

SELDOVIA NATIVE ASSOCIATION

IBLA 2001 -141

Decided May 12, 2004

Appeal from a declaratory letter issued by the State Director, Alaska State Office, Bureau of Land Management, stating that easements reserved, AA-6701-EE, were open to all forms of reasonable public use for access to public lands.

Appeal dismissed.

1. Administrative Procedure: Administrative Review--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Decision to Reserve--Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal

Jurisdiction of the Board to consider an appeal is governed by Departmental appeal regulations at 43 CFR Part 4. The failure to file an appeal within 30 days of receipt of a decision reserving a public access easement under section 17(b) of the Alaska Native Claims Settlement Act requires dismissal of an appeal of that decision. Once a party has had an opportunity to challenge such a decision, further consideration of the issue in a subsequent appeal is barred by administrative finality.

2. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

Standing to appeal to the Board under the appeal regulations at 43 CFR 4.410 requires that a party to the case be adversely affected by a decision of the authorized officer. When any adverse impact is contingent upon

some future authorization which is uncertain, an appeal is properly dismissed as premature.

APPEARANCES: Donald Craig Mitchell, Esq., Anchorage, Alaska, for Seldovia Native Association; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

Seldovia Native Association (SNA) is the holder of title to certain lands near Seldovia, Alaska, contained in Native village selections (AA-6701-B and AA-6701-D), which were conveyed by the Department of the Interior pursuant to section 12 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611 (2000). The lands were approved for Interim Conveyance (IC) by decision of the Alaska State Office, Bureau of Land Management (BLM), in a decision dated October 9, 1975. The term IC is defined under the relevant regulation as follows:

Interim conveyance as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land.

43 CFR 2650.0-5(h). The lands were subsequently conveyed in IC-016 which was signed by BLM on October 17, 1975. Both the approval decision and the IC expressly provided that the conveyance was subject to the reservation of a public easement designated pursuant to section 17(b)(3) of ANCSA, Pub. L. 92-203, § 16, 85 Stat. 705 (formerly codified at 43 U.S.C. § 1616(b)(3)), in the form of “[a] 25-foot trail easement for the existing trail from the village of Seldovia to Seldovia Lake.”

Over the years since conveyance, the scope of this reserved easement has become controversial. Especially vexing is the question of whether the trail easement includes the right of access using motorized all terrain vehicles (ATV’s). In a letter to BLM, dated November 16, 2000, counsel for SNA set forth the basis for his legal argument that the easement does not encompass ATV access. The letter requested that BLM resolve the controversy by announcing that use of the 25-foot trail easement is restricted to foot traffic and snow machines, excluding ATV’s. Further, counsel asserted the easement is unsafe for snow machine use and urged BLM to close the easement to that use.

In a letter dated December 21, 2000, BLM responded to SNA expressing its disagreement with the assertion that the easements at issue are “limited to foot traffic and snow machine use,” finding that in the absence of express limitations or a clear intent to limit the reservations in that manner, the “easements were open to all forms of reasonable public use for access to public lands.” Departmental policy at the time of conveyance was not to limit section 17(b) easements to particular uses, BLM explained. Further, BLM pointed out that the confirmatory patent of the land involved, issued on September 14, 1993, listed specific uses allowed on the easement consistent with the currently applicable regulation at 43 CFR 2650.4-7.<sup>1/</sup>

An appeal from the BLM letter was filed by SNA. In its statement of reasons (SOR) for appeal, SNA points out that at the time the IC was issued in 1975 the relevant regulation, 43 CFR 2650.4-7 (1975), did not specify the uses intended to be authorized by easements of varying widths, but that a brochure distributed by BLM indicated that a 50-foot-wide easement, rather than a 25-foot-wide easement, would be reserved for ATV travel. (SOR at 10, Ex. A, Attachment 4.) Because the relevant regulation at the time of the IC, 43 CFR 2650.4-7 (1975), required that a reserved public easement be specific as to use and corridor location and size, SNA argues the failure to specify the use in the reservation precludes any use of the reserved easement. (SOR at 17-18.) Appellant also contends BLM should be estopped to deny that use of the easement is limited to foot traffic and snow machine use in light of the information published in the BLM brochure. *Id.* at 19-22.

In its Answer, BLM contends that at the time of the BLM decision approving the IC and the issuance of the IC, Departmental policy under the regulation at 43 CFR 2650.4-7 (1975) was to specify easement use through generally accepted terminology such as “trail or road” rather than listing present or prospective uses as either permitted or prohibited uses of the easement. (Answer at 3, citing a Memorandum from the Assistant Secretary, Program Development and Budget (Feb. 24, 1975), and Secretarial Order 2982 (Feb. 5, 1976)). Moving to dismiss the appeal as untimely, BLM asserts the decision not to limit the easement to foot or snow machine traffic was made at the time of the October 9, 1975, decision approving the IC and the October 17, 1975, IC itself which is subject to the reservation of the 25-foot trail easement. (Answer at 4.) Further, BLM notes that the confirmatory patent issued to SNA in 1993 specifically provided that uses allowed on a 25-foot wide trail easement include ATV traffic. *Id.* at 4-5. Thus, BLM contends that this is an appeal of the IC itself and that the Board lacks jurisdiction over this appeal because it is not filed within 30 days of the adverse decision and because the

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<sup>1/</sup> Among the uses specified in the confirmatory patent for a 25-foot trail easement is travel by two- and three-wheel vehicles and small ATV's less than 3,000 pounds. *See* 43 CFR 2650.4-7(b)(2)(i).

letter of December 21, 2000, itself did not adversely affect SNA. Alternatively, on the merits of the issue, BLM asserts that SNA errs in its contention that ATV use is precluded under the reserved easement. Because trail easements were reserved without any limitations as to use in the conveyance document (IC), BLM argues that the general Federal land management authority applies to the easements and thus use of 25-foot-wide trail easements by ATV's, as provided for in subsequently promulgated regulations at 43 CFR 2650.4-7(b)(2)(i), is well within its regulatory authority. *Id.* at 8. Additionally, BLM contends that the IC did not violate the regulations in effect in 1975 by identifying generic use of the easement as a trail rather than specifying authorized and prohibited types of trail use. *Id.*

Pursuant to section 12 of ANCSA, as amended, 43 U.S.C. § 1611 (2000), SNA filed land selection applications that included the lands in Seldovia Valley. Congress provided that, prior to the conveyance of title to such lands, the Federal-State Land Use Planning Commission for Alaska shall identify those easements which are reasonably necessary in order to “guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks and \* \* \* other public uses \* \* \*.” 43 U.S.C. § 1616(b)(1) (1976).<sup>2/</sup> Prior to issuance of a patent to lands within a Native village selection, Congress directed the Secretary to consult with the Commission and to “reserve such public easements as he determines are necessary.” *Id.* To implement these ANCSA provisions, Departmental regulation provided that “[p]rior to reserving any public easements under section 17(b) of [ANCSA], the concerned village and regional corporation shall be afforded notice and opportunity for submission of views” and that “[a] public easement shall be reserved only if it is specific as to use and corridor location and size \* \* \*.” 43 CFR 2650.4-7 (1975).

As noted in the BLM letter which SNA has appealed, the policy of the Department at the time of the IC was not to limit section 17(b) public access easements by listing specific uses which are permitted and prohibited in the conveyance document. *See* Memorandum of February 24, 1975, to Assistant Secretary--Land and Water Resources from Assistant Secretary--Program Development and Budget; Chairman, Alaska Task Force. Rather, uses were identified “through commonly accepted terminology, i.e., trail or road.” *Id.* at 2. In announcing this policy, the Assistant Secretary declined to adopt a suggestion in a November 6, 1974, letter from the Co-Chairmen of the Federal-State Land Use Planning Commission for Alaska that the Department “detail the uses which will be permitted and prohibited” on an easement. The policy announced by the Assistant

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<sup>2/</sup> Congress provided that the Commission was to cease effective June 30, 1979. Consequently, subsections (a) and (b) of 43 U.S.C. § 1616, relating to the procedures, duties, and powers of the Commission, were omitted from later editions of the U.S. Code.

Secretary was subsequently promulgated as Secretarial Order No. 2982. 41 FR 6295 (Feb. 12, 1976).<sup>3/</sup>

On August 18, 1975, the Planning Commission recommended that BLM reserve “a trail easement of 25 feet” along the existing trail from Seldovia to Seldovia Lake (through Seldovia Valley) and two spur trails. (SOR at Ex. A, Attachment 8 (Recommendation Letter of August 18, 1975, Attachment A at 4).) In memoranda addressed to the Planning Commission, dated May 20 and May 29, 1974, SNA had recommended that a road be built from Seldovia to Seldovia Lake. (BLM Answer at Ex. 4.) By decision dated October 9, 1975, BLM approved conveyance of lands selected by SNA, including parcels in T. 8 S., R. 15 W. and T. 9 S., R. 14 W., Seward Meridian (Seldovia Valley), subject to the 25-foot-wide trail easement for an existing trail from the village of Seldovia to Seldovia Lake. (BLM Answer, Ex. 3, at 4.)

Thereafter, IC-016 for the lands in those two townships was issued on October 17, 1975, reserving in pertinent part:

4. The public easements designated pursuant to section 17(b)(3) of the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, 708, 43 U.S.C. 1616(b)(3), upon conditions of use prescribed by 43 CFR 2650.4-7, and identified as follows:
  - a. A 25-foot trail easement for the existing trail from the village of Seldovia to Seldovia Lake. Also included are spur trails to the coastline easement and the campsite (D9-28) at the mouth of Seldovia River and two proposed spur trails to provide access to public lands. Subject easements (P-4, S-3) are described in easement case file AA-9791.

(BLM Answer, Ex. 2, IC-16 at 2.) By letter dated October 21, 1975, SNA acknowledged receipt of the IC-016 conveyance and expressed its intent to have it recorded.

Subsequently, BLM issued a decision on July 19, 1993, notifying SNA that surveys of the lands at issue had been completed and that BLM intended to issue patents to the lands described in the IC. Attached to the notice was a “draft” of the

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<sup>3/</sup> Revised regulations promulgated in 1978 are more specific regarding delineation of uses and relate uses to the width of the easement: “The width of a trail easement shall be no more than 25 feet if the uses to be accommodated are for travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)” 43 CFR 2650.4-7(b)(2)(i).

patent to be issued to SNA. With respect to easements, the draft patent provided under its exceptions and reservations provision:

Pursuant to Sec. 17(b) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(e) and 1621(j), the following public easements, referenced by easement identification AA-6701-EE, is reserved to the United States. These easements are subject to applicable Federal, State, or Municipal Corporation regulation. The following is a listing of uses allowed for these types of easements. Any uses which are not specifically listed are prohibited.

25 Foot Trail - The uses allowed on a twenty-five (25) foot wide trail easement are: travel by foot, dogsleds, animals, snowmobiles, two- and three- wheel vehicles, and small all-terrain vehicles (ATV's) (less than 3,000 lbs. gross vehicle weight (GVW)).

The 25-foot easements across SNA lands in Seldovia Valley are listed in the draft patent as EIN 19 C5, EIN 3 S, EIN 19a C5, EIN 3a S, and EIN 8 S. A final patent (50-93-0522) was issued on September 14, 1993, without change to these easements or the listed uses. Patent was delivered to SNA by certified mail. Within days of issuance, BLM discovered a defect in the description of EIN 8 S, not involved in this appeal, stating that it went "southeasterly" to public lands when it should have stated "southwesterly."<sup>4/</sup>

Since the time of the IC, considerable controversy has surfaced regarding potential use of the trail easement, as noted previously. On April 11, 1992, the Board of Directors, SNA, issued Resolution 92-4, stating: "[T]hat all public trail easements and uses on [SNA] land conveyed according to [ANCSA] shall be by traditional use at time of conveyance, and shall not be expanded to include any two or three-wheeled all-terrain vehicles. Such traditional trail use includes foot, snowmachine, dogsled, or animals." (BLM Answer at Ex. 8.) Other parties have expressed strong support for motorized access. See Letter of George Oliveira, Jr., to All Members of the Alaska Legislature, dated August 25, 2000, enclosing supportive Motion of the Seldovia City Council. Since 1997 BLM has "repeatedly encouraged the parties to negotiate a mutually agreeable solution." (Letter of December 4, 2000, from BLM to the Honorable Ted Stevens, United States Senate). The record shows that the State of Alaska wrote a letter to BLM indicating the results of its investigation in the community regarding the support for motorized access on the trail easement and the availability of alternative access to State lands that surround SNA land in the

<sup>4/</sup> BLM Memorandum to File (AA-6701-B) dated Sep. 17, 1993. It appears from a Dec. 23, 1993, letter of Fred H. Elvsaa, President, SNA, that the patent has been returned to BLM for correction.

Seldovia Valley. While the State found both support for and opposition to motorized access, many people in Seldovia made it clear that they cannot reach either the State easements as Seldovia Lake or the State lands surrounding the upper Seldovia Valley without either a very long walk or use of an ATV. (Letter of January 18, 2001, from State of Alaska Department of Natural Resources to BLM at 2.) Noting that “a straightforward application of the law may ultimately result in an unsatisfactory solution for both sides,” the State offered its assistance to negotiate an alternative which provides necessary access to State lands without the adverse environmental impacts feared by many. *Id.* at 2-3.

[1] To the extent SNA is attempting to seek review of the October 1975 decision approving the IC or the terms of the IC or the confirmatory patent, it is untimely. The relevant regulation regarding appeals requires that a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. 43 CFR 4.411(a). It is clear from our precedents that the timely filing of a notice of appeal is required to establish the jurisdiction of the Board to review the decision below and the failure to file the appeal within the time allowed mandates dismissal of the appeal. *Ilean Landis*, 49 IBLA 59, 62-63 (1980); *Lavonne E. Grewell*, 23 IBLA 190 (1976); see *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 264 (1978); *Pressentin v. Seaton*, 284 F.2d 195, 199 (D.C. Cir. 1960). Thus, to the extent that appellant is challenging the October 1975 BLM decision reserving the 25-foot trail easement without excluding ATV use in the present appeal, further consideration of this issue in the context of this appeal is barred by the doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, which dictates that once a party has had an opportunity to obtain administrative review within the Department, the decision may not be reconsidered in subsequent proceedings except upon a showing of compelling legal or equitable reasons. *Gifford H. Allen*, 131 IBLA 195, 202 (1994); *Helit v. Goldfields Mining Corp.*, 113 IBLA 299, 308, 97 I.D. 109, 114 (1990); *Joe N. Johnson*, 103 IBLA 5, 8 (1988).

We find no extraordinary circumstances upon which to waive the doctrine of administrative finality. The easement was specifically reserved for purposes of a trail to access public lands. As noted above, the policy of the Department at the time in reserving section 17(b) easements was to specify usage by category or type of use, e.g., trail, rather than to delineate permitted or prohibited uses. Most compelling, jurisdiction of BLM to alter the terms of the easement reservation was lost when the IC was issued.

Under section 22(j) of ANCSA, as amended, 43 U.S.C. § 1621(j) (2000), the IC was effective to convey title subject to “such conditions and reservations authorized by law as are imposed.” See 43 CFR 2650.0-5(h). Patent itself is issued upon completion of a survey of the lands within the IC. Since the IC is effective to

convey title and, thus, is generally similar to a patent, the Board has held, consistent with well-established precedent, that the Department effectively loses jurisdiction to adjudicate conflicting interests in the lands so conveyed. Stratman v. Leisnoi, Inc., 157 IBLA 302, 311 (2002); Bay View, Inc., 126 IBLA 281, 286 (1993), citing Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897). Thus, to the extent this appeal is construed as an effort to amend the terms of the 25-foot trail easement, it must be dismissed.

Counsel for appellant contends, however, that this case is properly considered an appeal of the December 21, 2000, BLM letter which appellant characterizes as a decision regarding management of the reserved trail easement interpreting the scope of uses permitted by the easement. The relevant regulation regarding easements reserved under section 17(b) of ANCSA provides that public easements are reserved to the United States and are subject to further Federal regulation. 43 CFR 2650.4-7 (d)(4). With respect to management of the easement, we note that the BLM letter indicates that "BLM does not presently intend to clear or improve the easements in question." (BLM Letter of December 21, 2000, at 2.) Appellant points out that the trail is currently used only "to travel to Seldovia Lake on foot because it is physically impossible to travel on the trail using a snow machine, three or four-wheel ATV, or other means of mechanized transportation." (SOR at 9.) Thus, it appears BLM has not made a decision to take action adversely affecting SNA.

[2] Under the relevant regulations governing appeals, subject to certain exceptions, any party to a case adversely affected by a decision of an official of BLM shall have a right of appeal to this Board. 43 CFR 4.410(a). In Nevada Outdoor Recreation Association, 158 IBLA 207 (2003), we recently considered the requirement of a decision adversely affecting appellant:

While standards governing questions of standing to appeal administrative decisions are generally less restrictive than those applied to standing in the courts, the requirement that there be "a decision of an officer" before there can be an appeal is essential. Joe Trow, 119 IBLA 388, 392 (1991). The "decision" referred to by the regulation has been interpreted to mean that some action affecting individuals having interests in the public lands is either authorized or prohibited. Id., citing California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977) (finding that users of the California desert had standing to appeal closure of BLM lands to vehicular use); Colorado Open Space Council, 109 IBLA 274 (1989) (holding that organizations of recreational users protesting suspension of an oil and gas well drilling requirement lacked standing to appeal because the effect of BLM's suspension order on their rights as users of the public lands was too speculative)

158 IBLA at 209. It does not appear from the record that BLM has made a decision to authorize improvement of the reserved easement which would be required to facilitate ATV access. When no decision has been made and an adverse impact on a party is contingent upon some future occurrence, it is premature for this Board to decide the matter. Id.; Blackwood and Nichols, 139 IBLA 227, 229 (1997); Phillips Petroleum Co., 109 IBLA 4, 15 (1989); Lone Star Steel Co., 77 IBLA 96, 97 (1983). We find that the letter which SNA has appealed is not a decision taking action adverse to appellant. Hence, appellant has not been adversely affected by this letter and lacks standing to appeal the letter.

For the reasons set forth above, we find that the motion to dismiss this appeal must be granted. At some point, however, BLM may find it necessary to issue a decision regarding permitted use of the reserved easements. We note our concurrence with the assessment by the State that pursuit of a legal ruling on the rights conveyed by the reserved easements may result in an unsatisfactory solution for both sides in this controversy. Accordingly, we recommend that the parties pursue mediation in an effort to resolve this controversy successfully.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge