

SEALASKA CORP.

IBLA 88-346

Decided July 19, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting historical place selection application AA-10511.

Affirmed.

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

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

2. Administrative Procedure: Burden of Proof--Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

3. Administrative Procedure: Hearings--Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--Rules of Practice: Hearings

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

APPEARANCES: Stephen F. Sorensen, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Sealaska Corporation (Sealaska) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 7, 1988, rejecting historical place application AA-10511, filed on December 12, 1975, pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1982). In historical place application AA-10511, Sealaska selected the East Taku River Village Site, described in the application as a "permanent village site" located "on the east bank of the Taku River, south of Taku Lodge, east of Hole-in-the-Wall glacier," within sec. 24, T. 39 S., R. 69 E., Copper River Meridian, Alaska.

Wilsey & Ham, Inc., consultants from Seattle, Washington, located and examined the site for Sealaska on August 4, 1975. See Bureau of Indian Affairs (BIA) Report of Investigation at 6. In its report, Wilsey & Ham stated: "No direct evidence of the village was found. However, the open character of the site is indicative of previous use. Several 'open spots' square in nature which could have been sites for community houses were located."

BLM forwarded Sealaska's application to the ANCSA Project Office of BIA for field investigation. BIA's investigative findings are set forth below:

Field investigation of East Taku River Village was conducted on May 20, 1979, by BIA Field Investigators Marquam George, L.A. Woodall, and Pete Ekstrom, under the supervision of Larry Roberts. Cooperative Park Studies Unit (CPSU) Archeologists Russell Sackett and Carol Rawlinson provided technical assistance. Melody Graumann, National Park Service historian, was also present.

Although the site is reported to have been the location of a large permanent winter village utilized by the Taku clan of the Tlingit Indians, field investigation revealed no cultural material. No aboriginal cultural materials were located on or near the parcel of land applied for during an on-site transected archeological survey. The area investigated included W $\frac{1}{2}$  W $\frac{1}{2}$  NE $\frac{1}{4}$ , E $\frac{1}{2}$  E $\frac{1}{2}$  NW $\frac{1}{4}$  Section 24, T. 39 S., R. 69 E., Copper River Meridian, Alaska.

Mrs. Susie James, a Native informant from Taku, reported that East Taku River Village was actually located on the site

of the present Taku Lodge, located just north of the applied-for site, on patented land (U.S. Survey 1199).

(Report of Investigation at 6-7).

As noted, CPSU cooperated with the ANCSA Project Office in investigating the Jamboree Bay Village Site. According to Russell Sackett, CPSU field archeologist who took part in the investigation, there were no "surface indications of Native use on the defined site area; and archeological testing of the area revealed only sterile soil below the surface" (Report of Investigation, Exh. 3 at 19). Moreover, he states that "ethnographic information and historic documentation does [sic] not place the applied-for site in this location but 1 mile upstream where the Taku Lodge now stands." Id.

On November 30, 1983, BIA issued a certificate of ineligibility for the East Taku River Village Site, listing the following two reasons: "1. Extensive field investigation by BIA personnel failed to find any concrete evidence to support the claim of a historical place. 2. The site does not meet the criteria for a historical place as required by 43 CFR 2653.5(d)(1-5)."

On July 27, 1987, Sealaska submitted to BLM a study prepared by the Chilkat Institute entitled "Assessment of Twelve Sealaska Corporation Historical Site Applications Under the Alaska Native Claims Settlement Act 14(h)(1)" (Chilkat Assessment). The purpose of this study was to present "new information" to demonstrate that BIA's certificates of ineligibility pertaining to 12 selection applications, including selection application AA-10511 for the East Taku River Village Site, were based upon inadequate investigations and incomplete information. Sealaska requested that BIA prepare a supplemental report for each of the 12 sites, "which incorporates new site investigations and that a re-determination of historical status eligibility be made in each case. Further substantiation in oral traditions should also be compiled from knowledgeable individuals" (Letter dated July 22, 1987, from Sealaska to BLM).

The Chilkat Institute asserts that "[t]he East Taku River Village site is directly associated with a significant Native historical and cultural event, the migration of the Taku Indians" (Chilkat Assessment at 85). The Chilkat Institute refers to "oral history" as "attesting that the material [evidencing the village site] is probably covered by ground and stating directly that sub-surface probing would be necessary to identify the site," and that the "prehistoric remains may have been pillaged, which would increase the difficulty of observing surface features associated with the site." Id. at 90. Moreover, according to Susie James, who visited the area when she was a young woman, there was a village located at the present site of the Taku River Lodge, but that "[t]his village should not be confused with the applied-for site, which lies at some distance from the lodge." Id. at 89.

By decision dated March 7, 1988, BLM rejected Sealaska's selection application, reciting the reasons given in BIA's certificate of ineligibility.

In its statement of reasons (SOR), Sealaska argues that Departmental regulations at 43 CFR 2653.5 establish a "presumption of validity for any Section 14(h)(1) application," and that the "application is to be given 'favorable consideration' if the site qualifies" (SOR at 6-7). Sealaska contends that "[b]y failing to give this application the type of favorable consideration and the presumption of validity required by Congress, the BIA violated its obligation to carry out the intent of Congress," and that "[i]t failed to perform an adequate and meaningful review and investigation of the site." Id. at 8-9.

Sealaska incorporated into its SOR, in slightly modified form, the evaluation of the East Taku River Village Site contained in the Chilkat Institute's study, discussed supra. Sealaska claims that BIA should have conducted subsurface testing, since the site was reportedly used as a burial ground or a crematory, and did not adequately review and research the oral histories concerning the site.

In its answer, BLM counters that there is neither a "presumption of validity" for a section 14(h)(1) application nor a requirement that every application be given "favorable consideration" (Answer at 7). In BLM's view, under 43 CFR 2653.5(a) "favorable consideration cannot be given unless the Secretary finds that the regulatory criteria is met." Id. at 8. BLM states that "[t]he Secretary cannot give favorable consideration to applications which are not eligible, 43 CFR 2653.5(a)." Id., quoting BLM Decision at 2. According to BLM, the East Taku River Village Site does not meet the regulatory criteria for a historical place.

On October 24, 1988, Sealaska filed an additional SOR and a request for a hearing. Sealaska argues that whether the East Taku River Village Site qualifies as an historical place under section 14(h)(1) of ANCSA "involves a material factual issue which would alter the disposition of the Bureau of Land Management's decision to deny Sealaska's application for the convey-ance of this historic site" (Additional SOR at 2). The "major factual finding" of BIA and BLM, which Sealaska wants resolved through a hearing, is that "no cultural remains of a village were found on the applied for site, neither the remains of a village complex nor a burial site." Id. at 4.

Sealaska now contends that "[t]he applied for site is the associated burial grounds and crematory for the acknowledged village site which is located on private fee land and is not available for selection." Id. at 5. Sealaska maintains that "the site was a cemetery and crematory, all in association with that part of the village now on private lands." Id. Sealaska concludes that although part of the village, i.e., where the Taku Lodge is now located, is unavailable for selection, the portion described in the application where the cemetery component of the village was located is available for selection as a historical place.

In its additional answer, BLM responds that "[w]hether the BIA conducted a sufficient investigation is not a material factual question requiring a hearing on the eligibility of the applied-for-site. Rather, if the Board found the investigation insufficient a remand would be the appropriate remedy" (Answer at 2).

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary to convey fee title to historical places to the appropriate regional corporation under certain circumstances and subject to various restrictions. A "historical place" is defined at 43 CFR 2653.0-5(b) as

a distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical or cultural events or persons, or which was subject to sustained historical Native activity, but sustained Native historical activity shall not include hunting, fishing, berry-picking, wood gathering, or reindeer husbandry. However, such uses may be considered in the evaluation of the sustained Native historical activity associated with the tract or area.

The criteria for determining whether a site constitutes a historical place are set out at 43 CFR 2653.5(d), which provides:

For purposes of evaluating and determining the eligibility of properties as historical places, the quality of significance in Native history or culture shall be considered to be present in places that possess integrity of location, design, setting, materials, workmanship, feeling and association, and:

(1) That are associated with events that have made a significant contribution to the history of Alaskan Indians, Eskimos or Aleuts, or

(2) That are associated with the lives of persons significant in the past of Alaskan Indians, Eskimos or Aleuts, or

(3) That possess outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of Alaskan Indians, Eskimos or Aleuts, or

(4) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or

(5) That have yielded, or are demonstrably likely to yield information important in prehistory or history.

We agree with BLM that the East Taku River Village Site does not satisfy the definition of "historical place" set forth in 43 CFR

2653.0-5(b). Having reviewed the record, we agree with BLM's evaluation of Sealaska's selection application for the East Taku River Village Site:

The existing record contains enough evidence to substantiate rejection of the claim for the East Taku River site as the location of a permanent village. Field investigations by Sealaska, BIA, CPSU and NPS [National Park Service] personnel failed to produce any evidence of such a village. Likely depressions were not identified as warranting further investigation. The subsurface testing that was done was sterile. More significantly, historical information placed a village one mile north of the applied-for site and indicated the applied-for site was used, instead, for burial purposes. Sealaska's own expert stated that Tlingits avoided burial sites (SOR, Exh. D, 5) and, presumably would not have had a village on the same site. Rather, "[i]t is probable that the applied-for burial site was associated with the former Taku Indian village at the lodge" (*id.*).

However, Sealaska applied for a historic place and not a cemetery site (Application AA-10511, *supra*, 1). Cemetery sites are treated and defined differently than historic places, 43 CFR §§ 2653.0-5(a) and (b). In light of the differing requirements, a cemetery site would not ordinarily or necessarily qualify as a historic place. Even if burial places were not limited to cemetery site status, Sealaska has not attached a "significant Native historical event" to the burial sites that would qualify it as a historic place.

In addition, while the oral history of the Taku River area appears credible and the history of the Taku Tlingit migration is impressive, the nexus to the particular legal requirements of an ANCSA historical place has not been established. The exact location of the place where the Taku Tlingit ended their migration is not firmly established by the record. Thus, there is a lack of the "distinguishable tract of land" required by 43 CFR § 2653.0-5([b]). In addition, Sealaska has not even alleged what specific features about the East Taku River site satisfy the requirements for "integrity of location, design, setting, materials, workmanship, feeling and association." 43 CFR § 2653.5(d).

(Answer at 11-12).

[2] Sealaska, as the party challenging BLM's decision rejecting its selection application, bears the burden of establishing by a preponderance of the evidence that such decision is in error. Sealaska has simply failed to meet this burden. *See, e.g., Minchumina Homeowners Association*, 93 IBLA 169, 178 (1986). As BLM notes, appellant has been unable to provide any evidence which links this specific site with the Taku migration, nor has

appellant proffered any evidence which could contradict the on-site investigations of BIA and CPSU which failed to disclose any indications of Native use. 1/

[3] Under these circumstances, we deny Sealaska's request for a hearing. The following standard is applicable to appellant's request for a hearing:

[The appellant] apparently wishes to rehash the factual determinations which BLM has already made. It offers no showing that an administrative law judge would be better able to make a reasoned decision on the basis of an oral hearing than could BLM or this Board make on the existing record. No offer of further evidence has been made. A hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. E.g., *Stickelman v. United States*, 563 F.2d 413, 417 (9th Cir. 1977); *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *Kim C. Evans*, 82 IBLA 319, 323 (1984). This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." *Stickelman v. United States*, supra at 417. In the instant case, the record does not reflect any significant factual or legal issues which warrant an oral hearing. [Emphasis added.]

Woods Petroleum Co., 86 IBLA 46, 55 (1985).

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1/ In addition, the Chilkat Institute claims that the East Taku River Village Site was "utilized by the Taku Tlingit as a burial ground and as such constitutes a cemetery site" (Chilkat Assessment at 85). The Institute feels that "further site investigation is necessary to locate and describe the reported burial site." Id. at 92. While the Institute also asserts that "[i]t is this burial site which Sealaska applied for" (id.), this assertion is not borne out by the record. Sealaska quite clearly applied for a permanent village site, not a cemetery site. Thus, the descriptive evidence submitted with the application noted: "No direct evidence of the village was found. However, the open character of the site is indicative of previous use. Several 'open spots' square in nature which could have been sites for community houses were located." Since, as appellant notes on appeal, the Taku people avoided burial areas, the assertion of community houses in the area is inconsistent with any claim that Sealaska was originally interested only in obtaining the burial grounds of the village. Because this appeal concerns BLM's rejection of Sealaska's application for conveyance of the East Taku River Village Site as a historical place, we do not address Sealaska's argument that the site qualifies for conveyance as a cemetery site.

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.

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Will A. Irwin  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge