

CHUGACH ALASKA CORPORATION

IBLA 2003-286

Decided August 1, 2006

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting a Native historical place selection application, as originally filed, and declining to consider a purported amendment of that application. AA-41487.

Affirmed in part; set aside and remanded in part.

1. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

Section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (2000), permits amendment of a Native historical place application only where the appropriate Native regional corporation identifies a distinguishable tract of land or area upon which occurred the significant Native historical event, which is importantly associated with Native historical or cultural events or persons, or which was subject to the sustained historical Native activity originally justifying selection of the site, the location of which was erroneously described in the application. See 43 CFR 2653.0-5(b), 43 CFR 2653.5

2. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

BLM properly declines to consider a purported 1995 amendment of a Native historical place selection application, filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (2000), and 43 CFR

Subpart 2653, where the Native regional corporation fails to demonstrate that the amendment is intended to correct an erroneous description of the land encompassing the site selected in the original application for a Native historical place.

APPEARANCES: Cheryl L. McKay, Esq., Anchorage, Alaska, for the Chugach Alaska Corporation; Maria C. Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Indian Affairs and Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Chugach Natives, Inc., a Native regional corporation, now doing business as Chugach Alaska Corporation (Chugach or CAC), has appealed a May 29, 2003, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting its Native historical place selection application, AA-41487, and declining to consider a purported November 21, 1995, amendment of that application, on the ground that the amendment constituted a new and untimely application. Application AA-41487 was filed on January 25, 1980.^{1/}

Section 14(h)(1) of the Alaska Native Claims Settlement Act (ANSCA), as amended, 43 U.S.C. § 1613(h)(1) (2000), authorized the Secretary of the Interior to

^{1/} As established by regulation, the application was required to be filed on or before Dec. 31, 1976. 43 CFR 2653.4(b). The cover letter to the application stated that Chugach had discovered 17 site selection applications, prepared for filing on Dec. 18, 1975, which were either delivered and lost or not delivered. It requested the Secretary's waiver of the filing deadline requirement pursuant to 43 CFR 2650.0-8. On Apr. 19, 1994, BLM issued a decision rejecting application AA-41487 as untimely filed under 43 CFR 2653.4(b). Chugach appealed, and the Board, in an Oct. 7, 1997, decision vacated BLM's decision and remanded the case to BLM with instructions to issue a decision addressing the merits of the application. Chugach Alaska Corp., 140 IBLA 323 (1997). On June 19, 1998, the Board granted BLM's petition for reconsideration and vacated both the Board's and BLM's decisions and remanded the case to BLM for referral of the waiver request to the Secretary. Chugach Alaska Corp. (On Reconsideration), 144 IBLA 337 (1998). On July 7, 1999, the request was declined and the case was closed. On Dec. 27, 2000, Congress enacted the Omnibus Indian Advancement Act, Pub. L. No. 106-258, 114 Stat. 2942, which reinstated selection application AA -41487.

“withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places.” Section 14(h)(7), 43 U.S.C. § 1613(h)(7) (2000), authorized the Secretary to withdraw and convey lands out of a National Forest for those purposes.

On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371-2551, 16 U.S.C. §§ 3101 *et seq.*, (2000), to complete the allocation of Federal lands in the State of Alaska. Amoco Production Co. v. Gambell, 480 U.S. 531, 549 (1987). Following a study of the land ownership and use patterns in the Chugach region, the United States and Chugach executed an agreement on January 10, 1983, settling all of Chugach’s entitlement under ANCSA. (Chugach Natives Inc. Settlement Agreement (CNI Settlement Agreement)). In paragraph 16 of the CNI Settlement Agreement, Chugach agreed to forego efforts to select new sites under section 14(h):

16. NO FURTHER SELECTION UNDER SECTION 14(h) OF ANCSA.
After the effective date of this Agreement [January 10, 1983] CNI shall not apply for, nor shall it seek any waiver of regulations in order to make future selections under section 14(h) of ANCSA, nor shall CNI approve of any future group selections within the National Forest System, nor shall CNI assert or seek to acquire any other legal authority to make future selections pursuant to section 14(h) of ANCSA within the national forests. Any selections on record on the date of the Agreement for a particular site, or any amendments thereto, shall not be regarded as a future selection for purposes of this paragraph. [^{2/}]

On December 27, 2000, Congress enacted the Omnibus Indian Advancement Act, Pub. L. No. 106-258, 114 Stat. 2942, deeming the application at issue in this appeal and six other Chugach section 14(h)(1) applications timely filed, and directing the Secretary to process those applications “in accordance with the criteria and procedures set forth in the regulations promulgated by the Secretary as of the date of enactment of this title.” The Act also directed the Department to “incorporate and use any work done on these applications during the processing of these applications since 1980” and allowed amendment of an application “in accordance with the rules and regulations generally applicable to amending applications under section 14(h)(1) of ANCSA.” Notably, however, the Act did not authorize selection of

^{2/} See BLM Answer, IBLA 94-473, dated Sept. 19, 1994. The parties do not dispute these consequences of the CNI Agreement. See Suppl. Statement of Reasons (SOR) at 6-7 and BLM’s Answer at 3-4; see also Chugach Alaska Corp., 101 IBLA 375 (1988).

new sites. Sections 1503-1505, Omnibus Indian Advancement Act, Pub. L. No. 106-258, 114 Stat. 2942.

The Department has promulgated regulations (43 CFR Subpart 2653), which implement section 14(h)(1) of ANCSA. A Native historical place is defined 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.

43 CFR 2653.0-5(b). The regulations further provide:

(d) 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.

43 CFR 2653.5(d); see Sealaska Corp., 127 IBLA 22, 28-29 (1993). The regulations require a regional corporation to submit, along with its application for a Native historical place, “a statement describing the events that took place and the qualities

of the site from which it derives its particular value and significance as a historical place.” 43 CFR 2653.5(f). This document is commonly referred to as a “statement of significance.”

The regulations list additional criteria that must be addressed before 14(h)(1) selections in a National Forest are allowed:

A historical place may be granted in a National Wildlife refuge or National Forest unless, in the judgment of the Secretary, the events or the qualities of the site from which it derives its particular value and significance as a historical place can be commemorated or found in an alternative site outside the refuge or forest, or if the Secretary determines that the conveyance could have a substantial detrimental effect on (1) a fish or wildlife population, (2) its habitat, (3) the management of such population or habitat, or (4) access by a fish or wildlife population to a critical part of its habitat.

43 CFR 2653.5(b).

Under the Department’s regulatory scheme, the Native regional corporation files a Native historical place selection application with BLM which segregates the selected lands from appropriation under the public land laws. BLM forwards the application to the Bureau of Indian Affairs (BIA) for investigation, report, and certification and supplies a copy to the National Park Service (NPS). When the 14(h)(1) application pertains to lands in a National Forest, BLM forwards a copy of the application to the Forest Service, U.S. Department of Agriculture (Forest Service). 43 CFR 2653.5(f)-(h). BIA, in consultation with the NPS and, in the case of National Forests, the Forest Service, certifies that the site or place exists and that it meets the regulatory criteria of historical significance. 43 CFR 2653.5(j). BIA then forwards its certifications and reports, along with the written comments and recommendations of the NPS and any other Federal agency to BLM, which adjudicates the applications. 43 CFR 2653.5(k).^{3/} The regulations also address amendments of Native historical place applications, providing that “[i]f, during its investigations, [BIA] finds that the

^{3/} The regulations provide for an additional step and the possibility that the land will not be conveyed if the U.S. Fish and Wildlife Service or Forest Service raises issues under 43 CFR 2653.5(b), including issues regarding conflicts with fish and wildlife, their habitat or management. In that case, BLM must refer the record to the Secretary for resolution of the conflict and, if the land is available, the Secretary “shall make [a] determination to convey or not to convey the site to the applicant.” 43 CFR 2653.5(k).

location of the site as described in the application is in error, it shall notify the applicant, [BLM] and other affected Federal agencies, of such error” and the applicant then has 60 days to file an amendment “with respect to the location of the site.” 43 CFR 2653.5(i).

The Secretary may give favorable consideration to applications by regional corporations for conveyance of existing cemetery sites or historical places pursuant to section 14(h) of ANCSA, provided the Secretary determines that the regulatory criteria have been met and the regional corporation covenants that the cemetery sites or historical places will be maintained and preserved solely as such. 43 CFR 2653.5(a).

Chugach filed application AA-41487 on January 25, 1980. The application sought approximately 80 acres of land in protracted sec. 36, T. 12 N., R. 11 E., Seward Meridian, Alaska, near Miners Bay, along the eastern shore of Unakwik Inlet, off Prince William Sound, within the Chugach National Forest (hereinafter, “the Miners Lake site”).^{4/} A topographic map, identified as “Anchorage A2 1960,” places the AA-41487 site on the northeast end of Miners Lake, about 2.3 miles away from the confluence with Miners River. There is no evidence in the record that, when Chugach filed application AA-41487, it submitted a statement of significance “describing the events that took place and the qualities of the site from which it derives its particular value and significance as a historical place,” in accordance with 43 CFR 2653.5(f).

BLM noted the application on the Master Title Plat (MTP) for protracted T. 12 N., R. 11 E., Seward Meridian, Alaska. In December 1983, BLM forwarded AA-41487 and 69 other Chugach selection applications to the BIA’s ANCSA Office for field investigation, report, and possible certification. (Letter, dated Dec. 2, 1983, from BLM State Office to BIA ANCSA Office.) Copies of applications selecting lands within the jurisdiction of other agencies (including AA-41487) were also forwarded to the Forest Service, U.S. Fish and Wildlife Service, and the National Park Service, as appropriate. Id.

Three years later, pursuant to 43 CFR 2653.5(i), Chugach submitted to BLM an amendment to Native historical place selection application AA-41487 (1986 amendment). In addition to the Miners Lake site described in the original 1980 application, the 1986 amendment sought to add sites in secs. 2, 3, and 16, T. 11 N., R. 11 E., Seward Meridian, Alaska, near Miners Bay, which together became known

^{4/} The January 1980 application described the following lands: SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 36, T. 12 N., R. 11 E., Seward Meridian.

as the “Miners Lake Complex site.”^{5/} There is no evidence in the record that Chugach submitted the requisite statement of significance with the 1986 amendment. The cover letter explains only that “these amendments are intended to conform the boundaries of the site applications to the archeological and cultural resources present” and that the amendment is submitted “to correct errors in the original selection applications.” (Letter, dated Mar. 13, 1986, from R. Marchell Espe, Chugach, to Robert Arndorfer, BLM.)^{6/}

We glean from the record that the “archeological and cultural resources present” in secs. 2, 3 and 16 which compelled Chugach to seek to amend the application in 1986 included, in secs. 2 and 3, situated at the outlet of Miners Lake, a 1985 discovery by a Forest Service archeologist, identified by a Native informant as a traditional hunting camp and, in sec. 16 (about 4.5 km southwest of Miners Lake), a 1976 Forest Service archeologist’s discovery, consisting of two intertidal stone fish weirs.^{7/} (1995 BIA Report of Investigation for Cannery Creek Fish Camp, BLM AA-41487, Chugach Alaska Corporation (Cannery Creek Report) at 7.) BLM noted the 1986 amendment on the MTP.

The record also includes a 12-page memorandum to BIA archaeologist Ron Kent, apparently prepared by an individual whose handwritten initials “J.J.” appear thereon.^{8/} That document, dated May 18, 1987 (14 months after Chugach filed the 1986 amendment), lists Application AA-41487 as one that had not been investigated. The entry for this application reports information pertaining to cultural remains located on two of the three sections Chugach identified in its 1986 amendment. It is silent regarding the original selection at section 36, and comments on section 28 as follows:

^{5/} The sites were described as follows: SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 36, protracted T. 12 N., R. 11 E.; W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of sec. 2, SE $\frac{1}{4}$ W $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ of sec. 3, and SW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 16, protracted T. 11 N., R. 11 E., Seward Meridian. A small map was attached to the 1986 submission and shows the three sites.

^{6/} The Mar. 13, 1986, letter also stated that Chugach would relinquish “those portions which neither comprise nor buffer the archeological or cultural properties” when the selections were fully adjudicated.

^{7/} The record is clear that Chugach did not select, as part of the 1986 amendment, ANC-247, a site further south along the Inlet in sec. 28, T. 11 N., R. 11 E. and the subject of this appeal, although the Forest Service had made this discovery in 1978.

^{8/} These initials may denote John F. C. Johnson, Chugach’s Cultural Resource Manager.

Miner Lake-FS #564- house pit and cache, pottery, stove, glass and chinaware found in the south of sec. 3, also in sec. 16 two stone-w[ie]rs found-FS #115, 116. [T]his area should be united into a historical complex. A vil[l]age was also found in sec 28 by a stream. [^{9/}]

On June 2, 1987, the Director of BIA's ANCSA Office wrote Espe to advise her that a field crew would be working in the Prince William Sound area that summer and to explain that BIA could not authorize investigation of the 1986 amendment sites before BLM forwarded the amendment for investigation. (June 2, 1987, letter at 1.) On June 26, 1987, BLM forwarded 34 amended applications, including AA-41487, to BIA's ANCSA Office for field investigation, report and possible certification. See June 26, 1987, Memorandum, from BIA ANCSA Office to the Chief, Branch of Koniag, Chugach, Sealaska (KCS) Adjudication.

On June 30, 1987, the Chugach Forest Supervisor wrote the BLM Alaska State Director objecting to Chugach's 1986 amendment on the ground that the amendment was improper and should be deemed a new application that was impermissibly initiated by Chugach instead of by BIA. BLM responded that, although the regulations at 43 CFR 2653.5(i) do not expressly address amendments initiated and submitted by applicants, rather than in response to BIA's recommendations following field investigations, they do not prohibit acceptance of location amendments initiated by applicants. (Letter, dated July 23, 1987, from Arndorfer, Alaska State Office, BLM, to Forest Supervisor.)

On July 25 and August 8, 1987, BIA investigated the sec. 36 Miners Lake site selected by Chugach in the original 1980 application but not the locations identified by Chugach in its 1986 amendment, forwarded to BIA by BLM's June 26, 1987, Memorandum. ^{10/} In 1991, BIA reported its findings in an overview report, covering

^{9/} Chugach identified the location of FS 564, 115 and 116 in secs. 3 and 16, T. 11 - the area that Johnson indicated "should be united into a historical complex" - in its earlier 1986 amendment. It is important to note that neither in the 1986 amendment nor the 1987 letter did Chugach suggest that sec. 28 (later known as the Cannery Creek site) should be part of the historical complex, along with the sites at Miners Lake (per 1980 application) and Miners Bay (per 1986 amendment), or that sec. 28 should be added as part of the amendment to AA-41487 for any other reason.

^{10/} BIA's 1991 Report of Investigations describes the application as encompassing the "area around the confluence of Miners River with Miners Lake, see Vol. VI,

(continued...)

investigations of numerous ANCSA section 14(h)(1) selections, including the Miners Lake site identified in Chugach's 1980 AA-41487 application. (BIA Report of Investigations for Chugach Alaska Corporation, Sites BLM AA-10720 through BLM AA-41502 (1991) (1991 Report of Investigations), Vol. V, at 558; Vol. VI, Table 8 at 756 and Figure 149, at 818.) BIA identified Miners Lake as "the epicenter of the 1964 earthquake" and described the difficulty its archeologists encountered investigating the site. *Id.* Vol. II at 178-79.

On March 26, 1991, BIA's Supervisory Archeologist recommended that BIA issue a Certificate of Ineligibility for BLM AA-41487, finding as follows:

1. Bureau of Indian Affairs archeologists examined the application area, but were unable to find any evidence to support the claim for a Native historical place.
2. That locale was not accessible by boat and could only be reached by floatplane. The inaccessibility makes it unlikely the application area was ever used on a sustained basis by Native people. The absence of CMTs [culturally modified trees], which are a good indicator of historic Native use, also indicates the unlikel[i]hood there has been sustained Native activity in the area during the historic period.

^{10/} (...continued)

Figure 149. * * * The head of Miners Lake is about 3.7 km northeast of Miners Bay in Unakwik Inlet." Figure 149 depicts the application area as the sec. 36 Miner's Lake site only, consistent with the land description for AA-41487 in Table 8. (1991 Report of Investigations, at 756.) Moreover, Figure 149 of BIA's 1991 Report of Investigations depicts Site ANC-564 in sec. 3, T. 11 N., R. 11 E., Seward Meridian. Although in its 1986 amendment, Chugach sought to encompass this site, first discovered by Forest Service archeologists in 1985, *see* Cannery Creek Report at 7, it appears that BIA archeologists investigating AA-41487 in 1987 were unaware of Chugach's 1986 amendment. (They noted that "[h]istoric debris was observed at the Miners Bay Site (ANC-564) * * * on the southern shore of the bay," and added, "but the site is far outside the application area and its "[c]ultural affiliation * * * could not be established." *Id.*, at 178.)

(BIA Site Evaluation for AA-41487 (1991) at 705.)^{11/} On April 15, 1991, BIA issued a Certificate of Ineligibility for AA-41487.^{12/}

BIA's 1991 Report of Investigations also stated that a "recently prepared statement of significance indicated prehistoric and historic cultural remains had been discovered within the application area and named the site Miners Lake Complex" and that the statement noted "a small village site, Makeli, reported by Stephen Britskalov." (BIA Report of Investigations, Vol. II at 178-79.) As indicated, the record does not contain a "statement of significance" filed with the 1980 application pursuant to 43 CFR 2653.5(f).

We think it is possible that BIA's 1991 reference in its field investigation report to "a recently prepared statement of significance" may identify some version of a one-page document pertaining to Chugach's 1986 amendment. The document is captioned "Miners Lake Complex," with the references "ANC A2" to the left of the caption and "AA-41487" to the right of it. The document, bearing the handwritten notations "6/3/87" and the name "J. Johnson," was among the documents in BIA's files forwarded to the Board on January 17, 2006. We refer to it as the 1987 Johnson statement. There is no indication in the record of when, if ever, BLM received this document and whether this was the recently received document BIA mentioned in its

^{11/} Chugach, commenting on the draft report, requested that BIA include a reference to "historic and prehistoric remains" documented by John Mattson, Forest Service Archeologist, in 1985 in his "NW Prince William Sound Recreation Cabin Survey." (Letter dated Nov. 8, 1990, from John F. C. Johnson, Chugach's Cultural Resource Manager, to Charles Bunch, at the BIA's ANCSA Office, at 3.) The Mattson report is not included in the record.

^{12/} The record evinces BIA's efforts to assist in correcting site location descriptions, as contemplated in 43 CFR 2653.5(i). For some regional selection applications, BIA recommended that Chugach submit amendments, substituting what BIA called "actual" or "verified" site locations for the "applied for location." For other sites, BIA indicated there was "no change" from the reinvestigation, and for still others, such as AA-41487 (where BIA was unable to find or obtain test pit data or identify features, CMT's or artifacts providing evidence that the site is a Native historical place and could not identify any other site that investigators believed more accurately reflected the site location), BIA did not recommend that Chugach amend its application to include any other site, including the known 1978 Forest Service discovery, ANC-247, which is Parcel A of the Cannery Creek site at issue in this appeal. (Letter, dated Apr. 23, 1991, and attachments from Bunch, BIA ANCSA Office, to Michael Chittick, Chugach.)

1991 Report. We note, however, that Chugach, in its pleadings, quotes language similar to the document's descriptions of the value and significance of the site. When it does so, however, Chugach apparently misidentifies the source, attributing the language at times to Chugach's "application" and at other times to the "statement of significance for AA-41487." See, e.g., SOR at 2; Reply at 3.

The 1987 Johnson statement reads:

Significant prehistoric and historic remains have been detected within the Miners Lake Complex. A[] small village called Makeli and associated prehistoric smokehouse and fish camps were reported by Black Stepan in this area * * *. These sites also served as summer homesites and travel networks in which a variety of products were manufactured. A thorough investigation of the northeastern shore of Unakwik Inlet, Miners Bay and Miners Lake should reveal sustained Native occupation of the Chugach in prehistoric and historic times.

That Chugach continued to focus on the cultural resources at sections 2, 3, and 16 as the Miners Lake Complex and as the corrected, amended location for AA-41487 and continued to urge BIA to investigate those sites is further evidenced by a Memorandum from John F. C. Johnson, Chugach, to his file and to Charlie Bunch, BIA, with a copy to BLM, dated July 1, 1992 (July 1992 Johnson Memorandum).^{13/} This additional information apparently refers to a memorandum Johnson prepared after Chugach conducted its own field investigation of the so-called "Miners Lake Complex" from June 13 - 16, 1992. In it, he states that "[i]t is now quite clear that our original selection on the east shore of Miners Lake was misplaced. Also our historical records at CAC reveal that the original map for this historical site shows that it is (in error) at a different location." (July 1992 Johnson Memorandum at 1). Johnson notes that, on March 5, 1986, CAC amended its historical selection to reflect "the Native cultural resources that are present within this complex." He lists Chugach's findings from its field investigation, including house pit depressions and midden material in section 3 (reported by Native elder Nick Selanoff as an area that was used over a long period of time as a travel camp and seal and fish camp), and stone fish weirs Chugach found on the west shore of section 16. Id. Chugach states that "[t]he cultural resources that have been documented as noted above, should be surveyed to represent the 'Miner Lake Complex'" and requests, as it had in 1986, that

^{13/} BLM posted receipt of this memorandum in its case abstract for AA-41487 as "Addtl Info Recd - Significance" on July 7, 1992.

Chugach's selection "be adjusted to conform[] to the cultural resources that are present." Id. at 2. ^{14/}

In 1986, Chugach sought to amend application AA-41487 "to conform the boundaries of the site applications to the archeological and cultural resources present" and "to correct errors in the original selection applications." (Letter, dated Mar. 13, 1986, from R. Marchell Espe, Chugach, to Robert Arndorfer, BLM.) Each of the three Chugach documents discussed above (1987 Johnson statement, and July and August 1992 Johnson Memoranda), reflect Chugach's focus on the Miners Lake Complex and its efforts to identify and document archeological and cultural findings in sections 2, 3, and 16 which support the Miners Lake Complex amendment. However, in 1987, BIA did not investigate sections 2, 3, and 16 and, "[f]or their 1992

^{14/} Chugach's July 1, 1992, memorandum does not mention a village or sec. 28. This is consistent with its statement that the survey, findings and letter support the 1986 amendment which sought to add only secs. 2, 3, and 16, T. 11 N., R. 11 E., to the original application selection. In reviewing the files for adjudication of this appeal, the Board noticed that the record did not contain a statement of significance, submitted by Chugach with its application in 1980, nor one submitted with its 1986 amendment. When contacted, BLM indicated there was no statement of significance for AA-41487 in its files. It referred the matter to BIA's ANCSA Office which provided copies of a variety of documents in its files, but none that appeared to have been attached to the 1980 application or 1986 amendment, pursuant to 43 CFR 2653.5(f). One document provided by BIA is a memorandum to files and to BIA (with no indication of a copy to BLM), forwarding a photo index of historical sites that were documented by CAC "over the past summer." (Memorandum, dated Aug. 18, 1992, from John F. C. Johnson to BIA and files, received by the Board on Jan. 17, 2006) (August 1992 Johnson Memorandum). The index itemizes the photos alphabetically and places historical site application numbers in parentheses next to those letters. Seven photos are identified as associated with AA-41487. All but one fit the description of the Miners Lake Complex findings for which Chugach requested, in its July 1, 1992, memorandum and its 1986 amendment that BIA conduct an investigation. One, however, does not: "#AA (41487) Rock Island site near Cannery Creek. Another large rock island was found right at the Cannery Creek complex and appears to be larger than the Siwash Bay site." There is no explanation as to why Chugach assigned the application number "41487" to that item in the photo index. It seems probable, however, that Chugach declined to include that finding in its July 1, 1992, memorandum requesting BIA's investigation of Chugach's 1986 amendment because "the Rock Island site near Cannery Creek" was not part of the Miners Lake Complex – the subject of the 1986 amendment to AA-41487.

reinvestigation of AA-41487, BIA archeologists ignored the Corporation's amended application." (1995 BIA Cannery Creek Report at 7.)

Instead, BIA "elected to explore the mouth of Cannery Creek" in search of a prehistoric village, named "Makeli."^{15/} Id. BIA reports that Chugach sought to select the site encompassing Makeli in its sec. 14(h)(1) application AA-11044, "at the entrance to Siwash Bay about 9 km southwest of Cannery Creek." Id. at 6. In 1981, BIA-Cooperative Park Studies Unit personnel examined the Siwash Bay area and "established a site parcel just south of the bay entrance which they believed to represent 'Makeli.'" Id. However, "[d]uring their 1987 revisit BIA archeologists discovered other cultural remains in the near vicinity. These were added as separate parcels to the original tract (US BIA 1991: 439-48), although again the cultural remains encountered do not appear to be those of a village." Id. at 6-7. By 1992, when BIA archeologists commenced their reinvestigation of AA-41487, they "were not convinced that 'Makeli' actually lies at Siwash Bay. Dissatisfied with the 1987 field work, they elected to explore the mouth of Cannery Creek, where a site (ANC-247) had been uncovered in 1978 during construction for the [Aquaculture Salmon Hatchery's barge landing (Mattson 1978).]"^{16/} Id. The nine test pits, opened at that time by Forest Service archeologist John Mattson, had revealed intact midden deposits.

BIA designated, as AA-41487 Parcel A, the ANC-247 site which revealed burned foundation logs of a historic cabin and several depressions, test pitted to reveal intact midden, with charcoal samples dating as far back as 860 \pm 70 years

^{15/} Archeologist Frederica de Laguna "learned of Makeli from Native informants in the early 1930s but reported its location only as 'somewhere in the [Unakwik] inlet.'" (1995 BIA Cannery Creek Report at 6.) Kaj Birket-Smith, de Laguna's ethnographic collaborator, recorded a traditional warfare narrative in which a confederacy of Chugach tribes, in later prehistoric times, "journeyed to Cook Inlet to battle Tanaina Indians in retaliation for past raids. The small 'Makeli' contingent of twelve men was led by strong man 'Apanguq.' The Chugach warriors returned triumphant after a brutal massacre." Id.

^{16/} It is unclear whether BIA's stated dissatisfaction relates to its 1987 investigation of AA-41487 at Miners Bay or its 1987 investigation of AA-11044 at Siwash Bay.

before 1950.^{17/} This area surrounds and underlies a barge landing and gravel pad adjacent to a salmon hatchery weir. BIA archeologists then “extended their survey along the bayshore to the south,” finding two small shrub and moss covered islets in the bay, about 0.37 miles southwest of Parcel A which they test pitted to reveal charcoal with a date of 400 ± 90 years before 1950.^{18/} BIA designated these islets “Parcel B.” Id. at 5, 10.

BIA’s Supervisory Archeologist Dale C. Slaughter noted the questionable connection with Chugach’s original application AA-41487 and the Miners Lake Complex area Chugach sought to include by amendment in 1986. Nevertheless, focusing on whether the site met the regulatory criteria for a Native historical place in 43 CFR 2653.5, and finding that it did, Slaughter recommended issuance of a Certificate of Eligibility for the Cannery Creek site, stating as follows:

1. Archeological remains consisting of what appear to be a village site and a refuge islet were located ca. 13 km from the application area.
2. This site is far removed from the application area and clearly is not a part of the ill-defined Miners Lake complex. However, the village site may be Makeli, an abandoned settlement at an unknown location in Unakwik Inlet.
3. The correlation of AA-41487 to Makeli can not be conclusively demonstrated. However, of the known archeological sites in Unakwik Inlet, AA-41487 [Cannery Creek] is by far the most likely to be Makeli.
4. AA-41487 [Cannery Creek] meets the criteria set forth for establishing Native historical places.

^{17/} In United States Forest Service, 160 IBLA 1, 3 n.4 (2003), we explained that, according to BLM, carbon dating uses 1950 as the reference year and also cited F. Hole and R. Heizer, *An Introduction to Prehistoric Archeology* at 223-24 (1969). For our purposes, the computation is as follows: $1950 - (860 \text{ plus } 70) = 1020$, or $1950 - (860 \text{ minus } 70) = 1160$.

^{18/} $1950 - (400 \text{ plus } 90) = 1460$, or $1950 - (400 \text{ minus } 90) = 1640$.

(Eligibility Recommendation for Cannery Creek Fish Camp (Aug. 15, 1995).) On October 11, 1995, BIA issued a Certificate of Eligibility and a letter recommending that Chugach amend its application to include this site.

The Forest Service objected to BIA's certification of the Cannery Creek site as eligible for conveyance under application AA-41487, contending that "the recommendation by the BIA to amend this selection application is actually a transfer of a selection number from a site that could not be found, to the discovery of a feature that was not properly selected by December 31, 1976." (Letter from Regional Forester to Terry R. Hassett, BLM, dated Nov. 17, 1995.) Accordingly, the Regional Forester asked BLM to reject the certification. Id.

Chugach filed its second purported amendment of Native historical place selection application AA-41487 on November 21, 1995 "to consolidate areas of documented sustained Native occupation." As BIA recommended, Chugach identified lands located south of Miners Lake and Bay in sec. 28, T. 11 N., R. 11 E., Seward Meridian, near the mouth of Cannery Creek, where it enters a shallow bay midway along the eastern shore of Unakwik Inlet (Cannery Creek site).^{19/} It "noted" the legal description of its "original selection" and stated that "[i]t is CAC policy not to relinquish or reduce any selections rights until the final conveyance process is completed." (1995 amendment.) Chugach did not explicitly refer to its 1986 selection.

In May 2003, BLM issued the decision from which Chugach appeals, determining that, "[s]ince BIA could not establish a definite connection between the Cannery Creek site and the Miners Lake Complex for which [Chugach] had originally applied, the certification appears to be based on cultural findings not related to the original selection." (Decision at 2.) BLM therefore concluded that the Cannery Creek site constituted a new site that was not part of the original application, and determined that "the original certification of ineligibility still stands." (Decision at 2.) On that basis, BLM rejected application AA-41487 "in its entirety." Id. Chugach appealed from BLM's May 2003 decision, filing its SOR, Reply to the BIA/BLM Answer, and Notice of Supplemental Authority.^{20/}

^{19/} The land was described as follows: Parcel A, SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 28, comprising about 2.2 acres, and Parcel B, consisting of about 0.1 acres, in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 28.

^{20/} Chugach submitted two BIA reports and certificates of eligibility it considered "pertinent and significant to CAC's argument that an original application which
(continued...)

On appeal, Chugach argues that BLM erroneously rejected its selection in its entirety because the Cannery Creek site meets the requirements of a Native historical place, and because “the site is the subject of CAC’s application and is located on land that CAC properly amended to its application.” (SOR at 1.) In essence, Chugach contends that when it made its selection in 1980, it intended to identify the location of Makeli and simply misidentified the location as section 36 at Miners Lake and that it also was seeking to identify Makeli in 1986 and again misidentified the location of the site when it identified secs. 2, 3, and 16, T. 11 N., R. 11 E., in its amendment. (SOR at 7.) Chugach characterizes the Cannery Creek site as “the probable location of Makeli” and therefore moves the Board to reverse BLM’s decision.

Chugach does not challenge BLM’s determination that the sec. 36 Miners Lake site failed to qualify as a Native historical place under section 14(h)(1) of ANCSA and 43 CFR Subpart 2653. Nor does it directly raise issues pertaining to the 1986 amendment.^{21/} The full weight of Chugach’s challenge to BLM’s rejection of application AA-41487 rests on its argument that BLM erred in declining to consider the Cannery Creek site as a valid amendment to Chugach’s 1980 application.^{22/}

[1] Since appellant’s focus, and thus ours, is on whether BLM erred in failing to consider the Cannery Creek site in its May 29, 2003, adjudication of AA-41487 and not whether the Cannery Creek site meets the Native historical place eligibility requirements, it is not the regulations regarding eligibility requirements which concern us, but rather the regulatory authority for submitting and processing amendments. The issue of whether Chugach properly submitted a valid amendment

^{20/} (...continued)

describes a historical site but incorrectly identifies its location should be amended and certified eligible where the correct site location is later identified.” (Notice of Suppl. Auth., Apr. 16, 2004.)

^{21/} BLM, in its May 2003 decision, did not address Chugach’s 1986 amendment of application AA-41487 and Chugach does not contend that it is entitled to conveyance of the lands identified in that amendment. Therefore, we are not adjudicating any issues regarding Chugach’s entitlement to the land described in the original application or the 1986 amendment.

^{22/} In its SOR, Chugach states that “[t]his appeal focuses on that portion of land at the Cannery Creek site that was amended to CAC’s original application.” (SOR at 4.) In their Answer, BLM/BIA make clear that BLM declined to consider the Cannery Creek sites, not because those sites failed to meet the criteria for historical sites in 43 CFR 2653.0-5(b), but because they are “new sites” and not amendments to the original AA-41487 application. (Answer at 10-11.)

to AA-41487 is of critical importance to Chugach because, as we have discussed, under ANCSA and the CNI Settlement Agreement, Chugach is foreclosed from making new selections under section 14(h)(1). Moreover, Title XV of the Omnibus Indian Advancement Act, Pub. L. No. 105-568 (2000), deeming application AA-41487 and six other section 14(h)(1) applications timely filed, does not authorize the selection of new lands under section 14(h)(1). Section 1504 allows only amendments submitted “in accordance with the rules and regulations generally applicable to amending applications under section 14(h)(1) of ANCSA.”

The regulations regarding amendments to historical place applications in effect at the date of enactment of the Omnibus Indian Advancement Act provided:

If, during its investigation, [BIA] finds that the location of the site as described in the application is in error, it shall notify the applicant, [BLM] and other affected Federal agencies, of such error. The applicant shall have 60 days from receipt of such notice to file with [BLM] an amendment to its application with respect to the location of the site. Upon acceptance of such amendment [BLM] shall reprocess the application, including segregation of lands and publication of notice.

43 CFR 2653.5(i).

In Chugach Alaska Corp., 146 IBLA 371, 375 (1998), Chugach had objected to BLM’s decision declining to consider an amendment in the adjudication of its Native historical place selection application and asked the Board to reverse the decision and either declare the site a Native historical place or remand the application for further investigation and consideration. We affirmed the BLM decision based on our conclusion that “the amendment was tantamount to a new application.” Chugach Alaska Corp., 146 IBLA at 376. BLM believes the same is true here.

In challenging BLM’s May 29, 2003, decision, rejecting the historical place selection application under section 14(h)(1) of ANCSA, Chugach bears the burden of establishing, by a preponderance of the evidence, that the decision is in error. United States Forest Service, 160 IBLA at 7; Chugach Alaska Corp., 142 IBLA 268, 272 (1998); Sealaska Corp., 127 IBLA at 31. In this case Chugach must show by a preponderance of the evidence that, when it sought to amend its application to include the Cannery Creek parcels, it was merely correcting an erroneous legal description of the land encompassing the site it selected in its original application and not, as BLM determined, selecting a new site.

To justify an amendment to a Native historical place application, the evidence should clearly evince a reasonable likelihood that “the location of the site as described in the application is in error.” 43 CFR 2653.5(i). The Native regional corporation must show that the site described in its amendment is the same site it originally selected and that the location of the site as identified in the amendment is the actual “on-the-ground” location of the historical place selected in the original application.

Put in terms of the regulatory definition of a Native historical place, we think that section 14(h)(1) of ANCSA permits amendment of a historical place application only where the appropriate Native regional corporation identifies a distinguishable tract of land or area upon which occurred the significant Native historical event, which is importantly associated with Native historical or cultural events or persons, or which was subject to the sustained historical Native activity originally justifying selection of the site, the location for which was erroneously described in the application. See 43 CFR 2653.0-5(b) and 2653.5.

[2] BLM properly declines to consider a purported amendment of a Native historical place selection application, filed pursuant to section 14(h)(1) of ANCSA, where the Native regional corporation fails to demonstrate that the amendment is intended to correct an erroneous description of the location of the land encompassing the site selected in the original application for a Native historical place.

Having thoroughly examined the record before us, we conclude that Chugach has failed to show that the Cannery Creek site is essentially the same historical site Chugach intended to select in 1980. BIA identified the lack of a connection between the Cannery Creek site and the original application’s Miners Lake site or even the Miners Lake Complex site when it stated: “Just how the two AA-41487 parcels [A and B] relate to the application itself is unclear. Both AA-41487 parcels lie far southwest of Miners Lake and cannot in any way be construed to represent elements of the so-called ‘Miners Lake Complex.’” (Cannery Creek Report at 14.) Nevertheless, in 1995, BIA issued a Certificate of Eligibility for Cannery Creek Fish Camp BLM AA-41487, based only on its finding that the Cannery Creek site met the regulatory criteria for a Native historical place.

The record contains documents, dated after 1986, which refer to a small village called Makeli, somewhere in the general Unakwik Inlet area, as well as a prehistoric smokehouse and fish camps, serving as summer homesites and travel networks specifically in the Miners Lake Complex area, and shows that Chugach urged a “thorough investigation of the northeastern shore of Unakwik Inlet, Miners Bay and Miners Lake” which it believed generally would “reveal sustained Native

occupation of the Chugach in prehistoric and historic times.” (1987 Johnson statement.) However, even though there is evidence that Chugach believed Makeli was somewhere in the area and, after its own 1992 field investigation, noted what appeared to be the remains of a village in sec. 28, the record does not indicate that Chugach considered the archeological and cultural remains in sec. 28 among those remains it sought to protect by applying for AA-41487 in 1980.^{23/} Nothing in the original application and attachments or in any subsequent filing pertaining to the original application resembles a statement of significance “describing the events that took place and the qualities of the site from which it derives its particular value and significance as a historical place.” 43 CFR 2653.5(f). The record does not establish that “the location of the site as described in the [original] application is in error”^{24/} or that the Cannery Creek amendment simply corrected that erroneous legal description. Since Chugach has not shown, by a preponderance of the evidence, that BLM’s decision declining to consider the 1995 amendment in its adjudication of AA-41487 is in error, we affirm that decision.

However, the record does not support BLM’s rejection of AA-41487 “in its entirety,” in light of the fact that BLM did not adjudicate or even discuss Chugach’s 1986 amendment to AA-41487. While Chugach expressed no specific intent to appeal the decision as to the 1986 amendment, AA-41487 may retain some viability with respect to that amendment, if Chugach seeks to pursue it. Chugach, it should be noted, will bear the burden of demonstrating its compliance with the statute and regulations.

To the extent not addressed herein, all other assertions of error, whether of fact or law, have been carefully considered by the Board and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM’s decision, declining to consider Chugach’s 1995 amendment to AA-41487, is affirmed and the rejection of AA-41487 “in its entirety” is set aside and remanded to allow Chugach to pursue its 1986 amendment, if it so desires. Chugach will have 60 days from the date of this decision to request adjudication of the 1986 amendment. If, within the prescribed time period, Chugach notifies BLM of its intent to pursue the amendment, BLM will proceed to adjudicate the amendment, affording the applicant the right to appeal

^{23/} As discussed, the record does, however, indicate that Makeli was the historical place that gave value and significance to another of Chugach’s sec. 14(h)(1) applications - AA-11044 at Siwash Bay.

^{24/} 43 CFR 2653.5(i).

from any adverse decision. If Chugach fails to pursue adjudication of the amendment within the specified time period, BLM's decision will be deemed to have rejected the 1986 amendment with administrative finality.

Christina S. Kalavritinos
Administrative Judge

We concur:

H. Barry Holt
Chief Administrative Judge

Bruce R. Harris
Deputy Chief Administrative Judge

Lisa Hemmer
Administrative Judge

David L. Hughes
Administrative Judge

James K. Jackson (concurring specially)
Administrative Judge

R. Bryan McDaniel
Administrative Judge

James F. Roberts
Administrative Judge

ADMINISTRATIVE JUDGE JACKSON CONCURRING SPECIALLY:

I write separately to emphasize my belief that if appellant's counsel's representations of fact had been supported by the record presented, we would have reached a different result. In its Statement of Reasons (SOR), counsel represented that Chugach's original application "stated that '[s]ignificant prehistoric and historic remains have been detected' within the application area. [Application AA-41487 (Jan. 14, 1980)] The application further states that a 'small village called Makeli and associated prehistoric smokehouse and fish camps' were reported in the area. *Id.*" (SOR at 2 (emphasis added).) See also SOR at 7. Counsel chastised BLM for ignoring

the fact that CAC's [Chugach Alaska Corporation's] original application reported potential prehistoric and historic cultural findings, including the probable location of Makeli, on the shores of Unakwik Inlet. Without explanation or citation, the BLM Decision presumes that since the "BIA could not establish a definite connection between the Cannery Creek site and the Miners Lake Complex for which CAC had originally applied, the certification appears to be based on cultural findings not related to the original selection." This presumption ignores the correlation between the artifacts, remains and Makeli village site described in CAC's original application and the artifacts, remains and probable Makeli village site identified at the Cannery Creek site location."

(SOR at 7-8 (emphasis added).) Counsel also represented in reply that

[t]he Statement of Significance for AA-41487 describes "[s]ignificant prehistoric and historic remains", a "small village called Makeli and associated prehistoric smokehouse and fish camps", and "summer homesites and travel networks" that "reveal sustained Native occupation of the Chugach in prehistoric and historic times." AA-41487 Statement of Significance."

(Reply at 3.) The only evidence of record containing the above statements attributed to Chugach's original application is an undated document from BIA's files describing the Miners Lake Complex and bearing hand written notations of "6/3/87" and "J. Johnson." This 1987 document does not support counsel's characterization for at least two reasons: it expressly addresses the Miners Lake Complex, a site first identified by Chugach more than 6 years after it filed its 1980 application; and if the handwritten notations are accurate, it was prepared more than 7 years after Chugach's original application. It neither clearly pertains to nor is reasonably contemporaneous with Chugach's original 1980 application.

It may be that the 1987 document was based upon an earlier filing that was directly related to the 1980 application but could not be located by BLM for this appeal. If such a filing occurred and was reasonably contemporaneous with the 1980 application, it would support counsel's several assertions that Chugach's intent in 1980 was to locate "a small village called Makeli."^{1/} Absent evidence of that intent^{2/}, the record fails to support a finding that "the location of the site as described in the [1980] application is in error." 43 CFR 2653.4(I). I, therefore, concur fully with the majority decision.

James K. Jackson
Administrative Judge

^{1/} The specificity of the above-identified representations is of concern. If a reasonably contemporaneous document was filed by Chugach, it should have been provided to the Board by BLM and/or BIA; but if not, these representations may exceed acceptably aggressive advocacy

^{2/} If the 1986 amendment is pursued on remand, clear evidence of Chugach's intent in 1980 could be dispositive on whether the 1986 amendment should be accepted or "was tantamount to a new application." Chugach Alaska Corp., 146 IBLA 371, 376 (1998).

ADMINISTRATIVE JUDGE PRICE DISSENTING:

Whether Chugach's 1995 amendment constitutes a new historical place application depends on whether and at what point Chugach intended to select Makeli village in application AA-41487. If Chugach did intend to select Makeli village in application AA-41487 and expressed that intention at an appropriate juncture, the question is whether Chugach erroneously placed the site in sec. 36, and whether and to what extent, under applicable regulations, Chugach could amend its application. Though I fully appreciate how my colleagues reach a different conclusion, I would remand the entire case for further action because of the questions raised by the record, and because I believe that BLM was required to determine the four corners of the application, which required it to adjudicate the unresolved amendment, before or in connection with adjudicating the further amendment at issue in this appeal.

As to the questions posed in the record, in early 1980, Chugach submitted an historical place application identifying a site in protracted sec. 36, T. 12 N., R. 11 E., Seward Meridian, Alaska, in Miners Lake near Miners Bay, along the eastern shore of Unakwik Inlet. Later, on March 25, 1986, Chugach submitted an amendment to regional selection application AA-41487 (1986 amendment). Nothing in the record shows that the application was accompanied by the statement of significance required by 43 CFR 2653.5(f), nor does the record include the Federal Register notice of filing required by 43 CFR 2653.5(h).

In March 1986, Chugach submitted an amendment. In addition to the sec. 36 site first described in the original 1980 application, the 1986 amendment sought to add nearby sites in secs. 2, 3, and 16, T. 11 N., R. 11 E., Seward Meridian, Alaska, near Miners Bay, which together, at some point, became known as the "Miners Lake Complex site." Again, nothing in the record shows that the application was accompanied by the statement of significance required by 43 CFR 2653.5(f), nor does the record include the Federal Register notice of filing required by 43 CFR 2653.5(h). However, no technical deficiency in the form or manner of tendering the amendment has been raised or is suggested in the record or by the parties.

In a memorandum dated May 18, 1987, from John J. F. Johnson, Chugach's Cultural Specialist, to Ron Kent, a BIA archaeologist, Johnson briefly described each application and indicated its status by various codes. Application AA-41487 is coded as not investigated, next to the caption "Miner Lake." For that entry, Chugach described three sites in sec. 3 and sec. 16 and a village in sec. 28. That village could only be the Cannery Creek site, as maps in the record confirm. Nothing in the case files provides or suggests the context for this reference to the Cannery Creek site. BIA investigated the sec. 36 site in 1987, leading to the determination that it was ineligible in 1991.

On June 2, 1987, the Director of the BIA's ANCSA Office wrote Marchell R. Espe, Chugach, to advise her that a field crew would be working in the Prince William Sound area that summer and to explain that BIA was not authorized to investigate applications that had not been submitted by BLM. The letter stated that, "[a]s of this date, BLM has not asked us to investigate these amendments and, consequently, we will not be doing any work on those sites." (June 2, 1987, letter at 1.) The letter referred to a meeting between BIA ANCSA Office staff and Chugach staff on February 5, 1986, to discuss the application process in the Chugach Region. The letter also alluded to and enclosed a September 21, 1984, letter in which the Director set forth the agreement that had emerged from the February 1986 meeting, specifically acknowledging that Chugach was to review sites certified as ineligible and list those that Chugach believed had been inadequately investigated or for which the information was inadequate.

Nothing in the record sheds any light on the genesis or basis of those concerns and whether they were well-founded. The referenced letter is not in the record, and nothing explains whether the May 18, 1987, list is the list that the Director expected, or if it is not, whether such a list ever was submitted and when. There is no documentation of the February 5, 1986, meeting, who attended it, or what transpired when it occurred, and thus we cannot know whether and to what extent application AA-41487 and the village site in sec. 28 might have arisen or been discussed, if at all. Moreover, nothing in the record specifically identifies the amendments that would not be investigated that summer.

We do not know, precisely, how to interpret the effect of amendments, or even fully understand the process and how it actually worked at that time. The 1986 amendment simply provides the land description of the sec. 36 site, and below that, the land descriptions for the sites in secs. 2, 3, and 16. The March 13, 1986, cover letter explains that the enclosed amendments are "to correct errors in the original selection applications," none of which are identified in the letter, and notes further that the amendments were "made pursuant to the direction of the [BIA] ANCSA Program staff in attendance at the February 5, 1986 meeting with CAC staff convened to discuss the 14(h)(1) process in the Chugach Region." (Mar. 13, 1986, letter.)^{1/} Lastly, the letter stated that, "[a]t such time as the selections are fully adjudicated, we stand ready to relinquish those portions which neither comprise nor buffer the archaeological or cultural properties." Id.

In contrast, the 1995 amendment explains that it is intended to "consolidate areas of documented sustained Native occupation." (Nov. 17, 1995, Amendment.)

^{1/} I do not cite the quotes to establish the truth of the matters asserted, but only to ground my uncertainty about the proper interpretation of the amendments and the amendment process and, secondarily, to comment on the completeness of the record.

The “original selection site is noted as follows,” and the land description of the sec. 36 site is provided. Id. Noting the BIA’s October 11, 1995, request that Chugach amend its application, the land descriptions for the “new amendment” are provided. The amendment closes with the reminder that it is Chugach’s “policy not to relinquish or reduce any selections rights until the final conveyance process is completed.” Id.

The caveat regarding relinquishment or reduction of portions of selections that “neither comprise nor buffer the archaeological or cultural properties” when sites are conveyed seems to contemplate or suggest that an amendment can wholly replace an initial description, as well as add to one or decrease it. The record does not explain the effect of submitting an amendment on the application as originally submitted in this case, nor have the parties offered one on appeal. The regulations do not answer this question, but they do provide that “[r]egional and village corporations authorized by [ANCSA] subsequently filing additional or amendatory applications need only refer to the serial number of the initial filing.” 43 CFR 2650.2(d)(1) (emphasis added).

We know that, notwithstanding the language of 43 CFR 2653.5(i) providing that amendments are submitted as a result of a BIA investigation finding that a location has been erroneously described in an application, BLM was of the opinion that applicants also could submit amendments, because the regulation did not prohibit it. (Letter dated July 23, 1987, from Arndorfer, BLM State Office, to Forest Supervisor, at 1.) We also know that in 1987 “concerns that the original determinations were based on inadequate investigation or inaccurate information” remained, and that BLM believed it was obligated to address them. (Letter dated July 23, 1987, from Arndorfer, BLM State Office, to Forest Supervisor, at 1.) However, nothing in the record explains whether those continuing concerns affected or informed the perception of what AA-41487 was supposed to entail.

On July 25 and August 8, 1987, BIA investigated only the sec. 36 site. Other selection sites were investigated or reinvestigated as well, the results of which were to be reported in a single overview Report of Investigations. The 1986 amendment was not investigated that season or in any subsequent season, as far as we can tell, and BLM apparently never took any formal action regarding it.

In 1991 BIA finalized and issued its findings in a Report of Investigations of numerous Chugach selections. The Report of Investigations did not specifically refer to or acknowledge Chugach’s 1986 amendment, and it generally described the application as encompassing only the “area around the confluence of Miners River with Miners Lake.” In that report, BIA acknowledged the “recently prepared statement of significance,” for which no date is established in the record, and it acknowledged that it related to Makeli. (BIA Report of Investigations, v. II at 178-79.) Only one document among those before us could be the requisite statement of

significance. It bears the handwritten name “J. Johnson” and the handwritten date of “6/3/87,” and identifies Makeli and the smokehouse, fish camps, summer home sites, and travel routes associated with it.^{2/} BLM case abstracts dated in March 1999, March 2000, March 2001, and April, May, June, and July 2003 show a July 7, 1992, entry “Addt'l Info Recd” with the further entry “SIGNIFICANCE” under the Remarks section.

From this entry, it clearly appears that Chugach had submitted a statement of significance at some point prior to July 1992, and then supplemented it on July 7, 1992, with Johnson’s memorandum to Kent dated July 1, 1992. Whether the “6/3/87” document was submitted in 1986 or in 1980 cannot be established from the record. The case abstracts do not refer to an earlier significance submission, which is just as baffling, given that it is an obvious first and necessary step in a course of action that could lead to a conveyance of Federal land. Chugach’s briefs on appeal contain quotes that seem to confirm that the “6/3/87” document or a version of it is the relevant statement of significance, but there is no corroboration one way or the other in the case files.^{3/}

On March 26, 1991, BIA’s Supervisory Archeologist recommended that BIA issue a Certificate of Ineligibility for the sec. 36 site originally identified in AA-41487 because there was no evidence of a Native historical place. If this application pertained only to the sec. 36 site in Miners Lake as BLM now contends, that seemingly would have ended the matter. It did not.

Chugach conducted its own investigation in 1992, and in a memorandum in July 1992 informed the BIA that Chugach had erred in its description: “It is now

^{2/} The correspondence is important for the light it might shed on the process and the parties’ allegations. To be clear, however, I believe that a statement of significance was filed; if this case is rooted in reality at all, it surely began with the submission of a statement of significance to support the application, it was acceptable to BLM both as to its timing and content, and it obviously provided adequate reason for BLM to request BIA’s investigation of the sec. 36 site. That much is confirmed by the case abstracts, though they do not indicate when it was filed, and nothing resembling a statement of significance was in the case files transmitted to the Board. In any event, the application was not rejected in 1980 for failure to submit a statement of significance, nor was the 1986 amendment officially rejected for this or any other reason. Moreover, no such defect has been raised in this proceeding.

^{3/} Chugach refers to the standard form application it filed in 1980, coupled with the statement of significance, whether it is the “6/3/87” document or another, as its application. Whether it does so correctly, this Board cannot say.

quite clear that our original selection on the east shore of Miners Lake was misplaced. Also our historical records at CAC reveal that the original map for this historical site shows that it is (in error) at a different location.” (Memorandum from Johnson to files and Bunch, BIA, dated July 1, 1992, at 1.) The memorandum lists the survey findings in sec. 3 and sec. 16 only, and requested that those “cultural resources” be surveyed “to represent the ‘Miners Lake Complex’” and that Chugach’s selection be “adjusted to conform to the cultural resources found.” *Id.* The village in sec. 28 identified in the May 1987 list is not mentioned. Yet in August 1992, Chugach submitted to Kent at BIA a photographic index for the selection sites it had investigated that summer. There is no indication that BLM was copied, although the July 1, 1992, memorandum states that photographs would be submitted to BLM. In addition to photographs specifically relating to AA-41487 and the Miners Bay sites, the index included a photograph depicting “Rock Island site near Cannery Creek. Another large rock island was found right at the Cannery Creek complex and appears to be larger than the Siwash Bay site.” Those photographs are not in the case file. This index suggests, however, that the village site in sec. 28 was relevant to Chugach’s application. It also engenders significant doubt about what conclusions can safely be drawn regarding the nature and extent of the “Miners Lake complex,” and because the sec. 36 site had been eliminated in 1991, one might reasonably question whether “Miners Lake complex” was, at this point, merely a way of referring to application AA-41487, as opposed to a continuing assertion that the historical place was located in sec. 36 in Miners Lake.

On April 19, 1994, BLM issued a decision rejecting AA-41487 as untimely, setting off the series of actions described by my colleagues that finally ended with Congress’ legislative reinstatement of this and other applications in December 2000. But even as that course of events was unfolding, in October 1995 BIA issued its report of its investigation of the “Cannery Creek Fish Camp, AA-41487” (CCR) with a certificate of eligibility, presumably because Chugach’s pending application or an amended application compelled BIA to do so.^{4/} Because of the arguments BLM advances, it is important to look closely at the CCR.

^{4/} I presume as much not only because it seems highly unlikely that BIA had either the leisure or the extra resources to investigate potential historical places not identified in an application merely because they were archaeologically interesting, but because application AA-41487 is identified in the caption of the report and because of the nature of the subsequent notification to Chugach on Oct. 11, 1995, directing Chugach to amend AA-41487. Moreover, the only other application that mentioned Makeli was AA-11044 in Siwash Bay, also in Unakwik Inlet, but that locale had been eliminated in 1991 with issuance of a certificate of ineligibility for the original application area, designated Parcel A, and a certificate of eligibility for amended locations designated Parcels, B, C, and D, none of which contained evidence of a village. See CCR at 7.

In describing the BIA's investigations, after the 1987 investigation of the sec. 36 site in Miners Lake, the CCR states that in 1992 BIA archaeologists initiated a "second investigation of the case file. Disregarding the application area, they focused instead on likely locations for 'Makeli' village. Two separate parcels were ultimately established near the mouth of Cannery Creek, roughly 8 kilometers (km) [4.97 miles] southwest of Miners Lake." *Id.* Except for the allusion to dissatisfaction with the 1987 field work and a lack of conviction about the Siwash Bay sites approximately 9 km (5.59 miles) southwest of Cannery Creek, no solid reason for BIA's determination to continue investigating under application AA-41487 long after the sec. 36 site had been declared ineligible is offered in the report, none appears from the record, and the parties have made no attempt to provide the context for this action.

On August 18, 1995, BIA's Supervisory Archaeologist, averred that he had reviewed the Cannery Creek Report, field notes, and research data; that the report was based on a professional analysis; and that his recommendations were consistent with the provisions of 43 CFR 2653.5 *et seq.* (CCR at iv.) Charles F. Bunch, the BIA's ANCSA Office Director, certified the eligibility of the Cannery Creek site on October 11, 1995. *Id.* at ii.

The regulations provide that "[i]f, during its investigation, the [BIA] finds that the location of the site as described in the application is in error, it shall notify the applicant, the BLM, and other affected agencies, of such error." 43 CFR 2653.5(i). In such event, the applicant is provided 60 days to amend its application to correct the error thus found by the BIA. By letter dated October 11, 1995, after noting the 1992 investigation, Slaughter recommended that Chugach submit an amendment to BLM for AA-41487 "indicating the verified parcel locations. The site applied for within * * * sec. 36, T. 12 N. R. 11 E., Seward Meridan (SM), Alaska. Parcel A actually lies within * * * sec. 28, T. 11 N., R. 11 E., SM, Alaska. Parcel B lies within * * * sec. 28, T. 11 N., R. 11 E., SM, Alaska." (Emphasis added.) Chugach did so on November 21, 1995. No technical deficiency in the form or manner of tendering the amendment has been raised or is suggested in the record or by the parties.

By letter dated November 17, 1995 (received by BLM on November 22, 1995), the Regional Forester, Chugach National Forest, objected to the certification of Parcels A and B as eligible for conveyance, on the ground that the CCR had not shown that the selected site was improperly described in the application. (Letter at 1.) If BLM responded to this letter, it is not in the record.

By letter dated March 4, 1997, the Forest Service, Alaska Region, again articulated numerous issues relative to Chugach's pending selections. The letter raised questions regarding the standards for evaluating potential sites, and stated

specific issues for each pending application, and in the case of AA-41487, contended that the lands certified were not those selected. (Letter at 8.)

BLM belatedly replied to the Forest Service's March 4, 1997, complaint by letter dated March 8, 1999, promising to adjudicate each application on its merits and to consult the Forest Service before making any decisions regarding such applications. The letter further stated that the questions regarding standards for determining eligibility had been forwarded to Pratt for a response. If Pratt ever responded to the question of BIA's standards for eligibility determinations, it is not in the record.^{5/} In fact, nothing in the case file articulates or illuminates BIA standards for such determinations or how they were applied in this instance.

BLM relies on the following circumstances to support its contention that the Cannery Creek site constitutes a new application: Chugach submitted a map with the 1980 application identifying sec. 36 in Miners Lake; the CCR statement that "how the two AA-41487 parcels relate to the application itself is unclear;" the CCR statement that the two parcels lie "far southwest" of Miners Lake; the CCR's acknowledgment that Parcel A "is certainly the best candidate among the known sites in Unakwik Inlet;" the location of the village is uncertain, as demonstrated by the fact that it was also identified in application AA-11044 in Siwash Bay; and neither BIA nor Chugach located evidence establishing that Cannery Creek is the remains of Makeli.

Chugach argues that Cannery Creek is the subject of its application; that the artifacts and evidence "correlate to those described" in its application; that it properly amended its application; that, in accordance with its application, the BIA further investigated the shores of Unakwik Inlet and thereby discovered the probable location of Makeli and evidence of sustained Native occupation of the area; and, because the application was properly amended, BLM erred in rejecting it in its entirety. In its Reply, Chugach maintains that it is apparent that the BIA concluded that the original Miners Lake location was an error because no evidence was found at the sec. 36 site that matched Chugach's description, and that, because Cannery Creek does match the description provided, Chugach correctly amended its application.

We can only speculate about the evolution of the application area from sec. 36 in Miners Lake to the so-called "Miners Lake complex," what that term encompassed, what might constitute a "complex," what quantum of evidence is needed to demonstrate an erroneous description, and what guides BIA when it determines that

^{5/} The provisions of 43 CFR 2653.5(k) appear to be relevant at this juncture. That regulation states that the BIA is required to submit its report and certification to BLM, with the comments of the National Park Service and any other Federal agency, and "[i]f the land is available, the [BLM] shall issue a decision to convey." (Emphasis added.)

an historical place was described in error.^{6/} Even lacking those answers, however, I find some circumstances more compelling than others and an adequate basis for setting the decision aside. It remains true that the application retained its vitality long after the sec. 36 site had been declared ineligible, even though the 1986 amendment was never officially acted upon or adjudicated, and even though BLM had moved to reject the application as untimely. BIA continued to investigate in Unakwik Inlet, determining to focus its efforts on the likely location of Makeli, rather than the area originally described in the application.^{7/}

In my view, the failure to adjudicate the 1986 amendment creates a significant problem in this case. The case files tell us nothing of why there was no formal resolution of the 1986 amendment, yet the CCR expressly acknowledges that application AA-41487 was amended to include the sec. 3 and sec. 16 sites. (CCR at 7.) The amended application, if indeed it was amended, was ignored in the 1992 reinvestigation, another decision that is only superficially explained by a reference to dissatisfaction with the 1987 field work and a conviction that Makeli had not been located in Siwash Bay. *Id.* We cannot know whether the latter refers to the concerns mentioned earlier or issues that surfaced later, or even which party was dissatisfied with the previous field work. I assume that there is a factual basis for the CCR's statement and, consequently, I am not today prepared to state with certainty that the 1986 amendment was "never investigated or reported on," even informally. And while there are certainly questions to be asked about the "6/3/87" document, on its face it nonetheless relates to the Miners Lake Complex and Makeli, in content it is a statement of significance, and Chugach's briefs are consistent with that content. It is thus clearly material to the issues here presented. From my perspective, the question is whether it was submitted as it appears or revised, in whole or in part, to support the 1980 application, the 1986 amendment, or the 1995 amendment.

If the "6/3/87" document was submitted to support the 1980 application, this Board likely would not be divided about the proper outcome in this case.^{8/} However,

^{6/} The documentation of BIA's archaeological investigations in this case is a far cry from what was submitted by Chugach in its Notice of Supplemental Authority. It only serves to emphasize how much about the events and circumstances associated with this amended application we should be able to learn from the case files.

^{7/} Nothing in record or BLM's arguments suggests that BIA proceeded in a manner that is contrary to the regulations or to applicable investigative principles when BIA archaeologists determined that it was appropriate to verify the Makeli village site based on its likely location rather than the place described in Chugach's application.

^{8/} On the other hand, if the "6/3/87" document is dismissed altogether because of the questions it raises, then this case loses coherence and collapses altogether and

(continued...)

if the document was submitted to support the 1986 amendment, the failure to investigate and adjudicate the amendment cannot simply be ignored. The 1986 amendment both acknowledged error in the sec. 36 location of the site and referred to a “complex” southwest of Miners Lake. Only an investigation, which presumably would have fleshed out exactly what was or was not included or sought in the Miners Lake/Miners Bay “complex,” and an official decision rejecting the 1986 amendment could serve to preserve the application as the selection of a site in sec. 36. I reach that conclusion because the sec. 36 site had been certified ineligible in 1991 and, in submitting the amendment, it was expected and understood that Chugach would later relinquish the erroneous sec. 36 site. I therefore would not permit BLM to resurrect the 1980 application as if the 1986 amendment had never been submitted when the record fails to document its reasons for not adjudicating it.

Even ignoring the troublesome issue of the unresolved 1986 amendment, however, I am not quite persuaded that BLM’s decision is rightly affirmed in part. BLM points to the statement in the CCR that the sec. 28 site is “far removed from the application area and clearly not part of the ill-defined ‘Miners Lake complex’” to support its assertion that Cannery Creek is not the proper subject of an amended application. (CCR at iii.) Whether the 8 km (4.97 miles) distance between Miners Lake (or the roughly 2-mile distance between the sec. 16 site at Miners Bay containing the stone fish weirs) and the sec. 28 site is fairly characterized as “far removed” or not, distance is not alone dispositive, as BLM admits. Since the “Miners Lake complex” is not defined anywhere in the record, in the CCR, or by the parties on appeal, in my opinion the substance and force of the statement as a justification for BLM’s decision is illusory. BLM’s position rests on the “Miners Lake complex” designation in the application and the map depicting sec. 36, but it seems clear that, with the 1986 amendment, sec. 36 was known to be erroneous, perforce leaving in its place the unresolved 1986 amendment to be correlated to the sec. 28 site ultimately verified by the BIA.

BLM finds support from the circumstance that application AA-11044 also stated that Makeli was somewhere in the area. In the absence of a better record in this appeal and the record associated with application AA-11044, however, the statement can plausibly be viewed as confirmation that the village was, just as Chugach and others had stated, somewhere in the Unakwik Inlet area, a description that embraces both Siwash Bay and Miners Bay, and Cannery Creek midway between the two. We know that a lake in sec. 21 and sec. 28 flows into Cannery Creek, just as Miners River flows into Miners Lake. (CCR, Fig. A-1, Site Location Map.) We know also that this application concerns an ancient place in an inlet that has been subject

^{8/} (...continued)

ought to be referred for a hearing.

to earthquake disturbance, most recently in 1964, as we know that the historical place was further described in terms of a network of travel routes, activities, and home sites. What such details or factors might mean in verifying an application is left to the archaeologists under BLM regulations, and they have reached and certified a conclusion that is at odds with BLM's view.

BLM's decision was premised on the conclusion that, "[s]ince BIA could not establish a definite connection between the Cannery Creek site and the Miners Lake Complex for which CAC originally applied, the certification appears to be based on cultural findings not related to the original selection." (Decision at 2.) I look to the CCR to ascertain the context for BIA's inability to "establish a definite connection." Relevant statements appear in the Site Evaluation and Interpretations sections of the CCR. The Site Evaluation section states:

1. Archeological remains consisting of what appear to be a village site and a refuge islet were located ca. 13 km [8 miles] from the application area.
2. This site is far removed from the application area and clearly is not a part of the ill-defined Miners Lake complex. However, the village site may be Makeli, an abandoned settlement at an unknown location in Unakwik Inlet.
3. The correlation of AA-41487 to Makeli can not be conclusively demonstrated. However, of the known archeological sites in Unakwik Inlet, AA-41487 [Cannery Creek] is by far the most likely to be Makeli.
4. AA-41487 [Cannery Creek] meets the criteria set forth for establishing Native historical places.

(CCR at iii.)

The Interpretation concludes as follows:

Just how the two AA-41487 parcels relate to the application itself is unclear. Both AA-41487 parcels lie far southwest of Miners Lake and cannot in any way be construed to represent elements of the so-called "Miners Lake Complex". Parcel A may very well be "Makeli" * * * Certainly, the remains at AA-41487 are the best candidate for this village among the known sites in Unakwik Inlet.

Both AA-41487 parcels are clearly significant archaeological properties in their own right. Despite substantial ground disturbing activity in

Parcel A, enough of the site remains to offer some research potential. Such information as has been collected indicates substantial antiquity. By comparison, Parcel B is virtually untouched and retains excellent research potential.

Id. at 14.

The BIA's statements acknowledging the strong likelihood that the sec. 28 site is Makeli and the asserted lack of a "definite connection" between sec. 28 and the Miners Lake complex (whatever that appellation truly signifies) can be reconciled only if the BIA proceeded on the basis that a conclusive demonstration was necessary, as was recited in the Site Evaluation section of the report. Putting aside the substantial question of whether the standard that governs BIA archaeological investigations of prehistorical and historical site selections and assessments is properly one of conclusive proof, however, it was the BIA's responsibility to reach a conclusion about the location of the place called Makeli and its archaeological or cultural relationship to AA-41487. After a third investigation, the BIA did just that; looking at all the evidence before it, the BIA concluded that Chugach had erred in placing the village in sec. 36 and acted on that judgment when it communicated that conclusion to Chugach. Where neither BLM nor BIA is prepared to squarely disavow the BIA supervisory archaeologist's verification that the Makeli village site "actually lies within * * * sec. 28," I would not allow BLM to rest its case on softer, more equivocal statements that are susceptible to any number of interpretations, including one consistent with Chugach's position in this matter.

Chugach was advised that BIA's investigations had verified the location of Makeli village in sec. 28; it submitted the 1995 amendment. That amendment should have been evaluated in light of the unresolved 1986 amendment, not the original application it was to modify. In setting aside that portion of BLM's decision rejecting the application "in its entirety," my colleagues leave open the question of the status of the 1986 amendment, recognizing that application "may retain some viability with respect to that amendment." Majority Opinion at 25; id. at 21 n. 22. They note that Chugach has expressed no "specific intent to appeal the decision as to the 1986 amendment." Id. at 25. Without a decision on the purported amendment, however, there is nothing from which Chugach could appeal. And because the pending 1986 amendment was not properly severable from the application or the further attempt to amend it in 1995, adjudicating the 1986 amendment could present the very same questions raised or implicated here, relating to the record of what site Chugach intended to apply for and when, the nature and role of the archaeological investigation and verification of site selections, and whether and to what extent Chugach could further amend its application under the regulations, ultimately bringing us back, full circle, to the import of the Cannery Creek site and report to application AA-41487.

In these circumstances, I would set aside BLM's decision and remand the case to explain and resolve both amendments in light of the questions noted or reflected in these opinions.^{2/}

I therefore dissent.

T. Britt Price
Administrative Judge

^{2/} I note that, with respect to the Siwash Bay site that was the subject of application AA-11044, the site identified in the original application (later designated Parcel A) was rejected by BLM, and the amended sites identified as Parcels B, C, and D were approved and conveyed. Compare Certificate of Eligibility dated Apr. 15, 1991, at ii with Figure 149, North Sound Area Map 2. Whatever the Siwash Bay area's other merits, BIA apparently determined that this did not contain the remains of a village, yet BLM did not reject the application in its entirety. (CCR at 7.) See also U.S. Forest Service, 160 IBLA 1 (2003).