IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF SOUTH NAKNEK, Plaintiff, vs. 0.655 ACRES, more or less, U.S.S. 7545 A-623, Kvichak Recording District, Third Judicial District, State of Alaska, et al., Defendants.	)	No. 3:10-cv-0081-HRH

O R D E R

Motion for Judgment on the Pleadings

The United States of America and the Bureau of Indian Affairs (herein "defendants") move for judgment on the pleadings.[1] The motion is opposed.[2] Oral argument was requested and has been heard.

Facts

Plaintiff, the Native Village of South Naknek, is an unincorporated village in the Bristol Bay Borough of Southwest Alaska.

[1]Docket No. 11.

[2]Docket No. 14.

According to the 2010 census, it has a population of 79 people[3] and an area of 97.5 square miles.[4] Plaintiff is also a Native village recognized by and subject to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(b)(1).

Pursuant to 25 U.S.C. § 357, plaintiff seeks to condemn .655 acres of land for an easement for a sewer line. The property in question "is situated on Lot 2 United [States] Survey No. 7545"[5] and is part of a Native allotment that was conveyed to Lissia J. Anasknok. Anasknok died intestate on December 26, 2001, and her interest in the allotment was inherited by her daughter, Roma Vestal-Reakoff. Vestal-Reakoff is also deceased. The probate of Vestal-Reakoff's estate was commenced, and in a decision dated September 30, 2010, Vestal-Reakoff's four children have been determined to be her heirs. By a separate motion to amend its complaint,[6] plaintiff seeks to join those heirs as defendants.

It is undisputed that the United States does not hold legal title to the subject property. Indeed, in a footnote in their response to plaintiff's second motion to amend, defendants observe that "the United States does not hold an interest in the allotment

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[3]Alaska Community Database Community Information Summaries, http://www.commerce.state.ak.us/dca/commdb/CIS.cfm (last visited April 11, 2011).

[4]Southwest Alaska Municipal Conference, Comprehensive Economic Development Strategy Report 2003-2008, Chpt. 4, Table 4.3.C.

[5]Complaint in Condemnation at 2, ¶ 2, Docket No. 1.

[6]Docket No. 34.

itself[.]"[7] However, in granting the Native allotment to the subject property, the United States reserved a right-of-way for ditches or canals, and reserved oil and gas rights. Based only upon those reservations, defendants contend that plaintiff does not have any authority to bring this condemnation action without the United States' consent. Defendants also contend that, contrary to plaintiff's assertion, AS 09.55.240(a)(10) does not grant eminent domain power to plaintiff.

Discussion

"'A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law.'" Ventress v. Japan Airlines, 603 F.3d 676, 681 (9th Cir. 2010) (quoting Fajardo v. County of L.A., 179 F.3d 698, 699 (9th Cir. 1999)). "If ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, the court may "consider certain materials — documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion [for judgment on the pleadings] into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

[7]Response of the United States and Bureau of Indian Affairs to Second Motion to Amend Complaint at 3, n.2, Docket No. 36.

Here, the court has taken judicial notice of the population and geographical size of plaintiff, which does not require it to convert the instant motion into a motion for summary judgment. However, both defendants and plaintiff also have submitted evidence and the court has heard arguments beyond the pleadings. While defendants' subject matter jurisdiction argument may permit review of evidence beyond the complaint without converting the motion for judgment on the pleadings to a motion for summary judgment, defendants' second argument is that plaintiff's complaint fails to state a claim upon which relief can be granted. Therefore, the court will treat the instant proceedings as a motion for summary judgment; and having so considered defendants' motion, finds that there is no genuine dispute as to any material fact[8] and that the instant motion may be resolved as a matter of law.

The primary jurisdictional basis for plaintiff's complaint is 25 U.S.C. § 357, which provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Defendants argue that there is no jurisdiction to condemn an allotment under 25 U.S.C. § 357 in which the United States holds a pro-

[8]The court recognizes that parties were not aware of nor did they make reference to the 2010 population or the geographical size of the Village of South Naknek. The court seriously doubts there is any basis to dispute that information; however, should defendants disagree, the court will entertain defendants' motion for reconsideration on that subject.

prietary interest, unless the United States had consented to the condemnation.

As an initial matter, defendants contend that contrary to plaintiff's allegations in its complaint, the United States does not hold the property in question in trust nor does it hold legal title to the property. Rather, because the property is part of a Native allotment, defendants contend that full legal title was vested in the applicant subject only to restrictions on alienation and taxation. See Ramona Field, 110 IBLA 367, 370-72 (Sept. 14, 1989). However, the United States did reserve a right-of-way for ditches or canals and oil and gas rights. Because of these reservations, defendants argue[9] that the United States retains a proprietary interest in the property. Because of that proprietary interest, defendants insist that this land cannot be condemned without the United States' consent. Because the United States has not consented, defendants argue that this court lacks subject matter jurisdiction over this matter.

Defendants' argument here is based on United States v. Pend Oreille Pub. Util. Dist. No. 1, 135 F.3d 602 (9th Cir. 1998). There, the court considered whether Indian allotments held in trust could be condemned under 25 U.S.C. § 357. Id. at 613-14. "The United States and the Tribe argue[d] that § 357 was repealed by the Federal Power Act[.]" Id. at 614. The court rejected this argu-

[9]This argument appears to conflict with defendants' position in responding to plaintiff's motion to amend complaint. See footnote 7.

ment because "[t]he continued vitality of § 357 is largely irrelevant to the disposition of this case, because under the circumstances here the statute cannot be used to condemn the lands." Id. The court explained that because "[t]he United States retains a proprietary interest in the allotted lands," "consent of the United States is required before the lands can be condemned." Id. Because the United States had not consented to the condemnation of the allotted land in question, the land could not be condemned. Id.

Defendants argue that the holding of Pend Oreille applies to any allotment land in which the United States holds an interest. Defendants contend that the Pend Oreille court did not define the specific proprietary interest held by the United States when it made the statement that consent of the United States was required before the allotted lands could be condemned. Thus, defendants insist that the holding in Pend Oreille is not limited to only allotments issued in trust and in which fee title is held by the United States, but applies to any land in which the United States holds some interest.

Defendants' argument is unavailing. Pend Oreille involved allotments which were held in fee by the United States, in trust for the individual allottees. The Pend Oreille court cited Minnesota v. United States, 305 U.S. 382, 385 (1939), to support the proposition that "[t]he United States retained a proprietary interest in the allotted lands." Pend Oreille, 135 F.3d at 614. Minnesota also involved allotted lands which the United States

owned in fee and held in trust for the allottees. Minnesota, 305 U.S. at 385. The holding of Pend Oreille is limited to cases involving allotments which are held in fee by the United States, in trust for the individual allottees. It has no application to this case. Here, it is undisputed that the Native allotment in question is not held in trust by the United States, but rather that full title vests in the allottee, subject to reservations and restrictions on alienation and taxation.

As an aside to the legal merits of what is before the court, the above position taken by the United States is troubling. The basis for the foregoing argument is that the United States has not given its consent. Plainly, and if it were legally required, the United States could give its consent. Why the United States would, if its consent were necessary, choose to rely upon rights-of-way for ditches and canals and/or mineral rights as a reason to prevent the construction of a sanitary sewer is a mystery. The court doubts that the United States has ever made use of its rights-of-way for ditches and canals in the Territory of Alaska or the State of Alaska. Surely none are planned for South Naknek. An easement for a sewer is unlikely to interfere in any material way with reserved, subsurface mineral rights. Counsel seemed to say at oral argument that the United States could not consent to plaintiff's condemnation action because of the Pend Oreille case; but that case stands for exactly the opposite proposition: the United States can, where it holds legal title in trust, consent to the condemnation of land which it owns.

Title 25 U.S.C. § 357 expressly affords this court jurisdiction over condemnation proceedings with respect to "[l]ands allotted in severalty to Indians...." That is precisely the action which plaintiff has brought. Plaintiff does not seek to condemn the rights in the allotment in question which the United States has reserved. The court concludes that, as a matter of law, it has jurisdiction for purposes of plaintiff's condemnation action.

Defendants next argue that plaintiff does not have eminent domain authority. Section 357 authorizes an action in condemnation to proceed against an issued allotment in accordance with the law of the state in which it is located. See Nicodemus v. Wash. Water Power Co., 264 F.2d 614, 617 (9th Cir. 1969). Under Alaska law, "[t]he power of eminent domain may only be delegated by statute." AS 09.55.240(g). Plaintiff alleges that it has the power of eminent domain pursuant to AS 09.55.240(a)(10).

AS 09.55.240(a)(10) provides that "the right of eminent domain may be exercised for the following public uses ... sewerage of an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated[.]" (Emphasis supplied.) Defendants argue that AS 09.55.240(a)(10) does not purport to delegate eminent domain authority. Defendants argue that AS 09.55.240(a)(10) only defines one of the public uses for which eminent domain authority, if delegated, may be exercised. Plaintiff argues that case law provides that delegation may be inferred and need not be express and that it can be inferred from

AS 09.55.240(a)(10) that a village, such as plaintiff, has eminent domain power.

The Village Safe Water Act "establish[ed] a program designed to provide safe water and hygienic sewage disposal facilities in villages in the state." AS 46.07.010. "[T]here will be at least one facility for safe water and hygienic sewage disposal in each village. AS 46.10.020. A "village" for purposes of the Act means "an unincorporated community that has between 25 and 600 people residing within a two-mile radius...." AS 46.07.080(2).

Although the Alaska Legislature has set out a goal and program procedure for achieving hygienic sewage facilities in villages and made provision for the "acquisition of real property," AS 46.07.040(c), the Village Safe Water Act does not grant eminent domain powers to villages. However, the State of Alaska intends that small villages such as plaintiff should operate public sewage disposal facilities. The Act expressly provides that "[i]t is the responsibility of the village governing body to maintain and operate the safe water and hygienic sewage disposal facility [once it is completed and transferred]." AS 46.07.050(a).

The Alaska Supreme Court, in Greater Anchorage Area Borough v. 10 Acres (GAAB), 563 P.2d 269, 273 (Alaska 1977), held that inferences in favor of eminent domain power are permissible. The GAAB case involved use of the state declaration of taking statute, AS 09.55.420, a procedure by which the state municipalities may take immediate possession of condemned property. This case does not involve a declaration of taking, but the underlying proposition

of the GAAB case is that the court may properly infer the existence of the power of eminent domain based upon AS 09.55.240(a). In GAAB, the Alaska Supreme Court based its holding on two statutes, "AS 09.55.420, which authorizes a municipality to condemn land, and AS 09.55.240(a)(3), which allows the right of eminent domain to be exercised for public buildings for a borough school district." Id. at 271-72 (footnote omitted).

In GAAB, the thrust of the disagreement between the parties was whether or not the borough should be characterized as a municipality as opposed to a county. Here we have no such disagreement. The question is the more fundamental one of whether Alaska law empowers villages to condemn land. Section 420, to which the Alaska Supreme Court makes reference, does not authorize — that is, empower — anyone to condemn land. Rather, it authorizes the state or a municipality, entities which have eminent domain power, to employ the declaration of taking procedure. It is AS 09.55.240(a) from which the Alaska Supreme Court infers the power to condemn. In discussing that section, the Alaska Supreme Court in GAAB observes that: "[t]he Borough argues persuasively that [AS 09.55.240(a)(3)] would not have any meaning if the Borough were not authorized to take the land required for borough buildings, for what other body would have the authority to condemn land for those buildings?" Id. at 272. The court continues observing with respect to subsection 240(a), "a statute allowing the exercise of eminent domain for public buildings for school districts would be ineffectual unless the Borough, as a school district, were

authorized to condemn the land for such buildings." Id. at 273. Similarly in this case, plaintiff cannot effectively carry out the function which state law expects it to assume – operating sewage disposal facilities – unless it too has the power of eminent domain.

AS 09.55.240(a)(10) provides:

> (a) Except as provided in (d) and (e) of this section, the right of eminent domain may be exercised for the following public uses:
>
> ....
>
> (10) sewerage of an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated, or a subdivision of it, or of a settlement consisting of not less than 10 families[.]

Subsection 240(d) has to do with the exercise of eminent domain power for the purpose of transferring title to another private person for economic development. Plainly, this exception has no application in this case. Subsection 240(e) proscribes the use of eminent domain for purposes of certain recreational facilities and plainly has no application in this case.

AS 09.55.240(g) provides that: "[t]he power of eminent domain may only be delegated by statute." Plaintiff and defendants disagree as to the implications of this amendment to section 240, which became law after the GAAB case. Subsection 240(g) does not alter the holding of GAAB.

First, the plain language of subsection 240(g) says that eminent domain power can only be delegated to some other entity by

state law. The Alaska Supreme Court has held that AS 09.55.240 authorizes the power of eminent domain in favor of a borough; and that same holding has equal application to a village.

Second, the parties disagree over the implication of the legislative history lying behind subsection 240(g). That legislative history provides:

> Legislative Intent and Findings. (a) The Legislature finds that
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> (1) the United States Supreme Court decision in Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L.Ed.2d 439 (2005), demonstrates that an overly expansive application of eminent domain powers can be a threat to the property rights of all private property owners;
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> (2) it is necessary to provide clarification regarding the exercise of eminent domain in the following two situations:
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> (A) the taking of private property if the purpose is to transfer the property to another private person for economic development;
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> (B) the taking of a landowner's personal residence to develop an indoor or outdoor recreational facility or project.
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> (b) In recognizing that many public projects will have economic effects, the legislature intends by this Act not to
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> (1) restrict those public uses already recognized in state law merely because the project may have an associated economic effect; or
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> (2) provide an absolute bar on transfers of land to private entities, but to place restrictions on when such transfers occur.
>
> (c) In this section, "economic development" means development of property for a commercial

> enterprise carried on for profit or to increase tax revenue, tax base, or employment.

2 Session Laws of Alaska (2006), Ch. 84, § 1 (emphasis supplied).

The concern of the Alaska Legislature in adopting subsection 240(g) was the "overly expansive" use of eminent domain powers. The taking of private property for a sewer easement plainly does not fall within this legislative concern. The legislative history reinforces and perhaps clarifies limitations on the power of eminent domain which were already contained in subsections 240(d) and (e), which, as observed above, do not come into play in this case. Most importantly, subsection (b)(1) of the legislative history does not restrict eminent domain power for sewer purposes.

AS 09.55.240(g) thus creates no impediment whatever with respect to the continued viability of GAAB and its holding that the borough (and in this instance, a village) is by inference entitled to exercise the power of eminent domain (for school buildings in the earlier case, and a sewer in this case). The court concludes that plaintiff has eminent domain power for purposes of a sewer easement.

Conclusion

The defendants' motion for judgment on the pleadings is denied.

DATED at Anchorage, Alaska, this 13th day of April, 2011.

s/ H. Russel Holland
United States District Judge