

INTERIOR BOARD OF LAND APPEALS

Chugach Alaska Corp.

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CHUGACH ALASKA CORP.

IBLA 96-142

Decided March 22, 1999

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, rejecting Native historical place selection application. AA-11030.

Affirmed.

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

BLM properly rejects a Native historical place selection application filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (1994) where the Native applicant fails to establish, by a preponderance of the evidence, that the site qualifies as a historical place.

APPEARANCES: Philip Blumstein, Esq., and Christopher Stroebel, Esq., Anchorage, Alaska, for the Chugach Alaska Corporation; Maria C. Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the 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 Indian Affairs and the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Chugach Alaska Corporation (Chugach), a Native regional corporation, has appealed from a November 9, 1995, Decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting its Native historical place selection application AA-11030 for the Wells Bay site (the site).

In its original application, Chugach sought 80 acres of land in the protracted fractional E¹/₂SE¹/₄ sec. 33 and fractional W¹/₂SW¹/₄ sec. 34, T. 10 N., R. 11 E., Seward Meridian, Alaska, situated at the southeastern tip of a peninsula on the western shore of Wells Bay, where it enters the Prince William Sound. The land sought encompassed part of the mainland and a

small island just off the coast. All of the land sought is within the Chugach National Forest, and thus under the jurisdiction of the U.S. Forest Service (USFS), U.S. Department of Agriculture.

In accordance with 43 C.F.R. § 2653.5(f), BLM asked Chugach to submit a statement describing the events and qualities associated with the site that give it "particular value and significance as a historical place." Chugach responded on January 13, 1981, stating that the site includes an historical Native village known as Kanixluq (meaning corner), which had been reported by Frederica de Laguna in her book Chugach Prehistory, (Univ. Wash. Press 1956) to be located on the mainland "at a bend near the mouth of Wells Bay." Chugach Prehistory at 27. According to legend, Pukituq, a shaman who lived among people but could change into any thing he wished, lived in Kanixluq and was buried on an island called "Paktiumqunga" meaning "Pukituq's grave," located in front of the village. Id.; Kaj Birket-Smith, The Chugach Eskimo (Nationalmuseets Publikationsfond) at 151.

Subsequently, a Bureau of Indian Affairs (BIA) investigator and an archeologist 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 22, 1981. The entire site, including the mainland and the island, was investigated, but no cultural features were found on the island, and only several cut trees were found on the mainland. (1984 Report at 7.) The BIA field investigator and CPSU archeologist both initially concluded that the location of the sight was in error, based on the lack of significant cultural remains. (1984 Report at 8.) However, the CPSU archeologist later recommended that the site be conveyed, based on the statements of two Chugach Native elders she interviewed after the field investigation:

Former Chenega chief Charlie Selanoff said people from Tatitlek used that site and he had seen a cavin (or smokehouse) there which belonged to Nick Gromoff[, an important Native informant for de Laguna during her archaeological expedition to Prince William Sound in the 1930's.] * * *. Ed Gregorioff, resident of Tatitlek, * * * said he had heard older people talk of the village on this site with 10 or 12 residents, who also had a village on the other side of the point. Their residence depended on the area they hunted. Ed also said that Nick Gromoff had a smokehouse here. Because Gromoff built the smokehouse and used the area, the site was referred to as "Golomoo Munktak," meaning Nick Gromoff's smokehouse (Golomoo is a nickname for Nick Gromoff).

(1984 Report at 26.) The BIA Claims Examiner recommended on March 20, 1994, that the site be found ineligible as a historic place; relying on the CPSU archeologist's revised report, NPS recommended that the site be certified as eligible. (1984 Report at D, 17.) On June 14, 1984, BIA issued a Certificate of Ineligibility for the site pursuant to 43 C.F.R. § 2653.5(j), for the primary reason that "[e]xtensive field examination

by BIA personnel failed to find any evidence supporting a claim of a Native historical place." (1984 Report at B.) Later, Chugach notified BIA by memorandum dated June 22, 1992, that it wished to amend its selection application to also encompass a small parcel of land about 1-1/2 miles west, across the peninsula, from the original site, along the eastern shore of Unakwik Inlet. This parcel was situated in the protracted fractional SW¹/₄ sec. 32, T. 10 N., R. 11 E., Seward Meridian, Alaska. Chugach stated that the parcel reflected sustained Native occupation in the area and that a cave on the parcel may contain prehistoric remains.

The land sought to be added to Chugach's application was examined by three BIA archaeologists, along with the Director, Alaska Native Claims Settlement Act (ANCSA) Office, BIA, on August 31, 1992. (1995 Report at 8.) They located the cave, finding red pictographs depicting five anthropomorphic figures, seven hand-hewn wooden planks (which were considered to be the remains of a coffin), a split pole notched at one end, a hand-carved wooden staff, and a caim (which they felt might conceal a secondary burial). Id. at 9-12. The BIA examiners concluded that "[t]he coffin planks and wood objects leave no doubt that it is indeed a burial cave," and noted that the pictographs "are clearly associated with the most sacred of Native traditions." Id. at 14.

The BIA examiners also found, almost 200 meters south of the cave, fire-cracked rock along a gravel tombolo (sandbar) which extended from the mainland out to an islet and eight culturally-modified trees, with short, narrow scars, on the islet itself. (1995 Report at 3, 5, 13.) They noted that, since the tree scars were of the type associated with Native travel camps, the fire-cracked rock and tree scars represented a "temporary camp perhaps unrelated to the cave." Id. at 13.

Significantly, the BIA examiners also concluded that the additional parcel of land did not encompass the village of Kanixluq or Pukituq's grave. (1995 Report at 8, 14.) On October 6, 1995, BIA issued a second Certificate of Ineligibility for the additional parcel of land, based on the following reasons:

1. Application AA-11030, filed December 1975, is for the settlement of Kangirlluk and the nearby burial site of Pukituq, a legendary shaman who died in the eighteenth century.
2. Interviews with Native informants in 1981 indicated the application area is correctly located although investigators failed to find evidence of the settlement or grave at that locality.
3. The area examined in 1992 is far removed from the application area and the burial cave found there was not reported until 1988-over a decade after Application AA-11030 was filed.

4. The burial cave examined is clearly not the subject of application AA-11030 and can not be substituted for the objectives of that application.

(BIA Report (1995) at iii.)

By letter dated October 6, 1995, BIA recommended that Chugach amend its selection application to substitute the additional parcel of land in the protracted fractional E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 32 for the original site in secs. 33 and 34. Chugach filed an amendment encompassing the additional land on November 21, 1995, but did not relinquish its claim to the original site.

Relying on BIA's June 14, 1984, and October 6, 1995, certifications, BLM rendered its November 9, 1995, Decision rejecting Chugach's selection application in its entirety. BLM's Decision specifically echoed BIA's conclusion that the additional parcel of land sought by Chugach in its 1994 amendment was "clearly not the subject of application AA-11030." (Decision at 2.) Chugach timely appealed therefrom.

Chugach primarily contends that BLM erred in not considering its entitlement to the additional parcel of land, asserting that the parcel was, in fact, the "subject" of its original selection application filed on December 18, 1975. Chugach argues that the burial place found in the cave is the situs of Pukituq's grave and that the village of Kanixluq was also located within that parcel. Chugach asks that the Board reverse BLM's November 1995 Decision and convey the additional parcel to Chugach.

Chugach also contends that BLM erred in concluding that the original site does not also qualify as a Native historical place. Rather, Chugach argues that, as demonstrated by the reports of Native informants, the site was the subject of sustained Native historical activity, and thus qualified for conveyance. Thus, Chugach concludes that the original site should also be conveyed to it. In the alternative, Chugach states that the site should be reinvestigated.

The BIA and BLM have filed an Answer, arguing that Chugach has not met its burden to show that BIA and BLM erred in finding that the amended site does not encompass Pukituq's grave, or in finding that the original site does not satisfy any of the criteria for a historical place.

[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 historical 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 in determining the eligibility of a site as an historical place, the quality of significance in Native history or culture shall be considered to be present in places that possess integrity of location, design, setting, materials, workmanship, feeling and association, and:

- (1) That are associated with events that have made a significant contribution to the history of Alaskan Indians, Eskimos or Aleuts, or
- (2) That are associated with the lives of persons significant in the past of Alaskan Indians, Eskimos or Aleuts, or
- (3) That possess outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of Alaskan Indians, Eskimos or Aleuts, or
- (4) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or
- (5) That have yielded, or are demonstrably likely to yield information important in prehistory or history.

43 C.F.R. § 2653.5(d).

Chugach has the burden to prove, by a preponderance of the evidence, that BLM's Decision is in error. See Chugach Alaska Corp., 142 IBLA 387, 391 (1998).

The BIA clearly addressed the question of whether the original site sought by Chugach met the criteria of historical significance of 43 C.F.R. Subpart 2653, concluding that it did not qualify. (BIA Report (1984) at B, D, 2-3.) BLM agreed with that conclusion in its November 1995 Decision. However, BIA did not consider whether the additional parcel of land in the SW $\frac{1}{4}$ sec. 32, on the eastern shore of Unakwik Inlet, met that criteria, either in its 1984 or its 1995 report. Rather, while recognizing the historical and cultural importance of the parcel, BIA concluded that it was not properly considered the "subject" of Chugach's original selection application. (BIA Report (1995) at ii-iv, 14-15; Answer at 9.) Thus, it did not rule on whether the parcel met the criteria of historical significance of 43 C.F.R. Subpart 2653 and thus qualified for conveyance as a Native historical place. BLM agreed with that approach in its November 1995 Decision. (Decision at 2; Answer at 9.)

Chugach argues that the parcel was, in fact, the "subject" of its original selection application, because the village of Kanixluq and Pukituq's grave were not located within the original site, but rather within the additional parcel of land. (SOR at 2, 11-15, 22-26.) We do not agree.

There is considerable uncertainty regarding whether the village of Kanixluq was located anywhere within the additional parcel of land in the SW¹/₄ sec. 32, on the eastern shore of Unakwik Inlet. Plainly, while that site may be considered to be at a bend near the mouth of Wells Bay, since it is just around the peninsula from that mouth, it is not "in" the bay, contrary to the reports of both de Laguna and Birket-Smith. (Exh. D attached to SOR at 36; Exh. E attached to SOR at 28.) Further, there is no island "in front of" that parcel. (Exh. D attached to SOR at 36; Exh. E attached to SOR at 27.) Rather, there is only an islet, about 35 by 60 meters, situated about 20 meters from the mainland. (BIA Report (1995) at 5.)

Further, there are no reports by different Native elders placing a village at that location. There is only one brief mention in the entire record that even suggests that the parcel was the situs of a village. Gregorioff told the CPSU anthropologist in 1981 that he thought that, in addition to the village within the original site, there was also a village "on the other side of the point." (1984 Report at 26.) Gregorioff did not identify the situs of that village or specifically place it within the additional parcel of land. Indeed, it could, based on his description, be anywhere along the eastern shore of Unakwik Inlet. In addition, we are not prepared to conclude, that the fire-cracked rock and eight culturally-modified trees along the tombolo and on the islet are evidence that a village was located within the additional parcel of land. See SOR at 22-23. Thus, we cannot conclude, on the basis of any physical or testimonial evidence, that the additional parcel of land is the situs of Kanixluq or any other village, or even of sustained Native habitation.

Nor can we conclude that the cave found within the additional parcel of land is the location of Pukituq's grave. All we know is that the cave is a "burial place." (SOR at 12.) There is no evidence that Pukituq was buried there. Nor are we persuaded that this was the case because chiefs or other important people were generally buried in caves, or that pictographs were generally associated with shamans. Id. at 15, 25. Also, we find it significant that while de Laguna and Birket-Smith reported that Pukituq's grave is on an island, the cave is not. (Exh. D attached to SOR at 36; Exh. E attached to SOR at 27.)

Thus, Chugach has failed to show, by a preponderance of the evidence, that the village of Kanixluq and Pukituq's grave were located within the additional parcel of land now sought by Chugach. We therefore conclude that BLM's November 9, 1995, Decision rejecting Chugach's application as to the additional parcel of land must be affirmed.

As to the original site, Chugach argues that it was the situs of "sustained historical Native activity" under 43 C.F.R. § 2653.0-5(b), noting that the 1982 investigation revealed that the site was occupied by Nicolai Gromoff, and that he had a smokehouse on the site. Chugach also refers to the testimony of other Natives who recalled that Natives had inhabited the site.

Other than a few ax-cut trees, no physical evidence of Native use, let alone the presence of a Native village or encampment, has ever been discovered within the site, either on the mainland or on the offshore island. (1984 Report at 7, 21-22; 1995 Report at 1, 7-8.) Moreover, as noted by BIA and BLM, if the only use of the site was for a smoke-house in support of hunting or fishing, such activities do not qualify the site as a historical place under 43 C.F.R. § 2653.0-5(b). All of the evidence noted by Chugach regarding the existence of a village on the site is based on recollections of Natives in the area. We find that such evidence, absent the existence of any corroborating physical evidence, is not sufficient to establish a preponderance.

Therefore, we find that Chugach has failed to show, by a preponderance of the evidence, that the original site was the situs of any sustained historical Native activity, and conclude that BLM's November 9, 1995, Decision rejecting Chugach's original site must be affirmed. See Chugach Alaska Corp., 146 IBLA 49, 55 (1998).

Chugach has not shown that remanding this case for another investigation of the original site is necessary. Thus, its request for reinvestigation of the site is denied. 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.

John H. Kelly
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge