

September 12, 1991

IBLA 85-688 : F-14903-A
: :
CITY OF NENANA : Village Selection
(ON JUDICIAL REMAND) : :
: Board Decisions Vacated
: by Court Order

ORDER

Pursuant to the attached Stipulation and Order in Toghotthele Corp. v. Lujan, No. 89-1763 (RCL), the United States District Court for the District of Columbia vacated the following Board decisions by order dated August 1, 1991: City of Nenana, 98 IBLA 177 (1987), and City of Nenana (On Reconsideration), 106 IBLA 26 (1988). In that Stipulation and Order the court directed this Board to "publish in its reporter system an appropriate notation that the IBLA decisions cited herein have been vacated."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the action of United States District Court for the District of Columbia, vacating the decisions of this Board, cited as City of Nenana, 98 IBLA 177 (1987), and City of Nenana (On Reconsideration), 106 IBLA 26 (1988), is hereby noted and published.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

APPEARANCES:

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United States District Court
for the District of Columbia
U.S. Courthouse
333 Constitution Ave., NW.
Washington, D.C. 20005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOGHOTTHELE CORP.)	
)	
Plaintiff)	
)	
vs.)	
)	
MANUEL LUJAN, JR.,)	
)	
Defendant)	Civil Action No. 89-1763
)	(RCL)
CITY OF NENANA,)	
)	
Intervenor Defendant;)	
)	
ALASKA RAILROAD CORP.;)	
)	
Intervenor Defendant)	

STIPULATION AND ORDER

The parties to the above-captioned matter, having reached an agreement settling all issues in this matter conditional upon the entry of an order vacating certain decisions of the United States Department of the Interior Board of Land Appeals (IBLA) hereby stipulate to entry of an Order by this Court as follows: (1) this action, previously dismissed without prejudice by Order dated March 6, 1990 subject to reinstatement, is hereby reinstated; (2) the decisions of the IBLA cited at City of Nenana, 98 IBLA 177 (1987), sustained as modified, 106 IBLA 26 (1988), are hereby vacated; and (3) the IBLA

is hereby directed to publish in its reporter system an appropriate notation that the IBLA decision cited herein have been vacated.

Respectfully submitted,

June 14, 1991 _____

Lloyd Benton Miller
Donald J. Simon
Counsel for Plaintiff

July 5, 1991 _____

Edward Pasarelli
Stuart Schoenburg
Counsel for Defendant
Secretary of the Interior

June 17, 1991 _____

Greg M. O'Leary
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Railroad Corporation

June 14, 1991 _____

General Counsel
for Intervenor, Alaska
Railroad Corporation

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July 2, 1991 _____

Steven W. Silver
Counsel for Intervenor
City of Nenana

ORDER

IT IS SO ORDERED.

DATED this 1st day of August 1991.

U.S. District Court Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOGHOTTHELE CORP.)	
)	
Plaintiff)	
)	
vs.)	
)	
MANUEL LUJAN, JR.,)	
)	
Defendant)	Civil Action No. 89-1763
)	(RCL)
CITY OF NENANA,)	
)	
Intervenor Defendant;)	
)	
ALASKA RAILROAD CORP.;)	
)	
Intervenor Defendant)	

SETTLEMENT AGREEMENT

IN CONSIDERATION OF the mutual promises made herein, this Settlement Agreement is made by and among the Toghoththele Corporation ("Toghoththele"), the Secretary of the United States Department of the Interior ("Secretary"), the Alaska Railroad

Corporation ("ARRC"), and the City of Nenana, Alaska ("Nenana"), entered by and through their respective counsel, as follows:

1. Toghotthele is a Native village corporation organized pursuant to the terms of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1601 et seq. ("ANCSA") in part to select and receive conveyance of various lands in the vicinity of Nenana, Alaska, in compensation for the settlement of all claims based on aboriginal land claims of the Native community of Nenana.

2. Pursuant to section 12 of ANCSA, Toghotthele has selected certain lands within and in the vicinity of the city limits of Nenana, as those limits existed on December 18, 1971. Nenana and the ARRC contest those portions of Toghotthele's land selections situated within two-miles of the city limits on the ground that the selections conflict with Section 22(l) of ANCSA and the Department of the Interior's implementing regulations. Toghotthele contends that the selections are valid under those same authorities.

3. The ARC holds a license to operate certain properties of the United States, formerly administered by the Federal Railroad Administration, U.S. Department of Transportation, located within and in the vicinity of Nenana under provisions of the 1982 Alaska Railroad Transfer Act ("ARTA"), 45 U.S.C. § 1201 et seq. Toghotthele has selected those lands (hereinafter "rail properties") under Section 12 of ANCSA to the extent they qualify as "public lands" under Section 3(e) of ANCSA. The ARRC takes the position that Toghotthele's selections of rail properties in or within two miles of Nenana are invalid under Section 22(l) of ANCSA, and that no portions of the rail properties constitute "public lands within the meaning of ANCSA. Administrative proceedings before the Alaska State Office

of the Bureau of Land Management, U.S. Department of the Interior ("BLM"), to establish which portions of the rail properties constitute "public lands" within the meaning of the Act, and which portions do not, have been stayed pending the outcome of this litigation. Lands ultimately determined not to be "public lands" are to be conveyed by the Federal Railroad Administration to the ARRC.

4. ANCSA section 14(c)(3) authorizes certain lands which have been conveyed to Toghoththele to be reconveyed by Toghoththele to Nenana, without fully specifying the nature and extent of any duty to reconvey such lands.

5. On May 9, 1985, the BLM dismissed Nenana's protests to Toghoththele's selections of lands within two miles of Nenana's 1971 city boundaries. The City appealed to the Interior Board of Land Appeals ("IBLA"). The IBLA reversed BLM's decisions and ruled that such selections were invalid as contrary to Section 22(l) of ANCSA and its implementing regulations. City of Nenana, 98 IBLA 177 (1987), sustained as modified, 106 IBLA 26 (1988) ("the IBLA decisions"). The IBLA decisions constitute final agency action for the Secretary on the matter. Toghoththele timely brought suit in federal district court to reverse the IBLA decisions. Thereafter, Nenana and the ARRC intervened as defendants.

5A. Toghoththele claims that certain conveyances made by the United States to Nenana within U.S. Surveys 1127, 1503 and 4026 after December 17, 1971, by operation of Pub. L. 96-55 are not legally valid, and that conveyances made after December 17, 1971 by the federal Townsite Trustee (on behalf of the Secretary) to Nenana within the area known as the St. Marks Addition, pursuant to the Alaska Native Townsite Act of May 25,

1926, 44 Stat. 629, are also not legally valid. Toghotthele claims that as a consequence it is entitled to conveyance of said lands pursuant to ANCSA.

6. The parties desire to enter into a Settlement Agreement to avoid continuing costly, uncertain, and time-consuming litigation and administrative proceedings, to resolve all outstanding differences, and to achieve a fair and equitable resolution consistent with the respective parties' needs.

7. Each and every aspect of this Settlement Agreement is contingent upon the United States District Court for the District of Columbia, which has jurisdiction over Toghotthele Corp. v. Lujan, No. 89-1763, entering an order vacating the IBLA decisions, as provided in the Stipulation and Order attached hereto as Attachment H. Once the IBLA decisions are vacated, the Bureau of Land Management will be enabled to take the actions contemplated by this Agreement. Simultaneous with the execution of this Agreement, the parties in Case No. 89-1763 have stipulated to the entry of a court order vacating the IBLA decisions.

8. Nenana and the ARRC hereby withdraw their protests, and forever waive any and all objections they may have, whether or not heretofore asserted in any administrative or judicial proceedings, to Toghotthele's right and entitlement to select and receive conveyance of all lands designated in Toghotthele's selection applications presently on file with the BLM, as modified by the relinquishment of certain selections set forth herein and in Paragraphs 12 and 14 of this Agreement including, without intending any limitation, all protests or other objections based upon Sections 22(1) and 3(e) of ANCSA; provided that Toghotthele's selections of lands within the 200 foot total width mainline

right-of-way of the Alaska Railroad are relinquished pursuant to Section 606(b)(4)(A)(i) of ARTA, 45 U.S.C. § 1205(b)(4)(A)(i) and no mainline right-of-way lands shall be conveyed to Toghothele pursuant to this agreement; and provided further that any spur, industrial or siding trackage of the Alaska Railroad presently situated on lands that are outside the Alaska Railroad's 200 foot right-of-way and are to be conveyed to Toghothele shall be protected by appropriate trackage easements granted by Toghothele to the Alaska Railroad Corporation to facilitate continued rail operations over such trackage.

9. Upon entry of an order vacating the IBLA decisions, the BLM shall immediately proceed to adjudicate all of Toghothele's selections to lands within the core township (T. 4 S., R. 8W., F.M.), excluding those lands to be conveyed to ARRC pursuant to Paragraph 12 of this Agreement, and excluding the selections that Toghothele has already relinquished or hereby relinquishes to the lands described as the S1/2SW1/4, Section 15 and Lot 3 and the NE1/4NW1/4, Section 22, all in T. 4 S., R. 8 W., F.M. This adjudication shall be as provided by ANCSA, and BLM shall make a good faith effort to complete the adjudication and to issue final decisions to convey all remaining Toghothele selections in the core township within 120 days after entry of the court order vacating the IBLA decisions. This adjudication shall include adjudication under Section 3(e) of ANCSA of Toghothele's selection inside the core township of an approximately 800 acre FAA withdrawal (as set aside by ANS 10 and ANS 267), pursuant to the terms and conditions so forth in the Bureau of Land Management's May 20, 1985 case file memorandum.

10. Toghothele has relinquished all of its selections to land outside the core township but within the two-mile boundary of the City of Nenana situated within T 5 S., R. 8 W., F.M., and no further BLM adjudication of those selections is required.

11. It is anticipated that the BLM shall withhold from conveyance to Toghothele, from lands outside of the core township, only the smallest possible amount of acreage needed to take into account possible acreage adjustments necessary upon full survey of previous conveyances. If upon such survey it is determined that Toghothele should receive additional acreage, that additional acreage will be conveyed from Toghothele's remaining priorities. In order to allow for conveyance as close to full entitlement as possible, in the event such survey discloses an overconveyance to Toghothele, Toghothele commits to the future reconveyance of its lands back to the United States in an amount necessary to eliminate such overconveyance. All reconveyances from Toghothele shall conform with the standards established by the Department of Justice in Standards for the Preparation of Title Evidence in Land Acquisition (1970). This provision is severable and may be enforced separately.

12. Pursuant to Section 606(b) of ARTA, 45 U.S.C. § 1205(b), ARRC and Toghothele agree as follows:

(a) Of the rail properties selected by Toghothele, the surface estate of Tract A, Block 2, Industrial Subdivision U.S. Survey 1138, containing 17.18 acres more or less, shall be conveyed by interim conveyance to Toghothele pursuant to ANCSA on the basis of a metes and bounds description as set forth in Attachment A. BLM shall make a good faith effort to complete the adjudication and to issue a final decision conveying said

lands within 120 days after entry of the court order vacating the IBLA decisions. The subsurface estate of the foregoing lands shall be conveyed to Doyon, Ltd., pursuant to ANCSA. ARRC hereby waives any and all objections, defenses or protests it may have with respect to the validity of Toghoththele's selection of the foregoing lands and relinquishes the license to the foregoing lands it presently holds pursuant to Section 604(b)(1)(B) of ARTA, 45 U.S.C. § 1203(b)(1)(B), effective upon conveyance of such lands to Toghoththele, and agrees that the license may be terminated in the same BLM decision approving conveyance of the land to Toghoththele. ARRC shall receive a conveyance pursuant to section 604 of the Alaska Railroad Transfer Act of 1982 of the other rail properties and right-of-way selected by Toghoththele. Following receipt of a conveyance of these lands, ARRC shall deliver to Toghoththele a 50 foot-wide road easement granting access rights to the parcel described in the first sentence of this paragraph. Although more fully described in the easement document, the easement will begin at a point just west of the railroad right-of-way at the 10th Street Crossing and proceed within the proposed right-of-way for Tokchaket Road to the Toghoththele parcel described above. Toghoththele shall have responsibility for the safe construction, maintenance, and operation of the road easement. The easement will be subsumed and extinguished by the development of a perpetual public road access to the Toghoththele parcel.

(b) Toghoththele relinquishes and forever disclaims its selection of rail properties of the Alaska Railroad other than those identified in the foregoing subparagraph 12(a). If necessary or useful to facilitate the processing of ARRC's conveyances under ARTA, Toghoththele, upon request by ARRC or the Department of the

Interior, shall file with the Bureau of Land Management a document or documents confirming the relinquishment of its selections of such rail properties.

(c) In order to permit such lands to be developed for industrial purposes consistent with development of a nearby railroad shipping yard, ARRC shall cooperate and work with Toghoththele in the establishment of a separate track mechanism and siding track, provided that Toghoththele shall bear all costs for the planning, engineering, and construction of such trackage, provided further that in consultation with ARRC and Nenana Toghoththele shall dedicate an eighteen (18) foot wide easement for development of a railroad industry track across the lands described in Attachment A hereto at a mutually agreeable location which will best serve such lands and adjoining industrial subdivision.

13. Toghoththele shall immediately upon execution of this Agreement and issuance of the Court's order as specified in Paragraph 7, reconvey by quitclaim deed to Nenana (as set forth in Attachment E) the surface estate in the following properties, provided that nothing herein shall be construed to require the reconveyance to Nenana of any lands or interests therein which have not previously been conveyed to Toghoththele pursuant to ANCSA:

(a) the existing Nenana cemetery, described as U.S. Survey 1150 (containing approximately 5.40 acres), and Lot 3, Section 35, T. 4S, R. 8W (containing approximately 36.17 acres), provided that the reconveyance deed shall contain a covenant prohibiting use in a manner that could foreseeably cause the Nenana River to erode such property;

(b) the NE1/4SW1/4, Sec. 11, T. 4S, R. 8W, Fairbanks Meridian, containing 4 acres for a sanitary landfill cover material source, provided that the conveyance of these

lands shall contain a covenant stating that in the event Nenana ceases to use the tract as a sanitary landfill cover material site as part of Nenana's operation of the sanitary landfill for a period longer than 2 (two) years, this tract shall immediately revert to Toghotthele.

(c) the SE1/4 Sec. 25, T. 4S, R. 8W, Fairbanks Meridian, containing 160 acres for airport expansion, provided that the conveyance of these lands shall contain a covenant prohibiting their subdivision or their use for any purpose other than airport expansion purposes, and providing that upon breach of the covenant the lands no longer so used for airport expansion purposes shall revert to Toghotthele.

14. Within 30 days after conveyance to Toghotthele, pursuant to Paragraph 9, of any land that includes any or all of the properties described in this paragraph, Toghotthele shall by quit claim deed (as set forth in Attachment F) reconvey to Nenana the surface estate to the following properties, provided that nothing herein shall be construed to require the reconveyance to Nenana of any lands or interests therein which are not first conveyed by the Secretary to Toghotthele pursuant to ANCSA.

(a) U.S. Survey 1127, E1/2, Lot 1, Block 15, subject to the existing water treatment facility right of way (containing .43 acres for expansion of the City's water treatment plant facilities);

(b) U.S. Survey 1127, Block 39, Lots 4-6, totalling approximately 0.48 acres;

(c) U.S. Survey 1127, Block 40, Lots 10-14 and 16, totalling approximately 0.94 acres;

(d) U.S. Survey 1127, Block 42, Lots 1-18, totalling approximately 2.48 acres;

(e) U.S. Survey 1127, Block 43, Lots 1-16, totalling approximately 2.20 acres;

(f) A 10 acre parcel, as more particularly described in Attachment B, located within Sec. 12, T. 4 S, R. 8 W, Fairbanks Meridian, for use by Nenana for municipal television satellite and communication facilities only.

(g) A non-transferable, non-assignable land use permit (more particularly described as Attachment C) to run the annual "River Daze" ten kilometer race, provided that Nenana shall assume all liability arising from the race and shall defend and hold Toghoththele harmless should Toghoththele be sued in connection with the race, and provided further that Toghoththele reserves the right to develop the lands on which the easement is granted and require Nenana to alter the course of the race, and provided further that the easement is to be used for no other purpose than the conduct of the annual River Daze ten kilometer race.

15. Toghoththele hereby assigns to Nenana all of its obligations, rights and interests in claims which may be made under Sections 14(c)(1) or 14(c)(2) of ANCSA pertaining to the lands described in Paragraphs 13 and 14(a)-(g), including the obligation to determine the validity of such claims and the obligations to convey lands to successful claimants. Nenana agrees to undertake all obligations otherwise imposed by law upon Toghoththele by application of Sections 14(c)(1) and 14(c)(2) of ANCSA to such lands. Nenana hereby agrees to defend, indemnify and hold Toghoththele harmless (1) in any action

challenging the validity of this assignment; (2) in any action asserting claims under Sections 14(c)(1) or 14(c)(2) of ANCSA to said lands (including any adverse judgment which may be rendered against Toghoththele in such action); (3) for any liability which may arise out of the application of Sections 14(c)(1) or 14(c)(2) of ANCSA to said lands; and (4) for any other costs or expenses (including attorneys' fees) incurred by Toghoththele arising out of Section 14(c)(1) claims or Section 14(c)(2) claims to said lands.

16. Toghoththele shall remove from the public land records the lis pendens filed with respect to lands owned by the City of Nenana within that area known as the St. Marks Addition (as provided in Attachment G), and Toghoththele hereby forever waives any and all claims challenging the validity of Nenana's title to lands situated therein and previously conveyed to Nenana by the Secretary, through the Townsite Trustee, under authority of the Alaska Native Townsite Act.

17. Toghoththele shall not object to any agreement which Nenana and Doyon, ltd. may negotiate over the extraction of subsurface interests owned by Doyon within the NE1/4 SW1/4 Sec. 11 T. 4S, R. 8W, Fairbanks Meridian, provided Nenana and Toghoththele have previously negotiated an acceptable agreement for access and use of the surface estate in such lands owned by or to be conveyed to Toghoththele.

17A. Toghoththele hereby forever waives any and all claims it may have against the United States or Nenana challenging the validity of title to those lands conveyed to Nenana pursuant to Pub. L. No. 96-55.

18. Nenana hereby forever waives, and releases Toghoththele, its successors in interest and assigns, and the United States from all claims it may have under

Section 14(c)(3) of ANCSA, it being Nenana's intent to accept the provisions of this Agreement as being in full settlement and satisfaction of any and all claims it may have under Section 14(c)(3). Nenana is hereby forever barred from asserting any claims of any nature whatsoever against Toghothele under Section 14(c)(3) of ANCSA.

19. This Agreement shall finally dispose of this litigation, each party to bear its own costs and attorneys' fees.

20. In the event any party fails to comply with any provision of this Agreement, the aggrieved party may move the Court for appropriate relief, provided that the sole remedy against the United States shall be reinstatement of this action.

Respectfully submitted,

June 14, 1991 _____

Lloyd Benton Miller
Donald J. Simon
Counsel for Plaintiff

July 5, 1991 _____

Edward Pasarelli
Stuart Schoenburg
Counsel for Defendant
Secretary of the Interior

June 17, 1991 _____

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