

INTERIOR BOARD OF LAND APPEALS

Sealaska Corp.

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SEALASKA CORP.

IBLA 90-303

Decided July 20, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting historical place selection application AA 10529.

Affirmed.

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

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the site does not meet the criteria set forth at 43 CFR 2653.5.

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

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1988), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

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

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

APPEARANCES: Stephen F. Sorensen, Esq., and Robert W. Loescher, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Sealaska Corporation (Sealaska) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 13, 1990, rejecting historical place application AA 10529, 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). ^{1/} This application selected 27 acres within sec. 21, T. 23 S., R. 34 E., Copper River Meridian, Alaska, referred to as the "Disenchantment Bay Village Site." These lands are located within the Tongass National Forest just north of Point Latouche, approximately 43 kilometers north of Yakutat, Alaska.

In its decision BLM stated:

The Secretary of the Interior (hereinafter, the Secretary) authorized the Bureau of Indian Affairs (BIA) to investigate historical places and cemetery sites and to certify as to their eligibility, 43 CFR 2653.5(h). On October 24, 1983, BIA certified that this application was not eligible. Sealaska Corporation requested that BIA reassess AA-10529, based on the additional information provided within a report entitled "Assessment of Twelve Sealaska Corporation Historical Site Applications." After reinvestigation, BIA certified on January 10, 1990, that this application was not eligible because:

1. A field reinvestigation was conducted by BIA personnel who did not find sufficient evidence to support the claim for a Native historical place.
2. Native oral history indicates this site was used for hunting purposes and had no permanent settlement. No cultural features were located. This site has been subject to erosion caused by the sea and a 1958 earthquake. Any possible evidence has been destroyed by these actions.
3. Disenchantment Bay does not meet the criteria for qualifications as a Native Historical place as required by 43 CFR 2650, et seq.

The Secretary cannot give favorable consideration to applications which are not eligible, 43 CFR 2653.5(a).

^{1/} In its decision BLM also stated that the lands encompassed by the Disenchantment Village Bay site were not unreserved and unappropriated and were therefore not available for selection. In its answer BLM concedes that it erred in finding that the lands were unavailable for conveyance.

As indicated in the decision, two investigations of the site have been conducted by the Department of the Interior. Initially, a field investigation was conducted by Bureau of Indian Affairs (BIA) personnel assisted by an archeologist of the National Park Service (NPS), Cooperative Park Studies Unit (CPSU), on May 21-22, 1980. Based on the field examination, research, and consideration of CPSU recommendations, BIA issued its Report and Certificate of Ineligibility on October 24, 1983 (1983 Report). ^{2/} The 1983 Report rejected selection of the site based upon a finding that there was no evidence to support Sealaska's claim of the location as a historical site. The report also found that although the site was used for seal hunting, this would not qualify it for historical site selection, as "hunting sites are specifically excluded for eligibility by the language of 43 CFR 2653.0-5(b)" (1983 Report at 3).

While the 1983 Report contained a number of maps, photographs, a precise legal description, and other documents, its investigative analysis of Native historical antecedents was not discerning. The report stated:

According to Wilsey & Ham, informants from Yakutat identified the site as a large old sealing camp. Informants for Goldschmidt and Haas * * * also identified the area as a seasonal sealing camp. However, during their visit to the site in 1975, Wilsey & Ham personnel found no direct evidence of structures or remains.

Frederica de Laguna * * * described the site as Qeqotteya, one of three sealing camps located in Disenchantment Bay. When she visited the site in May of 1954, the snow was too deep to permit exploration * * *. She reported, however, that when the three camps were visited by the Harriman Alaska Expedition in the spring of 1899, 300 - 400 Natives from Yakutat, Sitka, and Juneau occupied the area * * *. [Citations omitted.]

(1983 Report at 6). The report concluded: "A thorough field investigation by BIA and CPSU personnel failed to locate any evidences of past Native use or occupancy" (1983 Report at 7).

On July 27, 1987, Sealaska supplemented the record, and filed with BLM a report entitled "Assessment of Twelve Sealaska Corporation Historical Site Applications." The report, dated June 30, 1987, prepared by Rosita Worl and Charles W. Smythe (Worl & Smythe Report) for the Chilkat Institute on behalf of Sealaska, challenges BIA's 1983 conclusions. Worl and Smythe based their assessment of the historical significance of Disenchantment Bay in large part upon two treatises written by Frederica de Laguna in 1963 and

^{2/} While CPSU concluded that the Disenchantment Bay Village Site qualifies under the regulations as an Historical place, CPSU described the site as a "historic sealing camp" noting that that "hunting seal was the main activity" (Exh. 3, 1983 Report).

1972, and the Goldschmidt and Haas treatise, written in 1946 (Worl & Smythe Report at 116). They state that "photographs from the Harriman Alaska Expedition document historical utilization of the applied-for site." Id.

According to Worl and Smythe, Disenchantment Bay was not only historically significant to Natives as a hunting site; it was important for cultural and spiritual reasons as well. According to their report, the site was a common area used by different tribal groups, and was successfully defended against a Russian invasion in the early 19th century by staking a fort, known as Eagle Fort (Worl & Smythe Report at 118, 121). Worl and Smythe state that Native camps were most heavily populated during the late 19th century, as demonstrated by photographs taken by the Harriman Expedition, documented in a 1902 treatise written by Grinnell, a member of the expedition, and referred to by de Laguna in her 1972 work. These photographs, according to Worl and Smythe, document not only hunting, but at least seasonal encampment with the performance of traditional activities, including weaving. Id. at 116. The sacred uses of the encampment are documented by Worl and Smythe via reference to de Laguna's report, which relies upon the ethnographic documentation of Native oral history traditions. Id. at 117-18.

Following review of the Worl & Smythe Report, BLM determined that the Disenchantment Bay site qualified for reinvestigation. Thus, on July 26, 1989, BIA archeologists conducted a second field examination of the site. The reexamination included both aerial and surface reconnaissance, and subsurface testing (1990 Report at 12-13). Four shovel tests were excavated during the reinvestigation. These tests indicated a "5 centimeter sod mat overlying unstratified deposits of gravel, sand and cobbles, probably representing a glacial till" (1990 Report at 13). The tests yielded no cultural strata or artifacts (1990 Report at 15). BIA issued a Report of Reinvestigation and Certificate of Ineligibility (1990 Report) on January 10, 1990.

The 1990 Report took a closer look at the ethnographic data accumulated about Disenchantment Bay than did the 1983 Report (1990 Report at 6-12). The 1990 Report states that due to the Native custom of using multiple place names for single geographic features, it is difficult to ascertain the exact location of the Disenchantment Bay Village site (1990 Report at 6). Stating that Worl and Smythe have no factual basis for assuming that the Harriman Expedition precisely located a village at the location of Sealaska's selection site, the Report contends that documentation by de Laguna provides evidence of three historical village sites, two of which were probably located further northward along the beach (1990 Report at 9). The 1990 Report also disputes that Disenchantment Bay was the locus of Eagle Fort, stating that the 1972 de Laguna treatise places the situs of the Eagle Fort battle legend on the Situk River or on the Situk Lake (1990 Report at 8).

Like the 1983 Report however, the 1990 Report maintains that the village site was primarily a sealing camp (1990 Report at 8). The 1990 Report contains an analysis of written historical accounts of the sealing villages which is illuminating:

The earliest historic mention of the application area is related to the Spanish government supported voyage of Alejandro Malaspina. On 1 July 1791, a local Native guide led Malaspina's boats north of Point Latouche to a "spot corresponding to the later campsites visited by the Harriman Alaska Expedition in 1899" (deLaguna 1972:67).

The Harriman Alaska Expedition visited the sealing camps north of Point Latouche in June of 1899. At that time, approximately 300 to 400 people were found in three camps on a gravel beach just above the high tide line. It is uncertain which of these camps they visited. DeLaguna (1972:68) refers to a set of field notes from the expedition by C. Hart Meriam. The notes mention two smaller villages northward along the beach, "1/2 mile and one mile away" from the main village that the expedition visited. This is contrary to Worl and Smythe's (1987:116) interpretation of the same sources where they state "300 to 400 people were camped at the applied-for site when he [Grinnell] visited in 1899 with the Harriman Alaska Expedition."

The inhabitants occupied wall tents and bark shelters and constructed smokehouses and drying racks (Grinnell 1910:158-159; deLaguna 1972:68, 72-80). George Grinnell wrote a description of seal hunting methods and game processing based on his visit to these camps north of Point Latouche (1910:158-165). He described a camp, noting the abundant evidence of seal butchery and:

(t)he place is a busy one. Back of the beach is a lagoon of freshwater, from which the Indians get their drinking water, in which the children wade about, sailing their canoes, and in which the mothers bathe their babies (Grinnell 1910:165).

Grinnell's statement illustrates the range of activities taking place in these camps and also contributes to an understanding of their environmental setting. Especially noteworthy is the mention of a lagoon behind the site.

Photographs from the Harriman Alaska Expedition (deLaguna 1972:plates 72-80) add much to the characterization of these encampments and the local environment. Plate 72 (deLaguna 1972, shows an encampment at the north end of the "camping" area. Tents and bark structures are on a gravel beach with a 2 meter (m) to 4 m escarpment rising up behind the camp. As pointed out in the caption, a component or part of a loom was leaning against (or was tied) to one of the structures. This is the only photograph documenting anything related to a loom or weaving. It is very likely that Worl and Smythe were referring to this particular photograph when they wrote, "[A] Chilkat Blanket weaving loom is also present in one of the photographs" (Worl and Smythe

1987:116). In their concluding remarks, they took what was in fact a loom part and claimed that the activities at the site included the preparation of "clothing and ceremonial regalia" (Worl and Smythe 1987:123).

Plate 73 (deLaguna 1972), a view to the southeast of an encampment, shows a very rocky and barren mountain slope in the immediate background. The application area appears to be captured on Plate 74 (ibid.), based on the configuration of the mountains in the background. No escarpment is visible here, but it is obvious that the camp was set upon areas of sand and gravel in an otherwise cobble-covered beach front. Tents and various activities are visible in Plate 75 (ibid.). Also, it is apparent that the cobble beach is very deep and wide at this location. The background of this photograph indicates the exposure was taken at the north end of the application area. Bark shelters were photographically documented in Plate 76 (ibid.). These shelters were located at the south end of the application area on a cobble beach. Another plate, Plate 77 (ibid.), shows that the beach area was either very wide, or that the encampment was near one of the stream mouths. Sparse vegetation grows between the cobble-sized rocks. Plate 78 (ibid.) shows brushy vegetation on the flats behind the camp and in front of the mountains. The camp itself appears to be on an elevated bar out on the beach. A camp shown in Plate 80 (ibid.) appears to have been constructed at the very top edge of the beach. Brush is growing immediately behind this camp.

Each of the camps were thought to be associated with different Tlingit communities: Juneau, Sitka and Yakutat (Grinnell 1910:158-161). DeLaguna (1972:68) thought they represented sib groups rather than village groups. Grinnell (1910) thought the campsites had been used for generations.

(1990 Report at 9-11).

The 1990 Report interpreted the discrepancy between oral and historical accounts of a thriving seasonal community and the lack of on-site artifacts supporting such as follows:

The structures were ephemeral in nature and very mobile. It is likely that poles, sheets of bark and canvas were removed from the area after each use. According to the report of the Harriman Alaska Expedition, refuse from the occupation was disposed of on the beach. Therefore, it would be expected that little would be left behind, and what was left behind would be subjected to erosion.

It is doubtful that vegetation obscures the remains of this site. The fact that the area has been relatively recently over

grown probably has no bearing on arguments for the site's presence in the brush. Conflicting evidence exists for these vegetative changes. Photographs of the Harriman Alaska Expedition show vegetation partially covering mountain slopes in the background, and one photo shows brush growing immediately in back of the beach. DeLaguna mentions that Point Latouche was barren in 1954, and today the feature is fully overgrown. A BIA informant in 1980 mentioned that the application area had been overgrown over the past 20 years.

Actually, this last observation may be related to a far more dramatic form of environmental change which may have had a serious impact to the site. A 1958 earthquake caused radical changes in elevation around the bay (deLaguna 1964:18-19; 1972:28). In addition, tidal waves related to the tectonic activity may have scoured portions of the bay. Several of deLaguna's informants indicated that there have been additional incidences of tectonic activity that have significantly changed the local geomorphology (1972:68). These events could also preserve sites by uplifting them from the reach of continuous shoreline erosion.

There was no evidence for perched or abandoned shorelines inland from the present shore. There were no terraces, escarpments, altered stream channels or vegetative indicators of such a change. There was no indication for gradual progradation of shorelines, which would also leave a site inland in an area today obscured by vegetation. This phenomenon would be marked by similar features as well as by abandoned sloughs and ponds. In this case, the escarpments would be more subtle than those produced by violent tectonic activity.

However, there is evidence for erosion. This could be caused by ice scouring during periods in which the bay is choked with ice pack. DeLaguna's informants mention the deleterious effect of large waves caused by icebergs calving into the bay. The lagoon or pond mentioned by the Harriman Alaska Expedition and also by deLaguna's informant is no longer at this location or at any other of the reported campsites in the bay. This seems to indicate that portions of the shoreline have been lost. Additionally, a comparison of photographs taken in 1980 and 1989 shows variation in the height of the escarpment at the top of the beach. This also hints toward continuous erosion.

(1990 Report at 16-17).

The 1990 Report in relevant part concluded with the following "Summary of Reinvestigation":

Archeological reconnaissance and subsurface testing failed to find any evidence of cultural remains in the application area, a place named Qegotleya'. Qegotleya' also refers to the entire shoreline in this part of Disenchantment Bay. Disenchantment Bay was the location of several spring/early summer villages or encampments that have seen sustained use at least since 1899.

Qegotleya' was one of those encampments and may have been occupied in 1899. * * * The combination of the ephemeral nature of these encampments, their location on the beach and the great potential for gradual or drastic erosion from any number of causes leads to the conclusion that the site has been destroyed (1990 Report at 19).

In its statement of reasons (SOR), Sealaska contends that the regulations establish a presumption of validity for any section 14(h)(1) application in that 43 CFR 2653.5(a) provides that an application is to be given "favorable consideration" if the site qualifies and the applicant agrees to be bound by certain land-use restrictions. Sealaska also claims that BIA failed to perform an "adequate and meaningful review of the site" (SOR at 10). Appellant alleges error in the Department's investigation in that it conducted only limited subsurface testing and surface reconnaissance (SOR at 16). In response BLM and BIA (hereafter BLM) assert that the administrative record satisfactorily substantiates the determination that Disenchantment Bay Village Site does not qualify as an ANCSA historic place.

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary to withdraw and convey fee title to "existing * * * historical places." Regulation 43 CFR 2653.0-5(b) defines "historical place" as follows:

(b) Historical place means 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, wool gathering, or reindeer husbandry. However, such uses may be considered in the evaluation of the sustained native historical activity associated with the tract or area.

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

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

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

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

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

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

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

BLM concluded that appellant had not met the statutory requirement that the historical event be linked with a distinguishable tract of land, or the regulatory requirement that the historical event possess integrity of location. Further, BLM determined that the only event alleged is that of seasonal hunting, which is disqualified by the statute as a basis for historical site selection.

Appellant argues that BLM's decision interprets both the statutory language of section 14(h) of ANCSA and the regulatory language of 43 CFR 2653.5(d) too restrictively. Appellant argues that it has established that the Disenchantment Bay Site was of Native historical significance as required by section 14(h)(1), and that Sealaska has met its burden under 43 CFR 2653.5(d) by establishing that the site has met one of the five criteria listed.

In response, BLM states that the regulatory definition requires a showing of "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'" (BLM Answer at 5). Further, BLM alleges, "[e]ven after the initial definition is met, a historical place must also satisfy the preliminary criteria of 43 CFR § 2653.5(d), plus one of the five alternative requirements set out as subsections (1) - (5) of 43 CFR § 2653.5(d)." *Id.*

Thus, BLM argues that under the regulation an applicant must show that the site meets the preliminary criteria of "integrity of location, design, setting, materials, workmanship, feeling and association," related to one of the five alternatives listed in 43 CFR 2653.5(d). Under this interpretation, however, a site that has been destroyed by natural causes could never qualify as an historical site.

Sealaska counters with an argument that the regulations establish a presumption of validity for any section 14(h)(1) application in that 43 CFR 2653.5(a) provides that an application is to be given "favorable consideration." We have rejected that argument in previous cases this appellant has brought before us. We stated in those cases that the burden is on the applicant to establish that BLM has misapplied the law and regulations. *Sealaska Corp.*, 115 IBLA 249, 255 (1990); *Sealaska Corp.*, 115 IBLA 257, 262 (1990).

The 1990 Report indicated that appellant's application for a specific site location in this instance may have been misguided, since information gathered did not identify a specific place-name, but applied generally to the Bay and to "perhaps four different encampments" (1990 Report at 18). The Report stated:

Except for deLaguna, all parties involved with the previous investigations, including the 1980 BIA and NPS/CPSU crew, misapplied the general information and presented it as being site specific. Worl and Smythe repeatedly used information regarding Disenchantment Bay and claimed that it referred to this particular site. This error reflects a lack of critical review of primary published sources concerning the Disenchantment Bay area.

Id.

We agree with BLM that appellant needs to present more supporting evidence than was presented herein. Indeed, considering the entire record, we are not persuaded that the decision is in error. Appellant has not shown error in BLM's determination that these camps were of no historical importance apart from their function as seasonal hunting events. Also, appellant has failed to characterize the historical nature of this location as anything other than that of seasonal hunting, which is excluded under the regulation.

Furthermore, while we are not inclined to hold that a historical place selection can never be made where no archeological evidence is in existence, we accept BLM's rationale for its interpretation of the regulation to require that there be evident an essential connection between an event or events of specific historical nature and a particular parcel of land. Where this nexus is not evident, appellant bears the burden of making it so. Where appellant fails to do so, we must conclude that such does not exist. While we acknowledge that Native religious and cultural customs may have been practiced in the camps, these practices, in and of themselves, without grounding in a particular Native historical endeavor of cultural significance, will not be sufficient to qualify a selection under section 14(h)(1) of ANCSA.

[2] Appellant argues that BIA failed to perform an adequate and meaningful review of the site, and challenges BIA's on-site reconnaissance. Appellant has not, however, offered evidence that BLM erred in its site investigation. "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 decision is in error." Sealaska Corp., 115 IBLA 257, 262 (1990). In light of the analysis in its 1990 Report, we do not believe that BLM was remiss in performing its responsibilities. The record shows that BLM made a thorough and comprehensive examination and that its reinvestigation, which resulted in the determination of ineligibility was appropriate.

[3] On June 26, 1990, Sealaska filed a request for hearing in this matter. By order dated February 27, 1991, the Board took appellant's request under advisement, "pending receipt from appellant of a list of the witnesses to be called at the proposed hearing, and a statement explaining how the anticipated testimony tends to show that the disputed site is qualified for certification as an historic site under 43 CFR 2563.5." Appellant did not submit the information requested. Based on the record before us, we do not find a hearing is warranted and deny appellant's request. See Sealaska Corp., 115 IBLA 257 at 263.

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.

Gail M. Frazier
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge