

Editor's note: appeal filed, sub nom. Minchumina Natives, Inc. v. Lujan, Civ.No. F92-018 (D. Alaska June 5, 1992); aff'd (July 27, 1993), rev'd remanded to IBLA, No. 93-35841 (9th Cir. March 30, 1995); amended, (but still remanded to IBLA) (July 18, 1995), 60 F.3d 1363; affirmed as modified by Minchumina Natives, Inc. (On Judicial Remand), 153 IBLA 225 (2000)

MINCHUMINA HOMEOWNERS ASSOCIATION ET AL.
STATE OF ALASKA, INTERVENOR
v.
MINCHUMINA NATIVES, INC.
and
THE BUREAU OF INDIAN AFFAIRS

IBLA 88-618

Decided April 2, 1992

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer finding that Native group members did not constitute a majority of the residents of the locality and reversing the decision of the Bureau of Indian Affairs to issue a certificate of eligibility as a Native group.

Affirmed as modified.

1. Alaska Native Claims Settlement Act: Conveyances: Native Groups--
Alaska Native Claims Settlement Act: Definitions: Generally

A Native group locality is the area where houses and other structures have been constructed, amenities are present, and daily life takes place. The term refers to not only the land on which group members live but also land in the same area on which others reside. It must encompass the greater area in which other residents live in relative proximity, as compared with the population density of lands beyond the area so designated.

2. Alaska Native Claims Settlement Act: Conveyances: Native Groups--
Alaska Native Claims Settlement Act: Definitions: Generally

BIA improperly determines a Native group locality when it identifies the locality as the smallest legally describable area which includes the member's residences and other improvements.

3. Alaska Native Claims Settlement Act: Conveyances: Native Groups--
Alaska Native Claims Settlement Act: Withdrawals and Reservations:
Generally--Withdrawals and Reservations: Effect of

The fact land is withdrawn and may be unavailable for conveyance to a Native group is unrelated to the factual determination of the group's locality.

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

Absent evidence that anyone lived in an area on or about Apr. 1, 1970, it cannot be part of the area in which residents lived in relative proximity for the purpose of determining a Native group's locality.

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

A member of a Native group must actually reside in the group's locality on Apr. 1, 1970, to be counted as a resident. The exception provided in 43 CFR 2653.6(a)(4) for children "who are temporarily elsewhere for purposes of education" does not require that a child who is attending school be under a particular age, but that the child be the son or daughter of someone residing in and maintaining a home within the locality so that the child may be counted as a member of the parent's household.

6. Alaska Native Claims Settlement Act: Conveyances: Native Groups--
Alaska Native Claims Settlement Act: Definitions: Generally

Non-Natives are not eligible for enrollment in a Native group and may not be counted as members of a group for purposes of determining whether group members constitute a majority of the residents of the group's locality.

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OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Minchumina Natives, Inc. (MNI), has appealed the July 29, 1988, decision of Administrative Law Judge Harvey C. Sweitzer, reversing the April 28, 1983, decision of the Juneau Area Director, Bureau of Indian Affairs (BIA), to issue to MNI a certificate of eligibility under section 14(h)(2) of the Alaska Native Claims Settlement Act (ANCSA), P.L. 92-203, 85 Stat. 688, 704 (Dec. 18, 1971), as amended, 43 U.S.C. § 1613(h)(2) (1988), which allows an incorporated Native group that does not qualify as a Native village to receive land "surrounding the Native group's locality."

MNI filed its Native group application (AA-11184) with the Fairbanks District Office, Bureau of Land Management (BLM), on March 4, 1976 (Joint Exhibit (Jt. Exh.) 5 at 18). The application listed seven members. Four were the children of Val Jean and Hazel Aveoganna Blackburn: Robert James Thompson, Carol Lee Gho, Valerie Jean Nelson, and Jonathon Allen Blackburn ("the Blackburn siblings"). The other three members were: Jane Kilavsuk Thompson, the wife of Robert Thompson; Sharon Nasuk Thompson, their daughter; and Mary Flood, who is unrelated to the others. Field investigations were conducted during October 1978 and November 1979 by realty technicians for the Tanana Chiefs Conference. BIA personnel made a subsequent investigation on September 7-8, 1982. Based on the report of its investigation, BIA issued the certificate of eligibility to MNI on April 28, 1983 (Tr. 326; Jt. Exh. 5).

BIA's decision was appealed by the Minchumina Homeowners Association (MHA) and by numerous individuals who claimed residency or ownership of property at Lake Minchumina. By order dated August 20, 1984, the State of Alaska was granted permission to intervene to challenge MNI's eligibility as a Native group due to conflicts between lands selected by MNI and State selections which had been tentatively approved in 1963 (F-28722). The appeals were consolidated for review and, after dismissing a number of individual appellants for procedural reasons, the Board found that the remaining appellants had a sufficient interest in the lands selected by MNI so as to be adversely affected by BIA's decision and have standing to appeal. Minchumina Homeowners Association, 93 IBLA 169, 177 (1986). Finally, the Board concluded that the appellants had raised issues of fact which required resolution at a hearing and referred the case to the Hearings Division for a hearing before an Administrative Law Judge "on the issue of whether MNI meets the requirements for eligibility as a Native group under 43 CFR 2653.6." Id. at 178.

The hearing was held in Fairbanks on September 23-25 and 28, 1987, and at Lake Minchumina on September 26, 1987, before Administrative Law Judge Sweitzer. After briefing by the parties, a decision was issued on July 29, 1988. In his decision, the Judge first concluded that the method used by BIA to determine the boundaries of MNI's locality had been erroneous as a matter of law because it was not in accord with Tanalian, Inc., 75 IBLA 316 (1983) (Decision at 11). Examining the evidence in light of the Tanalian decision, he found that the Native group locality identified by BIA should be expanded to include additional land to the east. He then considered the evidence as to the residency of various persons on April 1, 1970, the controlling date for questions of fact under Secretarial Order No. 3083 (47 FR 30658 (July 14, 1982); 601 DM 3.4).

Of the seven members of MNI, only five claimed residence at Lake Minchumina as of the critical date, since Jane Thompson did not move there until her marriage to Robert Thompson in August 1970, and Sharon Thompson was not born until 1971. Judge Sweitzer found that Carol Lee Gho was not a resident as of April 1, 1970, as she was, at that time, teaching school in California. Judge Sweitzer also found that Valerie Jean Nelson was not an actual resident as of the critical date, concluding that, since she was then

19 years old, she was an adult on April 1, 1970, and could not qualify under the exception provided by 43 CFR 2653.6(a)(4) for "children who are members of the group and who are temporarily elsewhere for purposes of education." Accordingly, Judge Sweitzer found that three MNI members (Robert Thompson, Jonathon Blackburn, and Mary Flood) and three other persons (Val Blackburn, Thomas Flood, and Kenneth Granroth) resided within the expanded locality. Because MNI group members did not "comprise a majority of the residents of the locality" as required by the statutory definition of a Native group (43 U.S.C. § 1602(d) (1988)), the Judge held that BIA had erred in issuing a certificate of eligibility.

On appeal, MNI raises three arguments designed to demonstrate error in Judge Sweitzer's determination that MNI group members did not constitute a majority of the residents of its locality. First, MNI argues that, contrary to Judge Sweitzer's finding, Valerie Nelson was a resident on April 1, 1970 (Statement of Reasons (SOR) at 2-5). Second, MNI contends that the Judge erred in extending the eastern boundary of the locality, resulting in the inclusion of the person whose home was within the added area as a resident (Granroth) (SOR at 5-6). Third, MNI argues, as it did before the Judge, that two non-Native residents of the locality (Val Blackburn and Tom Flood) should be counted as group members because they were part of the members' families and socially part of the group (SOR at 6-8).

BIA is aligned with MNI in seeking to reverse Judge Sweitzer's decision to the extent it holds that Valerie Nelson does not qualify as a resident. BIA agrees, however, with that part of the decision which holds that non-Natives cannot be counted as group members (BIA Answer at 5-10). BIA maintains that the group locality determination it made is correct under the regulations. However, on appeal, BIA does not challenge the Judge's decision to expand the locality because a reversal of his finding as to Nelson's residency would make MNI group members a majority of the residents of the locality identified by Judge Sweitzer. To the extent that his determination of the locality is challenged by appellees on the ground that other areas were improperly excluded, BIA argues that the Judge's decision is supported by the evidence and relies on the arguments made in its posthearing brief. *Id.* at 11.

Counsel representing MHA and the remaining individuals who initially filed appeals ^{1/} and counsel for the State of Alaska have filed a joint answer. They argue that the issue of Nelson's residency was properly decided, and support BIA's position that non-Natives cannot be counted as group members (MHA/Alaska Answer at 23-27, 31). In addition, they argue,

^{1/} The remaining individual appellants are: Kelly A. McMullen, Catherine S. Blair, Gwenn Davies-Guy, Gary Guy, Lyman and Geraldine Benshoof, Dale J. Walther, David A. Koester, Karyn Marie Ellingson, Judilee Jantz, Hans C.S. Nielsen, Lila May King and Lena Phipps, Kenneth H. Murray, Mr. and Mrs. Jeffrey Coe, Paul E. and Johnnie H. Stutzmann, and Walter B. and Patricia I. Parker.

as they did before the Judge, that Tanalian requires that MNI's locality include the entire community of people who lived along Lake Minchumina's shoreline so that all members of the community should be counted as residents. Id. at 4-14. MHA and the State maintain that, due to factual misunderstandings of the record, the Judge misapplied Tanalian and thereby erred in determining MNI's locality. Further, MHA and the State argue that BIA improperly excluded seasonal residents of the locality. Id. at 28-30. Finally, they argue that MNI members could not qualify as an eligible Native group because the group did not constitute a separate community, distinguishable from nearby communities, as required by 43 CFR 2653.6(a)(5). Id. at 14-23.

In response to MHA's and the State's renewed arguments, MNI and BIA have filed replies adopting the arguments of their posthearing briefs.

I

Before addressing the parties' arguments, it will be helpful to describe the geography and history of Lake Minchumina and the location of various residences in 1970. The lands directly involved can then be identified before moving on to discuss the legal issues.

Lake Minchumina is a large, irregularly shaped lake located northwest of Mt. McKinley near the geographic center of Alaska (Tr. 29; Jt. Exh. 4). Its most defined feature is its northern point formed by 3-4 miles of shoreline on each side. On the western side of the point the shoreline extends south into the lake and then turns northwest for approximately one-half mile to form a peninsula which divides the lake's northern and western portions. The shoreline continues west for about a mile and a half before reaching the western shore, giving the lake a distinct northern shore on its western side. Most of the remainder of the shoreline is irregular, apparently formed by the depositional patterns of a number of streams and rivers entering the lake from the south. The chief exception is Yutokh Hill (also known as Holek's Hill) which rises some 400 feet above the level of the lake and is a large peninsula of over 1-square mile extending into the lake on the southeastern shore. Southwest of Yutokh Hill is another smaller peninsula on the southern shore.

The lake is remote. For many years it could be reached only by river and overland trails. Cities along the Nenana, Tanana, and Yukon Rivers are 90 to 110 miles away (MHA/Alaska Answer, App. A). Nevertheless, the area has been inhabited since prehistoric times. At the turn of the century, Athabascan Indians resided along the lake as they had for many years (Jt. Exh. 9 at 92-94, Jt. Exh. 10 at 7-8, Jt. Exh. 11 at 8-10, 57-58). Other Natives lived along or near the rivers and trails used for travel and trade. Between 1900 and 1930 the population of the area changed. Non-Native trappers and prospectors began to move through the area, some settling at the lake and nearby areas (Tr. 46-49; Jt. Exh. 10 at 9-10, Jt. Exh. 11 at 19-23). During the same period, epidemics, which were sweeping much of Alaska, decimated the Native population around the lake, and, by

the early 1930's, the Athabaskan population had either died or moved away. (Tr. 48-50; Jt. Exh. 10 at 9, Jt. Exh. 11 at 17-18, 58, 64; cf. United States v. Jones, 106 IBLA 230, 243, 95 I.D. 314, 321 (1988)).

The airplane made Lake Minchumina more accessible. During 1941 and 1942, a communications site and two runways were constructed by the Civil Aeronautics Administration (later the Federal Aviation Agency and the Federal Aviation Administration (FAA)) on the peninsula dividing the lake's northern and western portions (Jt. Exh. 11 at 24-27). The 1942 withdrawal of the area (hereinafter, the "FAA site") encompassed 735 acres (U.S. Survey No. 2655), including the peninsula and land to the north (BIA Posthearing Brief, Exh. 3). A number of buildings were constructed near the shore on the western side of the peninsula, close to the boundary of the withdrawal and the point where the shoreline turns west to form the distinct northern shore. They included six quarters buildings, a duplex, and a house (Tr. 111; Jt. Exh. 2). Part of the basement of the duplex was subsequently made into a recreation hall and housed a library (Tr. 118-19). Later, 60.44 acres on the eastern side of the peninsula were removed from the withdrawal (U.S. Survey No. 4002) and conveyed to the State (Tr. 296; BIA Posthearing Brief, Exh. 5).

The airfield brought a new generation of trappers to the lake. They, along with some FAA employees, constructed houses along the shoreline to the west of the FAA site and at other places around the lake. Immediately to the west of the FAA site are the 4.25 acres of U.S. Survey No. 2657 patented to Kenneth Granroth in 1949 (Tr. 298). ^{2/} Originally a trapper, he became the postmaster at Lake Minchumina and, in 1970, operated the post office from his home (Tr. 102, 134, 188-89, 219-20). In 1954, U.S. Survey No. 3315 identified 12 additional lots along the shore, beginning with lot 1 adjacent to Granroth's land. Between 1956 and 1964 all but lots 1, 4, 7, and 12 were patented (Tr. 298). Although houses were constructed on all of the patented lots, by 1970 most were occupied only during portions of the year. However, Val Blackburn, a trapper and guide who had moved to Lake Minchumina in 1946, continued to live in the home he had constructed in the early 1960's on lot 6 (Tr. 89-91, 435). Previously, he had lived with his wife Hazel, an Inupiaq Eskimo, and their children in a lodge he had built on lot 3, to which he received patent in 1956 (Tr. 75-76, 298, 435). His son, Robert Thompson, who had been in the military between March 1966 and March 1969, had moved back to the lake in August or September of 1969 and lived in either the lodge or one of the cabins on lot 3 (Tr. 437-38, 451-53).

Along the shoreline north of the FAA site are two surveyed areas. The first, U.S. Survey No. 3786, consists of five lots, one of which was patented in 1962. There is no clear indication in the record as to who owned it in 1970 or whether anyone lived on it or the other lots. The second area, U.S. Survey No. 4341, consists of 70.49 acres patented to

^{2/} By telephone, the Board requested a copy of the historical index for T. 12 S., R. 24 W., Fairbanks Meridian.

Weldon Holmes in 1972 (Tr. 295). He had moved to Lake Minchumina in 1952 as an FAA employee, and later with his wife, Frances, set up a power plant to supply electricity to the FAA (Tr. 195-96). The service lines extended to a number of the residences, including Granroth's and the Blackburn lodge (Tr. 101, 190, 262). The Holmeses also operated a grocery store from their home and had a telephone available for use by residents of the area (Tr. 152, 196-97). In 1970, they continued to live at their home and operate their businesses.

Across the lake on the smaller peninsula on the southern shore are three patented parcels. One was patented in 1962 to Leonard Menke, a trapper who had moved to Lake Minchumina in 1953 with his wife Hazel, an Athabaskan Indian born in Anvik (Tr. 246-47, 297). In 1963, they moved to the northern shore, constructing a cabin near the eastern boundary of lot 2 which had been patented to Walter B. Parker in 1960, the postmaster prior to Granroth (Tr. 193, 248, 297-98, 446; Jt. Exh. 1, Jt. Exh. 8, Granroth letter). Lot 1 of U.S. Survey No. 3315 and land to the north of lots 1 through 4 of U.S. Survey No. 3315 as well as land north of U.S. Survey No. 2657 are all included in Hazel Menke's Native allotment application (F-1268) (Jt. Exh. 8). In 1970 the Menkes did not live year-round at the lake, having moved to Talkeetna the previous year (Tr. 179, 249). Although they returned most years to trap, there is no evidence they were residents at the lake on April 1, 1970 (Tr. 249-50, 439-40).

In 1958, Tom and Mary Flood moved to Lake Minchumina to trap and built a house on the lake's eastern side to the north of where Muddy River flows from Lake Minchumina (Tr. 478-79). In 1969, they moved across the lake to a house they constructed at the lake's western tip where the distinct northern shoreline turns south (Tr. 320-21, 481-82; Jt. Exh. 2). In 1970, Mary Flood became assistant postmaster at the lake and, in 1972, succeeded Granroth as postmaster (Tr. 489-90). Mary Flood was originally from Holy Cross and is of Eskimo and Indian descent (Tr. 478). Eighty acres around her house are parcel A of her Native allotment application (F-1282) (State Exh. 9). The parcel includes the lake's small western point and a bit of the western shoreline, but primarily extends to the east along the northern shoreline, either abutting or including lot 12 of U.S. Survey No. 3315. ^{3/}

As air travel became the dominant mode of transporting both people and supplies, the roadhouses and settlements along the rivers and overland trails disappeared (Jt. Exh. 9 at 110, Jt. Exh. 11 at 23-24). The closest

^{3/} Although Joint Exhibit 2 shows the eastern boundary of parcel A of Flood's allotment application as excluding lot 12 of U.S. Survey No. 3315, the application identifies corner number 1 of the parcel as "cor. of Lot # 11 (on shoreline) of Sur. 3315" (State Exh. 9). The map accompanying the application, however, shows the applied for land as west of lot 12. Copies of the Master Title Plat show the allotment application to include most of lot 12. Because the difference affects the parcel's entire eastern boundary, it affects the entire configuration of the 80 acre parcel.

towns to the lake are now almost 50 miles distant (MHA/Alaska Answer, App. A). During the 1960's FAA operations began to be automated and the number of employees at the site was reduced. By 1967, when the station manager, Dick Collins, retired, only two employees remained performing duties at the site (Tr. 173, 176). By 1970, it appears that only Frank White lived at the station, and, by the time of his retirement on October 22, 1971, operations had become completely automated (Tr. 158, 173-74; MHA/Alaska Answer, App. C). By then, BLM had begun to use the site to house firefighting crews, but this use apparently was seasonal and the land remained under FAA jurisdiction (Tr. 296, 524).

Both White and Collins remained at Lake Minchumina. White moved to a cabin he had purchased in 1969 which was located on U.S. Survey No. 2657 (Tr. 135-37, 220-23; MHA Alaska Answer, App. C). Collins, along with his wife Florence and their three children, moved to U.S. Survey No. 2656 on the eastern side of Yutokh Hill where they built a house (Tr. 112, 130, 208; Jt. Exh. 3). The land had been patented to Joe Holek in 1949 and was purchased by the Collinses sometime before Dick's retirement (Tr. 297). In 1970, the family continued to live at their home (Tr. 130; Jt. Exh. 11 at 79). Living near them in a cabin on the eastern side of Yutokh Hill was Hjalmar (Slim) Carlson, who had lived and trapped in the Lake Minchumina area for many years (Tr. 85, 114-15, 138-39).

In filing its Native group application, MNI did not specify a locality for the group (Tr. 344-46). Instead, it provided, as the regulations then required, a list of lands "in the area surrounding the locality in which the Native members of a group reside and are enrolled" which the group wished to have conveyed. 38 FR 14218, 14226 (May 30, 1973). Arranged from east to west, the primary lands desired for conveyance were:

Protracted T. 11 S., R. 24 W., Sections 22, 26, 27, 33, 34, 36 and the SW 1/4 of the SW 1/4 of Section 25: All except Lake Minchumina, containing 1,705 acres more or less.

Protracted T. 12 S., R. 24 W., Section 4: All except Lake Minchumina, 120 acres more or less.

U.S. Survey 3786, Lots 1, 2, 3, 5: All (Located within protracted T. 12 S., R. 24 W., F.M., Sections 4, 5, 8, 9) containing 26.26 acres more or less.

U.S. Survey 2655: All except valid existing rights (Located within protracted T. 12 S., R. 24 W., F.M., Sections 5, 8, 17) containing 690.26 acres more or less.

U.S. Survey 3315: Lots 4 and 12: All (Located within protracted T. 12 S., R. 24 W., F.M., containing 5.36 acres more or less.

(Jt. Exh. 5 at 19). The area described encompasses almost all of the shoreline on both sides of the northern point of the lake, the unpatented

lots of U.S. Survey No. 3786 to the north of the FAA site, the FAA site itself, and lots 4 and 12 on the northern shore to the west of the FAA site. The latter two lots, along with lots 1 and 7, remain unpatented (Tr. 298).

The BIA Report of Investigation supporting issuance of the certificate of eligibility to MNI identified "the group locality (improved area) boundaries" as being within the:

S1/2 SW1/4, SW1/4 SE1/4 Section 7, N1/2 NW1/4 NW1/4 Section 18, T. 12 S., R. 24 W., E1/2 NE1/4 SW1/4, NE1/4 SE1/4 SW1/4, SW1/4 NE1/4 SE1/4, NW1/4 SE1/4, N1/2 SW1/4 SE1/4, SE1/4 SE1/4 Section 12, NE1/4 NE1/4 NE1/4 Section 13, T. 12 S., R. 25 W., Fairbanks Meridian (FM), Alaska.

(Jt. Exh. 5 at 10). A hand-drawn map which was part of the report shows more precisely the area BIA determined to be MNI's locality (Jt. Exh. 5 at 12; see also Jt. Exh. 2). It consists of lots 3 through 12 of U.S. Survey No. 3315 and parcel A of Mary Flood's Native allotment application. Thus, BIA determined that MNI's locality lay between and included the Floods' home on the western tip of the lake and lot 3 where Robert Thompson resided.

In his decision under review, Judge Sweitzer, after finding BIA's determination of MNI's locality erroneous, determined that it "encompasses Mary Flood's parcel A and the lands eastward from there along the shore of Lake Minchumina (USS 3315, USS 2657 and the Menke Native allotment claim F-1268) up to the west boundary of the FAA site (see Jt. Exh. 2)" (Decision at 13). A comparison of this description with BIA's shows that the Judge added lots 1 and 2 of U.S. Survey No. 3315, Kenneth Granroth's U.S. Survey No. 2657, and parcel A of Hazel Menke's Native allotment application to the lands designated as MNI's locality.

II

As noted in Judge Sweitzer's decision, Congress enacted ANCSA "to provide a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a) (1988). To achieve this purpose, the Act extinguished aboriginal title to land in Alaska and all claims based on aboriginal right, title, use, or occupancy and, in exchange, authorized the transfer of 40 million acres of land to Native village and regional corporations along with the payment of almost a billion dollars. See Inupiat Community of the Arctic Slope v. United States, 680 F.2d 122, 125-26 (Ct. Cl. 1982); United States v. Atlantic Richfield Co., 612 F.2d 1132, 1137 (9th Cir. 1980); United States v. Jones, *supra* at 267-78, 95 I.D. at 334-40. Among the villages listed in ANCSA as possibly eligible for the receipt of land was "Minchumina Lake, Upper Kuskokwim." 43 U.S.C. § 1610(b)(1) (1988). The Act provided, however, that a village would not be eligible if it consisted of less than 25 Native residents "on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary" or if the village was "of a modern and

urban character, and the majority of the residents are non-Native." *Id.* § 1610(b)(2). On December 28, 1973, BIA certified Lake Minchumina ineligible as a Native village.

MNI's right to select land and the issues on appeal arise under two other provisions of ANCSA. In subsection 14(h), Congress provided that an additional 2 million acres of land would be conveyed for a variety of purposes. Its second provision allows the Secretary to "withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's locality." 43 U.S.C. § 1613(h)(2) (emphasis supplied). ^{4/} Additionally, ANCSA defined a "Native group" as "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality." 43 U.S.C. § 1602(d) (emphasis supplied).

Although MNI's and BIA's arguments on appeal primarily concern Judge Sweitzer's rulings on residency rather than his determination of MNI's locality, both issues necessarily conjoin in deciding whether he correctly found that MNI's members were not a majority of the residents of their locality. Thus, arguments regarding residency are of consequence only if they concern someone whose home at Lake Minchumina was within MNI's locality, so that the person's residency will affect the count of residents. Conversely, arguments as to whether a particular area should be included in MNI's locality are of consequence only if the area contained someone's home and including it will affect the count of residents.

III

As quoted above, both ANCSA subsection 14(h), which authorizes conveyances to Native groups, and the statutory definition of a "Native group" use the term "locality." The difficulty with the term, of course, is that it does not have a narrow and precise meaning. *See Connally v. General Construction Co.*, 269 U.S. 385, 394-95 (1926). As recourse to any standard dictionary will indicate, while the word is used to refer to a particular place, site, or neighborhood, there is nothing about its meaning which defines or limits the size of the area to which it may refer. The meaning is understood by others not simply by knowing the meaning of the word but by understanding the context in which it has been used and often with reference to the specific area to which it is being applied.

Congress, however, was not specifically referring to Lake Minchumina, or any other place, when it allowed the conveyance of land "surrounding the Native group's locality." Rather, it was enacting general legislation and

^{4/} With the 1973 regulations, the Department limited conveyances to 320 acres per member of a Native group and 7,680 acres per group. 38 FR 14218, 14226 (May 30, 1973); *see* 43 CFR 2653.2(b); 2653.6(b)(1).

relying upon the general meaning of the term. The phrase does suggest a contrast between the "locality" where a Native group resides and the "surrounding" land, but does not indicate where the boundary might be.

ANCSA's legislative history also does not offer any direct insight into what Congress may have meant, 5/ but does provide a context for understanding "the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Seldovia Native Association, Inc. v. Lujan, 904 F.2d 1335, 1341 (9th Cir. 1990). The conference committee report notes that its bill provided that conveyances would be made "to each of the native groups that is too small to qualify as a Native village." H.R. Conf. Rep. No. 746, 92nd Cong., 1st Sess. 2, reprinted in 1971 U.S. Code Cong. & Admin. News 2192, 2248. The statute similarly refers to Native groups which do not "qualify as a Native village." Thus, subsection 14(h)(2) appears to have originated with a recognition that not all Natives lived in settlements of at least 25, the number required for eligibility as a Native village, and was intended to allow such smaller groups to receive land as part of the settlement of aboriginal claims. In this regard, Native group selections may be considered to be similar to Native village selections, though on a smaller scale. See also 43 U.S.C. § 1613(h)(4) (1988).

[1] In order to assure that lands available as of the date of ANCSA's passage would continue to be available for selection by Native villages, Congress withdrew the public lands in each township enclosing all or part of a Native village and the two tiers of townships surrounding the "core" township. Id. § 1610(a)(1). Congress did not withdraw lands for Native groups but instead authorized the Secretary to do so and to convey to a Native group title to land "surrounding the Native group's locality." In this context, a "locality," like a village, is the area where houses and other structures have been constructed, amenities are present, and daily life takes place. Similar to the physical location of a village serving to identify the "core" and surrounding townships, a Native group "locality" identifies the area where land may be withdrawn and conveyed. Implicit in both village and group conveyances seems to be a recognition that the land and resources where people reside are important to their economic survival, whether used for commercial purposes, development, or subsistence.

5/ Other than conveyances to village and regional corporations, H.R. 10367 provided only for conveyances to individuals occupying lands as their primary place of residence or business or using land for subsistence campsites or reindeer husbandry. The predecessor to ANCSA subsection 14(h)(2) appears to have been subsection 13(h) of S. 35 which allowed the Secretary to withdraw up to 23,040 acres for, inter alia, "any settlement of a Native group established as of April 15, 1969, and not otherwise eligible for lands under this Act" and to convey to a group a maximum of 5,760 acres. That bill, however, did not use the term "locality." The phrase "surrounding the Native group's locality" was added by the conference committee, but its report does not mention the phrase.

Similar to the disqualification of Native villages in which "the majority of the residents are non-Native," id. § 1610(b)(2), Congress required that members of a Native group "comprise a majority of the residents of the locality." Id. § 1602(d). Like subsection 14(h)(2), the provision indicates that Congress recognized that people depend upon the land and resources of the area where they live and that removing land from the public domain by conveying it to a Native group would affect others who were not members of the group but who resided in the area. Its apparent purpose is to preclude a conveyance in those situations where transferring title would place ownership in a small group, restricting or eliminating its use by the majority of the residents of the area. See Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 458 (9th Cir. 1990). Thus, "locality" must be understood to refer to not only the specific land on which members of a Native group live but also the land in the area on which others reside.

Because the term "locality" is not precise, this Board, in referring a dispute in Tanalian for a hearing, identified some factual matters to address in determining a "locality." In that case, the Native group consisted of six members of the Alsworth family who resided in two households on 153 acres of patented land known as "the Alsworth homestead." Tanalian, Inc., supra at 317. If the homestead was the group's locality, as they contended, the group's members would necessarily have been a majority of the residents. The consequence, however, would have been to convey title to lands without regard to the effect on others living in the area, contrary to the reason for requiring that group members "comprise a majority of the residents of the locality." 43 U.S.C. § 1602(d) (1988). Accordingly, the Board held that the locality could not be limited to the homestead and required that:

The "locality" must encompass the greater area in which other residents live in relative proximity, as compared with the population density of lands beyond the area so designated. Evidence of the extent to which residents of the area share common interests or concerns in the local amenities, facilities, and services may be received as indicative of the geographic area of the locality. "Locality" has been held to be synonymous with "community." Conley v. Valley Motor Transport Co., 139 F.2d 692, 693 (6th Cir. 1943). It means the place, near the place, vicinity, or neighborhood. Connally v. General Construction Co., 269 U.S. 385 (1926).

Id. at 320-21. ^{6/}

^{6/} The proper method for determining a Native group locality was also at issue in Chugach Natives, Inc., 80 IBLA 89 (1984). The case was referred for a hearing. On appeal from the decision of the Administrative Law Judge, however, arguments as to the proper delineation of the Native group's locality were not addressed because a ruling would not affect the outcome. Chugach Alaska Corp., 94 IBLA 24, 29 (1986). Consequently, the issue was not addressed either by the district court which reversed the Board's

Given the factors identified in Tanalian and an understanding of the statute, the procedure for determining a Native group's locality would seem fairly straightforward. The facts about the location of residences, amenities, facilities, and services can be ascertained. The placement of residences would show the area in which residents "live in relative proximity, as compared with the population density of lands beyond," while the location of amenities, facilities, and services would serve to confirm, narrow, or expand the locality indicated by proximity of residence. A controversy whether to include a particular residence could be resolved by examining the extent to which the resident used or relied upon the amenities, facilities, and services used by other residents. Having identified the group's locality, a count of the residents would determine whether group members were a majority.

IV

Judge Sweitzer found BIA's method for determining the boundaries of MNI's locality to have been erroneous because it was not in accord with Tanalian. This conclusion was based on testimony by BIA's claims examiner and its field investigator. On direct examination the claims examiner testified:

Q * * * Were you able to make findings and conclusions concerning the boundaries of the Native group -- Minchumina Native group's locality?

A Yes I was.

Q What were your findings and conclusions?

A My findings and conclusions were that the -- the Native group had claimed -- do you want me to show it on the chart?

Q Yes, please.

A It started from..... [sic]

Q Okay. You're pointing at Joint Exhibit 2.

A Which is U.S. Survey 3315. Starting with Lot 3 through 12 and the -- the Flood Native application.

Q Okay. That's the area outlined in green on..... [sic]

fn. 6 (continued)
decision, Chugach Alaska Corp. v. Hodel, No. A87-066 Civil (D. Alaska June 30, 1989), or by the Ninth Circuit when reversing, in part, the district court, Chugach Alaska Corp. v. Lujan, 915 F2d. 454, 456 n.3 (9th Cir. 1990).

A Right.

Q [sic] Joint Exhibit 2?

A That's correct.

Q Okay. What were your reasons for finding that the boundaries for the locality are those that are depicted on -- in green on Joint Exhibit 2?

A This was the area that was -- was determined to have been claimed by the Native group as their locality.

(Tr. 307). The matter came up again on cross-examination:

Q (By Ms. Neville) Mr. Casey, don't the group eligibility regulations provide that the Bureau of Indian Affairs shall determine and identify the exterior boundaries of a Native group's locality?

A Yes, ma'am.

Q My understanding from your testimony is that you would find a Native group eligible as long as they could define a geographic area that encompassed their dwelling and which did not have a majority of non-Native group residents; is that correct?

A The BIA uses the information that we acquired in the field to determine these locations.

Q I understand.

A Maybe I'm not understanding your question.

Q Okay. My question is: The regulations require that a group have an identifiable physical location; that they be the majority of the residents of the locality; and that they have the character of a separate community which is distinguishable from nearby communities.

A That's correct.

Q And it's my understanding of your testimony that you would find all three of these requirements met as long as the group could identify a geographic area that encompassed their dwellings and within which the group members were the majority of the residents; is that correct?

A That's correct.

Q Okay. And that would meet all three of those requirements; is that correct?

A (Inaudible speech.)

COURT REPORTER: I didn't hear that.

THE COURT: What was your response, sir?

A Yes.

(Tr. 347-48). The BIA field investigator similarly testified:

Q Okay. Well, tell us, then, more specifically how you determined the boundaries of the group locality.

A The aliquot parts description?

Q Yes.

A Yes. We -- well, we took note of the existing structures which were owned and constructed by the Native group members and the -- we -- we -- let's see, we took note of the -- of the primary places of residence and we determined the aliquot parts description that would have encompassed the Native group primary places of residence and related structures.

Q Did you consult with any group member on the description of the group locality?

A Not the aliquot parts description. But we were able to determine the aliquot parts description from the information supplied to us by the -- by Jonathan Blackburn and the other -- the other Native group members, pertaining to the location of the structures and the different lots. [7/]

(Tr. 365). Again, the matter was addressed on cross-examination:

Q My understanding from your testimony is that the manner in which you determined the geographic extent of the group's locality was basically by describing the smallest tract of land that would include both Mary Flood's house and the dwellings on the Blackburn property. Is that a fair characterization?

7/ Jonathan Blackburn testified that one of the BLM field examiners had asked him what he considered to be MNI's locality and that, based on use of the area along the northern shore as a child, he told BIA: "The area from down to Mary Flood's up to about the FAA property" (Tr. 631-32). See also Tr. 656-57.

A Well, not quite. I would say it was -- it described an area of land that included the Native group members and also followed existing U.S. survey lines. That was a very convenient way of demarcating the -- the external boundaries.

Q So, you took the description of the U.S. survey on which -- lot on which the Blackburn lodge is located and Mary Flood's allotment at the opposite end and used those boundaries to determine the geographical extent of the locality?

A Yes.

(Tr. 400-401).

Based on this testimony, Judge Sweitzer found that BIA had accepted the area identified by MNI as its locality and had described it using the smallest possible legal tracts which encompassed the members' houses and other improvements and no more (see also Tr. 322, 342-43, 346). Accordingly, he concluded that BIA had not included in MNI's locality "the larger area in which other (non-group) residents of the area live in relative proximity to the Native group, as compared with the population density of lands outside the designated 'locality'" as required by Tanalian (Decision at 11).

On appeal, MNI and BIA contend that MHA and the State failed to show by a preponderance of the evidence that the agency's decision was in error and have adopted their prior arguments that BIA correctly determined MNI's locality (SOR at 6; BIA Answer at 5). In its posthearing brief, BIA argued that, whatever the requirements of Tanalian, the agency had properly complied with the regulations in identifying MNI's locality (BIA Posthearing Brief at 8-9). Similarly, MNI argued that the agency had been correct because the regulations identify a Native group's locality with the area occupied by its members' dwelling houses (MNI Posthearing Brief at 3).

In 1973, acting under general authority delegated by ANCSA (43 U.S.C. § 1624 (1988)), the Department promulgated regulations governing, among other matters, Native group selections. 38 FR 14218 (May 30, 1973). More detailed regulations were issued in 1976. 41 FR 14734 (Apr. 7, 1976). Two subsections of 43 CFR 2653.6(a) are relevant to the issue of MNI's locality:

(4) The Bureau of Indian Affairs shall investigate and determine whether each member of a Native group formed pursuant to section 14(h)(2) of the Act is enrolled pursuant to section 5 of the Act. The Bureau of Indian Affairs shall determine whether the members of the Native group actually reside in and are enrolled to the locality specified in its application. The Bureau of Indian Affairs shall specify the number and names of Natives who actually reside in and are enrolled to the locality, including children who are members of the group and who are temporarily elsewhere for purposes of education, and it shall further determine whether the members

of the Native group constitute the majority of the residents of the locality where the group resides. The Bureau of Indian Affairs shall determine and identify the exterior boundaries of the Native group's locality and the location of all those permanent structures of the Native group used as dwelling houses.

(5) The Native group must have an identifiable physical location. The members of the group must use the group locality as a place where they actually live in permanent structures used as dwelling houses. The group must have the character of a separate community, distinguishable from nearby communities, and must be composed of more than a single family or household. Members of a group must have enrolled to the group's locality pursuant to section 5 of the Act, must actually have resided there as of the 1970 census enumeration date, and must have lived there as their principal place of residence since that date.

MNI's argument concerns 43 CFR 2653.6(a)(5). It contends that the requirements that a Native group have "an identifiable physical location" and that its members "actually live in permanent structures used as dwelling houses" show that "the focus of the regulation's definition is the actual dwelling houses of the group members, not the larger area which may be used by the group for other purposes" (MNI Posthearing Brief at 3). MNI concludes that "the locality of the group must be defined in terms of the actual dwelling houses of the group members." Id. at 4.

While MNI's initial point is well taken, the conclusion which follows is not that the regulations limit a Native group's locality to the land on which its members' residences have been constructed. The provisions on which MNI relies require group members to reside in permanent structures used as dwelling houses. One consequence is to disqualify a group whose members use an area on a temporary basis, as indicated by the use of temporary shelters. In contrast, permanent structures provide physical evidence which ties group members to an area and provides a basis for identifying the group's locality. The provisions do not equate a group's locality with the land on which the houses have been constructed, but require that group members maintain residences within the locality they claim.

Other provisions of the regulations similarly necessitate a broader understanding of a Native group's locality than advocated by MNI. The 1973 requirement that an application be "for land in the area surrounding the locality in which the Native members of a group reside and are enrolled" (38 FR 14218, 14226 (May 30, 1973)), was changed in 1976 to provide that an application must identify "the section, township, and range in which the Native group is located" and list "periods of use of the locality by members." 43 CFR 2653.6(a)(2). Corresponding to the change, provisions were added requiring BIA to investigate to determine whether a group's

members "actually reside in and are enrolled to the locality specified in its application" and whether they "constitute the majority of the residents of the locality where the group resides." 43 CFR 2653.6(a)(4). These provisions identify the lands listed in an application as the area which, as an initial matter, is to be reviewed by BIA as the group's "locality." They do not identify the locality as the land on which group members' residences have been constructed. ^{8/} To the extent the provisions of 43 CFR 2653.6(a) indicate anything about a Native group's "locality," it is that BIA is required to investigate all of the land listed in an application. ^{9/}

[2] We agree with Judge Sweitzer that the testimony at the hearing showed that BIA identified MNI's locality based on information from group members, did not consider other areas, and defined the locality using the smallest legally describable area which included the member's residences. Indeed, the BIA report explicitly identifies the land described as "the group locality (improved area) boundaries." The error in this procedure was not that existing survey lines or aliquot parts of the public land survey were used to identify MNI's locality. Rather, the error was that the smallest such area which included the member's residences and other improvements was identified as the locality. As in Tanalian, the consequence was to exclude neighboring and adjacent areas where others lived, defeating the reason for requiring that group members "comprise a majority of the residents of the locality." 43 U.S.C. § 1602(d) (1988). Accordingly, we

^{8/} Although 43 CFR 2653.6(a)(2) is not explicit as to whether a Native group is to list in its application only the section or sections in which it is "located" or also the other lands which it wishes to have conveyed, provisions of subsection (b) governing "selections" indicate that the latter is the case. Upon receipt of an application, BLM is to "segregate the land encompassed within the group locality" from the lands withdrawn for selection. 43 CFR 2653.6(b)(2); see 43 CFR 2653.3. The agency is required to "visit the locality" and recommend modifications of the segregation "to encompass the residences of as many members as possible while allowing for the inclusion of the land most intensively used by members of the Native group." 43 CFR 2653.6(b)(3). Selections are limited to "lands segregated for that purpose." 43 CFR 2653.6(b)(4). The consequence of reading these provisions to limit "locality" to either the immediate area containing group members' residences or the section in which they are located would seem to be that only that land would be segregated and could be conveyed. See also 43 CFR 2653.2(d).

^{9/} The 1976 regulations, of course, had not been promulgated when MNI filed its application, so the lands listed in its application could not have been the basis for BIA's investigation. MNI seems to have read the 1973 provision quite literally to mean lands "in the area surrounding the locality." (Emphasis supplied.) The only land near its members' residences which was included in the list of the primary lands desired for conveyance were lots 4 and 12 of U.S. Survey No. 3315. Like Tanalian, however, this case presents only the issue of MNI's eligibility as a Native group and not the propriety of its land selections or the availability of the lands for conveyance.

affirm Judge Sweitzer's conclusion that BIA's method for determining the boundaries of MNI's locality was erroneous as a matter of law. Because BIA's procedure was flawed, we also agree that Judge Sweitzer was free to determine MNI's locality based on his review of the record and understanding of Tanalian.

V

After finding BIA's method erroneous, Judge Sweitzer reviewed areas around Lake Minchumina to consider whether they might be part of MNI's locality. He first excluded the FAA site because

As a Federal installation, the FAA site has its own rules and regulations, which everyone who entered the site was obliged to follow. These rules and regulations did not extend to those living outside the compound (Tr. 158, 314). The recreation room at the FAA site (the place where many holiday gatherings for the community at large were held) was not open to the public and could only be used when FAA personnel were present (Tr. 126, 127). Attendance by non-FAA employees was apparently by invitation, but it often included anyone who may have been visiting the area.

(Decision at 12). He excluded several other areas because they "lack sufficient proximity to each other and to the area surrounding the claimed locality to be considered part of the 'locality' for purposes of determining MNI's Native group eligibility." Id. These included the patented lands on the peninsula on the southern shore, parcel B of Mary Flood's Native allotment application at the tip of the northern point of the lake, parcel C of her application on the lake's eastern shore, and the Collinses' and Slim Carlson's residences on Yutokh Hill. Finally, he excluded the Holmeses' residence, stating that, although the store they maintained was "a significant service to all residents of the Lake," it was "several miles distant from the claimed locality and separated from it by the FAA enclave." Id. at 13.

However, Judge Sweitzer found that lots 1 and 2 of U.S. Survey No. 3315, Kenneth Granroth's U.S. Survey No. 2657, and parcel A of Hazel Menke's Native allotment application were part of MNI's locality because they were "proximate to the claimed locality, and contain several permanent residents (the Menkes and Kenny Granroth) as well as the only community-wide service: the post office." Id. Accordingly, he concluded that the locality extended along the northern shoreline from Mary Flood's parcel A east to the west boundary of the FAA site. He found this area to be appropriate as MNI's locality because it "is a geographically compact contiguous area that is separate and distinguishable from the rest of the Lake Minchumina area and includes 'the greater area in which other residents live in relative proximity.'" Id.

As previously stated, none of the parties fully agrees with the Judge. MNI argues that he erred in not accepting that barricades to the west of the property line between lots 1 and 2 (MNI Exhs. 4, 5) were a physical and

social barrier defining the eastern boundary of MNI's locality, 10/ and consequently erred in including in the locality lot 1 of U.S. Survey No. 3315 and particularly Kenneth Granroth's U.S. Survey No. 2657 (SOR at 5-6). MHA and the State renew their general argument that, under Tanalian, MNI's locality should include the entire community of people who resided at the lake (MHA/State Answer at 4). In addition, they argue that the Judge erred in distinguishing the FAA site from adjacent areas and in finding that the residences of the Holmeses, the Collinses, and Slim Carlson were not sufficiently "proximate" to MNI's claimed locality. Id. at 5.

The parties' arguments and the Judge's rulings can best be addressed by examining them in relation to the matters set forth in Tanalian. MHA's and the State's general argument is based on the sentence which notes that "locality" has been held to be synonymous with "community." As used in the statute, "locality" refers to the area where houses and other structures have been constructed, amenities are to be found, and daily life takes place. "Community" may similarly be used to refer to a group of people who live in a limited geographic area. When used in this way, the term is synonymous with "locality" in that both are applied based on the fact people live near each other, or, as stated in Tanalian, their "relative proximity as compared with the population density of lands beyond the area so designated." Tanalian, Inc., supra at 320.

MHA and the State argue that the evidence showed that those living at Lake Minchumina did not regard the distances separating their residences to be significant, visited each other frequently, and functioned together as members of a community (MHA/State Answer at 7-11; Posthearing Brief at 17-24). However, in addition to designating those who live in an area, "community" may be used to refer to a group of people with a common origin, characteristic, or interest, who for that reason share various concerns. This use of the term is found in the requirement that a Native group "must have the character of a separate community, distinguishable from nearby

10/ The barricades which MNI references were constructed by Leonard Menke on the east 1-acre of lot 2, blocking access across the property on a trail running from the FAA site to Mary Flood's allotment. While these barricades might be evidence of personal animosities between Leonard Menke and some of his neighbors, especially Val Blackburn (see Tr. 178-79, 444), the fact of the matter is that Val Blackburn brought a suit in State court arguing that the barricades were obstructing a public highway and that by reason thereof "his lodge and place of business is blocked off from the post office, the airport, and the intervening land." See generally MNI Exh. 6. Both Kenneth Granroth and Bill Holmes were called to testify by Blackburn. He subsequently obtained a court order requiring the removal of the barricades. Thus, to the extent that the locality of the group is in question, Val Blackburn's actions could arguably be seen as supportive of the position of MHA and the State that the locality extended across the intervening land to the post office and airport.

communities." 43 CFR 2653.6(a)(5). The provision requires that the members of a Native group share interests or concerns, social or cultural, which distinguish them as a group from other residents of the area, not that they live segregated from others. The evidence relied on by MHA and the State concerns the question whether those living at the lake formed a single community or whether MNI's members constituted a separate community.

Of course, the two uses of "community" are not entirely unrelated. A "community" which is identified based upon a shared identity of its members is understood to exist within a larger society in some geographic area, and some concerns of its members may arise because they live within that society. Conversely, as noted in Tanalian, those living in an area are likely to have shared interests or concerns in local amenities, facilities, and services. Evidence was introduced to show that both MNI members and non-members used the airstrip, post office, and grocery store and received electrical service (MHA/Alaska Answer at 18-20). While these facts would not necessarily indicate that MNI lacked the character of a separate community under 43 CFR 2653.6(a)(5), they are relevant in determining the group's locality. These facilities and services, however, were all located at or near the FAA site and do not indicate that MNI's locality should include the entire area around the lake where people lived.

In regard to the FAA site, MHA and the State contend that the fact that an area is "withdrawn for a federal installation does not establish, and rarely means, that it is socially or economically separate from the surrounding community" (MHA/Alaska Answer at 11). To the contrary, they note that the FAA site was used as a public airport, was not physically separated by a fence or other barrier, and that access to the site was not restricted. Id. at 12. Moreover, they point out, its status as a Federal installation had diminished by 1970 because FAA operations had been largely shut down and only one person remained to perform maintenance. Id. at 13.

[3] A withdrawal withholds land from settlement, sale, location, or entry under some or all of the general land laws in order to maintain other public values, reserve the area for a particular public purpose or program, or transfer jurisdiction over the land from one department, bureau, or agency to another. 43 U.S.C. § 1702(j) (1988); 43 CFR 2300.0-5(h). The effect is to change the legal status of land, precluding the acquisition of private rights, but not to nullify prior rights or otherwise restrict its use. The legal status of land, however, is unrelated to the factual matter of determining a Native group's locality. The fact that lots in U.S. Survey No. 3315 were patented, including lot 3 where Robert Thompson resided, did not require that they be excluded from MNI's locality. See Tanalian, Inc., supra at 320. Similarly, while a withdrawal may make land unavailable for conveyance to a Native group, see Wisnak, Inc. v. Andrus, 471 F. Supp. 1004 (D. Alaska 1979), the availability of land does not determine whether it is part of the group's locality.

As a practical matter, of course, a withdrawal may prevent land from becoming part of a Native group's locality. Most obviously, a withdrawal

which precludes settlement will affect the relative proximity in which the residents of an area live. In this case, the FAA site was unavailable to those building homes at Lake Minchumina and they selected places to the west, the north, and elsewhere around the lake. Equally, placement of the land under FAA jurisdiction gave that agency authority to construct its facility, including housing for its employees. The employees and families who moved to Lake Minchumina affected the relative proximity of people in the area. To the extent there may have been economic and social differences between them and those who made their living primarily by trapping (see Tr. 203, 407-08, 441-43, 603), this properly concerns the question whether MNI members constituted a separate community under 43 CFR 2653.6(a)(5); it does not necessarily establish that those living there must be regarded as a distinguishable "community" in the sense in which that term is synonymous with "locality."

As noted in the decision, the FAA had rules and regulations governing the site. In several respects, however, restrictions seem to have been minimal. As MHA and the State point out, access to and across the site was not physically limited by a fence or other barrier. Hazel Menke testified that she and her husband placed fishnets at the end of the runway and that others also fished there (Tr. 265-66). Robert Thompson similarly testified that he fished there (Tr. 465). The land seems to have been commonly traversed to reach the grocery at the Holmeses' residence and by the Holmeses to reach the airstrip and post office. Indeed, the Geological Survey topographical maps used for exhibits show a trail or sled road to enter the FAA site from the north, run parallel to the main landing strip, and continue west along the northern shore (Jt. Exh. 2, MHA/Alaska Answer, App. B).

In other respects the site seems to have been affirmatively open. Most obviously, the airstrip was relied upon for transportation, supplies, and mail. Residents would gather at the runway to await an airplane's arrival and help unload it (Tr. 115, 167). Walter Parker, the postmaster prior to Granroth, operated a post office at the site (Tr. 102, 115, 193). In the 1960's, the only telephone at the lake was at the Collinses' home within the site but was available for everyone to use (Tr. 102, 128). The local garbage dump was located within the site (Tr. 102, 152-53, 231-32, 704). Even the recreation room, which also served as a library, seems to have been open to everyone's use, with the limitation that an FAA employee needed to be present because there was equipment in the basement (Tr. 126-27). While the parties and other events held there or on the spit at the end of the lower runway may have technically been by FAA invitation, the testimony was that they were not FAA sponsored, could be organized by anyone, and generally were held with an open invitation to everyone who happened to be at the lake (Tr. 86-87, 116-19, 153, 172-73, 203-04, 218-19). In general, the room seems to have functioned much like a combined community hall and public library.

As MHA and the State note, whatever separateness the site may have had in the early 1960's, by the relevant date of April 1, 1970, the situation had changed. Frank White, who continued to live at the site performing maintenance, cannot be regarded as having been in a separate community.

Significantly, automation of FAA's operations seems to have made little difference in use of the site by local residents, except perhaps that, after Kenneth Granroth retired as postmaster, the post office was moved to one of the buildings (Tr. 164-65, 228). We conclude that it was error to exclude the FAA site from MNI's locality for reason of its separateness. The fact the land was withdrawn did not require its exclusion and the record does not show that use of the site was restricted so as not to have been part of MNI's locality. Additionally, the airstrip was a facility of crucial importance to those living at the lake.

MHA and the State argue that Judge Sweitzer erred in excluding other areas around the Lake Minchumina shoreline from MNI's locality as not "sufficiently proximate" and that he misunderstood the evidence presented at the hearing, pointing to a sketch map contained in his decision (MHA/Alaska Answer at 5). We agree that the map is not accurate, but believe the reason is that it was drawn to show only the approximate position of the residences and areas identified. We see no reason to believe that the Judge reached his conclusions based on the sketch rather than the evidence of record. The question, in any event, is whether he correctly excluded these other identified areas.

[4] MHA and the State argue that the Judge was mistaken in stating that "the identify of any residents" on the peninsula on the southern shore "was not introduced into evidence" (Decision at 13). They note that the Menkes lived in this area prior to moving across the lake and that one of the lots was owned by Al Willis (MHA/State Answer at 7; Tr. 78-79, 247-48, 406). While these facts are true, they do not show error. There is no evidence that anyone lived on the peninsula on or about April 1, 1970. Absent such evidence, the peninsula cannot be part of the area in which residents lived in relative proximity. For the same reason it is clear that the Judge correctly excluded parcels B and C of Mary Flood's Native allotment application. Although there is some indication that she and her husband lived on the eastern shore during trapping season (Tr. 139-40, 148), there is no evidence that they resided there on or about April 1, 1970. Accordingly, we affirm Judge Sweitzer's decision as to these areas.

MHA and the State also argue that the Judge erred in excluding the Holmeses' residence northeast of the FAA site. They criticize his finding that their residence could not be part of the locality because it was "several miles distant from the claimed locality," stating that in fact it is "only slightly farther away from the Blackburn lodge than the Flood home" (MHA/Alaska Answer at 6).

The maps indicate that the Holmeses lived slightly less than 2 miles from buildings at the FAA site, perhaps a half mile more than the Floods from the Blackburn lodge. The relevant fact, however, is not the distance of the Holmeses from either MNI's "claimed locality" or its members' residences, but the relative proximity of their residence to others. As noted above, the Holmeses lived about twice as far from the buildings at the FAA site as the Floods lived from Val Blackburn, the greatest distance between

residences on the northern shoreline, while most others lived about a quarter of a mile from each other.

Although the Holmeses did not live in the same relative proximity as others in the area, we believe the question whether their residence was properly excluded from MNI's locality is appropriately resolved based on two other considerations. First, MNI's selections include land to the north and south of the Holmeses' property and it appears they would be directly affected by a conveyance of land to MNI. Consequently, including their residence within the locality is consistent with the statutory purpose for requiring that members of a Native group comprise a majority of the residents of its locality. Second, their home was also the location of the electrical power plant as well as the store and telephone for those at the lake. These were used by those living to the west of the FAA site, including MNI members, and were amenities, facilities, and services of concern to residents of the area (Tr. 263, 609; MHA Exhs. 6-24). For these reasons we conclude the Holmeses' residence should properly have been considered part of MNI's locality.

The same considerations do not apply to the residences of Slim Carlson and the Collinses on the east side of Yutokh Hill. They lived 5 miles from the buildings on the FAA site (Tr. 164-66; Jt. Exh. 3), clearly not the same relative proximity as others in the area, including the Holmeses. While, as MHA and the State argue, the Collinses may not have regarded the distance as a significant impediment to travel and saw themselves as part of the Lake Minchumina community (MHA/State Answer at 7-8; Tr. 166-67, 184-85), these facts are unrelated to the standards identified in Tanalian. If anything, the fact that travel across or around the lake was necessary to pick up mail and supplies (as well as socialize) indicates that the Collinses lived outside the area where the events of daily life occurred for most residents of the area. The location of Yutokh Hill on the southeastern portion of the lake also makes it unlikely that a conveyance of available land surrounding a locality in which they were not included would have much affect on them. Accordingly, we affirm Judge Sweitzer's exclusion of their residences from MNI's locality.

We conclude that on April 1, 1970, the area in which "residents live in relative proximity, as compared with the population density of lands beyond," Tanalian, supra at 319, was, as in the preceding decades, along the distinct northern shore on the western side of Lake Minchumina, including the FAA site. Tom and Mary Flood's residence on the western point must be included in the locality because she was an MNI member and resident on April 1, 1970. For reasons previously identified, we also include the Holmeses' residence to the north of the FAA site. Stated in terms of the public land survey, the locality consisted of U.S. Survey No. 4341 owned by the Holmeses; U.S. Survey No. 3786 immediately to the south; the quarter-quarter sections of the FAA site between these areas on which the buildings and runways were located; Kenny Granroth's U.S. Survey No. 2657; lots 1 through 12 of U.S. Survey No. 3315; and parcel A of Mary Flood's Native allotment application.

VI

Having determined what lands are properly included in the group's locality, we next consider the issues raised by the parties with regard to residency. The regulations do not define the term "resident" or establish standards for determining who is a resident. However, it has been noted that several provisions use the term "actual" and that the effect is to require "actual, physical residence." Chugach Natives, Inc., 80 IBLA 89, 93 (1984). In Chugach Alaska Corp. v. Lujan, *supra* at 459, the court found that the Department had interpreted the term to have "its ordinary legal meaning, which is a 'person who occupies a dwelling within' the boundary who manifests 'a present intent to remain.'" As noted by Judge Sweitzer, Secretarial Order No. 3083 provided that:

For purposes of determining that the Native group constitutes a majority of the residents of the locality, as required in 43 CFR 2653.6(a)(4) (1981), I direct the Bureau of Indian Affairs to use all reasonable efforts to ascertain the actual residency on April 1, 1970, of all individuals in the locality. If all reasonable efforts fail to produce convincing evidence of actual residence of the members of the Native group, either at the group's locality or elsewhere, the fact that the Native individual is enrolled to the locality shall be used to presume residence.

In making the determinations concerning the eligibility of a group required in 43 CFR 2653.6(a)(5) (1981), the number of members of a group required to be actual residents at the location of the group on April 1, 1970, shall not be greater than the number of Natives required to comprise a majority of the residents of the locality.

47 FR 30658 (July 14, 1982). The order has been incorporated into the Departmental Manual. 601 DM 3.1, 3.4. Accordingly, the pertinent factual question is whether each person was actually residing at Lake Minchumina on April 1, 1970.

The chief issue raised by MNI and BIA is whether Judge Sweitzer properly concluded that Valerie Nelson was not a resident of the locality. There is no dispute that Nelson was not physically present at Lake Minchumina on April 1, 1970. On that date, she was attending Ricks Junior College in Rexburg, Idaho (Tr. 310, 370-71, 599-600). The issue of her residency arises because, in requiring BIA to "specify the number and names of Natives who actually reside in and are enrolled to the locality," the Department instructed the agency to include "children who are members of the group and who are temporarily elsewhere for purposes of education." 43 CFR 2653.6(a)(4). Judge Sweitzer concluded that, because Nelson had been born on October 26, 1950, "[o]n the critical date she was 19 years old, an adult in Alaska (Tr. 593)" and did not qualify under the exception (Decision at 14-15). In determining that 19 was the age of majority in Alaska he relied on Alaska Stat. § 25.20.010 and Davenport v. McGinnis, 522 P.2d 1140 (Alaska 1974).

On appeal, the parties primarily address the issue as one concerning Alaska State law. MNI argues that the word "children" is used in the regulation to mean "progeny" or "offspring" rather than minor or dependent children. MNI cites Hinchey v. Hinchey, 625 P.2d 297 (Alaska 1981), in which the Alaska Supreme Court approved a court order requiring a father to pay child support through the age of 23 so long as the children were full time students because the relevant statute used "children" without any modifying term (SOR at 2-4). MNI also contends that the Judge erred because, in April of 1970, Alaska law was ambiguous about the status of 19-year olds and the matter was not clarified until legislation was enacted later in the year (SOR at 4). BIA agrees that Alaska law was unsettled and that the Judge erred. It points to statements made by Senator Stevens of Alaska during Senate debate on ANCSA to argue that the provision should be construed to include children of all ages (BIA Answer at 6-7). In his remarks, Senator Stevens sought to clarify that residence referred to permanent place of residence as distinguished from the census standard of residence which turned on actual physical presence without regard to permanency. With regard to Nelson's age, BIA states that the Board approved counting residents age 19 and older in Chugach Alaska Corp., 94 IBLA 24 (1986), aff'd, Chugach Alaska Corp. v. Lujan, supra (BIA Answer at 7-8).

MHA and the State contend that Valerie Nelson should not be regarded as an actual resident of the locality. They point out that after 1955 she did not live at the lake except during the 1963-64 school year and portions of the summer (MHA/Alaska Answer at 23-24). They argue that, because everyone is someone's child, reading "children" to mean "progeny" or "offspring" renders use of the word in the regulation meaningless. The result, they point out, would be that the exception would apply to all "members of the group who are temporarily elsewhere for purposes of education." Id. at 26. They also criticize the relevance of Senator Stevens' remarks and the legislative history BIA cites, and they attempt to distinguish Chugach Alaska Corp., supra, from this case.

Senator Stevens' comments were directed to section 5 of the Act (43 U.S.C. § 1604 (1988)) which governs enrollment in regional and village corporations. In particular, the Senator sought to establish "the fact that residence under the census concept is not necessarily residence under this bill, because the bill is talking about permanent residence * * *." 117 Cong. Rec. 46964 (1971). Although the Senator was not referring to subsection 14(h)(2), the regulations make section 5 applicable to enrollment in Native group localities. 43 CFR 2653.6(a)(4). Extended to subsection 14(h)(2), Senator Stevens' remarks would allow Nelson to enroll in MNI even though she did not reside at Lake Minchumina on April 1, 1970, as provided by the regulations and 601 DM 3.1.

As to the regulation itself, while we agree that Alaska law appears to have been unsettled in April of 1970, we reject the assumption that Alaska law controls interpretation of the regulation. ANCSA is Federal law enacted after many years of debate in order to resolve longstanding issues about Native rights. Important consequences under the Act should

not turn on decisions by the Alaska courts or legislature which have been made for entirely unrelated purposes. To the extent ANCSA establishes an age of majority at which independent decisions may be made, it is 18. See 43 U.S.C. §§ 1604(c), 1606(c), 1606(f) (1988). Although this age might well be applied to decide at what age a Native may choose to enroll in a Native group, it does not follow that 18 is also the age at which the exception for "children" should cease to apply. As MNI correctly argues, "children" can mean something other than "of an age less than the age of majority."

Some indication of the purpose of the exception is offered by the prefatory comments to the regulations. They note that a clarifying change was made "in the wording of the phrase concerning children away from home." 41 FR 14734, 14736 (Apr. 7, 1976). While the change was minor and is not instructive, the notion that the exception was intended for children away from home is helpful. Absent the provision, BIA could not certify that children living and attending school outside a Native group locality on April 1, 1970, "actually reside in and are enrolled to the locality." 43 CFR 2653.6(a)(4). One of the policies set forth by Congress in ANCSA is that the settlement of Native claims be accomplished "in conformity with the real economic and social needs of Natives." 43 U.S.C. § 1601(b) (1988). One matter noted by Congress, documented in ANCSA's legislative history, was that frequently Alaskan Natives must go to boarding schools away from their communities in order to attend high school. S. Rep. No. 405, 92d Cong., 1st Sess. 72, 99-100, 102 (1971).

[5] The parties have focused on the word "children" and have neglected to consider the remainder of the provision. The requirement implicit in the exception for children "who are temporarily elsewhere for purposes of education" is not that a "child" who is attending school outside a Native group locality be under a particular age, but that the child be the son or daughter of someone living in the locality. Without a parent who maintains a home and resides within the locality, a child attending school outside of it cannot be "temporarily elsewhere." It is the fact that the child is away from home for purposes of education that allows him or her to qualify under the exception and be counted as an actual resident of the parent's household. Cf. Savonsoski, Inc., 80 IBLA 231 (1984); Neechootaalichaagat Corp., 79 IBLA 301 (1984).

In this case, Valerie Nelson, as well as her brothers and sister, lived at Lake Minchumina until her parents divorced in 1955 (Tr. 436, 594). She spent her remaining grade school years living first with her aunt and uncle in Vale, Oregon, then with her mother in Manley Hot Springs and Fairbanks, and returned to Lake Minchumina for the eighth grade, the only year school was conducted there (Tr. 594-600). She returned to Vale to attend high school and then went to college in Idaho (Tr. 310, 599-600). By 1970, her mother was deceased and her father continued to live at Lake Minchumina (Tr. 517, 603-04). During the years she was in school, she returned to the lake almost every summer, and she testified that she considered Lake Minchumina to be her home (Tr. 600-601). Under these facts we conclude

that on April 1, 1970, Valerie Nelson, Val Blackburn's daughter, was temporarily elsewhere than at home at Lake Minchumina for the purpose of receiving an education and may be counted as an actual resident of the locality as a member of her father's household. Accordingly, we reverse the Judge's decision that she did not qualify under the exception.

The remaining issues of residency are more easily addressed. MHA and the State argue that seasonal residents should be counted in determining whether MNI's members were a majority of the residents of the locality, noting that none of MNI's members had lived in the locality for an entire year (MHA/Alaska Answer at 28-30).

The problem with this argument is that, while appellees are correct in their assumption that actual, physical presence on April 1, 1970, is not required to show actual permanent residency on that date, seasonal residency at Lake Minchumina necessarily implies the existence of another residence outside of Lake Minchumina. If, as appears to be the case, the seasonal residents which appellees desire to have counted were at such residences on the critical date, they were not in actual residence in Minchumina on April 1, 1970. They were in actual residence at the other situs. Thus, their houses in Minchumina could not constitute the situs of their actual residency as of April 1, 1970, as required by the regulations.

[6] Judge Sweitzer also correctly rejected MNI's argument that non-Natives Tom Flood and Val Blackburn, who were residents, should be counted as group members rather than non-group members because they were, respectively, the husband and the father of group members and socially part of the group (SOR at 6-8). The argument is without merit. The definition of "Native group" is explicit that a group is an entity consisting "of Natives in Alaska" and must be "composed of less than twenty-five Natives, who comprise a majority of the residents of the locality." 43 U.S.C. § 1602(d) (1988) (emphasis supplied); see 43 CFR 2653.0-5(c). The regulations also require that members of a Native group be enrolled in the locality. 43 CFR 2653.6(a)(4). Non-Natives are not eligible for enrollment. 43 U.S.C. §§ 1602(a), 1604 (1988). Accordingly, Tom Flood and Val Blackburn could not be counted as members of the Native group. Cf. Chugach Alaska Corp. v. Lujan, supra at 458-59.

VII

We conclude, therefore, that within the locality of the Native group lived MNI members Mary Flood and Robert Thompson. In addition, Valerie Nelson may be counted as an actual resident of the locality under the exception for children living away from home for the purpose of education, as may her brother Jonathon Blackburn, who Judge Sweitzer found qualified under the exception because he was 17 and attending high school in Vale, Oregon (Decision at 14; see Tr. 630).

Those residing in the locality who were not MNI members included Tom Flood, who lived with his wife; Val Blackburn, who lived in his home on lot 6; Kenneth Granroth, who lived at his house on U.S. Survey No. 2657;

Frank White, who lived at the FAA site; and the Holmeses, who lived north of the FAA site on U.S. Survey No. 4341. Other homes existed within the locality, but, as the parties seem to agree, the evidence does not support a conclusion that the owners were residents on April 1, 1970. ^{11/} Thus, we conclude that six non-members resided within the locality. It follows, therefore, that since the number of members of the Native group (4) did not constitute a majority of the residents of the locality (10), BIA's certification of MNI was improper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Sweitzer's decision is affirmed as modified.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge

^{11/} Dick Collins testified that in 1970 the Todds and Lindholms were residents at the lake (Tr. 140, 148, 191-92). He believed the Lindholms were there because Floyd was the mechanic for the FAA (Tr. 140, 148). A copy of a bill issued to Floyd Lindholm dated Feb. 2, 1970, showed that either he or his wife had used the Holmeses' telephone during the previous months (MHA Exhs. 6, 7; Tr. 198-99). Frances Collins testified that the Todds lived at the FAA site in 1970 (Tr. 192-93). Her diary showed that they were present at the lake on Apr. 25, 1970 (Tr. 228). There are also indications that the Durbins lived at the lake during 1970 (Tr. 217, 228-29). A list of residents signed by Kenneth Granroth submitted with MHA's initial appeal of BIA's decision (Exh. B) also states that Mr. Durbin, who worked as a mechanic for the FAA, was at the lake in 1970. On appeal, the parties have not explored questions suggested by this evidence and, in the circumstances, we deem it insufficient to be conclusive.