

INTERIOR BOARD OF LAND APPEALS

Kawerak, Inc.

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KAWERAK, INC.

IBLA 2003-27

Decided March 18, 2005

Appeal from a determination under section 3(e) of the Alaska Native Claims Settlement Act of 1971, resulting in the transfer of 0.59 acres to a Native village corporation in the Village of Nome, Alaska. F-92651, F-14908-A, F-92936.

Motion to dismiss denied; decision affirmed; hearing request denied.

1. Administrative Procedure: Standing--Rules of Practice:  
Appeals: Standing to Appeal--Alaska: Alaska Native  
Claims Settlement Act--Alaska Native Claims Settlement  
Act: Native Land Selections: Village Selections

A party who claims a property interest in land affected by a BLM decision approving for conveyance land that has been selected by a Native village corporation and who has participated in administrative proceedings leading to that decision has a right of appeal to the Board under 43 CFR 4.410(b) (2002).

2. Alaska: Alaska Native Claims Settlement Act--Alaska  
Native Claims Settlement Act: Native Land Selections:  
Village Selections

The acquisition and holding of a parcel of land by the United States under the terms of the Reindeer Industry Act of 1937 and the subsequent use of that land by BIA for BIA teacher housing did not constitute a "valid existing right" that precluded the land from being withdrawn for purposes of Native village selection under ANCSA section 11(a)(1), 43 U.S.C. § 1610(a)(1) (2000).

3. Alaska: Alaska Native Claims Settlement Act--Alaska  
Native Claims Settlement Act: Native Land Selections:  
Village Selections

Lands acquired by the United States under the Reindeer Industry Act of 1937 have been available as public lands for withdrawal for selection by a Native village corporation under ANCSA sections 3(e) and 11(a)(1). 43 U.S.C. §§ 1602(e) and 1610(a)(1) (2000).

4. Administrative Procedure: Hearings--Alaska: Alaska Native Claims Settlement Act--Alaska Native Claims Settlement Act: Native Land Selections: Village Selections --Hearings--Rules of Practice: Appeals: Hearings--Rules of Practice: Hearings

Although the Board has discretionary authority to order a hearing before an administrative law judge, it normally will order a hearing when an appellant presents an issue of material fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through ordinary appeals procedures. Where an appellant seeks to elicit testimony which could not be probative of whether lands constituted the “smallest practicable tract \* \* \* enclosing land actually used in connection with the administration of [a] Federal installation,” within the meaning of ANCSA section 3(e), the Board will not order a hearing to determine whether the lands were public lands withdrawn for Native village selection under ANCSA section 11(a)(1). 43 U.S.C. §§ 1602(e) and 1610(a)(1) (2000).

APPEARANCES: Bruce Baltar, Esq., Nome, Alaska, for Kawerak, Inc.; Dennis Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; H. Conner Thomas, Esq., Nome, Alaska, for Sitnasuak Native Corporation.

#### OPINION BY ADMINISTRATIVE JUDGE HEMMER

Kawerak, Inc. (Kawerak), appeals from a September 3, 2002, decision of the Alaska State Office, Bureau of Land Management (BLM), approving for conveyance out of Federal ownership 0.59 acres of land located within the boundaries of Nome, Alaska. Kawerak, a Native regional corporation, had placed improvements for low income housing on 0.18 acres adjacent to this acreage pursuant to a use permit granted by the Bureau of Indian Affairs (BIA). Based on BLM’s determination that the acreage was “public land” within the definition of section 3(e), and for purposes of implementing sections 11 and 12 of the Alaska Native Claims Settlement Act of

December 18, 1971, as amended (ANCSA), 43 U.S.C. §§ 1602(e), 1610, and 1611 (2000), BLM's decision approves the transfer of the subject property to the Sitnasuak Native Corporation (Sitnasuak), the Native village corporation for the Native Village of Nome. See 112 Stat. 2681-258 (Oct. 21, 1998).

According to the record, the United States acquired certain lands within sec. 36, T. 11 S., R. 34 W., Kateel River Meridian, Alaska, by deed dated June 5, 1940, from the Northwestern Livestock Corporation, under the terms of the Reindeer Industry Act of September 1, 1937, 25 U.S.C. §§ 500-500m, 500g (2000). These lands are described as follows:

All of Lots numbered One (1), Fifty (50), Fifty-one (51) and Fifty-two (52), also the north fifty (50) feet of Lots numbered Forty-three (43) and Forty-four (44), all in Block numbered Twelve (12), and all of the Lots numbered Twenty-eight (28) and Twenty-nine (29), also a strip of ground twenty-five (25) feet in length running east and west, by twenty-four (24) feet in width, running north and south, in the southwest corner of Lot numbered Fifteen (15), all in Block numbered Thirty-three (33), all in the City of Nome, Cape Nome Precinct, Second Judicial Division, Territory of Alaska, according to the official map of the townsite of Nome on file with the recorder; subject to reservation of right of way thereon for ditches or canals constructed by the authority of the United States.

(Deed, June 5, 1940.)

Some time prior to the 1970s, BIA established buildings on a portion of this parcel for the purpose of housing BIA teachers. Photographs in the record show that construction of the buildings used by BIA for teacher housing during the village selection period had taken place by 1963.

On December 18, 1971, Congress enacted ANCSA. One express purpose of the statute was to ensure that on the date of enactment of ANCSA any claims against the United States based on statute and related to Native Alaskan use or occupancy were extinguished. 16 U.S.C. § 1603(c) (2000). In addition, section 12(a) of ANCSA permitted the village corporation for each Native village to select, within three years from December 18, 1971, certain lands within townships in which any part of the village is located.<sup>1/</sup> The "selection shall be made from lands withdrawn by section 1610(a)." 43 U.S.C. § 1611(a)(1) (2000). The Native village corporation could thus

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<sup>1/</sup> A "Native village" is a community comprising 25 or more Natives. 43 U.S.C. § 1602(c) (2000).

select available “public lands,” as defined in ANCSA section 3(e), from such lands withdrawn under the terms of section 11(a). Section 11(a)(1), 43 U.S.C. § 1610(a)(1) (2000), withdrew public land within townships enclosing a Native village, subject to valid existing rights. Section 3(e) defines “public lands” as “all Federal lands and interests therein located in Alaska except \* \* \* 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) (2000) (emphasis added).

On April 10, 1972, BIA forwarded to BLM an “installation and facility inventory” for the above-described land within Nome, asserting that “all lands described are necessary” for “BIA employees’ quarters.” (Kawerak Exhibit A.) On October 20, 1978, BIA forwarded to BLM another statement of sites it would retain for its own use under section 3(e). Once again it listed for BIA use the above-described land within Nome. (Kawerak Exhibit B-1.)

On June 17, 1974, Sitnasuak or its predecessor, as the Native village corporation for Nome, submitted selection F-14908-A under ANCSA section 12(a), 43 U.S.C. § 1611(a) (2000), for available public lands within sec. 36, T. 11 S., R. 34 W., as defined in ANCSA section 3(e). Kawerak is an “Alaska Native regional non-profit corporation and tribal consortium” which serves the 20 tribes of the Bering Strait region pursuant to a 1992 Compact of Self-Governance between Kawerak and the United States, issued pursuant to Title IV of Public Law 93-638. Kawerak asserts that it has assumed operation of most BIA programs and services under the Compact, including a Housing Improvement Program. Kawerak asserts that pursuant to a use permit issued to it by BIA in 1997, it established three single-family, low-income housing units, with water and sewer hookups and storage units, on or adjacent to Lots 1, 50, 51, and 52, the northern 50 feet of Lots 43 and 44 of Block 12, a 25-by-25 foot strip in the southwest corner of Lot 15, and Lots 28 and 29 of Block 33 in Nome. The structures were donated from other sites by the National Park Service.

At a later juncture, a dispute over the property arose between Sitnasuak and BIA, which wished to transfer the site to Kawerak. On September 8, 1998, BLM opened file F-92651 pursuant to ANCSA section 3(e), to determine which lands should properly be transferred to Sitnasuak as “public lands” under the statutory definition.

On October 21, 1998, Congress, in section 122(a)(1) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of October 21, 1998, Pub. L. No. 105-277, directed BLM to make a “determination under section 3(e) of the property” at issue in this appeal. 112 Stat. 2681-258 to 2681-259. Congress further directed in section 122(a)(2) that “[t]he ANCSA section 3(e) determination will determine if the lands must be conveyed to the Sitnasuak Native Corporation

(the Native village corporation for Nome).” Finally, Congress provided in section 122(a)(3) that, “[i]f and only if [BLM’s] ANCSA section 3(e) determination concludes that [Sitnasuak] is not entitled to the lands, and following the settlement of any and all claims filed appealing the decision,” the lands would be conveyed to Kawerak pursuant to section 122(b) of the Act. 112 Stat. 2681-258 to 2681-259 (emphasis added).<sup>2/</sup>

The “section 3(e) determination” that Congress required BLM to make plainly refers to a determination as to whether the lands at issue are “public lands” under section 3(e) of ANCSA. Under ANCSA, only “public lands” withdrawn under section 11(a)(1) could be selected by Sitnasuak as a Native village corporation. Thus, we interpret the 1998 statute as requiring BLM to make two findings: (1) that the lands at issue were “Federal lands and interests therein located in Alaska,” and (2) that they excluded the “smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.” See 43 U.S.C. § 1602(e)(1), and Kawerak Exhibit C.

Kawerak includes the following “explanation” for the language ultimately enacted in the 1998 statute sponsored by Senator Ted Stevens. Apparently, a prior version of the legislation had proposed transfer of some or all of the parcel in question to Kawerak. Senator Stevens proposed an amendment requiring a section 3(e) determination before a decision could be made as to whether the land should be transferred to Kawerak.

Sitnasuak \* \* \* has objected to the \* \* \* provision transferring land in Nome to Kawerak, Inc., the non-profit tribal organization in the Nome area, on the basis that Sitnasuak is entitled to claim any such lands under ANCSA provisions.

The Bureau of Indian Affairs disagrees and says that BIA has title to the land and can convey it to Kawerak under a use permit.

(Sept. 29, 1998, telefax from Office of Senator Stevens to L. Ballard.)

On September 30, 1999, BLM issued a “Section 3(e) Determination for the [BIA] Parcel Located Within the Nome Townsite.”<sup>3/</sup> Relying on a Departmental rule implementing ANCSA at 43 CFR 2655.2, BLM concluded that, in order to qualify for Federal retention and to be disqualified as “public land” pursuant to section 3(e), the

<sup>2/</sup> BLM file F-92936 pertains to this legislation.

<sup>3/</sup> BLM considered arguments submitted by Sitnasuak and Kawerak on Feb. 2 and Mar. 15, 1999, respectively.

lands must have been used by a Federal agency, in this case BIA, continuously throughout the 3-year “village selection period” from December 18, 1971, through December 18, 1974. (Determination at 2.) <sup>4/</sup> BLM separated 0.18 acres which it found was the “smallest practicable tract” of land actually used by BIA during the village selection period from the tract transferred to the United States in 1940. BLM stated that this 0.18 acre parcel was available for conveyance to Kawerak. (Determination at 4.) BLM found that the remaining 0.59 acres were “public lands” within the meaning of section 3(e) because they had not been in continuous use by BIA during the village selection period from 1971-74. BLM concluded that the 0.59 acres should therefore be transferred to Sitnasuak.

On September 3, 2002, BLM issued its final decision, adopting the same conclusions as those in the September 30, 1999, Determination. The decision approved the conveyance of the 0.18 acres to Kawerak and identified the property as follows:

A tract of land located within U.S. Survey No. 451, as shown on the unofficial subdivision plat of the Townsite of Nome dated April 13, 1905, in Sec. 36, T. 11 S., R. 34 W., Kateel River Meridian, described as follows:

Lots 51 and 52 of Block 12;

That portion of Lot 28, Block 33 more particularly described as:

Beginning at a point in Lot 28, Block 33 that is 5 feet northerly of the most northern corner of the building and perpendicular to the northerly side of the building, thence easterly (parallel to the front lot line of Lot 28) to a point on the line between Lots 27 and 28, thence southerly between Lots 27 and 28 approximately 35 feet to the corner of Lots 27 and 28, thence westerly along the front of Lot 28 approximately 50 feet to the corner of Lots 28 and 29, thence northerly between Lots 28 and 29 approximately 35 feet, thence easterly (parallel to the front lot line of Lot 28) to the point of beginning.

(Decision at 2-3.)

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<sup>4/</sup> The regulation generally sets forth standards for implementing the definition of “public lands” within ANCSA section 3(e), 43 U.S.C. § 1602(e) (2000).

The BLM decision also approved for conveyance the following 0.59 acres to Sitnasuak:

A tract of land located within U.S. Survey No. 451, as shown on the unofficial subdivision plat of the Townsite of Nome dated April 13, 1905, in Sec. 36, T. 11 S., R. 34 W., Kateel River Meridian, described as follows:

Lot 1 of Block 12;

The northern 50 feet of Lots 43 and 44, Block 12;

Lot 50, Block 12;

A strip of land 25 feet in length running east and west, by 24 feet in width running north and south in the southwest corner of Lot 15 of Block 33;

That portion of Lot 28, Block 33 more particularly described as:

Beginning at a point in Lot 28, Block 33 that is 5 feet northerly of the most northern corner of the building and perpendicular to the northerly side of the building, thence easterly (parallel to the front lot line of Lot 28) to a point on the line between Lots 27 and 28, thence northerly between Lots 27 and 28 approximately 65 feet to the corner of Lots 15, 16, 27 and 28, thence westerly along the line between Lots 15 and 28 approximately 50 feet to the corner of Lots 15 and 28 located on the easterly line of Lot 29, thence southerly between Lots 28 and 29 approximately 65 feet, thence easterly (parallel to the front lot line of Lot 28) to the point of beginning.

Lot 29, Block 33.

(Decision at 3-4.) BLM established that its conveyance to Sitnasuak would be subject to Kawerak's use permit, BIA-JAO-UP-801, "if valid." (Decision at 5 ¶ 4.)

Kawerak appeals from that determination. Kawerak raises four arguments.

First, Kawerak argues that whether or not the lands at issue can be defined as public lands within the meaning of section 3(e) of ANCSA, they were not withdrawn within the meaning of section 11(a)(1) of ANCSA because they were subject to valid

existing rights that prevented their withdrawal. This argument presumes that the section 3(e) determination ordered by Congress ultimately would not be relevant because the operation of section 11(a) prevented the lands, even if public lands, from being withdrawn. According to Kawerak, the property acquired by the United States pursuant to the 1940 deed was property held in trust for Natives interested in reindeer farming under the Reindeer Industry Act, which directed the Secretary of the Interior “to buy out the non-Native Reindeer industry and to manage the acquired \* \* \* property to establish a self-sustaining Native reindeer industry.” (Statement of Reasons (SOR) at 4, citing 25 U.S.C. § 500f (2000); see also SOR at 3-5.) The statute required the Secretary to purchase or acquire real property employed by the non-Native reindeer industry “for and on behalf of the Eskimos and other [N]atives of Alaska.” 25 U.S.C. § 500a (2000). The Secretary was authorized to distribute the property to Native Alaskans or otherwise obligated “to hold and use the same in trust for the use and benefit of said [N]atives,” with a goal of the “widest possible distribution of such reindeer and other property among those [N]atives of Alaska who are in need thereof and who can make proper use of the same.” 25 U.S.C. § 500g (2000).

Because the subject property was transferred to the United States under the Reindeer Industry Act, Kawerak asserts that it was being held in trust for Alaska Natives during the 1971-74 selection period. Kawerak argues that this trust interest in the lands in question amounted to a “valid existing right,” such that the property therefore was not withdrawn by ANCSA section 11(a)(1), 43 U.S.C. § 1610(a)(1) (2000), and thus could not be selected by a village corporation under ANCSA section 12(a), 43 U.S.C. § 1611(a) (2000).

Second, Kawerak argues that the parcel could not be withdrawn as “public lands” within the meaning of section 11(a)(1) of ANCSA because the parcel was “acquired land.” Again, this argument would vitiate the import of the section 3(e) determination required by Congress in the 1998 statute because it contends that, as acquired land, the relevant parcel could not be withdrawn for Native village selection within the meaning of section 11(a)(1), 43 U.S.C. § 1610(a)(1) (2000). Thus, Kawerak contends that the subject property was not withdrawn as “public land” identified in ANCSA section 11(a), and was never subject to selection by a village corporation under section 12(a).

Third, presenting an alternative argument in the case that the Board rejects its first two arguments, Kawerak argues that the BLM decision is excessively restrictive in determining the extent of BIA’s “Federal installation” within the meaning of section 3(e) and 43 CFR 2655.2. (SOR at 6.) Kawerak states that the BLM Land Law Examiner “appears to have done little more than to look at available photographic evidence and draw narrow boundaries around the buildings he concludes were on site in the 1971-74 timeframe.” Id. Kawerak complains that BLM’s decision misreads

section 3(e), which defines Federal installations as the “smallest possible tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.” (SOR at 7, citing 43 U.S.C. § 1602(e) (2000).) Kawerak objects to BLM’s use of a standard that amounts to, according to Kawerak, the smallest “possible square footage around a building.” (SOR at 7.) Kawerak points out that such a standard cannot be found in statute or rule. It also argues that there is no precedent for cutting up a site into a 0.18-acre installation. Id. at 8 (citations omitted).

According to Kawerak, the consequence is that BLM excludes from the low-income family dwelling sites, and conveys to Sitnasuak, property which would count as driveways and outside space used by current occupants, effectively as a yard. Kawerak argues that BLM’s decision severs strips that are too small for Sitnasuak to use and that have no road access, and also creates a transfer 13 feet wide.

Fourth, Kawerak challenges that portion of BLM’s decision which states that the patent of land to Sitnasuak will be subject to the use permit only “if valid.” (SOR at 8.) Kawerak argues that it obtained a possessory right under its BIA use permit. Kawerak cites section 14 of ANCSA for the proposition that any transfer of land shall be subject to any lease or permit in existence at the time of patent, and that the Federal government must remain the administrator of the permit. 43 U.S.C. § 1613(g) (2000).

Kawerak asks the Board to render a decision on the basis of either of its first two arguments as a matter of law. However, if the Board rejects those arguments, Kawerak asks the Board to order the case for hearing on the issues of fact regarding the actual use of the property in 1971-74, and also to determine what is the “smallest practicable tract.”

On December 2, 2002, Sitnasuak submitted an Answer to the SOR. In addition to responding to each of Kawerak’s assertions, Sitnasuak argues that Kawerak has no standing to appeal pursuant to 43 CFR 4.410 and moves that the appeal be “summarily dismissed.” The cited regulation states: “For decisions rendered by Departmental officials relating to land selections under [ANCSA], as amended, any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board.” 43 CFR 4.410(b) (2002). Sitnasuak argues that Kawerak is attempting to stand in the shoes of BIA in this matter, and may not do so under that rule. Sitnasuak argues that, if the Board does not dismiss the appeal on grounds of the standing question, the Board should reject Kawerak’s legal arguments and deny the request for a hearing because Kawerak has not provided sufficient proof of a factual question justifying a hearing.

[1] We reject Sitnasuak's motion to dismiss on the basis of 43 CFR 4.410(b) (2002). Kawerak is a "party," as it clearly has participated in all aspects of the proceedings. Further, Kawerak plainly "claims a property interest in land affected by the decision."

We turn to Kawerak's first two legal arguments. Were Kawerak to prevail on either of these arguments, reversal of BLM's decision would moot Kawerak's remaining arguments and request for hearing. Only if Kawerak does not prevail on either theory under the Reindeer Industry Act do Kawerak's other requests materialize.

[2] We reject Kawerak's argument that the subject land was being held under the Reindeer Industry Act of September 1, 1937, in trust for Alaska Natives during the 1971-74 selection period and that under ANCSA section 11(a)(1), 43 U.S.C. § 1610(a)(1) (2000), this trust use was a valid existing right preventing its transfer to a village corporation under ANCSA section 12(a), 43 U.S.C. § 1611(a) (2000). The purpose of the Reindeer Industry Act was to beneficially establish and protect a reindeer industry on behalf of Native Alaskans. 25 U.S.C. § 500 (2000). The Secretary was "authorized and directed to organize and manage" the industry for Native Alaskans. 25 U.S.C. § 500f (2000). The Secretary was obligated to distribute the property so acquired to Native Alaskans "or to hold and use the same in trust for the use and benefit of said [N]atives," for those "who are in need thereof and who can make proper use of the same." 25 U.S.C. § 500g (2000). See, generally, Reindeer Herders Ass'n v. Juneau Area Director, 23 IBIA 28 (1992), rev'd, Williams v. Babbitt, 115 F.3d 657 (9<sup>th</sup> Cir. 1997).<sup>5/</sup>

As a matter of fact, it is apparent that as of the 1971 passage of ANCSA more than 30 years after the United States' acquisition of the subject parcel, no such industry, farming, or land transfer had been established on it. Kawerak does not argue, and BIA documents do not plausibly suggest, that the parcel was ever in use or

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<sup>5/</sup> In the cited Interior Board of Indian Appeals (IBIA) decision, IBIA explained the general purpose and goals of that statute. The Ninth Circuit Court of Appeals reiterated statutory history. The Circuit Court, however, reversed the District Court decision upholding the IBIA, which had concluded that non-Natives were prohibited from importing reindeer into the State of Alaska. The Ninth Circuit reasoned that the District Court's interpretation "would almost certainly render" the statute a violation of the Equal Protection Clause of the U.S. Constitution in creating a prohibition on non-Native importation of reindeer. The Court stated that while a ban on non-Native participation in the reindeer industry "may have been narrowly tailored in 1937, it may no longer be today," particularly since the passage of ANCSA had "changed dramatically" "the economic and subsistence needs of [N]atives" and diminished the need for the program established in the Reindeer Industry Act. 115 F.3d at 666.

should have been available for use as part of a reindeer industry project. Rather, when ANCSA was enacted, BIA had already converted the parcel to BIA employee housing. Thus, to the extent Kawerak means to suggest that BLM was prohibited by the Reindeer Industry Act from withdrawing the property for selection by a Native village corporation because BLM was required to preserve the land in trust for the use established by the Reindeer Industry Act, any such potential use of the parcel had been abandoned as of the passage of ANCSA. Kawerak's preferred low-income housing use seemingly supports the conclusion that the lands were not needed for the reindeer industry. To the extent Kawerak's argument suggests that use of the site for BIA housing in 1971 was precluded by the trust requirements of the Reindeer Industry Act, Kawerak cites no support for such a conclusion, nor do we have jurisdiction to reconsider BIA's actions 33 years ago.<sup>6/</sup>

As a matter of law, considering the BIA's use of the property for housing when ANCSA was passed, the only valid existing right that plausibly could be identified by Kawerak within the meaning of the Reindeer Industry Act would be the right of Native Alaskans to have the property held "in trust for the use and benefit of said [N]atives, with a view of effecting the widest possible distribution of such \* \* \* property among those [N]atives of Alaska." 25 U.S.C. § 500g (2000). Even if we could agree with Kawerak that this is properly identified as a valid existing right, we find nothing in the language of section 11(a)(1) to suggest that the property could not have been withdrawn, subject to such right, for ultimate conveyance to a village corporation comprising, by definition, Native Alaskans. The thrust of Kawerak's argument is that, even though the Reindeer Industry Act permits the Secretary to convey the property to Alaska Natives, or hold it in trust for them, once the property is so held "in trust," the decision could never be made to permit a withdrawal for conveyance to Sitnasuak. We find no basis for such a construction.<sup>7/</sup> As noted

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<sup>6/</sup> It is BIA's very use of the site as a housing facility during the 1971-74 village selection period that forms the basis of Kawerak's arguments that some part of the townsite served as a "Federal installation" under ANCSA. Without that use, Kawerak would have no case even for the 0.18 acre, and no argument that the 0.59 acre was not "public lands" within the meaning of section 3(e) of ANCSA, subject to transfer to Sitnasuak.

<sup>7/</sup> While it is well-settled that statutes benefitting Native Americans must be construed "liberally in their favor," Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237, 1239 (9<sup>th</sup> Cir. 1988), this canon of construction has been rejected in the case of ANCSA, where it competes with the deference entitled the Secretary's interpretation. Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 n. 4 (9<sup>th</sup> Cir. 1990), and cases cited. "Moreover, the question here is not whether to favor Native Americans, but which Native Americans to favor." Id. Accordingly, where an

(continued...)

above, the Ninth Circuit has suggested that the very purpose of ANCSA was to convey lands to Native corporations and villages to ensure Native Alaskan rights in a manner that may have largely vitiated the need for the Reindeer Industry Act. Williams v. Babbitt, 115 F.3d at 666. Whatever the status of that statute after ANCSA, there is no basis in it for choosing between two Native Alaskan organizations, Kawerak and Sitnasuak.

Moreover, Kawerak errs in its view that any land acquired under the Reindeer Industry Act is necessarily subject to a “valid existing right” as it appears in ANCSA section 11(a)(1). It states, in relevant part:

The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that enclose all or part of any Native village identified pursuant to subsection (b)

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The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

43 U.S.C. § 1610(a) (2000) (emphasis added).

This Board and the Federal courts have addressed the issue of valid existing rights in association with the withdrawal for selection purposes under section 11(a), 43 U.S.C. § 1610(a) (2000). Thus, in Aleknagik Natives Ltd. v. United States, 635 F. Supp. 1477 (D. Alaska 1985), aff'd, 806 F.2d 924 (9<sup>th</sup> Cir.), aff'd on subsequent appeal, 886 F.2d 237 (1986), the courts confirmed the existence of a valid existing right, even though inchoate, asserted in a preliminary petition to segregate a townsite filed prior to ANCSA under the 1926 Alaska Native Townsite Act. Likewise, in Seldovia Native Association, Inc. v. Lujan, 904 F.2d 1335 (9<sup>th</sup> Cir. 1990), the association had obtained land purchase options from the State of Alaska

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7/ (...continued)

interpretation ultimately benefits one or another Native entity, neither of which has any interest in the statutory purpose of the Reindeer Industry Act, that principle of construction does not assist us here.

prior to passage of ANCSA; these constituted valid existing rights that precluded the withdrawal imposed by section 11 from taking effect.

This situation presents no analog. Rather, Kawerak acquired its use permit only in 1997. Kawerak does not assert that it held a valid existing right in the 1971-74 time frame; nor does it claim that the land should be used or held for reindeer industry purposes. Instead, Kawerak asserts a valid existing right on behalf of unidentified Native Alaskans to have BIA hold the land in trust for them. No such persons, however, have identified themselves as interested in use of the parcel for the reindeer industry. In the context of ANCSA section 14(g), 43 U.S.C. § 1613(g) (2000), it is an implausible stretch to suggest that Congress, in referring to valid existing rights in ANCSA, intended to create an exception to the broad withdrawal of lands for Native village selections, in the absence of any identification of a right actually asserted.

ANCSA section 14(g) confirms that the Federal government's authority to hold lands in trust for Native Alaskans was not a valid existing right which would prevent withdrawal for transfer to Native Alaskans, in the absence of an asserted right by a Native Alaskan potentially interested in using the land for reindeer farming purposes. Section 14(g) discusses "valid existing rights" as a "lease, contract, permit, right-of-way, or easement (including a lease[])." 43 U.S.C. § 1613(g) (2000). These rights are asserted by non-Federal entities in lands held by the Federal government. In employing the phrase "valid existing rights," Congress protected from withdrawal those Federal lands in which non-Federal entities held identifiable rights. To be clear, BIA was free to assert valid existing rights on behalf of Native Alaskan entities, to the extent any could be verified. By way of example, in Valid Existing Rights Under [ANCSA], 85 I.D. 1, 5-6 (1977), the Department identified as a valid existing right the authority asserted by BIA as trustee on behalf of "applicants for survey and entries or applications for patent on behalf of Native allotments." By contrast, to the extent Kawerak means to assert a right of Native Alaskans to use the land or have it transferred to them for reindeer farming, the existence of a beneficiary of that trust purpose in 1971-74 is entirely speculative. Thus, while the Aleknagik and Seldovia cases acknowledge the existence of valid existing rights that may be inchoate, see 904 F.2d at 1341, they provide no basis for assuming a "valid existing right" in Federal lands that no one apparently championed at the time the use was abandoned (or in the ensuing 30 years), so as to preclude their withdrawal as public lands under section 11 of ANCSA. Accordingly, we reject Kawerak's argument that lands acquired under the Reindeer Industry Act amount to "valid existing rights" that preclude the withdrawal of such lands for purposes of Native village selection under ANCSA section 11(a), 43 U.S.C. § 1610(a) (2000).<sup>8/</sup>

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<sup>8/</sup> BLM argues that any reserves set aside by legislation for Native Alaskan use were  
(continued...)

As a final point, we note that Kawerak's argument creates a number of problems for BLM in implementing the 1998 legislation which is the source of this dispute, as well as for Kawerak in obtaining the relief it seeks in the form of a transfer of the entire parcel to itself. As noted above, the 1998 legislation directed BLM to make a section 3(e) determination. Kawerak's argument regarding valid existing rights, however, necessarily presumes that the section 3(e) finding is irrelevant, because the valid existing rights claimed by Kawerak would mean that whether or not the subject lands are public lands, they nonetheless may not be withdrawn. While Kawerak's success on this argument would potentially moot the finding required by the 1998 legislation, we have proceeded to consider the argument because the provision in the 1998 statute requiring a section 3(e) determination does not invalidate section 11(a)(1) of ANCSA, or deprive BLM or the Department of the authority to render decisions in consideration of arguments under that section. But, by the same token, if Kawerak were correct in identifying a "valid existing right" in all lands acquired under the Reindeer Industry Act, the 1998 statute would do nothing to invalidate such a right or claim. To the contrary, section 122(a)(3) of the 1998 statute provides that "if [BLM's] ANCSA section 3(e) determination concludes that [Sitnasuak] is not entitled to the lands, and following the settlement of any and all claims filed appealing the decision," the lands would be conveyed to Kawerak. A valid existing right within the meaning of section 11(a)(1) would not be extinguished by the 1998 statute, and could preclude the land's transfer to Kawerak. 112 Stat. 2681-258 to 2681-259 (emphasis added). For all of the foregoing reasons, we reject Kawerak's first argument.

[3] Likewise, we reject Kawerak's second argument under ANCSA section 11(a)(1). 43 U.S.C. § 1610(a)(1) (2000). Kawerak contends that the subject parcel was never withdrawn under that provision for purposes of Native village selection, because, as acquired land, it was never open to use under the public land laws. Kawerak concludes, therefore, that as acquired land the parcel would be excluded from withdrawal under the public land laws because it was never open to them in the first place. Such lands not having been withdrawn, Kawerak contends that they could not be selected by a Native village corporation. Kawerak states that the "United States held title under an ordinary warranty deed \* \* \* in 1940. 43 USC

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<sup>8/</sup> (...continued)

expressly revoked by ANCSA section 19(a), 43 U.S.C. § 1618(a) (2000). While this is an intriguing argument, it presumes that acquisition of the parcel by the 1940 deed made it a "reserve" within the meaning of ANCSA. Failing to find that the parcel was subject to a "valid existing right" within the meaning of ANCSA, we do not find that it rose to the level of a "reserve." However, we agree with BLM that the necessary consequence of Kawerak's arguments would be to create some sort of reserve in, or setting aside of, those lands acquired under the Reindeer Industry Act. Certainly, if this were the case, any such reserve was revoked by ANCSA section 19(a).

§ 1610(a) had no effect on the status of this particular property.” (SOR at 6.)

Kawerak cites nothing in support of its suggestion that lands acquired by the United States under the Reindeer Industry Act did not constitute public lands available for withdrawal for selection by Native villages under section 11(a)(1). As identified in the emphasized portions of the section quoted above, it discusses two withdrawals: the broad withdrawal of public lands for Native village selection, and the subset of lands excepted from that broad withdrawal, including lands withdrawn for defense and National Park purposes. It is the former broad withdrawal that is at issue in this case. Nothing in ANCSA section 11(a)(1) or section 3(e) excludes lands acquired for purposes of the Reindeer Industry Act, let alone lands acquired from private parties, from the definition of “public lands” in ANCSA, as Kawerak suggests. In construing provisions of related legislation, the Supreme Court has noted that “[a]lthough language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning.” Amoco Production Company v. Village of Gambell, 480 U.S. 531, 548 (1987) (Alaska National Interest Lands Conservation Act, 16 U.S.C. § 1620). Moreover, Federal courts have made clear that the Secretary is entitled to deference in her construction of ANCSA. Chugach Alaska Corp. v. Lujan, 915 F.2d at 457 (construing ANCSA sections 3(d) and 14(h), 43 U.S.C. §§ 1602(d) and 1613(h)); Seldovia Native Association v. Lujan, 904 F.2d at 1342 (construing section 11(a), 43 U.S.C. § 1610(a)).

This Board has clarified that the term “public lands,” defining lands withdrawn by ANCSA, includes “‘all Federal lands’ except for those expressly excluded.” Sitnasuak Native Corp., 91 IBLA 86, 90 (1986). “Such a withdrawal [for Native village selection under section 11] could not occur if the land was either part of the National Park System or withdrawn or reserved for national defense purposes. Nor could the land be withdrawn if it was not ‘public land’ because it was, inter alia, actually used in connection with a Federal installation.” Id. The Board thus concluded that the withdrawal effectuated by section 11 was limited only by the exceptions cited, and discounted the suggestion that land “acquired” by the United States from private ownership was excluded from the definition of “public lands” within the meaning of section 3(e). Because the Board interpreted the section 11 withdrawal for Native village selection to be so broad, it construed the exception to the withdrawal, that is, the exclusion from lands available for Native village selection because they were withdrawn already for defense or National Park purposes, as correspondingly broad in scope. Id. at 90-91. Nonetheless, the import of the decision in that case, particularly with respect to lands available for selection by Sitnasuak, is that acquired lands, unless they were acquired for defense purposes, are

within the definition of “public lands” within the meaning of section 3(e). Accordingly, we reject Kawerak’s second argument.<sup>2/</sup>

[4] This brings us to Kawerak’s argument that BLM’s construction of its regulations was implausible because BLM’s division of the site in question creates sites that are too small for Sitnasuak to use and, effectively, divides the lands subject to Kawerak’s permit into parcels which are too small to administer. As support for this argument, Kawerak asserts that BLM unnecessarily restricted its analysis to the “minimum square footage around a building” and failed to consider the needs of the low-income housing residents today, especially the need for play space for tenant children and outside space for the families. Kawerak argues that a hearing is necessary because BLM did not properly follow the statute or regulation in determining to transfer the “smallest practicable tract” to Sitnasuak.

At the outset, nothing in section 3(e) of ANCSA can be construed to define “public lands,” for purposes of the 1971-74 village selection period, by the convenience of users of those lands 30 years later. Rather, the question is whether the lands were used during that period in connection with administration of a Federal installation. Accordingly, we cannot consider Kawerak’s arguments regarding the use of the tract today for purposes of answering the section 3(e) question.

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<sup>2/</sup> The Board acknowledged the “traditional” application of public land laws to acquired lands that forms the basis of Kawerak’s argument that the parcel deeded to the United States in 1940 was not “open” to public land laws. As we stated in Sitnasuak:

“Traditionally, ‘public lands’ were considered to be only those portions of the public domain which had never passed from Federal ownership; and only public lands were available for the acquisition of private rights and disposal under the public land laws. See Newhall v. Sanger, 92 U.S. 761, 763 (1875); Bobby Lee Moore, 72 I.D. 505 (1965), aff’d sub nom. Lewis v. General Services Administration, 377 F.2d 499 (9<sup>th</sup> Cir. 1967); 40 Op. Att’y Gen. 9 (1941). Consequently, lands to which the United States acquired title by purchase, condemnation, or gift were generally not considered to be public lands and were not available for disposal under the public land laws. Rawson v. United States, 225 F.2d 855, 858 (9<sup>th</sup> Cir. 1955), cert. denied, 350 U.S. 934 (1956); J. C. Babcock, 25 IBLA 316 (1976); Bobby Lee Moore, supra. Accordingly, there was never any reason to withdraw most acquired lands from the operation of the public land and mineral laws since those laws were inapplicable by their own terms.”

91 IBLA at 90-91. Whether or not, before its withdrawal under ANCSA section 11(a), the parcel would have been subject to appropriation under the public land laws is not before us, and does not answer the question of plain statutory interpretation with respect to section 3(e) of ANCSA.

Nor has Kawerak sufficiently presented an argument on appeal which would demonstrate, as a matter of law, that BLM incorrectly applied that definition in determining the “smallest practicable tract” in use by BIA. 43 U.S.C. § 1602(e) (2000). The statute makes clear that in determining the public lands available for selection by a village corporation, the Department was to exclude only the smallest possible tract, as determined by the Secretary, embracing land actually used in connection with the administration of a Federal installation. Kawerak presents no legal argument justifying its claim that the 0.18 acres BLM found to be retained by BIA during the 1971-74 time period was too small.

Departmental regulation 43 CFR 2655.2 sets forth criteria for making this determination. The regulation requires a determination of use as of December 18, 1971, as well as a finding that this use was continuous during the selection period through December 18, 1974. 43 CFR 2655.2(a)(1) and (2). BLM must take into account the nature of the use, and, in specifying lands to be retained, may include such “[b]uffer zone surrounding improved lands as is reasonably necessary for purposes such as safety measures, maintenance, security, erosion control, noise protection, and drainage.” 43 CFR 2655.2(a) and (b)(3)(ii).

BLM correctly limited its consideration of use to the selection period. The decision “found that the land described \* \* \* is the smallest practicable tract actually used by BIA in connection with the administration of the site.” (Decision at 2.) BLM considered the arguments of Sitnasuak and Kawerak. Kawerak sought the entire parcel. (Determination at 3.) Sitnasuak raised the objection that BIA did not use the entire site, but rather only the buildings. *Id.* BLM divided the lands in question based strictly on administration during the selection period. Thus, we find no basis in law for Kawerak’s assertions that the townsite cannot be divided into a segment of that size.

Kawerak’s only argument is thus a factual one. Kawerak asserts that the Board, after a hearing, must find as a factual matter that BIA used more land than BLM found in connection with administration of a Federal installation. Where an issue of material fact exists, a case is properly referred for an evidentiary hearing before an administrative law judge, pursuant to 43 CFR 4.415. Although the Board has discretionary authority to order a hearing before an administrative law judge, it normally will order a hearing when an appellant presents an issue of material fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through ordinary appeals procedures. *NaTec Minerals, Inc.*, 143 IBLA 362, 373-74 (1998).

We cannot find that Kawerak has shown that we should refer this matter for a hearing in this case, because it has made no offer of proof or other evidence that could be elicited which would be probative of the “smallest practicable tract”

necessary for BIA administration for employee housing during the relevant period in 1971-74, or, more directly, which would compel the conclusion that more such land was necessary for the “safety measures, maintenance, [and] security of the site,” under the regulations. Kawerak states that it submitted affidavits which it concedes were “silent” regarding use of the property during 1971-74. Kawerak argues that “[j]ust because a lot is unimproved or ‘vacant’ doesn’t mean it is not in use, or that it is not reasonably necessary to the use of adjacent land.” (SOR at 7.) Kawerak points to information dating “after the relevant period,” and cites individuals who discuss fence posts and a car parked off the street during the relevant period. *Id.* at 7-8. Kawerak fails to show the competence of the testimony it would elicit to prove anything about BIA’s administration of the land as a Federal installation, or to undermine BLM’s implementation of statutory or regulatory language.<sup>10/</sup> Accordingly, we deny the request for hearing.

Finally, Kawerak argues that BLM left ambiguous what would happen to Kawerak’s use permit if the decision is upheld. Kawerak objects to the portion of the decision which states that the transfer to Sitnasuak will be subject to the use permit “if valid.” While at first glance BLM’s condition may appear to suggest the permit is not valid, we find that the condition merely expresses the point that the patent would be subject to Kawerak’s permit, and that if, at some juncture, the permit is declared invalid or terminated, it would no longer affect the rights transferred by the patent. It is not a finding of the permit’s invalidity, and such a determination would presumably be subject to a separate appeal.

We make no finding that the issuance of a patent to Sitnasuak would violate section 14(g) of ANCSA. That provision ensures that if, prior to issuance of a patent to a village corporation, a permit has been issued for use of land, the “patent shall contain provisions making it subject to the \* \* \* permit.” 43 U.S.C. § 1613(g) (2000). While the patentee shall succeed to the rights of the grantor of such permit, the permit nonetheless shall be administered by the United States, unless the United States waives administration. *Id.* This record contains no indication that the United States has waived administration of Kawerak’s permit. Thus, Kawerak’s fourth argument is premature.

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<sup>10/</sup> To the extent Sitnasuak’s argument about “standing” is properly recast as a challenge to the competence of the testimony Kawerak seeks to elicit at a hearing, we agree.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision is affirmed and the request for hearing is denied.

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Lisa Hemmer  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge