

CHUGACH ALASKA CORP.

IBLA 96-21, 96-209

Decided December 4, 1998

Appeals from Decisions of the Alaska State Office, Bureau of Land Management, rejecting Native historical place selection applications AA-11084 and AA-12437.

Affirmed.

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

BLM decisions rejecting Native historical place selection applications filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(1) (1994), will be affirmed where the applicant fails to establish, by a preponderance of the evidence, that the sites qualify as historical places.

APPEARANCES: Zethina L. Loudon, Esq. and Peter Giannini, Esq., Anchorage, Alaska, for the Chugach Alaska Corporation; Beth Phillips, Esq., Christopher Stroebel, Esq., and Philip Blumstein, Esq., Birch, Horton, Bittner and Cherot, Anchorage, Alaska, for the Chugach Alaska Corporation; Maria 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 the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Chugach Alaska Corporation (Chugach), a Native regional corporation, has appealed from two Decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting its Native historical place selection applications 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). By Decisions dated September 1, 1995, and January 19, 1996, BLM rejected, respectively, Chugach's application AA-11084 for the Kwinlatah Slough site (Slough site), and its application AA-12437 for the Okalee River Site 1 (River site). By Order dated April 9, 1996, we consolidated both appeals for decision by the Board. Briefing has been completed and includes Chugach's Statement of Reasons (SOR), an Answer filed by the Bureau of Indian Affairs (BIA) and BLM, and Chugach's Reply.

The sites are situated in close proximity, where the Okalee River empties into Controller Bay off the Gulf of Alaska. The River site is located north of and adjacent to the river channel, while the Slough site is located just south of the River site in an area known as the Kwinlatah Slough at the eastern base of the Okalee Spit, a narrow peninsula that juts west out into the Gulf of Alaska. Chugach seeks 80 acres of land for the Slough site, described as N¹/₂NE¹/₄ sec. 28, and 40 acres for the River site, described as SE¹/₄SW¹/₄ sec. 16, all in T. 21 S., R. 8 E., Copper River Meridian, Alaska. All lands are within the Chugach National Forest, and thus under the jurisdiction of the U.S. Forest Service.

In accordance with 43 C.F.R. § 2653.5(f), Chugach was asked to submit with its application 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." In its response, Chugach submitted a joint Statement of Significance (Statement) with respect to both sites, noting the activities associated with the village of Qaxtale:

Okalee River, which enters Controller Bay just north of Okalee Spit, was the site of a Galyix-Kagwantan settlement, Qaxtale (pronounced 'a-xdaliḥ by the Eyak, but probably of Chugach origin * * *). Here was a Beaver House, where a woman shaman revived some boys who had been stabbed by their uncle, the chief, for being cowardly * * *. [This happened about 1860-70(?).] Now all that can be seen near the mouth of the river is one old log cabin and the remains of two others.

* * * * *

The houses of the Galyix-Kagwantan have been consistently named for the Beaver and the Wolf. Aside from the "original" Beaver House (segedi hit), already mentioned, there were others of this name at...Okalee Spit (abandoned about 1890?)....When the old house at Strawberry Point [much further northwest across Controller Bay from Okalee Spit] fell down in 1908, it was replaced that same year by a modern structure, built by Chief John...and his nephew John Bremner II, ...and its dedicatory potlatch honored the memory of Chief John's uncle and father-in-law, 'Axaquḍulu, "Make It Smaller". This man had been chief of the Beaver House at Qaxtale, at the base of Okalee Spit. I know little about that house, except that it was abandoned about 1890. The chief was the man who stabbed his little nephews when they were afraid to bathe in cold water, but his sister, Cakwe, a powerful shaman, brought them back to life.

(Statement at 1, 2 (quoting Frederica de Laguna, Under Mount Saint Elias: The History and Culture of the Yakutat Tlingit 102, 315 (Smithsonian Institution Press 1972)).)

In addition, Chugach stated that the sites met three of the criteria under 43 C.F.R. § 2653.5(d), arguing that the two sites are "associated

with events that have made a significant contribution to the history of the Chugach Native people," pointing to the fact that they are "intimately associated with events of the fur trade in Prince William Sound." (Statement at 1.) Further, Chugach refers to an historical account of a 1789 sea otter hunting expedition led by Baranof:

In a letter to his friend Delarof, Baranof tells of his further troubles: "...[W]hen at last we reached the sandy beach, exhausted from continued paddling, we threw ourselves upon the sand...No sooner had we closed our eyes, than the dreaded war-cry of the Kolosh brought us again to our feet. The greatest consternation prevailed among the naturally timid Aleuts, who were filled with such dread of the well-known enemy as to think it useless to make any resistance....After an unequal contest...the Kolosh retired to the woods...By shouting to (my men) in the Aleutian tongue, we succeeded in gathering the survivors...and departed from the inhospitable beach..."

(Statement at 1 (quoting Hubert H. Bancroft, History of Alaska 1730-1885 (History of Alaska) 366 (Hafner Publishing Co. 1970)). Chugach asserts that this incident occurred at the Slough site, which "should be declared a historic site in commemoration of the battle." See Reply at 9.

Next, Chugach argued that the two sites "possess outstanding and demonstrably enduring symbolic values in the traditions, cultural beliefs and practices of the Chugach Natives." (Statement at 1.) It pointed to the fact that the old Native village site had been the location of several Beaver houses, the original of which was where a female shaman had brought two boys back to life. Chugach also noted that Okalee Spit and Cape Suckling were associated with the activities of the legendary Raven, as recounted in Native folklore.

The record indicates that in June 1982, the BIA, together with the Cooperative Park Studies Unit (CPSU), University of Alaska, which was acting on behalf of the National Park Service, conducted investigations of the Slough and River sites. The BIA reports on the investigations of the two sites are hereafter referred to as River Report and Slough Report.

BIA initially reported that it could find no local Native informant for either of the sites. It then surveyed both sites from the air, finding no evidence of Native use. Following the overflight, the three BIA field investigators and a CPSU anthropologist examined both sites on the ground. With respect to the Slough site, BIA reported that it could not confirm the presence of a Native village:

The terrain of the Kwinlatah Slough area is low and swampy and covered with a tangle of brush. Immediately south of the slough is a low, steep ridge of land covered by spruce trees. There are very few trees in the lowland and most of this land was partially submerged before being lifted by the 1964 earthquake.

Field investigation revealed a collapsed structure and associated debris on the low end of the ridge. The CPSU anthropologist examined the structure and determined that it was less than 50 years old.

Further transected reconnaissance of the site revealed no evidence of Native use.

(Slough Report at 7.) With respect to the River site, less than a mile north of the Slough site, BIA reported:

The terrain of the Okalee River area is low and swampy, covered by a tangle of brush, and cut by a few small streams. There are very few trees, and it is probable most of the land was under water before the 1964 earthquake.

A transected reconnaissance of the site revealed no evidence of Native use[.]

(River Report at 7.) Neither site was surveyed by BLM.

On July 2 and 24, 1984, BIA issued Certificates of Ineligibility for the Slough and River sites, respectively, for the following reasons:

1. Extensive field examinations by BIA personnel failed to find any evidence supporting the claim of a Native historical place.
2. The site is not associated with any event or person of known significance in the history of the Alaska Native peoples.
3. This site does not meet the criteria for a selection as a Native historical place as required by 43 C.F.R. 2653, et seq.

Subsequently, in March 1986, Chugach sought to amend its selection application to conform to its Statement by adding 220 acres of land in the protracted fractional E½ sec. 34, T. 21 S., R. 8 E., Copper River Meridian, Alaska, to include the Cliffs of Cape Suckling and a cave known as "Ravens House." It is not disputed that BLM did not consider the amendment. See Answer at 18.

Because of questions raised regarding its previous investigation of the River site, BIA reexamined the site and its vicinity on the ground in 1987. It found "[no] evidence of a village or other Native use" and concluded that it was very unlikely that it was ever the site of sustained human habitation:

The application area is predominantly grass covered tidal flats and brush covered glacial outwash plains. The area exhibits low topographic relief and appears to be periodically inundated by

high tides and storm surges. Prior to uplift caused by the 1964 earthquake (estimated at 3 m[eters]) the area must have been more marshy, if not under water. * * *

* * * Much of the application area and the banks on both sides of the Okalee River upstream were examined. Evidence of Native use was not found. The entire application area is a glacial outwash plain of low relief. Elevated areas suitable for habitation were not observed. * * * It appeared highly improbable there could have ever been a settlement within the application area. It may have been possible for short-term campsites to have been used there during low tides; but if there were any, all traces have vanished.

(Exh. U attached to SOR at 2-3.)

Consequently, on April 15, 1991, BIA issued a second Certificate of Ineligibility for the River site. Relying on BIA's certifications, BLM rendered its September 1995 and January 1996 Decisions rejecting Chugach's selection applications in their entirety. Chugach timely appealed therefrom.

On appeal, Chugach asks the Board to reverse BLM's Decisions and declare the sites historical places. In the alternative, Chugach asks that the Board remand the applications for further investigation and consideration.

[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). As the party challenging BLM's decisions rejecting its selection applications, Chugach bears the burden of establishing by a preponderance of the evidence that such decisions are in error. See Chugach Alaska Corp., 142 IBLA 387, 391 (1998); Ahtna, Inc., 137 IBLA 111, 113 (1996) and cases cited.

In its SOR, Chugach argues that BLM erred in failing to adjudicate its Slough site application as amended. BIA and BLM argue that amendments are only permitted under 43 C.F.R. § 2653.5(i), which provides that historic site applications may be amended after the deadline for filing "if, during its investigation, [BIA] finds that the location of the site as described in the application is in error." Thus, they assert that because BIA did not find the location of the site was in error, or ask Chugach to relocate it, no amendment is allowed. We do not read the regulation as precluding BIA's consideration of an amendment initiated by an applicant after BIA's investigation but prior to BLM's decision. Such consideration, however, is discretionary. In this case, the amendment was tantamount to a new application, adding 220 acres to the site. Under these circumstances, we do not find that BLM's or BIA's refusal to consider the amendment constitutes an abuse of that discretion.

Chugach has not shown that either the Slough or the River site was the situs of any "significant Native historical event." 43 C.F.R. § 2653.0-5(b). Even if we assume that the Slough site was the location of the 1789 clash between the Baranof party and a group of Natives, the encounter represents but one example of early conflicts between Natives and Russians. Chugach has failed to show how this particular event rises to the level of making a significant contribution to the history of Alaska Natives. See 43 C.F.R. § 2653.5(d)(1).

Nor does Chugach identify any other event, whether associated with Native fur trading or other historical activity, which occurred at either site. Thus, it has not carried its burden under the applicable regulation, to demonstrate "an essential connection between an event or events of specific historical nature and a particular parcel of land." Sealaska Corp., 127 IBLA at 68.

Further, Chugach has not shown that either the Slough or the River site was "importantly associated with Native historical or cultural events or persons." 43 C.F.R. § 2653.0-5(b). As to Laguna's reference to the healing of the boys by a woman shaman, there is no evidence that, as a consequence of the incident, the site described in the application has any "outstanding" or "demonstrably enduring" symbolic value in the traditions and cultural beliefs and practices of the Chugach Natives themselves. 43 C.F.R. § 2653.5(d)(3).

Moreover, Chugach has not shown that either site has "yielded or [is] demonstrably likely to yield" information important in the prehistory or history of the Chugach Natives. 43 C.F.R. § 2653.5(d)(5). It points to no such information yielded by the sites themselves, as opposed to reports obtained from historians and their non-Native and Native informants. See SOR at 17-18. Instead, Chugach merely speculates that a thorough investigation of the sites may yield information. (Statement at 2.) There is no evidence that such investigation is demonstrably likely to do so.

Chugach has simply failed to prove that the specific sites at issue here are of particular historical significance. See Chugach Alaska Corp., 142 IBLA at 391. Accordingly, we conclude that Chugach has not shown, by a preponderance of evidence, that either site was the situs of a significant Native historical event or is importantly associated with Native historical or cultural events or persons. See Ahtna, Inc., 137 IBLA at 114.

Chugach also asserts that the sites are the situs of "sustained historical Native activity" under 43 C.F.R. 2653.0-5(b), submitting evidence that Okalee Spit was the location of an old Native village known as Qaxtale. Neither BIA nor Chugach has been able to locate any remains of the village, or the Beaver House and other cabin remains reported by de Laguna in 1972. See Letter to BIA from Chugach, dated May 18, 1994, at 1; Slough Report at 7; River Report at 7; SOR at 4, 11. Chugach speculates that the cabin discovered during the June 1982 BIA inspection of the Slough site may have been built on the foundation of an early potlatch house, but offers no evidence to that effect. (Letter to BIA, dated June 1, 1984.) Similarly, we find no basis for concluding that it was on the site of a cabin occupied by B.A. Jack, a Native, in 1913. (SOR at 7 (citing Exh. G attached to SOR at 4).)

Thus, we must conclude that Chugach has failed to show, by a preponderance of the evidence, that either site was the situs of any sustained historical Alaska Native activity. See Chugach Alaska Corp., 142 IBLA at 275, 277.

Therefore, we conclude BLM's September 1995 and January 1996 Decisions rejecting Chugach's Native historical place selection applications for the Slough site (AA-11084) and the River site (AA-12437) 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 Decisions appealed from are affirmed.

John H. Kelly
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

