

INTERIOR BOARD OF LAND APPEALS

United States Forest Service

167 IBLA 174 (October 27, 2005)

Title page added by:
ibiadecisions.com

UNITED STATES FOREST SERVICE

IBLA 2003-249

Decided October 27, 2005

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving historical place regional selection application AA-41488 for interim conveyance pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act.

Affirmed.

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

A BLM decision approving a Native historical place application for conveyance under section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (2000), and 43 CFR Subpart 2653, will be affirmed on appeal where error in BLM's decision has not been established by a preponderance of the evidence.

Appearances: Maria C. Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service; Joseph D. Darnell, Esq., Office of the Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Philip Blumstein, Esq., and Cheryl L. McKay, Esq., Anchorage, Alaska, for the Chugach Alaska Corporation.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The United States Forest Service, Department of Agriculture, has appealed an April 29, 2003, decision of the Alaska State Office, Bureau of Land Management (BLM), approving in part and rejecting in part regional selection application AA-41488 filed by Chugach Natives, Inc., now doing business as Chugach Alaska Corporation (Chugach), pursuant to section 14(h)(1) of the Alaska Native Claims

Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(1) (2000).^{1/} The Forest Service claims that the decision improperly approved a site as an historical hunting ground which is not a proper basis for approval of an historical place under Departmental precedent and regulations at 43 CFR Subpart 2653.

Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (2000), authorized the Secretary of the Interior to “withdraw and convey to [a Native] Regional Corporation fee title to existing * * * historical places.” Section 14(h)(7) permits the Secretary to withdraw and convey lands out of the National Forests for purposes set forth in subsection (h)(1). 43 U.S.C. § 1613(h)(7) (2000). By regulation, the Department established that an application for an historical place was required to be filed on or before December 31, 1976. 43 CFR 2653.4(b).

As defined by 43 CFR 2653.0-5(b), an historical place is 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.

The regulations further provide:

(d) 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

^{1/} By Pub. L. 108-452, Title II, sections 203-206, Congress enacted further amendments to section 14(h)(1) not relevant here.

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 CFR 2653.5(d). The regulations require that, when submitting its application, a regional corporation is obligated to 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.” 43 CFR 2653.5(f).

On January 25, 1980, pursuant to section 14(h)(1) of ANCSA, Chugach filed historical place selection application AA-41488 for approximately 80 acres of land located in the vicinity of Coghill Point, Alaska, on College Fjord in the Port Wells Project Area, and also located in Chugach National Forest administered by the Forest Service. According to a cover letter, dated January 24, 1980, Chugach discovered that the application, along with 16 additional site selection applications, had never been filed with BLM. Chugach asked for a waiver of the selection deadline.

The Bureau of Indian Affairs (BIA) conducted a field investigation of the site, identified as the Pua’Iwiit Seal Hunting Camp, on June 3 and 5, 1986. Based on the investigation, BIA identified the site as much smaller than the original 80 acres, and sought amendment of this and other sites applied for. See, e.g., Apr. 3, 1991, letter from BLM to Chugach, with attachments.

The results of the investigation were set forth in a 1991 Report of Investigations for Chugach Alaska Corporation Sites BLM AA-10720 Through BLM AA-41502. (1991 Report.) According to the 1991 Report, a “recently prepared statement of significance” asserted that “Coghill Point Camp served as the main sealing camp when brash ice advance prevented the use . . . of camps to the north.” (1991 Report, Vol. II at 187.) The Report explained that the camp was one of various camps used by entire families who would depart their homes in May and follow the seals, moving north as the ice retreated. Id.

Generally, in May of each year, entire families would depart Chenega and head either to Icy Bay south of Chenega, or north to Port Wells depending on the distribution of seals. When the Natives hunted in the Port Wells area, they would generally begin at the southern end near

Barry Arm and Golden, and move north as the winter ice retreated. Selanoff and M. Kompkoff indicated their family used Coghill Point as a hunting camp. It appeared the use of seasonal camps became less frequent after the 1930s when commercial fishing and logging lured the Natives into a cash-based economy.

(1991 Report at 187.)

The Report explained the cultural significance of the site, which was affected by the 1964 earthquake, as follows:

The site contains a mixture of modern, historic and prehistoric remains. Eight cultural features were recorded (Figure 31). The modern component is represented by the remains of a log cabin (Feature 8) and four modern hearths (features 1, 2, 3 and 7) containing partially burnt wood and charcoal. Earlier historic use is indicated by the presence of amethyst bottle glass and painted ceramics on the beach below an eroding terrace. A prehistoric component is indicated by the presence of 11 stone artifacts.

Feature 1 is a probable hearth constructed of tabular, thermally-altered stones arranged around a cluster of charcoal and rusted metal including tin cans and stove parts (Table 2). Associated debris is scattered around a 7 m radius. Features 2 and 3 are both hearths with deposits of charcoal. Feature 4 is a distinct depression adjacent to Feature 5 which is a cultural mound (Photograph 43). Feature 6 is an aluminum sign painted white nailed to a tree. It reads "Col. Coghill." Feature 7 is a semicircular hearth with FCR [fire-cracked rocks], charcoal-stained soil and rusted pieces of metal. Feature 8 is perhaps the collapsed log cabin shown on the 1960 USGS 1:63,360, Anchorage (A-3) quadrangle. At least two wooden beams and several asphalt shingles were visible on the surface, and a third beam was encountered in Shovel Test 4.

Five test pits (Table 4) were excavated; three of them yielded positive evidence of buried cultural remains. Test Pits 1 and 5 were excavated at the seaward edge of the southern beach terrace above two separate scatters of stone artifacts. In both cases, small amounts of FCR were noted in the test profiles. Test Pit 2 was excavated on the eastern side of Feature 5, and yielded moderate amounts of FCR from 5 cm to 65 cm. Soil profiles revealed homogenous, dark-gray, gravelly loam to depths of 40 cm below the surface. Test Pit 3 was void of cultural remains. Test Pit 4 was excavated within the suspected location of the modern cabin. An iron band and clear plastic strips were found in the

upper 10 cm. A boulder spall and a piece of ochre were discovered at 20 cm below the surface.

Fourteen artifacts were recorded, and four were collected from the surface of the site (Table 6). Eleven of these are stone which include two cobble percussors (030 and 032), such as the one depicted in Photograph 44, a core, a discoidal core (033), an Ulu-like boulder spall scraper (031) depicted in Photograph 45, a possible net sinker and five pieces of lithic debitage. Other artifacts include a painted, glazed ceramic sherd, an amethyst glass bottle fragment and a metal fragment. Most artifacts were found on the modern beach and appeared to have originated from an eroding bank. Stone artifacts were found in Feature 8, as well as in the western and central portions of the site; modern and historic artifacts were confined to the eastern portion.

Archeological evidence strongly suggests early twentieth century, as well as prehistoric use of the Pua'Iwiit Seal Hunting Camp. Amethyst discoloration occurs in glass produced prior to World War II and its presence probably indicates an early to mid-twentieth century occupation. Stone tools below an eroding bank and in subsurface deposits in Shovel Test 4 demonstrate the presence of buried prehistoric cultural remains. Features, stone tools and buried deposits also demonstrate sustained Native use.

(1991 Report, Vol. II, at 189, 191; see also Vol. V, Table 2 at 570 (feature descriptions), Table 4 at 617 (test pit data).)^{2/} Table 4 contains "test pit data"; for this site, it identifies that the test pits produced FCR (test pits 1, 2, 4 and 5), a discoidal core and yellow ochre (test pit 4). Table 6 catalogs that the investigators found on the beach a cobble percussor, an ulu-like boulder spall scraper, a cobble, and a discoidal core. (1991 Report at 649.)

BIA issued a Certificate of Eligibility dated April 15, 1991. (1991 Report at ii-iii.) This Certificate was based upon a BIA recommendation based on two conclusions specifically related to the Coghill Point (Pua'Iwiit Seal Hunting Camp) site. First, BIA stated that archaeologists "found substantial evidence of sustained Native historical activity which included archeological deposits, surface artifacts and oral history accounts pertaining to its use as a spring-to-early summer sealing camp." (1991 Report at 706 ("Site Evaluation for Pua'Iwiit Seal Hunting Camp," Finding 1). Second, BIA concluded that the site "has yielded and is likely to yield additional information important to understanding history and prehistory" of such camps. Id. at

^{2/} The record before us does not contain a copy of the referenced photograph 43.

Finding 2. BLM thereafter requested that the lands be surveyed. On March 5, 1993, the Forest Service concurred in the eligibility determination. (Mar. 5, 1993, Forest Service “ANCSA 14(h)(1) Report Reviews and Comments” at 6.)

On April 14, 1994, BLM rejected AA-41488, along with several other applications, as untimely filed. Chugach appealed this decision to the Board in a case docketed as IBLA 94-473. The Board vacated and remanded the decision to BLM. Chugach Alaska Corp., 140 IBLA 323 (1997). On reconsideration, the Board vacated its first decision and remanded the matter for referral of Chugach’s request for a waiver of the regulatory deadline to the Secretary. Chugach Alaska Corp., 144 IBLA 377 (1998). On July 8, 1999, the Acting Assistant Secretary denied Chugach’s request for a waiver, and BLM closed the file.

On December 27, 2000, Congress revived the application. In Pub. L. 106-568, Sec. 1501(a)(4), Congress declared that the Secretary has the authority to “withdraw and convey to the appropriate regional corporation fee title to existing cemetery sites and historical places” including AA-41488. Congress declared this and other applications to be timely filed, required the Secretary to process the application on its merits, and permitted Chugach to amend the applications subject to the legislation. Id. at Secs. 1503 and 1504.

BLM reopened the file for the application for 80 acres. On August 2, 2002, the BLM Land Law Examiner sent a request to the Anchorage Field Office, with a map depicting the site as containing 13 acres.

In a letter dated January 16, 2003, BLM advised the Forest Service that it was in the process of conveying the site to Chugach, and requested copies of any leases, permits, or rights-of-way for the site administered by the Forest Service. On March 6, 2003, BLM received a response from the Forest Service, which requested an easement under ANCSA section 17(b) for the portion of “the Coghill Lake Trail” that passes through the selected lands. (Mar. 3, 2003, letter from Deputy Regional Forester for Natural Resources, Forest Service, to BLM.) The Forest Service also included a letter from the Chugach National Forest Supervisor, which asserted:

I feel obligated to question the significance of the site * * *. The IBLA decisions in our opinion create a standard that a nexus must be established between a significant historical event or activities and the site under application. It must be demonstrated that the site did not just support common uses such as hunting and fishing camps. It is our understanding the lands being considered for conveyance should have a demonstrated significant value and meaning to the natives or that they will yield significant information as the site is excavated.

I do not dispute that this site has been used over a long period of time by native peoples. However, our records do not include information that shows how this case would be consistent with the findings of the last ten years of IBLA decisions. We request that the BLM review this case and BIA certifications of eligibility for consistency with IBLA findings prior to any conveyance decision.

(Feb. 25, 2003, letter from Acting Forest Supervisor, Forest Service, to BLM.)

BLM did not seek to reserve the trail, apparently based upon a BIA memorandum to BLM dated February 14, 2003, telefaxed to BLM. This document indicated that the trail is “500 [meters] south of AA-41488.” A March 27, 2003, Memorandum indicates that BLM reserved no easements. The correspondence described in this paragraph is the only response appearing in the record to the Forest Service letters. Apparently, BLM did not expressly respond to the Acting Forest Supervisor’s concerns regarding whether the site should properly be considered an historical place.

On April 29, 2003, BLM issued its decision approving for interim conveyance the 13-acre portion of the site and rejecting the remaining 67 acres. In the decision, BLM recites the procedural history related above. Its merits-based findings, however, appear to be limited to the following sentence: “As to the lands described below, selection application AA-41488 is properly filed and meets the requirements of ANCSA and of the regulations issued pursuant thereto.” (Decision at 2.)

The Forest Service timely appealed the decision and submitted a statement of reasons (SOR). BLM and Chugach each filed separate answers.

The debate among the parties centers on the Forest Service’s contention that BLM did not make an adequate finding that the Coghill Point site fits within the definition of “historical place” in 43 CFR 2653.0-5(b), because BLM has not shown that it was land “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” except for hunting and fishing, which is, by definition, not a permissible “sustained historical activity.” The Forest Service further alleges that BLM did not properly “evaluat[e] and determin[e] the eligibility of properties as historical places,” because it did not make any finding that the land is “associated with events that have made a significant contribution to the history of Alaskan Indians, Eskimos or Aleuts,” or any other finding that would come within the requirements of 43 CFR 2653.5(d).

In some respects, the Forest Service position has merit. Though it asserted that the site is in compliance with the requirements of ANCSA, BLM simply gave no

reason in its decision that it believed the 13-acre parcel fit the definition of historic places, leaving its merits-based consideration to the single sentence quoted above. This leaves the Board to, in the first instance, explain the site's compliance with section 14(h) consistent with the record. We are particularly hesitant to undertake such analysis in light of the Forest Service's express challenge to the site's eligibility during the course of the review process in 2003. See Feb. 25, 2003, letter from Acting Forest Supervisor, Forest Service, to BLM. BLM's response to those concerns might have prevented this appeal or bolstered its conclusion. Further, we find BIA's analysis less than definitive on the precise nature of the sustained Native historical activity which it found at the site, other than hunting.

Nonetheless, having reviewed the Board precedent on which the Forest Service's contentions were based, we affirm the decision and find that the record supports the outcome. We find no case in which BLM rejected an historic site application after BIA uncovered historic artifacts of the nature identified here. To the contrary, a decision of this Board already expressly considered the information regarding historical place regional selection application AA-41488 in a case addressing a related site, and strongly implied that the information was sufficient to justify an historical place designation. In Chugach Alaska Corp., 143 IBLA 127, 131 (1998), we stated:

Chugach's March 9, 1984, letter and its December 30, 1994, letter indicate that it regards the two sites, Khoquq and Pua'Iwiit, as a complex. The latter, the Pua'Iwiit (or Poi Witt) site (AA-41488), is in the NW¼ of sec. 6, T. 11 N., R. 9 E., Seward Meridian, some 4 miles north of the Khoquq site. The BIA issued a certificate of eligibility for this site based on "substantial evidence of sustained Native historical activity * * * including archeological deposits, surface artifacts and oral history accounts pertaining to its use as a spring-to-early-summer sealing camp." These cultural findings include the remains of a log cabin and four modern hearths containing partially burnt wood and charcoal. Amethyst bottle glass, painted ceramics, and stone artifacts, including cobble percussors and a boulder spall scraper, were also found. (SOR Ex. C at 706, 187-91; Ex. D.)

Rejecting the notion that the virtues of the Pua'Iwiit site could be attributed to the Khoquq site, the Board strongly implied that the certification of a site such as this one would warrant a finding that it was an historical place. "[T]he qualifications of the Pua'Iwiit site cannot be borrowed to support the Khoquq site's status as a historical place." 143 IBLA at 132. While that decision was neither determinative nor controlling with respect to application AA-41488, the implication is that following the precedent relied on by the Forest Service here would lead us to sustain BLM's conclusion.

Turning to the express requirements of BLM regulations, we find sufficient information in the record to support BLM's conclusions. First, the parties agree that to come within the definition of an "historical place" a site may be demonstrated to be a "distinguishable tract of land or area * * * which was subject to sustained historical Native activity," except hunting, fishing, berry-picking, wood gathering, or reindeer husbandry, which uses may be considered in the evaluation of the sustained Native historical activity. 43 CFR 2653.0-5(b).

As BLM points out in its Answer, BIA's conclusion that the site was eligible for an "historical place" designation found that "sustained Native historical activity" occurred at the site from the prehistorical period through the early part of the twentieth century. (BLM Answer at 6; 1991 Report at 191.) BIA properly documented this conclusion in its discovery of artifacts and prehistoric stone tools. Despite the Forest Service's reliance on Board decisions for its contentions, we find no case in which we have rejected such artifacts as evidence supporting a finding of sustained Native historical activity.

In the strongest language supporting the Forest Service's position, we stated: "While the artifacts may indicate that Native activities occurred on the site, these activities, without grounding in a particular Native historical endeavor of cultural significance are not sufficient to qualify the selection under section 14(h)(1) of ANCSA." Chugach Alaska Corp., 142 IBLA 387, 391 (1998), citing Sealaska Corp., 127 IBLA 59, 68 (1993), cited in Chugach Alaska Corp., 150 IBLA 137, 144 (1999). However, the artifacts discussed in the case from which this language is taken were not expressly tied to the site in question, nor were any artifacts located during the archeological investigation of the site itself. Rather, in that case Chugach alleged that it found artifacts in the area nearby, and BLM disagreed that those findings related to the site in question. By contrast here, BIA documented specific findings, and the Forest Service agrees that "this site has been used over a long period of time by native peoples." (Feb. 25, 2003, letter from Acting Forest Supervisor, Forest Service, to BLM.)

Moreover, in a case decided a month after the Forest Service submitted its SOR in this case, the Board rejected the Forest Service's similar arguments that a fishing camp site could not constitute sustained Native historical use. United States Forest Service, 160 IBLA 1, 5-6 (2003). In that case we addressed one of a number of sites to which historically Native "families dispersed seasonally to a multitude of camps" for hunting and fishing. Id. at 6. The Forest Service objected to the historical place designation, asserting that the fact that "Chenega Natives 'generally used and occupied this site' does not constitute historical native activity." 160 IBLA at 5. We observed that the regulatory requirement that the site be "subject to sustained historical Native activity" need not require a showing of sustained human habitation as argued there by the Forest Service. Further, while "an applicant cannot

demonstrate ‘sustained historical Native activity’ by adducing evidence of only hunting, * * * the artifacts and evidence in this case,” which included oral history of the site, were sufficient to show sustained Native activity there. *Id.* at 5-6. ^{3/} In the similar circumstances here, we will not reevaluate BIA’s express findings of sustained Native historical use.

Second, the site meets the test of 43 CFR 2653.5(d)(5) in that it “ha[s] yielded, or [is] demonstrably likely to yield information important in prehistory or history.” As BLM notes, BIA findings at page 706 of the 1991 Report expressly conclude that the site “has yielded and is likely to yield additional information important to understanding history and prehistory of seal hunting camps.” (Answer at 5.) The 1991 Report’s documentation of BIA’s discovery of prehistoric artifacts suggests that the site is a candidate for further discovery. (1991 Report at 187-91.) The Forest Service concedes that BIA made the finding required in 43 CFR 2653.5(d)(5), but criticizes the conclusion that the site therefore complies with requirements of that regulation, because it contends that BIA did not make the finding required in 43 CFR 2653.5(d) that the information be “important to the understanding of Native prehistory and history overall.” (SOR at 6.) The introductory portion of that rule compels that “the quality of significance in Native history or culture shall be considered to be present in places” that (5) “have yielded, or are demonstrably likely to yield information important in prehistory or history.” The Forest Service’s suggestion that we impose an additional burden on BLM, or BIA, to make a secondary finding regarding the importance “of Native prehistory and history overall” is not found in the rule itself. Nor does the Forest Service suggest that the artifacts identified on the site are either non-Native or not prehistoric. While the Forest Service suggests we reverse BLM for adopting BIA’s conclusions in the record, the Forest Service does not suggest how we could make an independent finding that the Native prehistoric artifacts identified on this site are not likely to yield information important in history. ^{4/}

^{3/} The Forest Service made similar arguments in that case to those made here, stating that “nothing in the [1994] Report distinguishes any activities occurring on Parcel B from the numerous similar seasonal camp sites located within Culross Passage used for hunting, fishing, and trapping activities. (SOR at 5.)” 160 IBLA at 3. As we noted in the 2003 decision and prior decisions involving the Chugach applications, however, the issue is not the relative value of a site to other sites; rather, it is whether the site displays sustained Native historical use. 160 IBLA at 6, citing Chugach Alaska Corp., 143 IBLA 127, 132 (1998) (“Each site must qualify on its own merits.”).

^{4/} Similarly, the Forest Service complains that the “statement of sufficiency” required by 43 CFR 2653.5(f) is insufficient because it “does not indicate the site is associated
(continued...)

[1] A party challenging BLM's decision approving an interim conveyance pursuant to an historical place selection application under section 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such decision is in error. Chugach Alaska Corp., 160 IBLA at 7; Chugach Alaska Corp., 142 IBLA 268, 272 (1998); Sealaska Corp., 127 IBLA 22, 31 (1993). We find that the Forest Service fails to meet that burden here. This is particularly true in light of the fact that in 1993 the Forest Service concurred in the certificate of eligibility for the site. As reflected in its SOR, and in the 2003 letter from the Acting Forest Supervisor, the Forest Service's change in position derives not from any characteristic of the site it had not been aware of or considered before, but rather from its reading of this Board's precedent in the intervening years. As noted above, our precedent would sustain the conclusion here. In the absence of a showing regarding other information undermining the Forest Service's prior concurrence in the eligibility of the site for historical place designation, we find that it fails to meet its burden of proof here.

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

Lisa Hemmer
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{4/} (...continued)

with specific events or associated with specific individuals that are significant to the history" of Natives. (SOR at 5.) We find no case in which a site, documented by investigation to contain historical and prehistorical artifacts, was determined by BLM (or BIA) not to qualify as an historical site on grounds that the statement of sufficiency was not itself sufficient. In any event, the Forest Service's complaint ignores the portion of the definition of "historical places" at 43 CFR 2653.0-5(b) specifying that such sites include places with evidence of "sustained Native historical use." BIA's express findings in the 1991 Report, based on the 1986 field examination, sufficiently support BLM's conclusion.