

SELDOVIA NATIVE ASSOCIATION, INC.

IBLA 85-725

Decided January 13, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving in part and rejecting in part Native village selection application AA-41574.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Federal Installation --
Alaska Native Claims Settlement Act: Definitions: Public Lands

Where the record on appeal establishes a reasoned basis for reservation of a buffer zone around a shellfish research station to protect water quality and prevent erosion, there is shown a sufficient connection between the creation of such a buffer zone and the Federal administration of the research facility to sustain the determination to retain the buffer zone as part of the station. The lands comprising the buffer zone are not subject to selection by a Native corporation absent a showing that the decision to reserve the lands pursuant to 43 U.S.C. § 1602(e) (1982), was in error.

APPEARANCES: Fred H. Elvsaas, President of Seldovia Native Association, Inc., for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Seldovia Native Association, Inc. (Seldovia), has appealed from a May 23, 1985, decision of the Alaska State Office, Bureau of Land Management (BLM), finding that 19.28 acres of land was required for operation of a shellfish research station on Kasitsna Bay near Seldovia, Alaska, by the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, United States Department of Commerce (Fisheries Service). Seldovia selected the land upon which the research station is situated pursuant to section 12(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611(a) (1982), as part of the entitlement to public lands obtained by the village of Seldovia pursuant to provisions of ANCSA. The decision appealed from made available 8.08 acres to Seldovia from the research site as originally reserved.

The Kasitsna Bay research station was established in 1957. In 1965, Public Land Order No. 3629 withdrew 27.36 acres from all forms of appropriation and reserved the land in U.S. Survey No. 4750, lot No. 5, for an administrative site for shellfish research. 30 FR 5481 (Apr. 15, 1965). Following selection of the research site by Seldovia in 1974, BLM sought a justification from Fisheries Service for continued retention of the entire Kasitsna site. On August 28, 1983, Fisheries Service responded with an explanation why all the Kasitsna administrative site reserved by the 1965 order was needed.

Part of the site contains buildings and other improvements, in use more or less continuously since 1957. As to that portion of the research station, Seldovia agrees that the site is properly considered not to be public lands available to the Native association for purposes of its selection. This built-up area encompasses approximately 2.5 acres, according to Seldovia. A difference of opinion exists as to the remainder of the station area, however. Fisheries Service argues that all of the original 27.36-acre reservation should be reserved for research use, even though the remainder contains no improvements, because the balance of the land is needed for a buffer zone for the station. This area is the subject of this appeal.

Fisheries Service explains the need for a reserved buffer zone around the research station in terms of environmental protection of an area to permit continued research:

The Western portion of the property forms a natural buffer zone that is required to minimize probability of tree blow-down, to protect the buildings from high winds, and to protect the water supply from contamination. A buffer zone is also required that will protect the site from airborne pollutants that would result from development activities on adjacent property.

An uncontaminated water supply is of prime importance to the research facility. This is now provided by a stream and protected by water right certificate No. 61 issued by the Alaska Division of Lands. Fresh water is used for all domestic needs at the station as well as for experimental laboratory uses. It is critical that NMFS [Fisheries Service] retain the land that forms the drainage for this source of water.

Adequate beach frontage is necessary for the research facility. This frontage provides room for sea water intake and discharge lines so that high quality sea water can be obtained for experimental use. The station dock and boat moorage areas are located on this frontage as well as areas to secure log booms to protect dock facilities and water lines from damage due to floating logs being driven ashore during frequent storms. A significant amount of buffer is needed on the beach on either side of the dock in order to secure offshore moorage rights and access for the larger research vessels that visit the facility, and also to protect the quality of the sea water essential to research. NMFS is seriously concerned that development of adjacent property has the potential to degrade the quality of this sea water and

thus substantially impair the ability to carry out its research. Also, float planes use much of the beach frontage for loading and unloading supplies.

Letter dated August 19, 1983, McVey to Karsteller, at pages 4, 5.

The Fisheries Service justification of the retention in Federal ownership of the entire research site was investigated by BLM, and, on February 21, 1985, using the survey of the site, aerial photographs of the research station, and a photograph of the site submitted by Fisheries Service, the Federal use of the research station was analyzed in light of Seldovia's objections. It was determined, using the photographs and survey, that part of the research site was not properly included within a buffer zone, and that two tracts numbered 2 and 3, totaling 8.08 acres could reasonably be subtracted from the station's original lands and made available to Seldovia for selection. As to the rest of the administrative site, however, BLM concluded that it should be retained for use by Fisheries Service because it was subject to a Federal use during all relevant times until the Native selection, and properly included as part of the research facility to protect the research activities of the station. This staff determination was the basis for the May 23, 1985, decision from which appeal was taken by Seldovia. Thus, the May 23, 1985, decision adopts the analysis of the February 21, 1985, staff analysis, reserving 19.28 acres for use for the research station and making available 8.08 acres from the original 1965 withdrawal for selection by Seldovia.

On appeal to this Board Seldovia attacks the decision to reserve a buffer zone around the improved area of the station, and alleges that it is unnecessary for the work of the station. Seldovia argues that reservation of a water supply and adjacent uplands to protect drainage and prevent contamination of research facilities is unwarranted and erroneous. Seldovia does not offer any additional evidence as a basis for these conclusions, but argues simply that it is enough for the Federal uses involved that the station retain the improved portion of the research station.

"Public lands" as that term is used to describe lands which are available for selection by Native associations organized to receive conveyances of land pursuant to ANCSA means "all Federal lands and interest 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 * * *." 43 U.S.C. § 1602(e) (1982). This limitation upon conveyances of land pursuant to ANCSA as it affects existing Federal installations is implemented by 43 CFR Subpart 2655.

In this case, since there is no dispute concerning the fact that the lands surrounding the Kasitsna station were subject to a Federal use at all relevant times, the only issue is whether the land BLM retained for that use was the "smallest practicable tract" within the meaning of the statute. Departmental regulation 43 CFR 2655.2 provides, pertinently, that such tracts may include: "(i) improved lands; (ii) buffer zone 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 * * *." 43 CFR 2655.2(b)(3). All three categories of use are claimed by Fisheries Service in its justification for retention of the station as originally constituted.

[1] The BLM decision appealed from is supported by the administrative record in this case, including the justification furnished by Fisheries Service, the photographs, maps, and survey of the research site, and the reasoned staff analysis of the documentary evidence of record made in light of the objections presented by Seldovia. The applicable Departmental regulation, 43 CFR 2655.2(b)(3), directly authorizes the retention of improved areas, and provides for the creation of a buffer zone to protect water supplies and prevent erosion, reasons advanced by Fisheries Service for retention of the buffer zone around the station. Seldovia has not shown that the decision to retain a buffer zone was in error. Since Seldovia seeks affirmative relief in the form of an increased share of the lands formerly reserved for the research station, the burden to show that the BLM decision was erroneous, as Seldovia claims, is squarely upon the Native corporation. See generally 5 U.S.C. § 556(d) (1982). In Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984), this Board found, in a similar case, that a Native association had failed to show that a buffer zone reserved around a balloon launching site was not reasonably needed by the United States Weather Service. Evaluating whether improved land and a buffer zone reserved to protect the Federal use were or were not "public lands" within the meaning of 43 U.S.C. § 1602(e) (1982), the Ukpeagvik decision observed that to establish the propriety of the reserved use, "a Federal agency need only prove that a logical nexus exists between use of the certain land and administration of a Federal facility, in order to establish entitlement to a section 3(e) exclusion." Id. at 227. Such a connection has been made in this case. Seldovia challenges the decision by objecting to the retention of a buffer zone around the improved area to protect water quality and prevent erosion, but has offered no proof to contradict the reasonableness of doing so, beyond the assertion that such a zone is unneeded.

Seldovia has neither offered to show the basis for its assertion that the buffer zone was created in error nor asked for a hearing in order to submit proof of the proposition, which it advances by argument alone, that no buffer zone is needed. While it is true that, in cases where there are disputed questions of fact presented for review by this Board, a hearing may be ordered, it is also true that in cases where it appears unlikely that a hearing will produce more evidence than is already present in the administrative record the appeal may be decided on the basis of the available documentary administrative record. See, e.g., State of Alaska, Mary Frances DeHart, 82 IBLA 165 (1984). As was the case in DeHart, the parties have already furnished statements of fact in their pleadings, maps, photographs, surveys, and other materials which form a documented record that permits decision. While Seldovia has disputed the correctness of BLM's decision it has not shown how it is in error, and it appears unlikely that a hearing would change matters in this case. Because it has failed to show error in the BLM decision, Seldovia's appeal must be rejected.

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.

Franklin D. Arness
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

R. W. Mullen
Administrative Judge

