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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NINILCHIK NATIVES ASSOCIATION, INC.,

Plaintiff,

vs.

COOK INLET REGION, INC.,

Defendant.

Case No. 3:10-CV-00075-JWS

REPLY IN SUPPORT OF MOTION FOR ORDER TO JOIN PARTIES OR FOR DISMISSAL OF CASE (FRCP 12 and 19)

I. Introduction

Although Ninilchik Natives Association, Inc. ("Ninilchik") concedes that there are numerous agreements among the Village Corporations that impact each village's ANCSA entitlements, Ninilchik argues that the other five Village Corporations are not indispensable parties to this case because (1) the other Village Corporations have no legally cognizable interest in the lands Ninilchik demands to fulfill its 12(a) entitlement because Ninilchik's right to those lands under the 9th Circuit's *Chickaloon*[1] case is clear; and (2) the Village Corporations have no legally cognizable interest to such lands under 12(b) of ANCSA because "CIRI appears to have broad and unreviewable power over

[1] *See Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972 (9th Cir. 2004).

what land is available for the Villages as section 12(b) land. *See* 43 U.S.C. § 1611(b)." Opposition at 3. Thus, according to Ninilchik, the Village Corporations only have a right to make selections under section 12(a) of ANCSA, not section 12(b), and because only Ninilchik's selections under section 12(a) remain outstanding, the selection rights of the other Village Corporations are not impacted. Ninilchik's argument is based on several fallacies. First, Ninilchik overstates the 9th Circuit's decision in *Chickaloon.* That decision does not dictate which lands Ninilchik should receive, or what process should be followed in fulfilling Ninichik's 12(a) entitlement. Second, Ninilchik overstates CIRI's role in deciding the Village Corporations' 12(b) entitlements under 43 U.S.C. § 1611(b) by taking that statute out of context and ignoring other relevant laws and agreements governing the Village Corporations' 12(b) entitlements. As CIRI has tried to make perfectly clear, there are numerous agreements, statutes (including amendments to ANCSA), and administrative decisions that are relevant to this complex case and govern the land disputes among the Village Corporations. The other Five Village Corporations have a legally protected interest in the outcome of this suit, and are indispensable parties that Ninilchik must add to pursue its claims.

II. Ninilchik Must Join the other Five Village Corporations Because They Have a Legally Protected Interest in the Outcome of this Case.

Federal Rule of Civil Procedure 12(b)(7) permits a party to challenge by pre-answer motion the complaint's failure to join a necessary party under Rule 19. Rule 19(a) provides that an absent party is necessary and must "[b]e [j]oined if [f]easible" in any of the following three circumstances: (1) "in that person's absence, the court cannot accord complete relief among existing parties," (2) "disposing of the action in the

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person's absence may . . . as a practical matter impair or impede the person's ability to protect [the person's] interest" that relates to "the subject of the action," and (3) "disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." The intent of compulsory joinder under Rule 19(a) is "to protect a party's right to be heard and to participate in adjudication of a claimed interest." *Republic of the Philippines v. U.S. Dist. Court for the Dist. of Haw.*, 309 F.3d 1143, 1152 (9th Cir. 2002). As described in the motion, the Five Village Corporations have a legally protected interest in the lands claimed by Ninilchik in that these lands would be available for the Village Corporations' 12(b) entitlement selections if Ninilchik does not win its claims.

A. Ninilchik's "rights" to the lands it demands is not so clear under *Chickaloon* that the other Five Village Corporations have no interest in this case.

Ninilchik's first argument is that its right to make new section 12(a) land selections as it did in 2008 is so clear under *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972 (9th Cir. 2004), that none of the other Five Village Corporations have a legally protected interest in those lands for the Village Corporations' section 12(b) entitlements. Contrary to Ninilchik's argument, what lands Ninilchik would receive in lieu of its original selections was not at issue in *Chickaloon*, and that case does not control here.

The Village Corporations originally made their 12(a) land selections in 1974. After the federal government determined "Appendix C" lands would not be available for conveyance, CIRI and the Village Corporations challenged the federal government's

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decision in federal court, and that case resulted in the Ninth Circuit's 2004 decision in *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972 (9th Cir. 2004). The Ninth Circuit based its decision on its interpretation of the Deficiency Agreement between CIRI and the federal government. Ninilchik had argued in that case that regardless of the proper interpretation of the Deficiency Agreement, it should receive its Appendix C selections due to its underselection of Appendix A lands. The Ninth Circuit rejected this argument, and held that "[b]ecause there are Appendix A lands available, it [Ninilchik] cannot resort to Appendix C and must fulfill its section 12(a) entitlements from Appendix A land not subject to other Villages' section 12(a) selections." *Chickaloon-Moose*, 360 F.3d at 984. The Ninth Circuit, however, did not hold that Ninilchik had a right to reselect lands twenty-four years after the original selection process.[2] Indeed, the lands CIRI recently attempted to convey to Ninilchik in satisfaction of its 12(a) entitlement were lands "from Appendix A land not subject to other Villages section 12(a) selections." If anything, the Ninth Circuit's decision supports CIRI's decision to fulfill Ninilchik's 12(a) entitlement from land it originally selected in the 1974 alternative rounds selections that did not become the operative rounds used. *See Chickaloon-Moose*, 360 F.3d at 984 n.5.[3]

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[2] If *Chickaloon* had so stated, CIRI expects Ninilchik would have immediately reselected lands in 2004 after that decision issued, instead of waiting until 2008. Rather, Ninilchik asserted for the first time in this 2010 case that the basis of its selection right was the 2004 *Chickaloon* decision. Ninilchik did not make this argument in 2008 when it attempted to reselect lands. It did not cite the *Chickaloon* decision for the basis of a right to reselect lands in CIRI's 2009 Case, which this Court dismissed on Ninilchik's motion.

[3] Notably, Judge Singleton's decision in *Chickaloon*, which discussed this matter in greater detail, expressly suggested that Ninilchik's 12(a) selections "may be satisfied" from Ninilchik's "selections in Appendix A, chosen under Methods A, C and D, that are not in conflict with another village's selections." Findings of Fact and Conclusions of Law, *Chickaloon-Moose Creek Native Ass'n, et al. v. Norton*, Case No. A97-0439 CV

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Ninilchik's right to the lands it attempted to reselect in 2008 is not so clear under *Chickaloon* that the other Five Village Corporations have no legally protected interest in this case and should not be heard on this issue.

B. The Village Corporations have a legally protected interest in this case due to their section 12(b) entitlement.

The second part of Ninilchik's strategy is to minimize the Village Corporation's interests in the lands Ninilchik desires. For the first time in thirty years, Ninilchik now takes the position that the Village Corporations have no rights to select lands to satisfy their section 12(b) entitlements. In order to argue that the other Five Village Corporations have no legally protected interest as part of their 12(b) entitlement in the valuable lands Ninilchik desires, Ninilchik argues that CIRI has complete discretion under 43 U.S.C. § 1611(b) to dictate which lands each Village Corporation will receive, and Ninilchik even goes so far as to suggest that CIRI may keep the land for itself. *See* Opposition at 3, 6-8 ("Furthermore, under ANCSA, if CIRI is not required by the court to convey the land to Ninilchik as a section 12(a) selection, as Ninilchik has asked, CIRI may choose to keep the land for itself. Under section 12(b) of ANCSA, CIRI appears to have broad and unreviewable power over what land is available for the Villages as section 12(b) land."). Ninilchik misreads section 12(b), and ignores other controlling legal authority and agreements.

Section 12(b) of ANCSA, codified at 43 U.S.C. § 1611(b), provides:

(JKS), entered August 17, 2001. Nothing in the Ninth Circuit's Opinion rejects or overrules the trial court's reasoning in this regard and, indeed, the Ninth Circuit's language (which also notes the "availability" of lands in the "alternative rounds") is entirely consistent with it.

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> The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) of this section shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall, not later than October 1, 2005, reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs, and population. The action of the Secretary or the Corporation shall not be subject to judicial review. Each Village Corporation shall select the acreage allocated to it from the lands withdrawn by section 1610 (a) of this title.

43 U.S.C. § 1611(b) (emphasis added). Clearly, the underlying premise of Section 12(b) is that the Regional Corporations allocate acreage amounts to the Village Corporations, and the Village Corporations then themselves select which lands they desire.

The Terms and Conditions Agreement between CIRI and the federal government, dated August 31, 1976, and Public Law 94-204, which was enacted to give effect to that agreement, altered somewhat the effect of 12(b) as it relates to CIRI and the Village Corporations. For example, Section VII A of the Terms and Conditions designates specific areas from which 12(b) lands will be chosen:

> In fulfillment of its obligation to equitably reallocate acreage among villages pursuant to Section 12(b) of ANCSA, CIRI shall allocate Section 12(b) selections to the following areas:
>
> (1) Four and one-half townships in the Talkeetna Mountain withdrawal, provided that such selections shall be compact and contiguous to 12(a) selections in said withdrawals and 12(a) overselections shall be selected first;
>
> (2) All lands that will not otherwise be conveyed to the villages under 12(a) from withdrawals on the Iniskin Peninsula;
>
> (3) To the extent necessary to fulfill any remaining 12(b) entitlement lands within the following: [legal descriptions omitted]

Terms and Conditions, ¶ VII (emphasis added).

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Moreover, PL. 94-204 amends section 12(b) to clarify that the selections within these areas would still be made by the Village Corporations themselves:

> Village Corporations within the Cook Inlet Region shall have until December 18, 1976, to file selections under section 12(b) of the Settlement Act [section 1611(b) of this title], notwithstanding any provision of that Act to the contrary.

Section (h), Pub.L. 94-204, Jan. 2, 1976, 89 Stat. 1145 (emphasis added).

In 1980, the Bureau of Land Management in the Department of the Interior sought legal advice from the Regional Solicitor about the proper procedures to be followed by CIRI in satisfying the Village Corporations' section 12(b) entitlements under 43 U.S.C § 1611(b) and the Terms and Conditions. The Office of the Solicitor opined that CIRI only has the right to allocate acreage under Section 12(b), and that the Village Corporations then have the right to select lands:

> Section VII.A. of the T&C provides that ". . . CIRI shall allocate Section 12(b) selections to the following areas . . ." It is our view that this section should be construed consistently with Section 12(b) of ANCSA itself. Since we construe Section 12(b) to mean that a regional corporation can only assign acreage amounts and it is up to the village corporations to select that acreage from available lands, we conclude that the phrase ". . . CIRI shall allocate Section 12(b) selections to the following areas . . ." should be construed to mean that CIRI can allocate acreage amounts to its village and those villages can select their allocated shares from land available pursuant to Section VII.A. or I.C.(2)(k) of the T&C.
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> * * *
>
> FN. It is understood that these villages have blanket 12(b) selections in these areas and that they will need to prioritize them following CIRI's allocation of acreage entitlements.

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Exhibit 1, Memorandum from the Office of the Regional Solicitor, U.S. Department of the Interior, dated July 21, 1980 (emphasis added).[4] In 1987, CIRI allocated the acreage each Village Corporation would receive. *See* **Exhibit 2**, Planchon letter dated January 15, 1987.

Despite the convenient argument that Ninilchik now makes, it is clear that the Village Corporations, including Ninilchik, have always understood that they have a right to select which lands they will receive as part of their section 12(b) entitlement. After the enactment of ANCSA, but before the enactment of section (h), Pub.L. 94-204 discussed above, the Village Corporations entered into a 12(b) Selection Agreement, attached as **Exhibit 3**, whereby they agreed "to meet and prioritize their 12(b) land selections such that no overlapping conflicts will arise." Ninilchik was a party to this agreement.

As the Department of Interior recognized in the Regional Solicitor's opinion in 1980, the Village Corporations have made blanket selections, but to date they have not agreed to "prioritize" those selections by selecting specific tracts of land to be conveyed in a specific order. The practical effect of the Villages' 12(b) Selection Agreement was to defer to a later date their selection of 12(b) lands. Although the other Five Village Corporations have now indicated a desire to move forward with the 12(b) selections, Ninilchik has taken the position that its 12(a) entitlement issues have to be resolved before the Village Corporations meet and agree to 12(b) entitlement selections. Because the resolution of Ninilchik's 12(a) lands in the manner it demands would clearly impact

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[4] The Ninth Circuit has held that the Department of Interior's interpretations of ANCSA are entitled to deference. *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004).

the pool of lands available to the Village Corporations for 12(b) selection, it seems obvious that the Villages have a legally protected interest in this matter.

Moreover, Ninilchik's argument in this case that the other Village Corporations are not indispensable parties and have no legally protected interest is belied by Ninilchik's own actions. In April 2008, Ninilchik distributed to the Village Corporations and CIRI the "Ninilchik Deficiency Lands Settlement Proposal," asking the Village Corporations to agree to Ninilchik's demand to its new section 12(a) selections and proposing a process to then resolve the 12(b) entitlement selections. *See* **Exhibit 4** at pp. 17-18, 25, 27-28. The Five Village Corporations did not accept Ninilchik's proposal, but the fact Ninilchik felt it should send letters to the other Village Corporations before bringing this case is clear evidence that Ninilchik is aware of the Village Corporations' legitimate interest in its outcome. See Affidavit of Bruce Oskolkoff, filed June 1, 2010 by Ninilchik in support of its opposition.

For Ninilchik to argue now that CIRI has complete discretion in selecting and conveying lands to the Village Corporations in satisfaction of their section 12(b) entitlements is disingenuous at best. Certainly, at a minimum, this Court's resolution of the Village Corporation's entitlement selection rights under section 12(b) is an issue that the other Village Corporations should have an opportunity to address as parties to this case.

In deciding this case, and the rights of Ninilchik and the other Village Corporations to certain lands under sections 12(a) and 12(b) of ANCSA, this Court will be called upon not only to apply the law, but it will need to interpret numerous contracts, including contracts among Ninilchik and the other Five Village Corporations—the 12(a)

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Agreement, the 12(b) Selection Agreement, and the Consent to Conveyance. It should be undisputed that the Village Corporations are indispensable parties to this case. *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir.2000) (holding that where the plaintiff sought to "undo[]" agreements to which a tribe was a party, the tribe "qualifies as a necessary party under . . . Rule 19(a)").

III. CIRI Could Be Exposed to Multiple or Inconsistent Obligations.

If anything is clear it is that the Village Corporations' entitlement issues are complicated and that there is a thirty-year history of lingering issues and disputes, including two Ninth Circuit decisions. The Village Corporations' entitlement issues under ANCSA need to be finally resolved, and the only way final resolution can be achieved in this case is for all of the Village Corporations to be made parties to this case so that all may be bound by its result. Ninilchik, as well as the other Village Corporations, should desire finality. Ninilchik's 12(a) entitlement claim should not be decided separately from a case concerning the Village Corporations' 12(b) entitlement issues. There is only one "pot" of available land, and there are competing demands to it. To achieve a final resolution that does not expose CIRI, the holder of the lands, to multiple judgments or obligations, all of the Village Corporations must be joined as indispensable parties under Federal Civil Rule 19.

IV. Conclusion

To advance its arguments that the other Village Corporations are not indispensable parties, Ninilchik has taken cases and statutes out of context, and misread them as fully

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supporting Ninilchik's rights to certain lands it demands for its section 12(a) entitlement. This is a complicated case, and statutes and cases cannot be read in isolation in deciding the Village Corporations' entitlement rights under ANCSA, or the various agreements among the parties meant to effectuate ANCSA. Ninilchik should not be allowed to pursue its claims without the other five Village Corporations—Chickaloon, Knikatnu, Salamatof, Seldovia, and Tyonek, which are parties to this case. This Court should allow leave for Ninilchik to amend its Complaint and add the other Village Corporations by a date certain. If Ninilchik does not join those other parties by the Court's deadline, CIRI requests that this case be dismissed.

DATED this 18th day of June, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of June, 2010, a true and correct copy of this document was served on:

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