

**Editor's note: Appealed -- reversed, Civ.No. A87-066 (D.Alaska Oct. 4, 1989); Dist. Ct. affirmed in part, rev'd in part, No. 89-35773 (9th Cir. Sept. 24, 1990), 915 F.2d 454**

CHUGACH ALASKA CORP.  
THE GROUSE CREEK CORP.

IBLA 85-521

Decided September 25, 1986

Appeal from a decision of Administrative Law Judge L. K. Luoma affirming a determination of Area Director, Bureau of Indian Affairs, holding that The Grouse Creek Corporation is not a Native group eligible for land selection entitlement. AA-11203.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Native Groups

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because members of the group did not constitute a majority of the residents of the locality on Apr. 1, 1970, will be affirmed where after a hearing is held the facts of record show that there were 30 residents of the locality on Apr. 1, 1970, of which only 15 were group members, and, therefore, the group failed to qualify as the majority of the residents of the locality as required by 43 CFR 2653.6(a)(4).

2. Regulations: Force and Effect as Law--Regulations: Validity

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

APPEARANCES: Stephan H. Coonrod, Seattle, Washington, and Frederick H. Boness, Esq., Anchorage, Alaska, for Chugach Alaska Corporation, and The Grouse Creek Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Indian Affairs; Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska, Intervenor.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Grouse Creek Native Corporation (Corporation; Group) and Chugach Alaska Corporation (Chugach), formerly known as Chugach Natives, Inc., have appealed from a decision of Administrative Law Judge L. K. Luoma, dated March 12, 1985, which affirmed a determination of the Area Director, Bureau of Indian Affairs (BIA), holding that the Group is not a Native group eligible for land selection entitlement pursuant to section 14(h)(2) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(2) (1982).

The Group originally filed a Native group application, AA-11203, with the Alaska State Office, Bureau of Land Management (BLM), on June 30, 1976, pursuant to section 14(h)(2) of ANCSA, for 6,720 acres of land around the Grouse Creek area. The Group, located within the Chugach region, asserted its locality to be between Mile 7 and Mile 8 of the Seward-Anchorage Highway.

After field investigation of the Group's locality was conducted on September 17 and 20, 1982, by BIA personnel, a detailed Report of Investigation for the Grouse Creek Corporation was prepared, which determined a larger area for the Group's locality between Mile 6-3/4 and Mile 8 on the highway. The larger area included the additional residence of William Frazier and his family (six members). Subsequently, by decision dated June 17, 1983, the Area Director, BIA, issued a certificate of ineligibility to the Group because the members of the Group did not constitute a majority of the residents of the locality where the Group resided on April 1, 1970, as required by 43 CFR 2653.6(a)(4).

The Group and Chugach appealed the BIA decision to the Board taking issue with the boundaries of the Group's locality as set by BIA. They asserted that the regulations in 43 CFR 2653.6(a)(4) and (5) should be interpreted to mean that a Native group's locality is the area bounded by the location of the group members' permanent homes. They contended the Frazier family was not a part of the Grouse Creek locality and should not have been counted against the Group.

Appellants further objected to the BIA count of residents of the locality contending that 15 members of the Group's enrollment of 22 Natives (a majority) resided in the Group locality on April 1, 1970; that 2 of the resident members were away at school; that another 2 members were enlisted in the armed forces while maintaining their residence in the Grouse Creek locality; that only 9 non-Natives resided in the Group locality on April 1, 1970; and that 5 Natives in the locality (the Munson family members), who are not enrolled in the Group, are enrolled in a village in a region other than Chugach, pursuant to section 5(b) of ANCSA, and therefore should not be considered legal residents of the Group's locality.

Appellants also objected to the regulations under which the Area Director declared the Group ineligible contending that the regulations impose additional restrictions on Native groups not applied to Native villages. They argued that no statutory basis justifies the distinction and, therefore, the group eligibility regulations should be invalidated.

By decision of March 30, 1984, Chugach Natives, Inc., 80 IBLA 89, we determined that a hearing was necessary to resolve the correct delineation of the boundaries of the Group's locality and the conflicting residency claims. Accordingly, we referred the case to the Hearings Division for a factual determination as to "locality" and whether the Group members constituted a majority of the residents of the locality on April 1, 1970.

Subsequently, on April 2, 1984, the State of Alaska (State) filed a motion to intervene in the proceeding, citing its interest in the outcome of the case based on a conflicting State selection for much of the same land selected by The Grouse Creek Corporation. The motion was granted on June 5, 1984, by Administrative Law Judge L. K. Luoma, to whom the case was referred for hearing.

In our initial examination of the residency of the Munsons, we agreed with BIA's position that the Munson family members, while not members of the Group, should properly be counted as residents of the Group's locality if they actually resided there on April 1, 1970. We stated:

As for the residency of the Munsons, BIA states that residency requirements for village enrollment and the determination of group member majority are quite different and that it is possible for a person to be enrolled in a village and still be counted as a resident in a group's locality. BIA states this is because the definition of "permanent resident" for village enrollment purposes does not require actual residence while the Native group regulations do require actual, physical residence. See 25 CFR 69.1(k) and 43 CFR 2653.6(a)(5). The fact that the Munsons are enrolled in a village away from the Group's locality does not, according to the Bureau, mean that the Munsons cannot be counted as residents of the Group's locality on April 1, 1970. BIA asserts the pertinent factual issue to be where the five Munsons actually resided on April 1, 1970. We agree.

Id. at 93.

We further rejected appellants' argument of the invalidity of the Group eligibility regulations stating:

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Board. Sam P. Jones, 71 IBLA 42 (1983); Enserch Exploration, Inc., 70 IBLA 25 (1983); Altex Oil Corp., 61 IBLA 270 (1982).

Judge Luoma held a hearing in this case on September 17 and 18, 1984, in Seward, Alaska. Prior to the hearing the parties stipulated to certain facts including the following: (1) The Corporation (Group) has 22 members, all of whom are enrolled pursuant to section 5 of ANCSA; (2) 7 enrollees, members of the McCanna family, did not reside in the Corporation locality as of April 1, 1970; (3) 13 individuals including the 5 Munsons, not members of

the Corporation, resided in the Corporation locality on April 1, 1970 (Stipulation of Facts, Exh. B-12 at 2-3).

After a thorough hearing, Judge Luoma issued his decision of March 12 finding that the locality of the Grouse Creek Corporation is from the Ronne-Frazier property line north to Mile 8 (Mile 7 to Mile 8 on the Seward-Anchorage Highway). He further found that Marshall Ray Ronne, Wayne Gutherie Ronne, Jeffery Toth, and Donald Bigelow were all residents of the locality on April 1, 1970. Based on these findings, the Judge's tabulation of residents of the locality on April 1, 1970, resulted in 15 group members and 15 nonmembers living in the critical area as of that date. He, therefore, concluded that the Group did not constitute a majority of the residents of the locality as required by law and affirmed the BIA Certificate of Ineligibility.

Appellants raise several grounds for appeal. They contend that Donald Bigelow should not be counted as a resident of the Grouse Creek locality on the critical date. Appellants claim he lived there only on a temporary basis, was not a part of the community, and no evidence was introduced to establish that he considered Grouse Creek to be his permanent residence. They argue that residence is "a question of subjective intent of the individual himself" that only the individual or a close relative or friend can substantiate. Since BIA did not present such evidence, appellants conclude Bigelow should not be counted against the Group (Statement of Reasons at 15-18).

In addition, appellants submit that the Munson family should be counted as group members for purposes of making an eligibility determination. In this regard they again argue the inconsistency of the regulations stating:

The ANCSA definitions of Native villages and groups do not require that, for purposes of determining eligibility, Native residents must be enrolled to the relevant locality. There is also nothing in ANCSA to justify a difference in village and group treatment of Native residents not enrolled to the locality since the basic distinction in ANCSA between villages and groups is simply one of size. However, unlike the village eligibility regulations, the group regulations--at least as interpreted by the BIA--count against the group Natives resident of the locality but not enrolled to it. The BIA interpretation of the group regulations thus not only imposes a non-statutory requirement on groups, but also creates an arbitrary and capricious distinction between villages and groups.

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Through its interpretation of the group regulations, the BIA reserves for itself the right to decrease group members counted in favor of the group when the BIA claims they are not resident. The BIA however refuses to increase group members counted in favor of the group when the group claims they are resident. That is fundamentally unfair.

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In its interpretation of the group eligibility regulations, the BIA wants a one-way street. It certainly is insisting on a one-way street in the Grouse Creek case: the BIA felt free to challenge the residency of the seven McCanna family members who are enrolled to the Group but refuses to treat the Munsons as group members for purposes of the eligibility determination. Such a position is fundamentally unfair to the Grouse Creek Group. [Emphasis in original.]

(Statement of Reasons at 5, 6, 11-12.)

[1, 2] We have reviewed the record of this case and the arguments advanced by the parties. Judge Luoma's decision sets out a full summary of the testimony and the relevant evidence presented at the hearing on the crucial issues determinative of the Group's eligibility under ANCSA. We agree with the Judge's findings of fact and conclusions of law and adopt them in full.

Appellant's contention that the Munson family should be counted in the Group's favor is unpersuasive. It is directly contrary to their previous contention that these five Natives should not have been counted as residents of the locality because they could not have resided in two locations simultaneously. There was no attempt at the hearing to introduce evidence to establish these "nonenrolled" Natives as members of the Group. There is no basis in the record for such a finding. Nor have appellants presented any substantive information with this appeal to persuade the Board the Munsons were active participants in the Group or ever considered themselves enrolled members of any Native organization other than their Village enrollment elsewhere in the Cook Inlet Region. Moreover, the parties specifically stipulated before the hearing that the Munsons were not members of the Group but still resided in the locality claimed by the Group (Stipulation No. 6, Stipulation of Facts, Exh. B-12).

Appellants have had more than ample opportunity to address the residency of the Munsons and their relationship to the Group and have failed to show any reason why these residents of the locality should not be counted as nonmembers of the Group. Instead, they rely on the same line of argument already rejected by the Board that BIA's Native group regulations are improper. Since our first decision in Chugach Natives, Inc., 80 IBLA at 92-94, we have reasserted the controlling nature of the Native group regulations on our adjudication of ineligibility appeals. Such regulations have the force and effect of law and are binding on the Board. Ahtna, Inc., 87 IBLA 283, 291 (1985); Wisnak, Inc., 87 IBLA 67, 69 (1985).

As to the question of Donald Bigelow's residency, we find no error in the Judge's decision to count Bigelow as a resident on the critical date. Judge Luoma found he was more than a temporary resident at the time he occupied the Loomis house on April 1, 1970. He had lived there continuously for 2 consecutive school years while a teacher in the community. Glen Loomis

testified that his house was rented to Bigelow in April 1970 and that Bigelow was there for 2 years (Tr. 131). A neighbor, Beulah Murawsky, acknowledged that Bigelow had rented the house on April 1, 1970. She was aware of that fact from her personal observation and from her daughter's school records which showed Bigelow was her teacher in 1970 (Tr. 115, 116). Under these circumstances, appellants' surmise that it was not Bigelow's intent to make Grouse Creek his permanent residence is without support.

The State and BIA have presented separate arguments on appeal contesting the Judge's finding of residency in the locality for Marshall Ray Ronne and Wayne Ronne. They also allege the Judge erred in limiting the boundaries of the Group's locality to such a small area of the community. We need not examine these issues because they are not necessary to the disposition of the appeal. We have already considered the status of residents living in the geographic locality deemed most beneficial to appellants' contentions. From this review we find the determination of ineligibility to be proper. There is no need to extend the geographical limits of the locality to include a review of more area and more people when it is clear appellants do not satisfy Native group eligibility requirements viewed in a light most favorable to them. Similarly, we do not discuss respondent's and intervenor's allegations regarding the Ronne brothers because appellants have failed to make the necessary showing of eligibility counting the Ronnes in their favor. The record does not support majority status for the appellant Group.

Therefore, 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.

Wm. Philip Horton  
Chief Administrative Judge

We concur:

John H. Kelly  
Administrative Judge

Kathryn A. Lynn  
Administrative Judge  
Alternate Member

