IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

JOHN E. NELSON,

Case No. 3:09-cv-00030-TMB

Plaintiff,

VS.

ARVIQ, INC.,

Defendant.

Granting in Part and Denying in Part Motion to
Dismiss

I. INTRODUCTION

Defendant Arviq, Inc. has a Motion to Dismiss at Docket No. 32. Arviq argues that the Court lacks subject matter jurisdiction over this case because the Plaintiff John Nelson's claims under the Alaska Native Claims Settlement Act ("ANCSA") are not yet ripe for review by this Court. Specifically, Arviq argues that Nelson cannot pursue any judicial remedy until his petition to Arviq under Section 14(c) of ANCSA is ruled upon. For the reasons set forth below, Arviq's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART.

II. BACKGROUND

A. Statutory Background

The United States Congress enacted ANCSA in 1971.¹ ANCSA extinguished the Native people of Alaska's claims to aboriginal land title, in exchange for federal lands and other

¹ 43 U.S.C. §§ 1601-1629(a) (1995).

consideration that were transferred to Alaska Natives.² In order to accomplish this purpose, Congress created regional and village corporations that were intended to receive the lands conveyed.³ The process for selection of land by Native corporations is set forth in Section 12 of ANCSA, codified at 43 U.S.C. 1611.

ANCSA contains a number of provisions "designed to protect the rights of those with existing rights to land conveyed under ANCSA," such as existing leases, homesteads, mining claims, and similar sites. Section 14(c) of ANCSA, codified at 43 U.S.C. § 1613(c), requires the conveyance of lands by the village corporation to individuals on the basis of their occupancy of the lands for a particular purpose, such as a primary place of residence, a primary place of business, or a subsistence campsite. To facilitate the transfer of section 14(c) properties to lawful claimants, the Secretary of the Interior enacted regulations requiring the survey of the lands claimed by the villages. This regulation requires village corporations to file a map delineating its land selections, including tracts that are to be reconveyed to petitioners under section 14(c). The map is then used by the Bureau of Land Management ("BLM") as a "plan of survey."

Although Congress' intent under ANCSA was to quickly convey land to the Native

² Ogle v. Salamatof Native Ass'n, Inc., 906 F. Supp. 1321 (D. Alaska,1995).

 $^{^{3}}$ Id.

⁴ *Ogle* at 1328.

⁵ See 43 U.S.C. §§ 1613(g), 1621(b), 1621(c).

⁶ 43 U.S.C. § 1613(c)(1).

⁷ See 43 C.F.R. § 2650.5-4.

⁸ Id.

corporations, "delays in conveyances have gone on for years," as Arviq notes.⁹ Indeed, Arviq claims that it "is in the minority of Village Corporations" that are "actually proceeding on [their] 14(c) process." Under 43 U.S.C. § 1621(j)(1), the BLM may make an interim conveyance of land to the corporation before the map of boundaries has been finalized. Such interim conveyances give the corporation alienable title to the land.¹¹

As set forth in 43 U.S.C. 1632, "Decisions made by a Village Corporation to reconvey land under section 14(c) of [ANCSA] shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within one year after the date of the filing of the map of boundaries as provided for in regulations promulgated by the Secretary." ¹²

B. Procedural Background

Arviq is an Alaska Native Village Corporation established under ANCSA, owned by the Alaska Native residents of Platinum, Alaska. In the early 1980s, Arviq applied to the Bureau of Land Management for title to 69,120 acres of land around the area of Platinum. The Bureau of Land Management ("BLM") adjudicated the Section 12(a) petition in 1982, granting an interim conveyance of some of the lands selected, pursuant to Section 14(a) of ANCSA and 43 C.F.R. § 2650.7.

On or about September 26, 1983, Plaintiff John Nelson, along with others, submitted an application to Arviq for reconveyance of land under section 14(c)(1) of ANCSA. Arviq has never

⁹ Dkt. 32 at 3 n. 7.

¹⁰ Dkt. 56 at 8.

¹¹ 43 U.S.C. § 1621(j)(1)

¹² 43 U.S.C. 1632(b).

adjudicated the claim. Nelson filed this suit under ANCSA on February 19, 2009, requesting several forms of relief, including: 1) an order declaring Nelson's interest in the land described in his Section 14(c) application; 2) an order requiring Arviq to convey the land to Nelson; 3) damages; and 4) "Such other relief as this Court deems just." ¹³

At the time the suit was filed, Arviq still had not ruled on Nelson's 14(c) application, despite the passage of over 25 years since it was filed. Arviq, however, says that it "recently received patent to its ANCSA 12(a) lands, has established its 14(c) policies and is ready to adjudicate Mr. Nelson's claim." Arviq also asserts that "after all 14(c) applications have been adjudicated by Arviq, Arviq will file its map of boundaries with the BLM." 15

At Docket No. 28, Nelson has filed a "Motion for Settlement Order", in which he argues that Arviq had previously agreed to the terms of a settlement, but has reneged on that agreement by refusing to sign the settlement papers.

III. LEGAL STANDARD

A Rule 12(b)(1) motion may raise a facial or factual challenge to the court's subject matter jurisdiction. A facial challenge is directed at the legal sufficiency of a claim. The

¹³ Dkt. 1 at 6.

¹⁴ Dkt. 32 at 4.

¹⁵ Dkt. 32 at 5.

 $^{^{16}}$ 2 James W. Moore, Moore's Federal Practice, $\$ 12.30[4[at 12-38 (3d ed. 1977) ("Moore").

 $^{^{17}}Id.$

burden of proof is on the party asserting jurisdiction.¹⁸ When assessing a Rule 12(b)(1) facial challenge to the court's subject matter jurisdiction, the non-moving party receives the same protections as those under a Rule 12(b)(6) motion, and the court applies a standard comparable to that used for Rule 12(b)(6) motions.¹⁹ The court "will accept the [non-moving party's] allegations as true, construing them most favorably to the [non-moving party], and will not look beyond the face of the complaint to determine jurisdiction."²⁰ The court will not dismiss a claim under 12(b)(1) unless it appears without any merit.²¹

IV. DISCUSSION

Before ruling on the merits of Arviq's Motion to Dismiss, the Court must first acknowledge Nelson's argument that the Court has jurisdiction to rule on his "Motion for a Settlement Order." Although Nelson's motion was filed prior to the motion to dismiss, the Court cannot rule on his motion so long as the Court's subject matter jurisdiction is in doubt. The issue of a lack of subject matter jurisdiction "may be raised at any time." The Court must address Arviq's jurisdictional arguments before addressing any other requests for substantive relief.

In their briefing, the parties attempted to addressed what on its face should be a simple question: Does this Court have the power to entertain a claim for conveyance of land based on

¹⁸ 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure, § 1340, at 226 (2d ed. 1990) ("Wright").

¹⁹ MOORE, *supra*, § 12.30[4] at 12-38 n12.

²⁰ Moore, § 12.30[4] at 12-38 - 12-39.

²M OORE, § 12.30[4] at 12-38 n.12.

²² Intercontinental Travel Marketing, Inc. v. F.D.I.C., 45 F.3d 1278, 1286 (9th Cir. 1994).

Section 14(c) of ANCSA before the Native corporation has rendered its own administrative decision on the request for conveyance? Arviq argues that the Court does not have that power, citing 43 U.S.C. 1632(b): "Decisions made by a Village Corporation to reconvey land under section 14(c) of [ANCSA] shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within one year after the date of the filing of the map of boundaries as provided for in regulations promulgated by the Secretary." According to Arviq, this means that no action to enforce a right under Section 14(c) may be brought in federal court before the corporation has filed its map of boundaries.

Nelson argues that the provision is not a bar to jurisdiction, but that it is merely a statute of limitations. As Nelson notes, the statute prohibits a 14(c) action in district court one year after the filing of a map of boundaries, but it is silent as to an action initiated *before* the map boundaries is filed. Nelson argues that if a 14(c) petitioner cannot bring an action before the map of boundaries is filed, then a Native corporation could avoid any judicial review by simply ignoring a 14(c) petition. Nelson cites *Wright v. Ahtna, Inc.*, an Alaska Superior Court case in which the court ordered the defendant Native corporation to request lands from the BLM for conveyance to the plaintiffs under § 14(c), after the corporation had failed to act on the plaintiffs' 14(c) claim for many years.²³

Arviq argues that *Wright* was wrongly decided, and that no judicial relief on a 14(c) application may be granted before a final map of boundaries has been filed with the BLM. Nelson argues that, if no such relief were available, "Village corporations could, if they chose, 'wait out' meritorious [14(c)] applicants until they die." and "[c]laimants under Section 14(c)

²³ Wright v. Ahtna, Inc., Alaska Superior Court No. 4FA-03-2538 CI.

would be left with a right without a remedy against such corporations."²⁴ In response, Arviq asserts that "there is nothing in ANCSA that imposes a deadline on a Village Corporation to complete its 14(c) process."²⁵ Indeed, Arviq asserts that "there is no requirement that it file[] its map of boundaries by a date certain, or really, at all."²⁶

The Court agrees with Arviq that Nelson cannot obtain substantive relief under Section 14(c) prior to an adjudication by Arviq and the filing of Arviq's map of boundaries with the BLM. "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Congress has provided 14(c) applicants with a remedy. Through ANCSA and its pertinent regulations, Congress "delegated" to the Native corporations the "initial responsibility to resolve section 14(c) claims. It would be improper for this Court to "imply or create a cause of action on the part of a 14(c) claimant against an ANCSA corporation." If this Court were to hold that substantive relief were available in federal district court prior to the adjudication of a § 14(c) claim by the village corporation, then the administrative review process provided by ANCSA would be superfluous. Section 14(c) applicants could simply use the district court as a court of first resort.

²⁴ Dkt. 55 at 3.

²⁵ Dkt. 56 at 3.

²⁶ Dkt. 56 at 10.

²⁷ Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 588 F.2d 1216, 1221 (9th Cir. 1978) (quoting National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458 (1974)).

²⁸ Ogle v. Salamatof Native Ass'n, Inc., 906 F. Supp. 1321, 1330 (D. Alaska, 1995).

²⁹ *Ogle* at 1332.

However, the Court cannot accept Arviq's contention that it need not adjudicate Nelson's claim or file a map of boundaries "at all." The plain language of ANCSA could not be clearer in requiring village corporations to "convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 [...] as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry." While the timing of the conveyance is not spelled out in the statute, the obligation of a village corporation to convey the land described in § 14(c) is unquestionable. It simply cannot be the case that, because no specific timetable is set forth in the statute, a village corporation may simply ignore its obligation to convey, or to even adjudicate § 14(c) claims.

Under 28 U.S.C. § 1361, the Court has "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."³¹ By virtue of Congress' delegation of authority to adjudicate § 14(c) claims under ANCSA, a village corporation is an "instrument of the federal government" for the purpose of such adjudications. ³² Nelson argues that the Court has mandamus jurisdiction to order Arviq to convey the lands to him. The Court disagrees that any such cause of action exists, for the reasons stated above. But while the Court cannot rule on the merits of Nelson's 14(c) claim, neither can it rule out the availability of some form of mandamus relief. "[I]t is well recognized that a writ of mandamus can be issued to compel a public officer to

³⁰ 43 U.S.C. § 1613(c)(1).

³¹ 28 U.S.C. § 1361.

³² *Ogle* at 1330.

exercise the judgment or discretion which is reposed in him by law."³³ Such relief may be appropriate in the "deplorable situation in which the responsible federal officials have failed to rule one way or the other" on the plaintiff's claim for relief.³⁴ As the U.S. Supreme Court has said, "A writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting."³⁵ Thus, Nelson may be entitled to mandamus relief ordering Arviq to take action on his § 14(c) petition.

Arviq contends that Nelson did not specifically request mandamus relief in his

Complaint, and that therefore his contention that he is entitled to mandamus is insufficient to
defeat the motion to dismiss. But Nelson did request "[s]uch other relief as this Court deems
just."³⁶ If the facts alleged in the Complaint support a request for mandamus, then the Court will
not dismiss the Complaint for failure to request that specific form of relief. Moreover, his request
that the Court order Arviq to convey the land implicitly includes an order that Arviq take action
on his § 14(c) petition. The Court does not take the position that Nelson is entitled to mandamus
relief, but the facts set forth in his complaint can support such a request for relief, sufficient to
defeat a motion to dismiss.

Arviq claims that Nelson cannot seek relief under ANCSA because the statute's intended beneficiaries were the Native corporations. But § 14(c) of ANCSA was plainly "designed to

³³ Rothgeb v. Statts, 56 F.R.D. 559 (S.D. Ohio, 1972).

³⁴ *Id*.

³⁵ Ex parte Burtis, 103 U.S. 238 at *1, 1880 WL 18902 (U.S.,1880)

³⁶ Dkt. 1 at 6.

protect the rights of those with existing rights to land conveyed under ANCSA[.]"³⁷ Arviq also argues that all other potential claimants to Arviq's land under § 14(c) are necessary and indispensable parties to this action, and Nelson's failure to join them is fatal. If the Court had jurisdiction to rule on the substance of Nelson's § 14(c) petition and order a particular disposition of land title, then Arviq would be able to make such an argument. But if the only possible relief for Nelson is to order Arviq to take action on his petition, then no other parties are necessary.

Nor does Arviq's promise that it is "ready to adjudicate Mr. Nelson's claim" necessarily render the action moot. Given Arviq's stated position that it has no obligation to ever file a final map of boundaries with the BLM, it is hardly unreasonable for Nelson to wonder whether "Arviq may once again lose its motivation" to rule on his § 14(c) claim once the Court has dismissed this case.

V. CONCLUSION

While the Court lacks jurisdiction to rule on the merits of Nelson's § 14(c) claim, the facts alleged by Nelson are sufficient to support a request for mandamus relief requiring Arviq to rule on his § 14(c) claim. Although Nelson has not specifically requested this form of relief, that is a defect which he may correct by way of amendment. In so ruling, the Court does not take the position as to whether Nelson is in fact entitled to such relief, nor the form which such relief might take. But the Court cannot adopt Arviq's assertion that an Alaska Native Village corporation may refrain from ruling on a § 14(c) petition in perpetuity, without recourse in the federal courts. For the foregoing reasons, Arviq's Motion to Dismiss at Docket No. 32 is

³⁷ *Ogle* at 1328.

³⁸ Dkt. 32 at 4.

GRANTED with regard to all of Nelson's requests for substantive relief under § 14(c) of ANCSA, but **DENIED** with regard to a request for procedural mandamus relief as described above.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 27th day of April, 2011.

/s/ Timothy Burgess TIMOTHY M. BURGESS U.S. DISTRICT JUDGE