

UNITED STATES FOREST SERVICE

IBLA 85-726

Decided January 26, 1988

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving, in part, historical place selection application AA-10443.

Affirmed.

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

Where the record establishes that a specific site has historic significance for Native history or culture and the site meets the criteria set forth at 45 CFR 2653.5, this site is properly conveyed to the appropriate Native Regional Corporation pursuant to 43 U.S.C. § 1613(h)(1) (1982).

APPEARANCES: Dennis J. Hopewell,, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs; Michael A. Barton, Regional Forester, Juneau, Alaska,, for the United States Department of Agriculture.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The United States Forest Service (Forest Service), Department of Agriculture, appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 16,, 1985, approving in part the historical place selection application AA-10443, embracing Fort Tongass, filed by Sealaska Corporation (Sealaska).

On December 12, 1975, Sealaska filed the application for the Fort Tongass site, located in Tongass National Forest, pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C § 1613(h)(1) (1982). On July 28, 1983, the Bureau of Indian Affairs (BIA) certified approximately 11.4 acres of the 18 acres applied for as a valid historical place under section 14(h)(1). In its May 16, 1985, decision, BLM approved the application as to those 11.4 acres and rejected the remaining lands. The Forest Service, as the agency with surface jurisdiction over the subject land, filed a timely appeal of that decision.

The Fort Tongass site was described in the amended application as S 1/2 SE 1/4 NW 1/4, N 1/2 NE 1/4 SW 1/4 sec. 11, T. 82 S., R. 98 E., Copper River Meridian, Alaska. The field investigation report accompanying Sealaska's application describes the location as a generally flat area surrounding a small cove on Tongass Island fronting Port Tongass. It noted that:

The large cleared area approximately 600' x 350' was reported by local informants to have been a U.S. Army fort established after the United States occupied the area. There are old engines and equipment on the beach as well as broken dishes, bottles, etc. There are also a number of bricks scattered around the beach. The remains of one wooden structure were found. Others may be present but hidden by salmonberry stands. There are several garbage mounds and several pits of varying sizes and shapes, one of which may be a grave, the other may be from bottle hunters. Part of the area has been gardened.

The field investigation noted that few signs of the fort remained and that the area was apparently visited by bottle hunters.

On July 28, 1983, BIA issued a Certificate of Eligibility to Sealaska for acquiring the Fort Tongass site under section 14(h)(1) of ANCSA. BIA concluded that:

1. Extensive field investigation by BIA/ANCSA personnel found concrete evidence supporting the claim of a historical place.
2. The site is associated with cultural events that had a significant impact on the prehistory and history of the Tlingit people of Southeast Alaska.
3. The site has excellent archeological and anthropological research potential that may yield information important to the history of the Tlingit people

Critical to BIA's conclusion was a March 18, 1981, report prepared by the Cooperative Park Studies Unit (CPSU) of the National Park Service. After reviewing the history of the military post, CPSU found:

(1) Fort Tongass is associated with events that have made a significant contribution to the history of the Tlingit (43 CFR 2653.5(d)(1)). Fort Tongass was established to govern Alaska after its purchase by the United States. As Alaska's first port of call, it attracted large numbers of Natives who came to trade for goods. Large numbers of Natives and whites came into contact. The Natives acquired new concepts of trade and cash economics. Hostile Native groups were forced to abandon hostilities among themselves and against Whites. (2) Fort

Tongass is associated with a person significant in the past of Alaskan Natives (43 CFR 2653.5(d)(2)). Chief Ebbetts (Yahsh-Noosh) was recognized as an effective leader by Tlingits and Whites alike. Ebbetts met many of the initial White explorers and entertained Governor Seward. He brought his people to Fort Tongass in 1868, seeking protection from hostile Sanyakwan Tlingit. (3) Fort Tongass possesses outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of the Tlingit (43 CFR 2653.5(d)(5)). The enforced cessation of intergroup hostilities is a focal point in Tlingit oral history. The Lincoln pole represents and remains today, a symbol of Tantikwan Tlingit recognition of a historical event. (4) Fort Tongass's visual remains embody the distinctive characteristics of a type and period for a military outpost (43 CFR 2653.5(d)(4)). The site was strategically placed overlooking Port Tongass. The visual remains, the barrack sites, and kitchen remains represent military organization and planning. (5) Finally, archaeological investigation of spatial debris patterning building foundations and refuse heaps will add greatly to our knowledge of trade patterns and cultural relationships developed during this period.

On September 16, 1982, James A. Calvin, Director, Lands, Minerals, and Watershed Management, Forest Service, submitted to BLM a report prepared by Forest Service archaeologist Chris Rabich Campbell. Calvin asserted in an accompanying letter that Campbell's report "more clearly represents the history of the site," and stated that the Forest Service was "of the opinion that Fort Tongass is not eligible for selection under section 14(h)(1) of ANSCA. Our opinion is grounded in historical data which indicates that researchers for the cooperative park studies unit used erroneous information in demonstrating the significance of Fort Tongass to the Native people."

Campbell's report varies in considerable detail from that prepared by CPSU. Thus, Campbell argued that the Fort was built long after a village had been established on Tongass Island and there was no evidence that the Tantikwan, or Tongass Indians, fled their villages to seek protection at Fort Tongass (Report at 3). Campbell asserted that "in fact, all the evidence points to the fact that one of the Tantikwan's principal villages has long been established on Tongass Island." Id. The report then challenged the BIA conclusion that Fort Tongass has economic significance to the Indians, contending that "trading at Fort Tongass, rather than serving to educate the Native people to the mores of living within a cash economy, appears to have had a detrimental effect on the population" (Report at 5). Campbell contended that notwithstanding the Fort's presence, the Natives continued to barter. The Campbell report also noted that the Tongass Indians had traded for European and American goods at Fort Simpson in Prince Rupert, Canada, which had been established in 1835, 32 years prior to the establishment of Fort Tongass. Thus, Campbell noted, "it does not appear that the presence of Fort Tongass was of any sort of economic benefit to the Tantikwan, or that

this marked the introduction of the Indians to an expanding cash economy. In fact, it appears that the only effect the Fort had on the Tongass Indians was a negative one, in that the garrison illicitly traded liquor with the villagers" (Report at 6).

The Campbell report also took issue with other factual statements made in the CPSU report, including the assertion that Chief Ebbits sought the protection of Fort Tongass and that the Lincoln totem pole was erected in memory of the protection afforded the Natives by either President Lincoln or the cutter Lincoln. <sup>1/</sup> The report concluded:

Certainly, Fort Tongass is likely eligible for the National Register, for two of the reasons identified by CPSU--it embodies the distinctive characteristics of a type and period for a military outpost; and archeological investigation could contribute to our knowledge; as well as a third reason, which being that this is the only location of a nineteenth century Alaskan U.S. Fort left on Federal Lands. We do not feel these three criteria alone are sufficient to substantiate Sealaska's claim on the site.

(Report at 7).

BLM's May 16, 1985, decision approving the historic place site application did not address the Forest Service letter or report. The decision did note, however, that the grant was subject to the issuance of a patent containing:

A covenant, running with the land, providing that (1) Sealaska Corporation shall not authorize mining or mineral activities of any type nor shall it authorize any use which is incompatible with or is in derogation of the values as a cemetery site or historical place (the standards for determining incompatibility or derogation are found in 36 CFR 800.3 (1982) which contains the Advisory Council on Historic Preservation criteria of effect and adverse effect); and (2) that the United States reserves the right to seek enforcement of the covenant in an action in equity.

The Forest Service timely filed an appeal from this decision. In its statement of reasons in support thereof, the Forest Service argues that, as the surface administering agency, it will be adversely affected by the BLM decision. Substantively, the Forest Service contends that the BLM decision

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<sup>1/</sup> Indeed, Campbell convincingly establishes that the famed Lincoln totem pole (which was known to the Tantakwan as either the First White Man Pole or the Proud Raven Pole) was not erected in honor of either President Lincoln or the cutter Lincoln to commemorate protection afforded the Tantakwan from their enemies. Rather Campbell shows that the entire story appears to be the creation of Judge James Wickersham who had lobbied in the 1920's to have Tongass Island declared a national monument.

is based on data which erroneously overemphasizes the significance of the site to Native history and culture and questions whether the site is able to meet the eligibility criteria as required by 43 CFR 2653.5(j) and (k). The Forest Service has submitted the Fort Tongass report, prepared by Campbell, in support of its contention. The Forest Service contends that the Fort Tongass site is primarily significant as a military outpost, not as a Native historical site, arguing that "if the BLM decision is allowed to stand, the United States will suffer an irretrievable loss of a segment of American history" (SOR at 1).

On September 30, 1985, BIA and BLM filed a joint answer. For simplicity all references to the joint answer will reference BLM in the singular.

BLM notes that, as an initial matter, it is clear that Fort Tongass is a distinguishable tract of land and therefore meets the definition of a "historical place" set out at 43 CFR 2653.0-5(b). With reference to the historical events which are said to have occurred there, BLM, to a large extent, concedes many of the points raised by the Forest Service, but argues that, nonetheless, a number of significant historical events directly relating to Native history and culture occurred at the site. Thus, BLM argues:

1) that Fort Tongass was the first American military post, customs house, and trading center in Alaska and was part of the process of acculturation of the Tlingit people into the American economic system; 2) that the proximity of Fort Tongass to the Tongass Island Village had immediate cultural effects on the Tantikvan clan of Tlingits inasmuch as it unquestionably increased trading opportunities and contact between Natives and non-Natives, and had a definite detrimental effect in bringing intoxicating liquor to the village; and 3) the establishment of the Fort is, in one way or another, linked to an important Tlingit person, Chief Ebbits. While all three of these events are significant and real, if the Board finds any one of these events to have been a "significant Native historical event, which is importantly associated with Native historical or cultural events or persons," then the definitional requirements are satisfied. Along the line, the process of acculturation, as discussed more fully in Exhibit 1, is a significant and important Native event that should be recognized at especially appropriate historical places like Fort Tongass -- the first American military post and customs house in Alaska.

(Answer at 11, 12).

BLM contends that it is undisputed that the Fort site meets the preliminary criteria of 43 CFR 2653.5(d) in that "the quality of significance in Native history or culture shall be considered present in places that possess integrity of location, design, setting, materials, workmanship, feeling, and

association" since the Fort's visual remains embody the distinctive characteristics of a type and period for a military outpost (Answer at 12). "Integrity" exists in that the site is "a remote undisturbed area where the visual evidence of the location, design, setting, materials, workmanship, feelings and association can still be observed and reconstructed" (Answer at 12, 13).

BLM further contends that, having satisfied the "threshold criteria" of being an eligible historical place, Fort Tongass also meets three or more of the five alternate requirements set out in 43 CFR 2653.5(d)(1)-(5). In particular BLM contends that the site is "demonstrably likely to yield information important in prehistory or history" as required in 43 CFR 2653.5(d)(5) (Answer at 13). BLM notes that, in addition, the site is "associated with events that have made a significant contribution to the history of Alaskan Indians" and is "associated with the lives of persons significant in the past of Alaskan Indians," satisfying 43 CFR 2653.5(d)(1) and (2) (Answer at 13). Finally, BLM contends the site satisfies the requirements of 43 CFR 2653.5(d)(4) in that it embodies "the distinctive characteristics of a type, period, or method of construction" (Answer at 13).

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary to convey fee title to historical places to the appropriate Regional Corporation under certain circumstances and subject to various restrictions.

A "historical place" is defined at 43 CFR 2653.0-5(b) 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, berrypicking, 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 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.

It is to be noted that all parties to this appeal agree that the Fort Tongass site is a site of some historical significance. The main area of difference is whether Fort Tongass has historical importance to the Alaskan Natives, particularly the Tlingit people, or to the history of Alaska, generally. In this regard, however, we note that the Forest Service is raising a false dichotomy between Fort Tongass' historical relevance to Native history and its importance to general Alaskan history. In this instance, we think that it can clearly be seen that Fort Tongass has a historical relevance to both.

Indeed, even Campbell admits that Fort Tongass had an impact on Native cultural development, though it is argued strenuously that the impact was negative. But, there is nothing in the regulations which suggests that only historical places which had a positive impact on Native history were available for selection by Regional Corporations under 43 U.S.C. § 1613(h)(i) (1982). We agree with counsel for BLM that the record clearly establishes that the criteria for selection have been met. We also note that the patent will contain a covenant prohibiting the authorization of any use which is "incompatible with or in derogation of the values" of Fort Tongass as a historical site. We, therefore, can find no basis upon which we could act favorably on the Forest Service's appeal.

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.

James L. Burski  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Will A. Irwin  
Administrative Judge

