CHUGACH ALASKA CORP.

IBLA 95-388 Decided March 11, 1998

Appeal from a Decision of the Alaska State Office, rejecting historical place selection application AA-12552.

Affirmed.

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

   Section 14(h)(1) of ANCSA authorizes the Secretary of the Interior to convey existing historical places and cemetery sites to the appropriate regional corporation. A selection application for a historical place is properly rejected when the site does not meet the criteria set forth at 43 C.F.R. § 2653.5.

2. Administrative Procedure: Burden of Proof--Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

   A party challenging BLM's rejection of its historical place selection application under section 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

APPEARANCES: Peter Giannini, 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 Indian Affairs and the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Chugach Alaska Corporation (Chugach) has appealed from the March 23, 1995, Decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting historical place application AA-12552, filed December 21, 1976, pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1994).

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The site applied for, referred to as "Summer Hunting Complex" (Khoquq), is located in the Chugach National Forest and embraces 1.86 acres, more or less. According to the Bureau of Indian Affairs' (BIA's) Investigation Report (Report), Chugach "marked the site location on United States Geological Survey (USGS) quadrangle map, 1:63,360, Anchorage (A-3)." (Report at 6.) On June 18, 1981, BIA conducted an aerial prelocation of the site. During the flight, a Native informant pointed out a specific area on which a smokehouse once stood. He also told investigators that the site was used seasonally. (Report at 6.) During a June 23, 1981, field investigation, a "transected archeological search was performed of the entire application area and the surrounding area." While geographic factors were found to indicate that this was an area of Native use, "no specific cultural features were located to positively identify the location."

Between June 27 and 30, 1981, a BLM cadastral survey was conducted, and BIA, ANCSA Projects Office, and National Park Service Cooperative Studies Unit (CPSU) personnel determined the site boundaries. (Report at 7, 39.) The ANCSA "Site Survey Form" in the Report states that the site "boundary was set to include the Native site usage area as indicated to BIA personnel by a Chugach elder during site prelocation. This area includes all cultural features with sufficient margin to protect the site's physical integrity." (Report at 36.) On July 6, 1982, Field Investigator and CPSU Archeologist Theresa Villa recommended the site for conveyance under ANCSA section 14(h)(1). Id. at 36. In a September 1, 1983, letter to the ANCSA Projects Office, the Associate Regional Director, National Park Service, endorsed the CPSU findings that the site met ANCSA section 14(h)(1) criteria. (Report at 25.)

Nevertheless, the ANCSA Project Officer evidently notified Chugach that he would reject the site. 1/ Chugach responded in a March 19, 1984, letter, referring to the site as "Summer Hunting Camp Complex (Khoquq and Poi Wiit)," speaking of both of these sites as a "complex," and noting that many stone age tools had been found at the Poi Wiit site. Chugach also stated that "the site should be evaluated in association with the other historic and prehistoric sites in College Fiord." (Report at 42-43.)

On April 4, 1984, BIA certified that this application was not eligible for the following reasons:

> 1. Extensive field investigation by BIA personnel failed to find any evidence supporting the claim of a Native historic place.
>
> 2. The site is described as a seasonal hunting camp and, as such, is specifically excluded from selection as a Native historical place by 43 C.F.R. § 2653.0-5(b), Definitions.

1/ The ANCSA Project Officer's letter rejecting the site has not been included in the file.

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> 3. The site does not meet the criteria for a Native historical place as required by 43 C.F.R. § 2653, et seq.

The BLM Decision quoted and affirmed these findings.

In its Statement of Reasons (SOR), Chugach admits that "no specific cultural features were located to positively identify the site location." (SOR at 1.) It argues, however, that BIA misidentified the site. The correct site, Chugach asserts, was identified by Chugach investigators in June 1994, at which time "[i]t was immediately apparent that the site had been incorrectly located." On December 30, 1994, Chugach wrote to BIA stating that its letter referred to "AA 12552 (Khoquq & Poi Witt—Summer Hunting Complex)." Chugach's letter stated in part:

> During the month of June, 1994 CAC conducted a field examination of the selection area and has documented extensive cultural remains a few hundred feet south of the application area. Along the shoreline, in the W2SE4 of section 25 (see attached map) approximately 500' of shoreline contained [fire cracked rock (FCR)] and the forested uplands contain at least 500' of old [culturally modified trees (CMT's)]. Some of the CMT[']s were located on old tree snags that have died many years ago. Photographs of the cultural features are not available, due to problems with the camera. The FCR was found to be at levels of the tide.

Chugach recommended in its letter that re-examination of the site was warranted and that Khoquq should be certified as an eligible historical place and "joined into a historical complex with the site 'Poi Witt.'" Chugach states that it received no response to its letter. (SOR at 1-2.)

Chugach argues that "Khoquq has significant cultural value which extends beyond its use as a hunting camp." It states that the site was occupied by Chenega Natives during summer months and cites the evaluation by anthropologist Theresa Villa to the effect that the site "possesses outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of the Chugach Eskimo," including the association of the site by elders with memories of an environment and a way of life that no longer exists. (SOR at 4-5.) Chugach points to neighboring sites certified as eligible for conveyance by BIA and asserts that these sites possess the "same oral history and physical features." (SOR at 6.) Chugach requests that the matter be remanded for a more thorough surface investigation, which it believes would "likely yield information important in prehistory or history." (SOR at 7.)

In their Answer, BIA and BLM (Appellees) assert that neither the site originally applied for, nor the site now claimed by Chugach, is an eligible historical place. Appellees note that Chugach admits that the applied-for site was not a historical place. They point out that section 16 of the

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1982 CNI Settlement Agreement with the Department precludes further selection filings under section 14(h)(1) of ANCSA after the effective date of the agreement, January 10, 1983.

Appellees contend that even if the FCR and CMT's had been found on the applied-for site, they would not serve to establish that a significant historical event occurred on the site or that there was sustained Native use of a qualifying character. (Answer at 5.) Further, Appellees contend that the fact that similar sites, containing better evidence of qualifying historical activity, have been certified eligible, cannot be used to "bootstrap" Khoquq, which is not a qualifying site. Appellees assert that, "[w]hile it is arguably proper to certify and convey the best example of a seasonal hunting camp in a given area," the record cited by Chugach demonstrates that better sites than Khoquq have already been certified. (Answer at 6; referring to SOR at 5-7; Exs. C, E, and F.) 2/ Finally, Appellees contend that Chugach has failed to meet its burden of proof, and therefore the agency decision must be affirmed.

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1994), authorizes the Secretary to convey fee title to "existing * * * historical places." The term "historical place" is defined as follows at 43 C.F.R. § 2653.0-5(b):

> (b) Historical place means 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 criteria for determining whether a site constitutes a historical place are set out at 43 C.F.R. § 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

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2/ These sites are Pua'Iwiit, where archeological and surface deposits were found; Iwilurtuli, where artifacts were found; and College Fiord, where prehistoric features, archeological deposits, and surface artifacts were found. (SOR Exs. C, E, and F.)

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(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.

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.)

In its December 30, 1994, letter, Chugach referred to a new area "a few hundred feet south of the application area," as being the area which should have been described as the Khoquq area. 3/ Thus, some 18 years after the filing of the application for the Khoquq site, Chugach notified BIA that the site had been "incorrectly located." As BIA and BLM point out, no ANCSA section 14(h)(1) application for these lands was ever filed, and section 16 of the 1982 Settlement Agreement between Chugach and the Department precludes any new selection filings under section 14(h)(1) of ANCSA after the effective date of the agreement, January 10, 1983.

However, even if these lands had been, or could be, included in the original application, they would fail to meet the regulatory requirements. Chugach has urged that "Khoquq was not a temporary hunting or fishing camp," and has cited anthropologist Theresa Villa's evaluation to the effect that the site possesses "outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of the

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3/ Chugach indicated that the correctly-identified Khoquq site should have included the W½SE¼, sec. 25, T. 11 N., R. 8 E., Seward Meridian.

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Chugach Eskimo." (SOR at 4.) Chugach has not identified these values or shown the existence of a particular Native historical endeavor of cultural significance associated with the site. Chugach has not shown the essential connection between an event or events of specific historical or cultural significance and the tract of land now urged as the subject of its application. See Sealaska Corp., 127 IBLA 59, 68 (1993). Chugach has failed to characterize the historical nature of this location as anything other than that of seasonal hunting, which is expressly excluded under 43 C.F.R. § 2653.0-5(b). Symbolic value, without grounding in a particular Native historical endeavor of cultural significance is insufficient to qualify a selection under section 14(h)(1) of ANCSA. Id. at 68.

Under 43 C.F.R. § 2653.5(d), a historical site or place qualifies as such based on the characteristics of the site in its own right or the historical events that occurred on that site, and not on what was found or occurred on another site. The regulation does not speak of site "complexes" or clusters and does not indicate that a site lacking artifacts or evidence of historical events may qualify as a historical place based on the merits of another site. Nothing in the regulation requires the weighing of geographical proximity between a site already certified and a site being evaluated as a factor bearing on the qualifications of the latter. Thus, the qualifications of the Pua'Iwiit site cannot be borrowed to support the Khoquq site's status as a historical place.

[2] Even though Chugach apparently reinvestigated the site in 1994, it presents no findings resulting from that reinvestigation. Moreover, Chugach has not offered evidence that BIA was superficial in its original investigation of the site. Despite this, Chugach asserts that BIA should again examine the site. A party challenging BLM's rejection of its 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. Sealaska Corp., 115 IBLA 257, 262 (1990). Chugach has not met this burden. Thus, the determination of ineligibility was appropriate, and we find no grounds to order further investigation of the site.

Therefore, 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.

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David L. Hughes
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge

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