

BERING STRAITS NATIVE CORP.

IBLA 95-144

Decided October 2, 1997

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, rejecting regional selection applications F-21912 et al.

Affirmed.

1. Alaska National Interest Lands Conservation Act: Generally--Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--Withdrawals and Reservations: Effect of

Selection applications under ANCSA section 14(h)(1) by a Regional Native Corporation were properly rejected because the land selected was not unreserved and unappropriated.

APPEARANCES: Jack Carpenter, Nome, Alaska, President of Bering Straits Native Corporation, for the Corporation; Dennis J. Hopewell, Esq., Acting Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Bering Straits Native Corporation has appealed from an October 14, 1994, Decision of the Alaska State Office, Bureau of Land Management (BLM), that rejected regional selection applications F-21912, F-21921, F-21922, F-21958 through F-21961, F-21968, F-22012, F-22280, and F-22294. All the rejected applications were for cemetery sites and historic places presently situated in the Bering Land Bridge National Preserve; the selections were made in December 1975 under section 14(h)(1) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1613(h)(1) (1994). The BLM Decision now under review rejected Appellant's applications after finding the lands applied for were withdrawn from all forms of appropriation beginning on December 18, 1971, and remain so withdrawn; BLM concluded that the lands were not, therefore, unappropriated and unreserved so as to be subject to selection by Appellant in 1975 under provision of ANCSA section 14(h)(1). The Decision finds that the lands selected by Appellant "have been continuously withdrawn" from selection by Appellant and presently remain withdrawn as part of a preserve established under section 201(2) of the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 431 note (1994).

While Appellant agrees the selected lands were continuously withdrawn from all forms of appropriation since December 1971, it is nonetheless argued that this circumstance does not prevent conveyance of the applied-for lands, because Departmental regulation 43 C.F.R. § 2563(c) permits conveyance of such lands pursuant to ANCSA section 14(h)(1). After quoting parts of the regulation, Appellant alleges that "the inference by BLM that said selections within the final recommendations [Pub. L. No. 92-203; section 17(d)(2)] are ineligible for conveyance is not supported by language in the legislation." (Statement of Reasons (SOR) at 2.) Appellant summarizes this argument as follows:

No language within the legislation excludes lands within the Secretary's final recommendations to Congress from selection as 14(h)(1) sites. The Secretary has the authority to convey inholdings within Section 17(d)(2) withdrawals provided the covenants attached to such inholdings are consistent with the policies of the management unit. The intent of the 14(h)(1) selections is consistent with the National Historic Preservation Act and the cultural resources management policy of the Bering Land Bridge National Preserve.

(SOR at 6.)

[1] This argument, however, overlooks the plain language of ANCSA section 14(h)(1), which provides, concerning such selections as those here at issue, that:

The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title, [as] follows:

- (1) The Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places.

43 U.S.C. § 1613(h)(1) (1994) (emphasis supplied). The plain meaning of the emphasized statutory language is that conveyance of lands to regional corporations is limited to land that is "unreserved and unappropriated." Because the land in the selections made by Appellant is concededly land that, at all relevant times, was withdrawn from selection, none of the land was unreserved, as ANCSA section 14(h)(1) required, in 1975 when Appellant filed the selections at issue, nor has it become so. Therefore, BLM was required to reject Appellant's selection applications. Bering Straits Native Corp., 87 IBLA 96, 101 (1985).

Bering Straits Native Corp., *supra*, provides controlling precedent for this appeal; therein, an application under ANCSA section 14(h)(1) was made

for land that was withdrawn under several Public Land Orders (PLO), including one that applies to the applications made herein, PLO 5250. In that case, as in the instant appeal, all the land withdrawn by PLO was included in recommendations made by the Secretary to Congress, as required by ANCSA section 17(d), and remained withdrawn thereafter until included in part of the National Park system. Id. at 101. This case cannot reasonably be distinguished from Bering Straits Native Corp., supra, and requires the same result.

The regulation relied upon by Appellant for the notion that an exception to the plain language of the statute was created by rule making is without merit. The regulation, 43 C.F.R. § 2653.3(c), was interpreted by the Bering Straits Native Corp. opinion, at 87 IBLA 98, to mean that lands included in the Secretary's recommendation to Congress were not subject to selection under ANCSA section 14(h)(1). This interpretation is correct. The rule states that: "A withdrawal made pursuant to section 17(d)(1) of the Act which is not part of the Secretary's recommendation to Congress of December 18, 1973, on the four national systems shall not preclude a withdrawal pursuant to section 14(h) of the Act." (Emphasis supplied.) Because the rule speaks only of lands not included in the Secretarial recommendation to Congress, the Board drew an inference that lands that were included in the recommendations were not available for selection. The same inference was drawn by BLM in the decision under review when it was determined that appellant's selections (which were included in the Secretary's recommendation) were not available for selection. Appellant has not shown that this interpretation of the Departmental rule was incorrect.

It is therefore concluded that rejection of Appellant's selections by BLM was required under ANCSA section 14 and Departmental regulation 43 C.F.R. § 2653.3, because the land applied for by Appellant was continuously withdrawn from such selection for other purposes.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Franklin D. Amess
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

