

INTERIOR BOARD OF LAND APPEALS

Chugach Alaska Corp.

150 IBLA 137 (August 27, 1999)

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CHUGACH ALASKA CORP.

IBLA 95-485

Decided August 27, 1999

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving in part and rejecting in part Native historical place selection application AA-11043.

Affirmed.

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

BLM properly rejects that part of a Native historical place selection application filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (1994), and 43 C.F.R. Subpart 2653, where the applicant fails to establish, by a preponderance of the evidence, that the rejected portion of the site applied for is the situs of sustained historical Native activity or that it otherwise qualifies as an historical place under the statute and regulations.

APPEARANCES: Beth Phillips, Esq., Anchorage, Alaska, and Zethina L. Loudon, Esq., Chugach Alaska Corporation, Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Chugach Alaska Corporation (Chugach or appellant), a Native regional corporation, has appealed from an April 18, 1995, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting 65 acres of its Native historical place selection application AA-11043 for an 80-acre historical site, 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), and its implementing regulations, 43 C.F.R. Subpart 2653. The Board granted Appellant's Petition for Stay on July 10, 1995.

The approved site, known as the Palutat Cave (cave site), is located on Schrader Island approximately 52 miles northeast of Whittier, Alaska, in the Chugach National Forest within Prince William Sound. The amended site application contained 80 acres of land, but the approved site included only a 15-acre area which was surveyed by BLM and is described as the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 13, T. 10 N., R. 12 E., Seward Meridian, Alaska. Appellant's appeal contests the denial of the remainder of Schrader Island and the small islands to the south of Schrader Island.

Regulation 43 C.F.R. § 2653.5(f) required that Chugach's application include 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[n] historical place." In its December 18, 1975, application (1975 Application), which included only the cave site and not the whole island, Chugach made only a general statement of the area's presumed historical importance. The application stated, in pertinent part:

Traditional native stories, historical exploration records and village remains of presently unknown cultural significance should provide data on area cultural sequences.

Architectural variations of shelter types, material cultural remains and traditional historic data should be provided through archaeological survey, site excavation and collection of traditional histories.

Establishment of more refined Alaskan and International historic and archaeological sequences should result through definition of pre-historic and post-historic cultural sequences of the area and their relationship to adjacent cultures.

(1975 Application at 3.) On April 19, 1978, the Chief, Branch of Lands and Minerals Operations, Alaska State Office, BLM, advised Chugach that its description of the Palutat Cave site was inadequate and that it must include 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. (Ex. A to Statement of Reasons (SOR) at 32.) Appellant subsequently provided the following description of the significance of the cave site, in pertinent part:

The Danish-American expedition of 1933 visited this site and reported significant finds that could advance the understanding of the Chugach culture. A wall of rock which over hangs to form the cave or rock shelter runs north and south and is about 100 feet long. De Laguna stated that before being plundered Palutat Cave must have been one of the greatest archaeological treasures of southcentral Alaska. (*Chugach Prehistory*, by Frederica de Laguna, page 55).

According to Professor Meany there were at least 23 burials in the cave and de Laguna's informant mentioned that 6 additional mummies were taken to Valdez. Mrs. Martin Anderson who lived in Sheep Bay said that the cave once contained many seated mummies wrapped in sea otter skins with their paddles beside them. The full name of the place is *Palutat nilimuq*, meaning "the hidden people in a cave". Makari Chimivitzki said there were 6 mummies of men dressed in armor and ground hog skins. Some wore masks representing human faces.

(Ex. A to SOR at 35.)

On September 25, 1980, BLM advised ANCSA Applicants, including Chugach, that certain of the requested historical or burial sites had discrepancies in site locations and that they had 60 days to correct the applications. (Ex. A to SOR at 38.) On November 17, 1980, appellant filed an amended application for the Palutat Cave site in which the new legal description that was provided, instead of merely making corrections, increased the acreage requested to now encompass all of Schrader Island. A further amendment, dated March 13, 1986, filed with BLM on March 25, 1986, expanded the application once again to include small islands immediately south of Schrader Island. Neither of these amendments contained information that established with particularity the value and significance of the additional acreage as historical sites or showed them to have been the locus of sustained historical Native activity.

On March 18, 1981, the National Park Service (NPS) submitted to the Bureau of Indian Affairs (BIA) its findings on the Palutat Cave site, only reporting on the cave site itself and not the entire island. A hand-written note in the report file queries whether the number of artifacts found in the cave warranted expansion of the site to the entire island. The boundary justification within the findings, however, states that "[t]he defined boundaries of the site contain all known cultural features, use area, and a buffer zone to maintain visual integrity." (Ex. A to SOR at 54.) On April 6, 1981, Linda Medlock, NPS Anthropologist, prepared a draft National Historic Places Inventory in which all of Schrader Island was included. (Ex. B to SOR, Item #10 at 2.) There is no evidence in the case file that this was acted upon.

On June 18, 1981, BIA approved the "Report of Investigation for Palutat Cave," which included investigative findings from the BIA, ANCSA Office. On July 15, 1981, the BIA Claims Examiner Officer recommended that BIA issue a Certificate of Eligibility for the Palutat Cave site as an historical site. By letter dated October 19, 1981, the Forest Service, U.S. Department of Agriculture, notified BIA of its concurrence with the report. On November 24, 1981, the BIA Area Director issued a Certificate of Eligibility to Chugach for the Palutat Cave site as a cemetery site. The certified cemetery site contained 3.3 acres.

However, BIA undertook a further investigation and on March 9, 1992, the Director, BIA ANCSA Office, approved the completed report of the Palutat Cave application (1992 Report). In the 1992 Report, the issue of the size of the site's boundary is addressed directly:

A point of beginning was established in 1980, but a standard boundary survey was not conducted. Instead, the field plans were to include the entire island as a parcel. During post-field drafting of the BIA ANCSA site report, it was decided that a boundary around the entire island could not be justified because no evidence was presented that cultural remains were present anywhere but inside the rock-shelter. Subsequently, a boundary employing a moderately narrow buffer zone around the rock-shelter was established on paper.

(1992 Report at 11.) The 1992 Report also explained that when the cave site was recorded in 1980, a slight plotting error was made. When the boundaries were adjusted in 1991 and the site was increased from a 3.3-acre cemetery site to a 15-acre historical place and cemetery site, a maximum buffer zone of 100 meters around the rock-shelter was added as was the contiguous beach area likely to contain additional cultural remains. The plotting error was corrected as well. See 1992 Report at 12, 13.

In its SOR, appellant contends, in pertinent part:

The voluminous amount of artifacts collected from both de Laguna's and the BIA's visit to the site, the observations of additional caves around the island, oral testimony by a Chugach elder of a burial site in section 13 and 14 on a small island south of Schrader Island, coupled with the extreme religious and cultural importance of the site, strongly indicates island wide occupation, and not occupation confined to 15 acres.

More importantly, Ted Chimivitsky, a Chugach Native elder, reported that burial caves were found on the other side of the island. He reported that on a small island a few hundred feet south of the site was a place called Ciktaarwiik in Alutiiq which means "a place for trying to beat[.]" See Exhibit E, page 2. On March 9, 1992 [sic], Chugach amended its application a second time to include the islands Mr. Chimivitsky spoke about, in section 13 and 14. The BIA expanded the site boundaries to 15 acres on March 9, 1992. Then, on April 18, 1995, BLM issued a Decision which rejected all of the selection except for 15 acres.

* * * * *

Palutat is an archaeological site of extreme cultural and historical significance to the Chugach people. The evidence of cultural and religious activities at Schrader Island has been

consistently acknowledged by professionals in the field, from de Laguna in the 1930's to BIA/CPSU archaeologists, Brad Lewis, Linda Medlock, and Ron Kent in the 1980's and 1990's. The island provides a direct link to the cultural heritage [of] the Chugach people. Our subsequent field investigations and oral history accounts strongly indicate that the island was used in its entirety by the Chugach people. The approved conveyance of 15 acres has yielded far in excess of 300 artifacts significant to religious and cultural activities of the Chugach Eskimo People.

(SOR at 6-7.)

In their Answer, BIA and BLM argue that Chugach has failed to show, by a preponderance of the evidence, that the 65 acres rejected by BLM meet the regulatory criteria as an historical place or that Chugach has shown that the entire island experienced sustained historical Native activity. They state that following Chugach's filing of its SOR, BIA asked for and received a 6-month extension of time so that it could further consider and investigate the Palutat Cave site. (Answer at 8.) They explain that BIA contracted with Northern Land Use Research, Inc. (NLUR), for a cultural resource survey of the Palutat Cave area and Schrader Island to determine whether any cultural material existed outside the 15-acre boundary of the site and whether the existing boundary adequately protected the integrity of the archaeological site. Id. The following results, conclusions and recommendations of the November 1995 NLUR Report (1995 Report) are relevant:

RESULTS:

A thorough systematic survey of the [Schrader] island was conducted focusing on rock overhangs and accessible backshore areas. No surface expressions indicating buried cultural resources (e.g. housepits, cache pits, or eroding midden deposits) were noted. We employed soil probes in backshore areas accessible from the water in order to definitively identify buried cultural resources, however, no evidence of such deposits were noted. A shovel test was conducted in the only flat, well drained area which was present on the island, but we encountered only culturally sterile deposits. We carefully inspected and probed all rock overhangs for the presence of surface and subsurface cultural materials, however, we did not find any additional remains.

We found, but did not collect, an isolated artifact (a greenstone adze blank) in the intertidal zone on the northwest end of the island. We tested the upland areas adjacent to the find using soil probes and one test pit, but found only culturally sterile deposits. We also found a boulder in the intertidal zone which appeared to have been

culturally altered. The boulder exhibits two donut-shaped marks which appear to be man-made, but we could find no evidence of pecking since the indentations are covered with barnacles. We photographed and noted the location of these finds.

We relocated the permanent BLM survey datum marker with ANCSA site tag and affixed its position with a Global Positioning Survey instrument (GPS). No additional cultural resources were identified adjacent to or in the buffer area around the site. Although steep uplands prevented access to corners 2 and 3, we thoroughly surveyed the areas adjacent to corners 1 and 4. We were able to survey the upland areas adjacent to corners 2 and 3 from more accessible locations on the west and north sides of the island. In the opinion of NLUR, the boundary established by BIA is adequate to provide a buffer around the SEW-048 site.

CONCLUSIONS AND RECOMMENDATIONS

We did not find any significant cultural material on Schrader Island outside the boundary of the existing 14(h)(1) selection BLM#AA-11043. We therefore conclude that evidence of intensive human use of Schrader Island appears to be restricted to the Palutat site. With the exception of a piece of possible rock art and an unfinished greenstone adze from the beach, no other indications of (presumably) pre-contact use were evident. A few isolated scarred trees and cut stumps were the only indications of timber resource use on the island. It is entirely possible that, given the proximity to large glaciers, this island was not in an attractive or productive environment until after full glacial retreat. Considering the topography of Schrader Island, and indeed Western Prince William Sound in general, rockshelters like SEW-048 have been among the few level and dry places to live. Archaeologists, geologists, and other Quaternary scientists are just beginning to understand the implications of paleoenvironmental change and tectonic shoreline modification on past land use and on site preservation. As environmental studies advance, or as more extensive, systematic site inventory is conducted in the region, we will be more able to adequately assess the significance of single sites like Palutat in a regional context. In the meantime, the site's exceptional and endearing importance as a symbol of Chugach pride and cultural heritage cannot be underestimated.

In our opinion the existing 14(h)(1) selection boundaries adequately protect the integrity of archaeological site SEW-048. By this we mean that the site falls entirely within the

selection boundaries, and there is an adequate buffer around the site to encompass any as yet undiscovered cultural material to the north, within the rockshelter.

(1995 Report at 9-10.)

BLM and BIA urge that the evidence in support of the decision to limit the site to 15 acres is buttressed by a BIA field investigation and the 1995 NLUR study. (Answer at 19.) Chugach, they claim, has provided no solid evidence of any sort in support of its claim that all of Schrader Island should be included as the Palutat Cave site or that qualifying historical activities or Native burials occurred on smaller islands south of Schrader Island. Id.

[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, but sustained Native historical activity shall not include hunting, fishing, berry-picking, wood gathering, or reindeer industry. However, such uses may be considered in the evaluation of the sustained Native historical activity associated with the tract or area.

43 C.F.R. § 2653.0-5(b). Further, regulations 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).

In its decision, BLM found that the acreage requested beyond the 15-acre cave site did not qualify as an historical site. While Chugach argues that the one island south of Schrader Island was the site of a burial cave, and that burial caves were found on the opposite side of Schrader Island from the Palutat Cave site, BIA's investigation and the 1992 Report found no evidence to support these claims. Moreover, appellant never has identified the island to the south of Schrader Island with the alleged burial cave. Therefore, the remaining issue in this appeal is whether the entire site claim qualifies as an historical place because it was the situs of sustained historical Native activity. For the reasons set forth below, we conclude it does not.

Chugach must prove, by a preponderance of the evidence, that the site qualifies under section 14(h)(1) of ANCSA and 43 C.F.R. Subpart 2653, as a situs of sustained historical activity by Alaska Natives. See Chugach Alaska Corp., 142 IBLA 387, 391 (1998). Objects found at the site must demonstrate the existence of a particular Native historical endeavor of cultural significance associated with the site. Chugach Alaska Corp., 142 IBLA at 391. Also, the additional 65 acres requested must be judged on its own merits; it cannot qualify as an historical site based on the historical merits of the Palutat Cave unless linked to the activities of the cave. Chugach Alaska Corp., 142 IBLA at 390.

Sustained historical Native activity in other areas of Schrader Island beyond the area of Palutat Cave is not established by evidence that past inhabitants of the Native villages of Prince William Sound used the Palutat Cave as a burial site. Nor is it established by the seasonal presence of area natives for hunting, fishing, or berry picking, which is expressly excluded under 43 C.F.R. § 2653.0-5(b). There is simply no substantial evidence that sustained historical Native activity occurred on Schrader Island in areas beyond the approved 15-acre Palutat Cave site. See Chugach Alaska Corp., 142 IBLA at 390. The two possible artifacts found on Schrader Island outside the cave site were both found in the intertidal area, where they could easily have been moved by the forces of nature. No evidence of other cultural finds resulted from the soil probes conducted near these locations and upland of these locations.

We also find that the remaining claimed 65 acres do not meet any of the criteria set forth at 43 C.F.R. § 2653.5(d). The fact that the cave site exemplifies a vital part of traditional Native culture in the

area does not demonstrate that the remainder of Schrader Island or the islands to the south are "associated with events that have made a significant contribution to the history of Alaskan [Natives]." See 43 C.F.R. § 2653.5(d)(1). Nor are we persuaded that the remaining 65 acres have "outstanding and demonstrably enduring symbolic value" under 43 C.F.R. § 2653.5(d)(3).

In its April 1995 decision, BLM did not specifically discuss Chugach's evidence or the BIA analysis and recommendation. However, it is clear that such evidence and such recommendation were considered by BLM. Moreover, after considering the assertions made by appellant in its SOR, BIA commissioned NLUR to take one final look at Schrader Island. This review only confirmed BIA's earlier recommendation acted upon by BLM in the April 18, 1995, decision. See 1995 Report at 9-10.

Nor are we convinced that the evidence in support of BLM's April 18, 1995, determination is inconclusive, thus requiring that we remand the case for further investigation and consideration, as requested by appellant. (Reply at 7, citing Sealaska Corp., 126 IBLA 383, 393 (1993).) Rather, the record substantiates BLM's finding that the excluded 65 acres do not support a determination of sustained historical Native activity.

Thus, we find that Chugach has failed to show, by a preponderance of the evidence, that the excluded 65 acres constitute a valid historical site or were the situs of any sustained historical Alaska Native activity, and conclude that BLM's rejection of 65 acres of Chugach's Native historical place selection application AA-11043 was proper.

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.

James P. Terry
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge