

CHUGACH ALASKA CORP.

IBLA 94-473

Decided October 7, 1997

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, rejecting regional selection applications. AA-41487, etc.

Vacated and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places—National Historic Preservation Act: Generally

Where BLM fails to respond to a Native corporation's petition pursuant to 43 C.F.R. § 2650.0-8 to waive the filing deadline for selection applications under section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1994), and instead proceeds to substantively adjudicate those applications during a 14-year period after their untimely filing, a BLM decision rejecting the applications solely because they were not timely filed 14 years earlier will be vacated, and the case will be remanded for issuance of a decision on the merits.

APPEARANCES: William P. Horn, Esq., Anne E. McInemey, Esq., Washington, D.C., for Appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Chugach Alaska Corporation (Appellant) has appealed from a Decision of the Alaska State Office, Bureau of Land Management (BLM or the Bureau), dated April 19, 1994, rejecting in their entirety regional selection applications under section 14(h)(1) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1613(h)(1) (1994). By Order of July 5, 1994, the Board granted Appellant's Request for Stay of BLM's Decision.

Citing 43 C.F.R. § 2653.4(b), BLM's Decision rejected seven selection applications ^{1/} on the ground that they were filed on January 25, 1980, more than 3 years after the deadline of December 31, 1976. The cited regulation states in pertinent part:

Except as provided in § 2653.10, applications for selection under this subpart will be rejected after all allocated lands * * * have been exhausted, or, if the application is received after the following dates, which ever occurs first:

* * * * *

(b) As to all recipients described in sections 14(h)(1), (2), and (3) of the Act—December 31, 1976.

Appellant asserts in its Statement of Reasons (SOR) that certain land selection applications for cemetery sites and historical places were "completed" on December 18, 1975, and "submitted" to BLM, but "were apparently either lost or misplaced in the application process." See SOR at 1. Appellant states that, in order to preserve its claims, it "refiled" the applications on January 24, 1980, and simultaneously requested a waiver of the filing deadline under 43 C.F.R. § 2650.0-8. In a letter dated January 24, 1980, Appellant's president wrote to BLM explaining that, for unknown reasons, the applications were never filed and requesting a waiver of the filing deadline under 43 C.F.R. § 2650.0-8. Appellant relies on various documents of record to support its argument that BLM effectively waived the filing deadline and took various steps towards adjudicating the applications in the 14-year period between their filing and the Decision here on appeal.

The cited regulation, 43 C.F.R. § 2650.0-8, provides: "The Secretary may, in his discretion, waive any nonstatutory requirement of these regulations. When the rights of third parties will not be impaired, and when rapid, certain settlement of the claims of Natives will be assisted, minor procedural and technical errors should be waived."

Appellant asserts that it never received any reply to "its January 1980 reapplication and waiver request." Appellant also alleges that BLM, by its subsequent actions, "indicated it had either accepted as valid the 1975 applications or approved the 1980 waiver." Appellant asserts that BLM substantively evaluated "most of the subject sites, and some of the sites were issued certificates of eligibility." See SOR at 2.

Appellant refers to a December 2, 1983, memorandum from BLM's Assistant Deputy State Director for Conveyance Management to the Bureau of Indian Affairs (BIA) ANCSA Office, requesting a "Field Examination of

^{1/} The serial numbers of the applications rejected by BLM's Decision are: AA-41487, AA-41488, AA-41489, AA-41490, AA-41491, AA-41492, and AA-41494.

Chugach Region Cemetery Site and Historical Place Applications." Included in the list of sites for which examination was requested were AA-41487, AA-41488, AA-41489, AA-41490, AA-41492, and AA-41494.

On March 25, 1986, Appellant submitted amendments to AA-41487 and AA-41488 in order to conform the boundaries of the sites to the archaeological and cultural resources present. ^{2/} On June 26, 1987, BLM forwarded "[c]opies of 34 amended applications" to BIA's ANCSA office "for field investigation, report and possible certification." Included among the 34 applications were AA-41487 and AA-41488.

In a July 23, 1987, letter to the Forest Supervisor, Chugach National Forest, BLM's Deputy State Director for Conveyance Management responded to Forest Service objections to amendments filed by Appellant to its applications. The Deputy State Director noted that it was the

intent of Section 14(h)(1) of the Alaska Native Claims Settlement Act * * * to convey title to Native cemetery and historical places which are not conveyed to a village or regional corporation under other authority. To fulfill our obligation and BIA's commitment, the Department must address [Chugach's] concerns that the original determinations [of land descriptions] were based on inadequate or inaccurate information.

* * * * *

Although the selection deadline was established at 43 CFR 2653.4(b) as December 31, 1976, this is a non-statutory requirement. If it is determined that the new land descriptions go beyond the scope of an amendment in correcting the location of a site previously selected, it may be necessary for [Chugach] to formally request a waiver of the selection period, in accordance with 43 CFR 2650.0-8, to select additional sites.

See SOR, Ex. F. The letter lists two of the sites here at issue, AA-41487 and AA-41488.

The record contains a Report of Investigations For Alaska Chugach Natives (Report) which was submitted to Appellant's president by BIA on April 23, 1991. See also SOR Ex. B. Table 1 of the Report indicates that the seven sites rejected by BLM's Decision were field-examined between May 1986 and August 1987. Measurements and various site features were recorded. Archeological specifics were described for test pits, geological composition was noted, and culturally modified trees were inventoried. The Report recommended, based on finds of historical and archeological

^{2/} The applicable regulation, 43 C.F.R. § 2653.5(i), provides a mechanism for amending and filing with BLM a location description of a site which BIA, during its investigation, found to have been erroneously described.

artifacts, that certificates of eligibility be issued for three of the sites, AA-41488, AA-41489, and AA-41490. On April 15, 1991, finding that the sites met the criteria for qualification as Native historical places and/or cemetery sites as required by 43 C.F.R. § 2650, the Area Director for BIA's Juneau Area issued certificates of eligibility for AA-41488, AA-41489, and AA-41490. See SOR Ex. C.

Appellant observes that BLM rejected its applications based solely on a procedural matter and contends that final eligibility determinations should be based on the substantive merits of the applications.

Referring to the documentation summarized above, Appellant contends that, since BLM treated the applications as if they were timely filed and failed to respond to Appellant's request for waiver of the filing deadline, equity and fairness call for reversal of BLM's Decision. Appellant stresses that it does not ask the Board to grant the applications, but only require BLM to adjudicate the applications based on the merits. See Id. at 10.

In its Answer, BLM asserts that the filing deadline imposed by 43 C.F.R. § 2653.4(b) was not waived by the Secretary and is binding on both BLM and the Board. The Bureau argues that Appellant has presented insufficient evidence to establish that its 1980 filings "were reconstructions of timely filed applications." See Answer at 4. The Bureau contends that, under applicable principles of law, BLM officials must be presumed to have properly performed their duties and not lost filings received by them. Finally, BLM contends that equitable relief is not available. 3/

[1] As noted earlier, under 43 C.F.R. § 2650.0-8, the Secretary may, in his discretion, "waive any nonstatutory requirement of these regulations." (Emphasis supplied.) The regulation suggests that this discretion may be exercised to waive "minor procedural and technical errors" with a view to assisting "rapid, certain settlement of the claims of Natives," ensuring, however, that rights of third parties are not adversely affected. The regulation does not require the Secretary to issue a notice or other written document indicating that a waiver has been granted or denied. Indeed, the regulation specifies no administrative mechanics by which the grant or denial of a waiver will be made manifest to a party requesting a waiver.

In this case, BLM's Decision does not refer to Appellant's waiver request. On appeal, counsel for BLM defends its Decision by asserting that

3/ The Bureau also contends that rejection of the applications is consistent with paragraph 16 of the "1982 CNI Settlement Agreement." See Chugach Alaska Corp., 101 IBLA 375 (1988). It quotes paragraph 16 of that Agreement as precluding further section 14(h) selections under ANCSA. The Agreement is irrelevant. By its terms, it forecloses only requests for waivers or selections made after its effective date, Jan. 10, 1983.

no waiver was granted and by arguing, with respect to the filing deadline (43 C.F.R. § 2653.4(b)), that regulations are binding on BLM and the Secretary. It is established that duly promulgated regulations have the force and effect of law and are binding on the Secretary and his delegates. ANR Production Co., 118 IBLA 338 (1991); Conoco, Inc., (On Reconsideration), 113 IBLA 243 (1990). However, the issue in this case is whether the regulatory filing deadline of 43 C.F.R. § 2653.4(b) was waived by the exercise of the discretionary authority afforded by another regulation, 43 C.F.R. § 2650.0-8. Both regulations are pertinent to this appeal.

The record shows that BLM was engaged in adjudicating the applications on their merits and was apparently unconcerned with unmet filing deadlines throughout the period between January 1980 and April 1994. The Deputy State Director's July 23, 1987, letter to the Forest Supervisor demonstrates BLM's concern that the sites be accurately described and illustrates that waiver of the filing deadline, in cases where new land descriptions went "beyond the scope of an amendment in correcting the location of a previously selected site" could be available as late as 1987, to facilitate further adjudication of the selections. As previously shown, other documents cited by Appellant similarly show that the selected sites were being field-examined and evaluated for eligibility for conveyance.

Both parties agree that the filing deadline is a nonstatutory provision, and there is no indication that rights of third parties will be adversely affected. As we observed earlier, 43 C.F.R. § 2650.0-8 is silent as to how the exercise of discretion accorded therein is to be applied. We conclude, therefore, that by failing to respond negatively to Appellant's 1980 request for a waiver, and by substantively adjudicating its applications over the years, BLM effectively waived the filing deadline. On remand, BLM should issue to Appellant a decision addressing the merits of the selections.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is vacated, and the case is remanded for further consideration in accordance with the views expressed in this Opinion.

David L. Hughes
Administrative Judge

I concur.

James L. Burski
Administrative Judge

