

KAKE TRIBAL CORP.

IBLA 84-858

Decided February 25, 1985

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native village corporation selection application AA-39180 in part and approving the surface estate of the balance of the lands described in application AA-39180 for interim conveyance to the Native village corporation.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Village Conveyances -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations -- Alaska Native Claims Settlement Act: Withdrawals and Reservations: Generally

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

2. Alaska Native Claims Settlement Act: Conveyances: Village Conveyances -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations -- Alaska Native Claims Settlement Act: Withdrawals and Reservations: Generally

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

APPEARANCES: Clarence Jackson, Sr., president, Kake Tribal Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On December 20, 1974, Kake Tribal Corporation (Kake) filed selection application AA-6982-D, as amended, for the surface estate of certain lands in the Tongass National Forest on behalf of the Native village of Kake. Kake's application was filed pursuant to the provisions of section 16(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601, 1615(b) (1982).

On February 6, 1980, the U.S. Forest Service (Forest Service) identified two tracts of land (totaling 29.73 acres) within the area selected by Kake deemed by Forest Service to be necessary for continued operation of a logging camp. The identified tracts are located on land withdrawn for inclusion in the Tongass National Forest by Presidential proclamation, dated August 20, 1902, as amended. The Forest Service requested that the identified lands be exempted from selection pursuant to section 3(e) of ANCSA, 43 U.S.C. § 1602(e) (1982).

By decision dated August 8, 1984, the Alaska State Office, Bureau of Land Management (BLM), stated, that on April 29, 1983, it had determined that the smallest practicable tract actually used by the Forest Service in the administration of the section 3(e) site contains approximately 10.75 acres. The decision also stated that the referenced lands "are not public lands as defined in Sec. 3(e) of ANCSA; therefore, [the Kake] selection application * * * is hereby rejected" as to the 10.75-acre tract described by metes and bounds in the August 8, 1984, decision. 1/ The BLM decision stated that the remaining 18.98 acres had been determined by BLM to be public lands and were considered proper for conveyance to Kake. 2/ Kake subsequently filed a timely appeal from the August 8, 1984, decision.

1/ The excluded tract was described as follows:

"A tract of land located within Sec. 3, T. 57 S., R. 73 E., Copper River Meridian, being more particularly described as:

"Beginning at the point for corner No. 1, a meander corner at the line of mean high tide on the north shore of Keku Strait, identical to corner No. 10 of USDA Forest Service Kake Administrative Site survey, marked with a Forest Service monument;

"thence N. 88 degrees 23'24" E., on a portion of line 10-11 of the USDA Forest Service Kake Administrative Site survey for a distance of 393.75 feet to corner No. 2, a point on line 10-11 of USDA Forest Service Kake Administrative Site survey;

"thence N. 38 degrees 15'00" W., for a distance of 901.25 feet to corner No. 3;

"thence N. 59 degrees 30'30" W., for a distance of 673.75 feet to corner No. 4;

"thence S. 38 degrees 40'50" W., for a distance of approximately 183.75 feet to corner No. 5, a meander corner at the line of mean high tide on the north shore of Keku Strait;

"thence southeasterly, with meanders along the line of mean high tide on the north shore of Keku Strait for a distance of approximately 1,617.00 feet to corner No. 1, the point of beginning.

"Containing approximately 10.75 acres."

2/ The decision provided that the conveyance of the 18.96-acre tract would contain four reservations to the United States. These reservations were then set forth in the decision.

In its statement of reasons for appeal Kake states that it is the main logger and construction company in Kake, Alaska, and that it needs the 10.75 acres rejected from the selection application because the land is necessary for Kake's long range logging plan. Kake states that it has "purchased all existing improvements on the land (sewer treatment and water system) including certain buildings," but does not offer any explanation of what bearing this might have on the outcome of this matter.

In a memorandum to BLM, dated August 11, 1982, the Regional Forester, Juneau, Alaska, stated that use and development of the 29.73-acre logging campsite commenced in 1966 in conjunction with the Kake #1 Timber Sale, with the camp being an appraisal item in that sale. The Regional Forester further stated that, as of December 18, 1971, the site was being used by the then current logging contractor. He noted that improvements, consisting of an office, a cookhouse and mess hall, approximately 8 crewquarters, approximately 15 family trailers, a machine shop, equipment sheds, outside equipment storage, fuel storage, and water supply, were located on the site on December 18, 1971. The Regional Forester asserted that only minor additions were made between December 18, 1971, and December 18, 1974, and that during that period nothing took place which would reduce the size of area needed. The Regional Forester concluded that use of the campsite has increased steadily since initial establishment in 1966. The memorandum further stated that use of the campsite has a direct, necessary, and substantial connection to the harvest of national forest timber; that it is not primarily used to derive revenue; and that costs incurred in the development of the camp have been subtracted from the appraised value of the timber harvested.

The memorandum further provides:

The Stikine Area Forest Supervisor and the Petersburg District Ranger have discussed the logging camp site identification with Kake Tribal Corporation in July 1980, July 1981, and April 1982. Kake Tribal Corporation initially stated they recognized the Forest Service need for the camp site and the importance of the camp to the City of Kake, and therefore, did not plan to select the camp site. In the latest discussions, Kake Tribal Corporation has expressed an interest in using the camp site as a part of their own forest operation, but still realizing the Forest Service need, questioned the possibility of sharing the camp or having two separate camps on the one site. Two separate camps may possibly be negotiated, but may cause some conflict for space. Two separate camps would be preferable to sharing one camp[,] however, as two operators in one camp would rarely be compatible.

[1, 2] Section 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982), provides that during a 3-year period from December 18, 1971, village corporations are entitled to select an area equal to 23,040 acres of land available for selection. Land available for selection is identified by section 16(a) of ANCSA as "public lands." Section 3(e) defines public lands as follows: "'Public lands' means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation."

The criteria for determination of the smallest practicable site pursuant to section 3(e) of ANCSA are found in 43 CFR Subpart 2655. 43 CFR 2655.2 provides that BLM shall determine:

(a) Nature and time of use.

(1) If the holding agency used the lands for a purpose directly and necessarily connected with the Federal agency as of December 18, 1971; [3/] and

(2) If use was continuous, taking into account the type of use, throughout the appropriate selection period; [4/] and

(3) If the function of the holding agency is similar to that of the other Federal agency using the lands as of December 18, 1971.

With respect to the size of the tract, 43 CFR 2655.2(b)(1) provides that the tract "shall be no larger than reasonably necessary to support the agency's use." The tract may include:

(i) Improved lands;

(ii) Buffer zone[s] surrounding improved lands as is reasonably necessary for purposes such as safety measures, maintenance, security, erosion control, noise protection and drainage;

(iii) Unimproved lands used for storage;
* * * * *

(v) Lands used by a non-governmental entity or private person for a use that has a direct, necessary and substantial connection to the purpose of the holding agency but shall not include lands from which proceeds of the lease, permit, contract, or other means are used primarily to derive revenue.

43 CFR 2655.2(b)(3). Appellant has not challenged BLM's determination of "smallest practicable tract" and, after review of the record, we find no evidence that the identification of the 10.75-acre tract as the "smallest practicable tract" for use as a logging camp is unreasonable.

Although private logging interests actually used the camp, such use clearly meets the criteria set forth in 43 CFR 2655.2(b)(3)(v), i.e., use by private logging interests pursuant to a permit to cut timber on behalf of the Forest Service. During the period of 1971 to 1974, the timber harvest was conducted on a permit basis pursuant to 16 U.S.C. § 476 (1970) repealed by P.L. 94-588, § 13, Oct. 22, 1976, 90 Stat. 2958. That section provided:

3/ "Holding agency" means any Federal agency claiming use of a tract of land subject to these regulations. 43 CFR 2655.0-5(a).

4/ "Appropriate selection period" is defined by the regulations as the "statutory or regulatory period within which the lands were available for Native selection under the act." 43 CFR 2655.0-5(b).

For the purpose of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such national forests as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. * * * Payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of Agriculture may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Secretary of Agriculture, in a separate account, and shall be covered into the Treasury.

The 10.75-acre tract in question is not primarily a source of revenue but is a necessary staging area used by private logging interests under permit from the Forest Service to accomplish the purposes set out above. The development and use of this campsite serves to limit the area which would be used by logging permittees as a campsite for a designated tract, thus avoiding the aggregation of multiple tracts, as would probably be the case if each permittee were allowed to choose its own campsite. Therefore, with respect to the actual use of the tract in question the Forest Service qualifies as a "holding agency" within the meaning of 43 CFR 2655.0-5(a) during the period of selection.

Although revenue is derived from the sale of timber pursuant to logging permits, such permits are primarily granted as a means of forest management. See Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984). Use of the 10.75-acre tract in itself produces no revenue for any party and, as noted in the August 11, 1982, memorandum, referenced above, maintenance of the camp is a cost borne by the private logging interests.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

