

INTERIOR BOARD OF LAND APPEALS

Sealaska Corp.

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SEALASKA CORP.

IBLA 88-348

Decided July 15, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting historical place selection application AA-10524.

Affirmed.

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

Sec. 14(h)(1) of the ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

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

BLM properly rejects a selection application for a historical place under sec. 14(h)(1) of ANCSA when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

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

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

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

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

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

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Sealaska Corporation (Sealaska) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 7, 1988, rejecting historical place application AA-10524, filed on December 12, 1975, pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1988). In historical place application AA-10524, Sealaska selected the Icy Strait Village Site, described in the application as a "permanent village site" located "[d]ue north of Sisters Reef approximately 4 miles, on Icy Strait," within sec. 9, T. 42 S., R. 62 E., Copper River Meridian, Alaska.

Wilsey & Ham, Inc., consultants from Seattle, Washington, located and examined the site for Sealaska on June 12, 1975. See BIA Report of Investigation at 7. In its report, appended in relevant part to Sealaska's selection application AA-10517, Wilsey & Ham refers to a report prepared by Robert Ackerman dated 1965:

South and east of the village at Village Point, the survey team located two graves with the remains of a balustrade type grave fence enclosure. Nearby on a wave cut bank, a large tree had fallen. Its huge root system, torn loose from the surface, had cleared in the tree's falling, a considerable area of the forest floor. In this area we found a hammer stone and three abraiding stones. A village may have once existed in this location. No testing was done on this site.

Upon investigating the site on June 27, 1975, Wilsey & Ham reported that "[n]o balustrade-type grave fence or graves, as described by Dr. Ackerman, could be seen here. All that was visible were the remains of a collapsed cabin on the end of the spit." They felt that they had examined the area described by Ackerman due "to the 'wave cut bank' and the large fallen trees which were seen here and which existed no where else nearby."

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

Site boundaries were determined by BIA personnel, with the assistance and agreement of CPSU [Cooperative Park Service Unit, National Park Service] personnel, following a transected reconnaissance of the site area. The site was located and surveyed within E1/2 SE1/4 SE1/4 section 8, W1/2 SW1/4 SW1/4 Section 9, T. 42 S., R. 62 E., Copper River Meridian, Alaska. The site as surveyed consists of 2.2 acres, more or less, and extends beyond the area originally applied for by Sealaska Corporation.

* * * * *

All cultural features were located on an elevated beach terrace some distance from the coastal margins along Icy Strait. The terrace remains fairly level throughout the site. A shallow stream makes up the natural boundary on the northern margins. To the west is Icy Strait, and to the south is one compass survey line completed by BIA field investigators.

Located on the site were several cultural features, including the remains of two graves with a balustrated fence as described in the Sealaska Statement of Significance. Robert E. Ackerman (1965) reports that the site contained no evidence of white occupation. Descriptive evidence from Sealaska (1975) and Ackerman (1965) reveal that they both were discussing the same site. It is therefore concluded that the actual Sealaska requested acreage may encompass another site of unknown cultural significance. [1/]

The applied-for acreage encompassed a limited inventory of cultural features. These features are as follows:

- #1. Remains of structure leaning against spruce; constructed of milled lumber with wire nails, partial roof lying on ground; roof was 1.9 meters above ground; length of roof 3.2 meters.
- #2. Cleared garden area.
- #3. Remains of structure constructed of milled lumber with wire nails measuring 5.4 meters by 4.5 meters; an enamel basin, enamelware, and wood crate with a label, 'Alaska Territory' were also found.

1/ As my colleague Judge Burski points out in note 1 of his concurring opinion, the concluding statement in this paragraph contradicts the preceding statements.

Site boundaries include the use area, with a small buffer zone to protect the cultural features. The site lies within Village Selection AA-6980-C, which includes the entire township.

(Report of Investigation at 8-9).

As noted, CPSU cooperated with the ANCSA Project Office in investigating the Icy Strait Village Site. In the opinion of Carol Rawlinson, CPSU field archeologist who took part in the investigation, "Icy Strait Village qualifies * * * for ANCSA 14(h)(1) selection by Sealaska Corporation" (BIA Report of Investigation at 33). She offers the following reasons for her conclusion:

Icy Strait Village was a small summer fishing village occupied by a few Tlingit families. It was a Tlingit custom to leave permanent villages during the spring and summer months and stay at temporary fishing sites. The Hoonah Tlingit may have occupied the site while also hunting fur seal and sea otter.

Icy Strait Village possesses outstanding symbolic value in the traditions of the Hoonah Tlingit. It is an example of a traditional Tlingit summer fishing village where the Hoonah Tlingit were involved in their food quest and seasonal round. The site is also significant because it possesses integrity of setting. Retaining its physical features, location, and surroundings, it recalls a traditional Tlingit fishing village. Icy Strait Village is further significant because it may yield important information on Hoonah Tlingit culture and local history. Along with other Icy Strait sites, Icy Strait Village is extremely important because it helps reconstruct past Hoonah Tlingit lifestyles.

(BIA Report of Investigation at 33-34).

On November 30, 1983, BIA issued a certificate of ineligibility for the Icy Strait Village Site, listing the following reasons:

1. Extensive field investigation by BIA personnel failed to find concrete evidence supporting the claim of a historical place.
2. The Cooperative Park Studies Unit (CPSU) report fails to provide sufficient concrete evidence supporting the claim. The report mentions a garden area and remnants of two structures. It also mentions the site as a temporary summer fishing village. According to this report no ethnographic evidence is available for this site.
3. The site does not meet the criteria for a historic place as required by 43 CFR 2653.5(d)(1-5).

On July 27, 1987, Sealaska submitted to BLM a study prepared by Rosita Worl and Charles W. Smythe, Ph.D., of the Chilkat Institute entitled "Assessment of Twelve Sealaska Corporation Historical Site Applications Under the Alaska Native Claims Settlement Act 14(h)(1)" (Chilkat Assessment). The purpose of this study was to present new information to demonstrate that BIA's certificates of ineligibility pertaining to 12 selection applications, including the application for the Icy Strait Village site, were based upon inadequate investigations and incomplete information. The Chilkat Assessment presented the Institute's view of shortcomings in the decision process that led to determinations that the sites were ineligible. In general, these were "poor field procedures and * * * disregard for the rudimentary findings that were obtained;" "inadequate analyses of surface and sub-surface findings;" "oral history was ignored or considered insufficient;" and a bias against seasonal sites (Chilkat Assessment at 1-7). Sealaska requested that BIA prepare a supplemental report for each of the twelve sites "which incorporates new site investigations and that a re-determination of historical status eligibility be made in each case. Further substantiation in oral traditions should also be compiled from knowledgeable individuals" (Letter dated July 22, 1987, from Sealaska to BLM).

The Chilkat Institute asserts that "BIA did not locate the village site; consequently their claims that it does not qualify as an historical place do not apply" (Chilkat Assessment at 107). In support of this argument, the Chilkat Institute refers to CPSU's statement that it "dug two 50-cm-square test pits to determine if this site corresponded to a site described by Dr. R. E. Ackerman of Washington State University." Id. at 111. The Chilkat Institute refers to maps accompanying the site report in claiming that the test pits were dug in the "garden area" and in a "small clear area just above mean high tide." Id. By contrast, Ackerman reported that no structures were visible other than the broken grave balustrade, and "made no mention of a garden area or other distinguishing physical features except the swath left in the ground where the large fallen tree tore up its roots." Id. In actuality, argues the Chilkat Institute, the site for which Sealaska applied was identified by two graves rather than the fallen tree. The Chilkat Institute supports CPSU's recommendation that the site be approved under section 14(h)(1) of ANCSA, pointing out that CPSU has nominated the site for placement on the National Register of Historic Places.

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

In its statement of reasons (SOR), Sealaska argues that Departmental regulations at 43 CFR 2653.5 establish a "presumption of validity for any Section 14(h)(1) application," and that the "application is to be given 'favorable consideration' if the site qualifies" (SOR at 6-7). Sealaska contends that the BIA "failed to perform an adequate and meaningful review and investigation of the site." Id. at 8-9. Sealaska incorporates into its SOR, in slightly modified form, the evaluation of the Icy Strait

Village Site contained in the Chilkat Institute's study. See SOR, Exh. D. Sealaska points out that the Icy Strait Village Site has been nominated by the CPSU for placement on the National Register of Historic Places (NRHP). Sealaska maintains that "[t]he criteria for nomination and placement on the [NRHP] is [sic] as extensive, if not more so, as the criteria used by the BIA for determination of eligibility and validity" (SOR at 10). Sealaska requests that we grant its application or remand the matter to BLM and BIA with instructions that BIA conduct a "proper, competent and thorough review and investigation of this site." Id. at 11.

BIA and BLM answer that there is neither a "presumption of validity" for a 14(h)(1) application nor a requirement that every application be given "favorable consideration" (Answer at 7-8). In the agencies' view, under 43 CFR 2653.5(a) "favorable consideration cannot be given unless the Secretary finds that the regulatory criteria is [sic] met." Id. at 8. The agencies state that "[t]he Secretary cannot give favorable consideration to applications which are not eligible, 43 CFR 2653.5(a)" (id., quoting BLM Decision at 2). The agencies argue that Sealaska has not met its burden of proving BLM's decision that this site did not meet the criteria was in error, and BLM's decision should be affirmed. Id. They conclude that CPSU's nomination of the site to the NRHP is irrelevant to whether it qualifies as a historic place. Id. at 18.

On October 24, 1988, Sealaska filed an additional SOR and a request for a hearing. Sealaska argues that whether the Icy Straits Village Site qualifies as an historical place under section 14(h)(1) of ANCSA "involves a material factual issue which would alter the disposition of the Bureau of Land Management's decision to deny Sealaska's application for the conveyance of this historic site" (Additional SOR at 2).

Sealaska states that "[t]he major factual finding of the Bureaus is that no cultural remains of a village were found on the applied for site, neither the remains of a village complex nor a burial site, and concludes that no historical site exists at the applied for site" (Additional SOR at 4). Sealaska claims that even if the two graves are located on patented land which is not available for selection, "[t]he applied for site is the associated village area for acknowledged grave sites." Id. Sealaska emphasizes the "totality of the archaeological and historical concept of a village," of which the burial sites and burial grounds comprise only one part. Thus, in Sealaska's view, "[t]hough part of the village is now unavailable for selection, another part of the village is, that being the applied for site." Id. at 5.

Sealaska concedes, however, that "the original site reported by Ackerman, which was the basis of Sealaska's application, has not been located." Id. at 6. Sealaska acknowledges that BIA located the Sealaska marker and investigated the site identified in Sealaska's application, conducting a more detailed survey than the Sealaska team. Id. at 7. Nevertheless, Sealaska maintains that the site marked by its team qualifies for conveyance under section 14(h)(1) of ANCSA on the basis that it constitutes

"part of a cultural complex of sites which, in their entirety, comprise a major unit with special historical and archeological significance." Id.

Sealaska repeats its view that CPSU's nomination of the Icy Strait Village Site for placement on the National Register is relevant to whether the site qualifies the site for conveyance under section 14(h)(1) of ANCSA.

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

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides "[t]he Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places." The Department has defined "historical place" in 43 CFR 2653.0-5(b) as

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

In evaluating a tract or area to determine whether a significant Native historical event occurred which is importantly associated with Native historical or cultural events or persons, 43 CFR 2653.5(d) provides that 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.

BIA and BLM refers to these as the "preliminary criteria" and five alternative requirements for a historical place that is associated with Native historical or cultural events or persons (Answer of the BIA and BLM at 5). See United States Forest Service, 101 IBLA 38, 43 (1988).

An application is not entitled to a presumption of validity and may be given favorable consideration only if it meets the criteria in the regulations. The language of section 14(h)(1) and of 43 CFR 2653.5(a) make clear that the Secretary has discretion to convey land to a regional corporation for a cemetery site or a historical place if the criteria are met. If a regional corporation files an application under section 14(h)(1), "[t]he Secretary may give favorable consideration to [the application] Provided, That the Secretary determines that the criteria in these regulations are met." 43 CFR 2653.5(a). For a historical site, this means that it must

be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity, as stated in the definition of "historical place" above. 2/

[2] We agree that the Icy Strait Village Site does not qualify for conveyance under section 14(h)(1). The Chilkat Institute stated that although the village site was reported by Ackerman in 1965, "[s]ubsequent investigators, including a second visit to the area by Ackerman, have not located the site successfully" (SOR, Exh. D, at 1). Moreover, the Chilkat Institute concludes:

Since the only report of this site is a survey conducted by Ackerman in 1964, and since it has not been possible to locate the site after Ackerman's initial sighting, it is possible that the site no longer exists. Located near the shoreline, it can be reasonably supposed that the site has been washed into the ocean by natural processes. * * * [D]ue to the natural weathering along the coastline and the rise of undergrowth, it may not be possible to locate the graves. A careful survey of the area should be made to clearly identify the grave site, and its relationship to the site or sites located by Wilsey & Ham and BIA/CPSU. At present, neither of the surveyed sites contains the graves. The BIA report indicates that graves can be located outside the applied-for area, and within the patented lot. This

2/ BIA and BLM note: "The important elements of this definition are that there must be 'a distinguishable tract of land or area' plus either a 'significant Native historical event, which is importantly associated with Native historical or cultural events or persons' or 'sustained historical Native activity.' [Emphasis in original.] If a site cannot meet the threshold requirement and fit into one of the alternative provisions of this definition, it cannot be a 14(h)(1) historical place" (Answer of the BIA and BLM at 4).

should be verified, and the identity of the graves reported by BIA should be established. * * * At present, oral history has not been collected which identifies this site and confirms it was a village.

(SOR, Exh. D, at 6).

BLM contends that, based upon the record, it appears that the Icy Strait Village Site is "no longer in existence," and therefore, "it cannot qualify as a historical place under ANCSA" (Answer at 12). It is questionable, in BLM's view, whether this historical place application meets the "threshold requirement" of describing a "distinguishable tract of land or area" as required by 43 CFR 2653.0-5(b). Since even Sealaska's consultants have failed to locate a definite site, "there can be none of the integrity required by 43 CFR 2653.5(d)" (Answer at 13). BLM points out that if the graves and the grave fence do exist, and are locatable, "they appear to be on patented land and rejection of the application would be required on that basis." Id. Our review of the record bears out BLM's evaluation of the Icy Strait Village Site application:

If, however, the site exists and is off the patented land, it still lacks the significance required to be an eligible ANCSA historical place. This is because it was, at most, a seasonal fishing site (BIA Report, 33). While there are no facts of record supporting the existence of even a seasonal fishing site, other than the structural remains and clearing found by BIA and CPSU investigators, use of an area for fishing would not qualify a site as a historical place under ANCSA, 43 CFR § 2653.0-5(b). The definition of a historical place expressly excludes "fishing" as the basis for site eligibility (id.). Some more significant event had to occur on the site to distinguish it from broader general use areas. This is particularly the case here where the claimed Icy Strait village site would have had the same general fishing, trapping and hunting use as adjacent areas (SOR, Ex. D, 1). Moreover, there is nothing about the few structural remnants and cleared area identified by investigators that establish the requisite "integrity of location, design, setting, materials, workmanship, feeling and association," 43 CFR § 2653.5(d). There is not even any evidence proving that the observed ruins and clearing were Native in origin. It is at least possible that the remains that BIA and CPSU found, which CPSU placed in the time frame of 1900-1919 (BIA Report, 38), were non-Native in origin since it is undisputed that homesteading occurred in the immediate area resulting in the issuance of a patent in 1917 (BIA Report, 7 and SOR, Ex. D, 5).

Moreover, appellant has utterly failed to meet its burden to prove that the application was erroneously rejected. Sealaska has not identified any "significant Native historical event" that occurred on an "identifiable tract of land" as required by 43 CFR

§ 2653.0-5(b). There is absolutely no evidence showing the existence of the alleged "permanent village" (Application AA-10524, supra, 1). There is not even adequate evidence to support the legally insufficient claim that the area was used as a seasonal fishing site. Even if the graves and grave fence could be located on federal land, this is not a cemetery site application and there is no evidence proving the significance and integrity that are requirements of 43 CFR § 2653.0-5(b) and 2653.5(d).

(Answer at 14-15). Cf. United States Forest Service, supra.

In evaluating Sealaska's argument that BIA failed to conduct a competent and thorough investigation of the Icy Strait Village Site, we must take into account Sealaska's own responsibility in filing its selection application pursuant to section 14(h)(1) of ANCSA. Regulation 43 CFR 2653.5(f) (1988) provides that "[t]he regional corporation shall include as an attachment to its application for a 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." In this case Sealaska's application itself casts doubt on whether the site qualifies for selection under section 14(h)(1). We agree with BLM that "[t]here is no requirement that the BIA engage in a general cultural or historical survey of the area around the claimed site, to undertake site excavation or to pursue oral evidence when there are no identified sources of such evidence" (Answer at 17). Sealaska failed, in its selection application and in its subsequent submissions, to describe "the events that took place and the qualities of the site from which it derives its particular value and significance as a historical place," as required by 43 CFR 2653.5(f). 3/

[3] Sealaska, as the party challenging BLM's decision rejecting its selection application, bears the burden of establishing by a preponderance of the evidence that such decision is in error. Sealaska has simply failed to meet this burden. See, e.g., Sealaska Corporation, 115 IBLA 249 (1990); Minchumina Homeowners Association, 93 IBLA 169, 178 (1986).

[4] Under these circumstances, we deny Sealaska's request for a hearing to resolve the factual question as to whether the Icy Strait Village Site qualifies for conveyance under section 14(h)(1) of ANCSA. As we have previously observed:

3/ We do not address appellant's argument that CPSU's nomination of the Icy Strait Village Site for placement on the National Register is relevant to whether the site qualifies the site for conveyance under section 14(h)(1) of ANCSA. Although the CPSU completed the NRHP nomination form for this site (see Appellant's Additional Statement of Reasons and Request for Hearing, Exhibit C), and the form may be "on file" with the State Historic Preservation Officer (BIA Report at 32), it is not clear that it was submitted to the State Historic Preservation Officer for review, "a necessary step before an agency * * * submits properties to the National Register." See Answer of BIA and BLM, Exh. 1.

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

Sealaska Corporation, supra at 255, quoting *Woods Petroleum Co.*, 86 IBLA 46, 55 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

To my mind, the decision in the instant case, far more than any of the other appeals which this Board has considered relating to rejections of applications filed by Sealaska Corporation under section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1988), ultimately turns on a burden of proof analysis. The lead opinion correctly rejects appellant's general assertion that there is a presumption of validity to any application for a cemetery or historical site for cogent reasons which I will not reiterate. Nor, I believe, is there any gainsaying the proposition that appellant has completely failed to affirmatively establish its entitlement to conveyance of the land sought on the basis of the present record. The more difficult question relates to whether or not this Board should either remand the matter for another on-site investigation or order a fact-finding hearing under the authority of 43 CFR 4.415. Proper consideration of that question requires a detailed attention to the facts of record.

The lead opinion notes that Sealaska's consultant, Wilsey & Ham, Inc., gave as its source for the existence of this site a report prepared in 1965 by Robert Ackerman which it quoted as follows:

South and East of the village at Village Point, the survey team located two graves with the remains of a balustrade type grave fence enclosure. Nearby on a wave cut bank, a large tree had fallen. Its huge root system, torn loose from the surface, had cleared in the tree's falling, a considerable area of the forest floor. In this area we found a hammer stone and three abraiding stones. A village may have once existed in this location. No testing was done on this site.

What the lead opinion charitably fails to mention is that, for some unexplained reason, Wilsey & Ham neglected to quote from the next paragraph of Ackerman's report: "The area was purchased as a homestead by James T. Barron on December 7, 1917 (U.S. Survey plot 1139, 17.43 acres, patent number 611041; records of the Bureau of Land Management (Juneau Field Office), U.S. Department of the Interior). There was no evidence of a white occupation."

The importance of this omission is obvious. There is no dispute that patented lands are not available for selection. Thus, the very document upon which appellant relies for the assertion that a village may have existed at the site also established that the site was not available, yet this fact was not disclosed in the original application.

Moreover, the field investigation which Wilsey & Ham subsequently conducted failed to disclose the two graves which had led Ackerman to his supposition that a village may have existed on the site. Rather, it found the remains of a collapsed cabin on the end of a spit. It concluded that this was the same site which Ackerman reported, "due primarily to the 'wave cut bank' and the large fallen tree which were seen here and which existed no where else nearby."

The Bureau of Indian Affairs (BIA) and the Cooperative Park Studies Unit (CPSU) field investigation discovered the ANCSA site tag left by Wilsey & Ham. It also discovered the remains of two structures and a small garden area. CPSU concluded from this that "Icy Strait Village was a small summer fishing village occupied by a few Tlingit families." Any basis for this conclusion, however, is totally lacking in the record. There is no indication that the two structures actually found were even Native in origin, a particularly important point since there was a non-Native homestead entry almost immediately adjacent to the site in question. Nor was any other ethnographic evidence tendered to support this conclusion. Moreover, as will be shown below, to the extent that the CPSU conclusion was premised on the Ackerman report, it is poorly based since, on appeal, even appellant agrees that the land sought is not the land described in the Ackerman report. In short, insofar as this site is concerned, the CPSU report is no more than an ipse dixit and clearly deserving of little, if any, weight.

For its part, the BIA report 1/ concluded that the site applied for was not the site referred to in the Ackerman report and rejected the application for this site on the ground that appellant had failed to establish that it met the criteria for a historical place set forth at 43 CF 2653.5(d).

Upon being apprised of BLM's tentative conclusion that the application should be rejected, Sealaska, as it did with all other 14(h)(1) sites which BLM had tentatively decided to reject, contracted with the Chilkat Institute to conduct further analysis of the application. In reviewing oral traditions relating to the site, the Chilkat report noted that the BIA report itself declared that "informants state the place is the site of a permanent

1/ While I do not agree with appellant that the BIA field investigation was, in any way, deficient, the same cannot be said with respect to the drafting of the actual report. Thus, for some unknown reason, the report declared that:

"Located on the site were several cultural features, including the remains of two graves with a balustrated [sic] fence as described in the Sealaska Statement of Significance. Robert E. Ackerman (1965) reports that the site contained no evidence of white occupation. Descriptive evidence from both Sealaska (1975) and Ackerman (1965) reveal that both were discussing the same site. It is therefore concluded that the actual Sealaska requested acreage may encompass another site of unknown cultural significance." (Report at 9).

Quite frankly, it is difficult to make any rational sense out of this paragraph. Thus, it seemingly declares that the two graves were located on the site, as they were described by Ackerman and Sealaska's Statement of Significance (though not by the Wilsey & Ham on-site investigation), yet then concludes that "therefore" this must not be the site which Sealaska intended to apply for. Exactly what was intended to be said by this report must forever remain elusive. However, there is absolutely no doubt that the graves were not located within the boundaries of this site. See BIA Report at 10; Chilkat Report at 111-12; Additional SOR at 7; Answer at 10.

village," arguing that this contradicted BIA's assertion that there was no ethnographic data existing for the village. ^{2/} This is somewhat disingenuous, however, since the only informant listed by anyone is Ackerman and, to the extent that Ackerman's assertions may be taken as providing ethnographic data, they are necessarily limited to the land which Ackerman examined. Moreover, Ackerman never stated that a village existed at the site he examined, he said that a village may have existed there. Thus, since the Chilkat report agrees that the site examined by Wilsey & Ham and BIA was not the Ackerman site (Chilkat Report at 111), BIA's assertion, corroborated by CPSU (see BIA Report at 39), that there is no ethnographic evidence for the site actually applied for stands unrebutted.

In its amended statement of reasons, Sealaska, while not completely recanting its assertion that the BIA field investigation was inaccurate, complains that "the fact remains that the original site reported by Ackerman, which was the basis of Sealaska's application, has not been located" (Additional Statement of Reasons (SOR) at 6). Sealaska is apparently of the view that merely by mentioning the Ackerman report in its initial Statement of Significance it somehow shifted the obligation from it to BIA to locate the area for which it "intended" to apply. ^{3/} In other words, if the area identified by its own consultants turned out not to be the area which Ackerman located, the duty somehow devolved upon BIA to go out and find the historical site which Sealaska desired. Such is not, however, the law.

In implementing the congressional grant of authority to withdraw and approve the conveyance of existing cemetery sites and historical places to

^{2/} We have actually two different reports prepared by the Chilkat Institute with respect to the Icy Strait Village site. One, bearing a date of June 30, 1987, and found in the case record is clearly the final report. However, a preliminary report, dated Apr. 14, 1987, was also prepared and was submitted as Exhibit D to appellant's SOR. It is interesting to note that while the preliminary report also argued that the BIA field report appeared to contradict its assertion that there was no ethnographic data with respect to the existence of this village, it also noted that "No documentation of this oral history material was available from the BIA ANCSA Office, however" (SOR, Exh. D, at 2). This admission was deleted from the final Chilkat report. See Chilkat Report at 110.

^{3/} Thus, even though Sealaska conceded that "[t]he Bureaus' field team located the Sealaska marker and provided a more detailed survey than the Sealaska team" (Additional SOR at 7), Sealaska continued to maintain that "this site was not adequately investigated by the Bureaus" (Additional SOR at 10). As is indicated in the text, however, Sealaska is now essentially differentiating between the site which its consultants delineated and which was physically described on its application and the site for which it "intended" to apply. The problem with this approach to adjudications of section 14(b)(1) applications is explored infra in the text of this concurrence.

Regional Corporations, ^{4/} the Department adopted regulations which guide its adjudications. Since BLM is required to withdraw the lands sought by Regional Corporations from further disposition under the public land and mineral laws, the regulations require the applicant to "identify accurately and with sufficient specificity the size and location of the site for which the application is made * * * to enable the Bureau of Land Management to segregate the proper lands." 43 CFR 2653.5(f). This regulation further provides that "[t]he land shall be described in accordance with § 2650.2(e) of this chapter," unless the acreage sought is less than 2.5 acres or cannot be described by a protracted survey description, in which case it must be described by metes and bounds.

Admittedly, 43 CFR 2653.5(h)(1) provides that "[i]f during its investigation, the Bureau of Indian Affairs finds that the location of the site as described in the application is in error, it shall notify the applicant, the Bureau of Land Management, and other affected Federal land agencies, of such error." The applicant is then afforded a period of 60 days in which to amend its description with respect to the location of the site. But the whole point of this provision merely underlines the fact that it is the applicant's description which delineates the area sought. And, in this case, when BIA concluded that the area sought was greater than that described, Sealaska amended its description accordingly. This amended area, however, does not include any grave sites.

Under the regulatory scheme, appellant bore the responsibility of accurately describing the land which it sought. If BIA, on the basis of its field investigation, determined that the land sought was misdescribed, appellant was afforded the option of amending its application to so conform. It was not, however, within the contemplation of these regulations that BIA would bear the affirmative obligation of finding historical sites or cemeteries which an applicant was unable to locate. Leaving aside the question

^{4/} It should also be noted that, generally, such land was required to be outside the areas withdrawn for Native village selection under section 11, 43 U.S.C. § 1610 (1988), and section 16, 43 U.S.C. § 1615 (1988). A specific exception permits conveyance of land withdrawn by sections 1615(a) and 1615(d) but not selected by a village corporation to Sealaska. See 43 U.S.C. § 1613(b)(8)(B) (1988). I note that this land was selected by the Huna Totem Corporation under selection AA-6980-C. Thus, under the statute, this land was not available for selection and conveyance to Sealaska under section 14(h)(1). The case file, however, contains a letter dated Nov. 10, 1987, to the Huna Totem Corporation in which the village corporation was informed that the Alaska State Office had decided to permit withdrawal of village selections in favor of section 14(h)(1) selections. Whether this policy comports with the requirements of the law need not be examined in the instant case, since I agree with the lead opinion that the site in question does not qualify for conveyance under section 14(b)(1) in any event.

whether two graves of undetermined origin could ever fulfill the requirements of a historical place (but see 43 CFR 2653.5(e)), the fact remains that, even if the graves still exist someplace, 5/ they are not within the limits of the application under review.

Appellant attempts to surmount the logical problems attendant upon simultaneously arguing that this site qualifies for conveyance under section 14(h)(1), while at the same time it is contending that BIA should be compelled to go out and locate the Ackerman site, by arguing that these two sites are, in reality, part of the same site. This, however, is not what CPSU concluded. Thus, in the descriptive narrative which it prepared to support possible nomination of the described site to the National Register, CPSU stated that "[t]he designated boundaries for Icy Strait Village include all cultural activity areas and surrounding areas, preserving site integrity and physical setting" (Additional SOR, Exh. C at 4). Moreover, the CPSU field report, which was included in the BIA report, expressly noted that "[t]he boundaries include all cultural activity areas" (BIA Report at 41).

We have, therefore, two discrete areas. The first, located by Ackerman in 1965 on patented homestead lands which are not available for selection, 6/ consisted of two graves and a balustrade fence which

5/ Appellant asserted in its original SOR that "BIA did find evidence of Native occupation and two burial sites within the vicinity of the site"

(SOR at 10). There is, however, no real support for this assertion, even given the confused nature of the BIA written report, see note 1, supra. Thus, the report clearly stated that "[a]ccording to Ackerman, the graves were located on patented land, U.S. Survey 1139, a short distance southeast from the applied-for location" (BIA Report at 10). Thus, any reference to the two graves was clearly premised not on an on-the-ground discovery but

on Ackerman's 1965 written report. In its subsequent Additional SOR, appellant basically abandoned its original factual assertion that BIA actually discovered the graves. See Additional SOR at 6-7. Not only did neither

the Wilsey & Ham nor BIA investigators succeed in locating the graves, the Chilkat Institute reported that Ackerman, himself, was unable to relocate the site in 1973 when he again visited the area (Chilkat Report at 110). This led the Chilkat Institute to speculate in its original draft report that "[s]ince the only report of this site is a survey conducted by Ackerman in 1964, and since it has not been possible to locate the site after Ackerman's initial sighting, it is possible that the site no longer exists. Located near the shoreline, it can be reasonably supposed that the site had been washed into the ocean by natural processes" (SOR, Exh. D, at 6). This language was also deleted in the final report. See note 2, supra.

6/ I note that Chilkat Institute reported a subsequent discussion with Ackerman:

"We discussed this issue with Bob Ackerman, and he stated the opinion that the graves may not lie within the patented area. His reasoning was based on the consideration that, using the quad maps that are available,

the assignment of boundaries can only be accurate within a half mile. That

Ackerman determined "may" have been the site of a village which had once existed. No one, including Ackerman, has succeeded in relocating this site since that initial examination. The second site, consisting of two decay-ing structures and a garden area, was located by Wilsey & Hams and the BIA field team. For this site, however, there is absolutely no ethnographic evidence establishing anything. The site might have been Native, it might not. There is simply no evidence, whatsoever, that a village ever existed at this site 7/ and I find it difficult to credit an argument that two structures and a garden area qualify it as a "historical place" within the meaning of the statute or regulations, which requires the showing of either a significant Native historical event, a finding that the site is "demonstrably likely" to yield information important in prehistory or history, or a determination that the site was subject to sustained Native historical activity. See 43 CFR 2653.0-5(b) and 2653.5(d).

There remains, however, appellant's request that we either order a fact-finding hearing pursuant to 43 CFR 4.415, or set aside BLM's decision with instructions to conduct another on-the-ground search for Ackerman's site. With respect to the latter question, it is undisputed that BIA located the site identified by Wilsey & Ham in appellant's application. If this is not the site appellant "intended" to apply for, the fault rests with appellant. I note that even though appellant admits that Wilsey & Ham did not find the Ackerman site, appellant has not seen fit to attempt to locate the Ackerman site on its own. BIA conducted a thorough and competent investigation of the land which appellant asserted to be the situs it sought to have conveyed. It is not BIA's obligation to conduct a general survey of the area hoping to disclose what appellant has been unable to ascertain. The ordering of a further field investigation would clearly be unwarranted.

With respect to the granting of a fact-finding hearing under 43 CFR 4.415, the facts relevant to our decision concerning the site selected are

fn. 6 (continued)

means his earlier statement concerning the patented area may be off by as much as a half-mile. Since the size of the site is small, he believes it is very likely that the graves will not be found within the patented area." (Chilkat Report at 113 (emphasis in original)).

While I recognize that it is not always easy to relate topographic features and specific sites to maps, I fail to see how the size of the site has anything to do with the question of whether it is within the patented lands. In fact, it would seem to be that the smaller the site the more likely it is that all of it would be included with the patented acreage.

In any event, since Ackerman was, himself, unable to relocate the site on the ground, it is bootless to speculate where it might be. It is clear that it is not the site under review.

7/ The CPSU assertion that "Icy Strait Village was a small summer fishing village occupied by a few Tlingit families" (BIA Report at 33) is simply a bald assertion unsupported by anything in the record. No evidence is provided of the existence of any village at this site, much less one "occupied by a few Tlingit families."

not in dispute. Rather, what is disputed is the interpretation of those facts. As this Board has stated in a different context:

The Board has the full de novo review authority of the Secretary. See Exxon Co., USA, 15 IBLA 343 (1974). While the Board will not normally set aside the findings of an administrative law judge where they are based on credibility, since the administrative law judge has had the opportunity to observe the witness during the course of his or her testimony and there has had an opportunity to take into account any demeanor evidence (United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973)), even in these situations the Board is not precluded from substituting its judgment for that of the administrative law judge. See, e.g., Lawrence E. Willmorth, 64 IBLA 159 (1982). Where, as in the instant case, what is involved is not a judgment as to the veracity or believability of a witness's testimony, but rather the consistency of a party's ultimate conclusion with the facts of record, little weight would be accorded to an administrative law judge's determination beyond that which it could command by the force of its analysis and the clarity of its exposition.

Thunderbird Oil Corp., IBLA 84-466, order of June 6, 1986, denying reconsideration of Thunderbird Oil Corp., 91 IBLA 195 (1986), aff'd sub nom. Planet Corp. v. Hodel, CV No. 86-679 (D.N.M. May 6, 1987). So, too, in the instant case, a hearing would ultimately result merely in the reargumentation of the proper application of law to the facts of record, a decision which this Board has the full authority to determine finally for the Department. Based on the showings herein, no purpose would be advanced by such a hearing.

Therefore, for the reasons set forth above, I agree that the decision of BLM rejecting historical place application AA 10524 should be affirmed.

James L. Burski
Administrative Judge