made only from lands within the geographic boundaries of the areas

[35] 38 Fed. Reg. 14218 (May 30, 1973).
[36] *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149 (1984).
[37] *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989).
[38] *See Eklutna*, 83 Interior Dec. at 644.

might not be available due to the conveyance of the State selection if the Village Corporation's selection was made after the withdrawal expired.

Consistent with this Opinion, a Village Corporation selection should not be categorically rejected simply because it occurred after the section 11(a) withdrawal expired. However, a Village Corporation's selection may still result in a rejection where the selection no longer has the benefit of the section 11(a)(2) withdrawal. In reality, the only section 11(a) withdrawals that could have expired before the regulatory deadline are the section 11(a)(2) withdrawals of State-selected but not yet patented lands, which expired by law on December 18, 1974. Once the withdrawal expired, the State's selection made on the land would again have priority over any Village Corporation's selection. If the land is conveyed to the State through patent or tentative approval, the Village Corporation selection would be rejected.[39] However, if the land becomes available, for example if the State relinquishes its selection, then BLM would approve the Village Corporation's selection of those lands if it determines the application is otherwise valid.

IV. Conclusion

Given the text and legislative history of ANCSA, as well the BLM's implementing regulations, I have concluded that the best legal interpretation is one that harmonizes the statutory requirement of selecting from lands withdrawn by section 11(a), along with the regulatory deadline that allows for section 12(b) selections up to December 18, 1975. Native Village selections made after the section 11(a)(2) withdrawals expired, but before December 18, 1975, must not be rejected exclusively on the basis of the filing date. As this legal interpretation is final and binding on the Department of the Interior, it has the effect of overruling any contrary legal interpretation in *Port Graham* and any other contrary legal interpretations in prior decisions by the Department.

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[39] This Opinion would not change the ultimate outcome of the *Port Graham* decision because Port Graham's selection would still be rejected, albeit on different grounds. The lands selected by Port Graham were tentatively approved to the State and have now been patented to the State. Because the lands were selected by Port Graham after the 11(a)(2) withdrawal expired, Port Graham's priority to these lands also expired. Port Graham's selection would still have been rejected because Port Graham's selection would not have priority over the State's selection. Once the 11(a)(2) withdrawal expired, the land became fully available to the State unencumbered with the Native claims. *See Eklutna*, 83 Interior Dec. at 644. The State's selection would again become a Tentative Approval, giving equitable title to the State. The BLM would therefore have been compelled to reject Port Graham's selection as it would no longer have jurisdiction over the land.