

INTERIOR BOARD OF LAND APPEALS

Chugach Alaska Corp.

147 IBLA 73 (December 18, 1998)

Title page added by:
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CHUGACH ALASKA CORP.

IBLA 96-22 Decided December 18, 1998

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, rejecting Native historical place selection application. AA-10785.

Affirmed as modified.

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

BLM properly rejects a Native historical place selection application for a village site based on BIA's determination not to certify the site as eligible for conveyance under section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (1994), and 43 C.F.R. Subpart 2653, where the Native applicant fails to establish, by a preponderance of the evidence, that the site qualifies as an historical place.

APPEARANCES: Peter Giannini, Esq., Chugach Alaska Corporation, 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 U.S. Forest Service; Joseph D. Damell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management and Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Chugach Alaska Corporation (Chugach), a Native regional corporation, has appealed from a September 5, 1995, Decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting its Native historical place selection application, AA-10785, filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(1) (1994), for the Double Bay South Village site (the site).

Chugach asks that the Board reverse BLM's Decision, or in the alternative, that BLM remand the case to BLM for further investigation and

reconsideration. Briefing has been completed and includes a Statement of Reasons (SOR) filed by Chugach and an Answer filed by the Bureau of Indian Affairs (BIA) and BLM.

In its application, Chugach sought 4 acres of land in the protracted fractional SW¹/₄ sec. 21, T. 16 S., R. 7 W., Copper River Meridian, Alaska, situated on two small islands off the northern coast of Hinchinbrook Island in Double Bay, off the Prince William Sound. The two islands, one circular and northwest of the other larger, elongated island, are directly south of a much larger barrier island which sits in the center of the entrance to the bay. Chugach's application encompassed all of the small island and much of the large island to the southeast. There is no dispute that, for quite some time before the 1964 earthquake, much of this area was underwater, but that it is now exposed except at high tide.

All of the land sought is within the Chugach National Forest, and thus under the jurisdiction of the U.S. Forest Service, U.S. Department of Agriculture.

BIA, together with the Cooperative Park Studies Unit (CPSU), University of Alaska, which was acting on behalf of the National Park Service (NPS), examined the site on June 8, 9, and 11, 1979. Two BIA field investigators and two CPSU anthropologists were accompanied to the site by Ted Chemavisky, a Chugach Native living in nearby Cordova, Alaska. The report of the field investigation and other related documents are paginated in a bound document hereafter referred to as "BIA 1983 Report." While both islands were examined on the ground, the examiners focused on the small, circular island, which faces out into the deep waters of Double Bay. See BIA 1979 Report at 1-2. Chemavisky indicated that "[a]lthough he had never seen a smokehouse at this site, his father told him about one located on this island." Id. at 8. Chemavisky's father was born in 1831 and was the last chief of Nuchek village on the western coast of Hinchinbrook Island. Id. at 40. In addition, Chugach had reported finding fire-cracked rocks and the remains of shelter lines on the island's beach. Id. at 7. BIA, however, noted that, but for a single net sinker located on the eastern shore of the large, elongated island, no evidence of human habitation was found. Id. at 9.

BIA surveyed the smaller island and adjacent land, finding it to be approximately 1 acre in size, and described it as being situated in the protracted fractional NW¹/₄SE¹/₄SW¹/₄ sec. 21, T. 16 S., R. 7 W., Copper River Meridian, Alaska.

By letter dated April 15, 1980, NPS notified BIA that the CPSU anthropologists had determined that part of the site, specifically the small, circular island, did qualify as a Native historical place under 43 C.F.R. Subpart 2653. (BIA 1983 Report at 23.) The CPSU report attached to the letter noted that while there was no indication the site had ever been used as a village, Natives had reported that it had once contained a

smokehouse. Based on the important functions served by smokehouses for the aboriginal Chugach, the report concluded that the site qualified as an historical place. Id. at 24-25.

On August 1, 1983, BIA, issued a "Certificate of Ineligibility" for the site pursuant to 43 C.F.R. § 2653.5(j), formally certifying that site was not eligible for conveyance to Chugach because:

1. Extensive field investigation by BIA/BLM personnel failed to find any evidence to substantiate the claim of a historical place under Section 14(h)(1) of [ANSCA].
2. The site does not meet the criteria for a historical place as required by 43 C.F.R. 2653.5(d)(1-5).
3. The report mentioned a possible smokehouse site, but such sites are specifically excluded from selection as a historical site by the language of 43 C.F.R. 2653.0-5(b), Definitions.

(BIA 1983 Report at B.)

On March 25, 1986, Chugach filed with BLM an amendment to its application which narrowed the original description from the protracted fractional SW $\frac{1}{4}$ sec. 21 to the protracted fractional SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 21, T. 16 S., R. 7 W., Copper River Meridian, Alaska, still encompassing the same portions of the two small islands in Double Bay. However, it also enlarged the area of land encompassed by its application to cover 80 acres of land in the protracted fractional S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 21 and NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 28, T. 16 S., R. 7 W., Copper River Meridian, Alaska. The result was to encompass additional land to the southeast along the northern shore of Hinchinbrook Island, opposite the two islands, and in the tidal area between them and the mainland. Chugach included that land because its 1982 field examination had uncovered two stone adzes, a hammerstone, and a piece of hematite (iron ore) in the tidal area just north of the mainland, near where several stone adzes were collected in the 1970's. (SOR, Exh. G at 16.) It also found, during a subsequent 1990 field examination, a few pieces of fire-cracked rock and a battered cobble or hammerstone in the tidal area near the northwest corner of the large, elongated island. (Exh. K attached to SOR at 42, 60-61.)

Subsequently, on May 28, 1993, three BIA field investigators reexamined the site, as amended, including the two islands, nearby mainland, and surrounding tidal areas. The report on this investigation and related documents are paginated in a bound document hereafter referred to as "BIA 1994 Report." They found no surface remains of a smokehouse or the reported fire-cracked rock and remains of shelter lines on the smaller island, but observed six culturally-modified trees, "two with long triangular wounds associated with bark stripping for construction and other

activities, and the rest with smaller oval scars characteristic of historic campsites." (BIA 1994 Report at 6.) The investigators also observed 10 to 12 scarred trees on the northern end of the larger island and one towards its southern end. *Id.* at 8. They noted that the smaller island had probably been used, dating from the early historic period, as a "cache island by residents from one of the bay's two principal village sites," located on the large barrier island north of the two small islands at issue here and on the western shore of the bay. *Id.* at 9.

The BIA investigators also found extensive lag deposits of fire-cracked rock in the tidal area between the two islands, concluding that "most likely it was this area where Chugach archaeologists collected a hammerstone and fire-cracked rock in 1990." (BIA 1994 at 6.) The investigators noted that the site, which represented prehistoric activity, had probably been submerged by a prehistoric earthquake and then uplifted by the 1964 earthquake. *Id.* at 9. However, they concluded that this site did not extend to the adjacent shoreline of either island and, since it was found only in the tidal area, could not be included in a section 14(h)(1) historical place. *Id.* at iii, 10. The BIA investigators were unable to recover any fire-cracked rock or artifacts along the shore of the mainland or in the tidal zone between the larger island and the mainland, concluding that the ones observed by Chugach archaeologists in 1982 had probably been covered by sediment. *Id.* at 8, 10.

On May 26, 1994, BIA issued a second Certificate of Ineligibility. Relying on BIA's two certifications, BLM rendered its September 5, 1995, Decision rejecting Chugach's selection application in its entirety.

On appeal, Chugach argues that BLM failed to adjudicate its entire application, as amended, and asserts that BLM erred in ignoring historical accounts of Native occupancy in the general area and supporting physical artifacts found on and around the site:

The number of artifacts recovered from Double Bay South Village is a strong testament to its historical significance as a place of sustained Native habitation. The site appears to have been an important component in the Double Bay subsistence economy and the travel routes of Natives living on Hinchinbrook Island. Every investigation of the site to date has turned up evidence of Native activity and habitation. Further investigation promises to reveal more information about the culture of the Natives who once lived in Double Bay.

(SOR at 19.)

[1] Section 14(h)(1) of ANCSA authorizes the Secretary of the Interior to "withdraw and convey to [a Native] Regional Corporation fee title to existing * * * historical places." 43 U.S.C. § 1613(h)(1) (1994).

Implementing regulations define an "[h]istorical place" 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." 43 C.F.R. § 2653.0-5(b).

The regulations further provide that a particular site will be considered eligible for conveyance pursuant to section 14(h)(1) of ANCSA where the site is shown to have significance, in terms of historical or cultural events or persons, because it meets one of five criteria set forth at 43 C.F.R. § 2653.5(d):

[T]he quality of significance in Native history or culture shall be considered to be present in places that present 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.

Chugach has the burden to prove, by a preponderance of the evidence, that the site at issue qualifies as an historical place under section 14(h)(1) of ANCSA and 43 C.F.R. Subpart 2653. See Chugach Alaska Corp., 142 IBLA 387, 391 (1998). For the reasons below, we conclude Chugach has failed to meet its burden.

At the outset, we note that in the Decision appealed BLM stated that smokehouse sites were "specifically excluded from selection as a historical site" by 43 C.F.R. § 2653.0-5(b). We recently held that the regulation contains no such exclusion. See Chugach Alaska Corp., 142 IBLA 268, 271 (1998). Thus, BLM's Decision is modified accordingly.

Turning to Chugach's arguments on appeal, we reject its assertion that BLM did not adjudicate its entire application, as amended. While BLM did not make specific reference to the fact that the application had been amended, it expressly relied in its September 1995 Decision, on BIA's two field examinations and resulting 1983 and 1994 certificates of ineligibility. BIA had clearly examined the entire amended site during its 1993 examination. (BIA 1993 Report at 6-8.)

Moreover, Chugach does not present any evidence that the site was the situs of any "significant Native historical event." 43 C.F.R. § 2653.0-5(b). Nor does it offer any convincing evidence that the site was "importantly associated with Native historical or cultural events or persons." 43 C.F.R. § 2653.0-5(b). It has presented no evidence that specifically identifies the small, circular island as the location of a rock known as Iram Qadliuravia. Relying on Kaj Birket-Smith's 1930's account in his book The Chugach Eskimo (1953), Chugach could only place the rock in Anderson or Double Bay. (BIA 1979 Report at 40; see Exh. G attached to SOR at 3.)

Chugach refers to evidence that the small, circular island was, during the last half of the 19th century and early 20th century, the location of a smokehouse, which was a "vital part of Chugach traditional subsistence culture and economy." (SOR at 10.) To establish that the island at one time had a smokehouse, Chugach relies solely on Chemavisky's account of what was reported to him by his father. No trace of the smokehouse has ever been recovered.

We do not question the importance of smokehouses to the Natives. However, even assuming that a smokehouse once stood on the island, Chugach provides no evidence that events associated with the smokehouse "made a significant contribution to the history of [the Chugach Natives]." 43 C.F.R. § 2653.5(d)(1). Nor has it shown that the site where the smokehouse stood has any "outstanding" or "demonstrably enduring" symbolic value in the traditions and cultural beliefs and practices of the Chugach Natives. 43 C.F.R. § 2653.5(d)(3). We are not convinced that the presence of the smokehouse afforded the site particular historical or cultural significance, especially where smokehouses are reported to have been scattered throughout the Prince William Sound area. (BIA 1979 Report at 24; see Ahtna, Inc., 137 IBLA 111, 114-15 (1996).)

Thus, Chugach has failed to carry its burden to demonstrate "the essential connection between an event or events of specific historical or cultural significance" and the particular land at issue here. See Chugach Alaska Corp., 143 IBLA 127, 132 (1998).

Chugach also asserts that the site was the situs of "sustained historical Native activity." 43 C.F.R. § 2653.0-5(b); see SOR at 8-9. However, the record contains no evidence that the site was the location of a

Native village or even subject to sustained human habitation. None of the evidence uncovered by BIA and CPSU confirms that there was ever a Native village anywhere within the site. (BIA 1979 Report at 24.)

Chugach noted that Frederica de Laguna had reported, in her book Chugach Prehistory, The Archaeology of Prince William Sound, Alaska (University of Washington Press 1956), that in the 1930's a Native village, called Xi Ydliaq (meaning shining bluffs) was "located on an island in the western half of Anderson Bay or Double Bay on the north shore of Hinchinbrook Island." (BIA 1979 Report at 40; see Exh. G attached to SOR at 3.) However, these are two different bays. In addition, there are a number of islands in both bays. Thus, de Laguna's report does not sufficiently identify the small, circular island or even the large, elongated island at issue here as the location of the village of Xi Ydliaq.

Chugach claims that the site is "part of a larger prehistoric village complex." (SOR at 2.) It asserts that this complex encompassed the Double Bay Northern Village site, which had been determined by BIA to be located on the large barrier island immediately to the north at the entrance to Double Bay and its surrounding areas, and that all of this land was subject to sustained Native use and occupancy. See id. at 8, 10-11, 11-12, 16. Furthermore, Chugach argues that BIA erred by not consolidating the Double Bay Northern Village site (AA-10786/AA-10787) and the Double Bay South Village site (AA-10785): "Because the Double Bay South Village contains the same kind of cultural remains as the Northern Village, and because of the sites' close proximity, they should have been judged to be a continuous cultural area, and combined." Id. at 17.

We have held that a particular site must qualify on its own merits, and thus will not qualify on the basis that it is associated, in some way, with another nearby site which has been subjected to sustained historical Native activity or otherwise qualifies under section 14(h)(1) of ANCSA. See Chugach Alaska Corp., 143 IBLA at 132. In this case, the Northern Village site was held by BIA to encompass a summer village or camp. There is no evidence that the South Village site, which is located on another island, is considered to be part of that village or camp.

Also, there is no evidence that Natives inhabited the particular site at issue here for any prolonged period of time. There are no oral reports to that effect. Chemavisky stated that the small, circular island was the location of a smokehouse at one time. However, that report is secondhand and undoubtedly dates back before the turn of the century, when Chemavisky would have been told by his father, who had been born in 1831. Further, no evidence of the smokehouse has ever been recovered, despite the fact that the island has been subjected to a number of field examinations by BIA, CPSU, and Chugach.

Finally, this is not the case where remand is justified because the evidence is inconclusive as to issue of sustained historical activity, and there is "sufficient indication of possible sustained Native historical

activity." See Sea Alaska Corp., 126 IBLA 383, 393 (1993); see SOR at 15, 16. On the contrary, the evidence clearly falls short of sustaining a determination of eligibility. The site has been subject to extensive field investigation, and there is nothing to suggest that further investigation would produce a different result. Thus, Chugach has failed to establish, by a preponderance of the evidence, that the instant site was the situs of any sustained historical activity by Alaska Natives, as required by 43 C.F.R. § 2653.0-5(b). See Chugach Alaska Corp., 142 IBLA at 273, 277.

Therefore, we conclude that BLM's September 1995 Decision rejecting Chugach's Native historical place selection application for the Double Bay South Village site (AA-10785) was proper and must be affirmed.

To the extent Chugach has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

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

John H. Kelly
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge