

INTERIOR BOARD OF LAND APPEALS

Minchumina Natives, Inc.
(On Judicial Remand)

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MINCHUMINA NATIVES, INC.
(ON JUDICIAL REMAND)

IBLA 96-78

Decided August 31, 2000

Remand to the Board by the United States District Court for the District of Alaska and the Ninth Circuit Court of Appeals for reconsideration of the Board's decision in Minchumina Homeowners Association v. Minchumina Natives, Inc., 122 IBLA 375 (1992).

Motion to dismiss denied; decision in Minchumina Homeowners Association v. Minchumina Natives, Inc., 122 IBLA 375 (1992), affirmed as modified.

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

A Native group locality under Tanalian, Inc., 75 IBLA 316 (1983), includes both the land on which group members live and the greater area in which other residents lived in relative proximity, as compared with the population density of lands beyond the area so designated. The factors of relative proximity, amenities, and other aspects of the community are interrelated in a total balance in determining locality, and 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.

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

A residence meets the requirement of "relative proximity," as used in Tanalian Inc., 75 IBLA 316 (1983), where the evidence discloses that inclusion of the residence in the locality would result in a significant break in population density beyond the limits of the locality as delineated so as to include the residence in question.

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

Under Tanalian Inc., 75 IBLA 316 (1983), evidence of the extent to which residents of an area share common interests or concerns in the local amenities, facilities, and services is properly received as indicative of the geographic area of the locality.

APPEARANCES: Michael J. Walleri, Esq., Tanana Chiefs Conference, Inc., Fairbanks, Alaska, for Minchumina Natives, Inc.; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of the Indian Affairs; John T. Baker, Esq., Anchorage, Alaska, for the State of Alaska and Heather H. Grahame, Esq., Anchorage, Alaska, for the Minchumina Homeowners Association.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The United States District Court for the District of Alaska, at the direction of the United States Court of Appeals for the Ninth Circuit, has vacated and remanded the Board's decision in Minchumina Homeowners Association v. Minchumina Natives, Inc., 122 IBLA 375 (1992) (MHA v. MNI). See Minchumina Natives, Inc. v. U.S. Department of the Interior, 60 F.3d 1363, 1369 (9th Cir. 1995).

The history of this case is detailed in previous Board decisions MHA v. MNI, *supra*, and Minchumina Homeowners Association, 93 IBLA 169 (1986). In brief, the record discloses that on March 4, 1976, Minchumina Natives, Inc. (MNI), filed a Native group selection application (AA-11184) for 2,240 acres of land within the Lake Minchumina area, pursuant to section 14(h)(2) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(2) (1982), and 43 C.F.R. § 2653.6 (1975). The selection application described approximately 2,546.88 acres of land, which constituted MNI's preferred selection, and approximately 5,047 acres of land, which constituted MNI's alternate selection. The application listed seven members as comprising MNI. On April 28, 1983, the Juneau Area Director, Bureau of Indian Affairs (BIA), issued a certificate of eligibility to MNI as a Native group. Subsequent thereto, the Minchumina Homeowners Association (MHA) and others who claimed residency or ownership of property at Lake Minchumina appealed that determination to this Board.

In Minchumina Homeowners Association, *supra*, while the Board did dismiss certain appeals as untimely, it declined to dismiss other appeals, including the appeal filed by MHA, expressly holding that standing to appeal from a decision issuing a certificate of eligibility to a Native group was controlled by the provisions of 43 C.F.R. § 4.410(a) rather than 43 C.F.R. § 4.410(b). Concluding that MHA had raised questions of fact regarding MNI's group eligibility, the matter was referred to the Hearings Division for assignment to an Administrative Law Judge.

By decision dated July 29, 1988, Administrative Law Judge Harvey C. Sweitzer reversed the April 28, 1983, decision of the Juneau Area Director and held that MNI's members did not constitute a majority of the residents of the locality as required by 43 C.F.R. § 2653.6(a)(4). MNI appealed this decision to the Board.

In its decision in MHA v. MNI, *supra*, the Board, while modifying Judge Sweitzer's decision, nevertheless affirmed his determination that a majority of the residents of the locality were nonmembers in MNI. As the Board explained:

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 [Federal Aviation Administration] 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. 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.

MHA v. MNI, *supra* at 402-403 (footnotes omitted).

On appeal, the United States District Court for Alaska focused on the rationale used by the Board in justifying the inclusion of the Holmeses within the locality. The Board had noted that:

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 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 the residents of the area (Tr. 262, 609; MHA Exhs. 6-24). For these reasons we conclude the Holmeses' residence should properly have been considered part of MNI's locality.

Id. at 398. In reviewing the Board's analysis under the standards previously delineated by the Board in Tanalian, Inc., 75 IBLA 316 (1983), the District Court held that the first component which the Board had utilized, i.e., the fact that the Holmeses residence would be affected by the selections made by MNI, was not properly a factor in determining whether or not the Holmeses were residents of the "locality," though the Court noted that the fact that MNI's land selections would extend beyond the Holmeses' residence might bear on its "relative proximity." See Minchumina Natives, Inc. v. Lujan, F92-18-Civil (D. Alaska July 3, 1992) at 14. Notwithstanding this holding, the District Court concluded that the Board's inclusion of the Holmeses' residence within the locality was correct based on the Court's analysis of their residence's relative proximity to other residences within the MNI locality and the fact, relied upon by the Board in its decision, that the Holmeses shared amenities, facilities, and services with other individuals within the MNI locality.

On appeal, the Ninth Circuit Court of Appeals set aside this determination. See Minchumina Natives, Inc. v. U.S. Department of the Interior, *supra*. The Court of Appeals stated:

In considering MNI's appeal, the district court correctly identified the Board's error in considering the impact of land selection as a factor militating in favor of including the Holmeses as residents of the locality. The district court concluded that a remand to the Board was unnecessary, however, because the Holmeses met the relative proximity requirement and had provided several amenities and services to the members of MNI.

MNI argues that the district court should have remanded to the Board instead. On this point, we agree with MNI. One improper factor - impact - clearly entered the Board's decision to include the Holmeses. The Board's opinion conceded that the Holmeses "did not have the same relative proximity as others in the area," and included them for other reasons. The district court determined that, even so, the Holmeses relative proximity was sufficient. This determination was for the Board, not the district court, to make in the first instance. See Securities & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).

A closer question is presented by the Board's reliance on a second factor for including the Holmeses - the provision of amenities such as telephone, groceries, and power to members of the community. As we read the Board's opinion, however, this second ground was not offered as a

wholly independent and sufficient reason for including the Holmeses. Both reasons were given together as supporting their inclusion. The Board analysis of "locality" throughout the opinion indicates that the factors of relative proximity, amenities, and other aspects of community are interrelated in a total balance. Because we are unable to determine whether, absent the improper factor, the Board would have made the same decision, we remand to the Board. We are not able to strike the balance anew in the first instance. See Id.

If, on remand, the Board determines that the balance of factors now favors exclusion of the Holmeses from the locality, then it should also redetermine the inclusion of the FAA facility. The exclusion of any extremity of the locality necessarily affects the relative proximity of the next-outermost portion. If, on the other hand, the Board determines that, after excluding from its consideration the improper factor, the Holmeses should be included, it will be unnecessary for the Board to re-determine the inclusion of the FAA facility.

Id. at 1369.

Pursuant to this Board's Order of January 16, 1996, MNI, the State of Alaska (State), and the MHA have filed briefs addressing the issues on remand. The Office of the Solicitor, on behalf of the BIA, has submitted copies of the briefing submitted to the Federal courts during the earlier litigation. Together with its brief, MNI filed a motion to dismiss the appeals filed by MHA and the State. In accordance with the Board's Order dated July 12, 1996, the State and MHA filed a joint opposition to MNI's motion to dismiss. We will first address MNI's motion to dismiss before exploring the issues remanded by the Court of Appeals.

The basis for MNI's motion to dismiss is two-fold. First, MNI asserts that the Board initially considered various individuals to have standing based on arguments that they were property owners in the Minchumina area. MNI argues that the Board did not find it necessary to inquire into the location or nature of these asserted property interests because, at that initial stage, the agency did not dispute the assertions made by those individuals. MNI contends that the standing issue warrants review in these proceedings because the "underlying factual premise now appears to be suspect." (MNI Motion at 4.)

In support of this assertion, MNI argues that, as a result of changed circumstances, the various individuals have ceased to have standing to appeal. Thus, MNI contends that, of the 20 individuals ^{1/} which

^{1/} While, in its motion, MNI listed 17 individual appellants, the Board, in fact, recognized 20 individuals as appellants before it. Omitted from MNI's list were Geraldine Benshoof, Mrs. Jeffrey Cole, and Kelly A. McMullen.

the Board found possessed of the requisite standing in its original decision (see Minchumina Homeowners Association, supra at 173-77), only five retain any land interests in the area and none of these are residents of the Lake Minchumina area. Noting that two of these individuals have already received patents for the land and that the other three are in the process of obtaining title, MNI argues that none will be affected by the Native group selection and therefore are not in a position to be adversely affected as required by the regulations.

The short answer to MNI's argument is that, even if all of its factual assertions were true, 2/ the fact that MNI could not select the actual land which these individuals own does not establish that they could not be adversely affected by MNI's selections. Indeed, in our prior decision, we expressly noted that those who resided around Lake Minchumina "use the land, including the selected land, for hunting, trapping, berry-picking, fishing, gathering wood for heating and building, access to property, and as a site of a community center, post office, and an airstrip." Id. at 176-77. Clearly, if MNI were deemed to be a qualified Native group, its selection of these lands would adversely affect these parties' rights to continue to use them as they historically have.

Moreover, there is no requirement that an individual be a full-time permanent resident of an area as a basis for predicated standing or in order to demonstrate adverse affect. While various individuals were required to establish actual permanent residency in order to be counted for the purpose of ascertaining whether or not the members of a Native group constituted a majority of the residents of a locality, as required by 43 C.F.R. § 2653.6(a)(4) (see Minchumina Homeowners Association, supra at 399-402), this standard has no bearing on whether or not an individual is adversely affected, within the meaning of 43 C.F.R. § 4.410(a), by a decision recognizing a Native group.

In any event, as MHA and the State point out, in the proceeding before the Board which was the subject of MHA v. MNI, supra, it was MNI which sought to have the decision of Judge Sweitzer reversed. Thus, it was MNI, not MHA or the State or the various individuals, which was the appellant, and it was MNI which was required to establish its standing to appeal, which it did. 3/ And, it was from the Board decision affirming Judge Sweitzer's conclusion that MNI appealed to the Court, which ultimately remanded the matter to the Board for its reconsideration. The

2/ We note that, in their joint response, both the State and MHA challenge numerous of the factual assertions concerning the original individual appellants made by MNI in its motion to dismiss. See, e.g., State/MHA Opposition to Motion to Dismiss at 6-7; Exhs. 2, 3, 4, 5, 6.

3/ Indeed, while MNI attempts to cast itself in the role of the "appellee" in the instant proceeding, it is, in fact, the appellant since it seeks a reversal of Judge Sweitzer's decision rejecting certification of MNI as an eligible Native group.

standing of MHA, the State, and the various named individuals is simply not properly implicated in the instant matter. 4/

MNI's motion to dismiss for lack of jurisdiction is essentially based on its assertion that, notwithstanding the fact that the Board ruled in Minchumina Homeowners Association, supra, that appeals from certifications of Native groups were governed by the provisions of 43 C.F.R. § 4.410(a), rather than 43 C.F.R. § 4.410(b), the Board was wrong. We find, however, that, to the extent that MNI seeks to revisit the Board's determination that Native group eligibility determinations are governed by the provisions of 43 C.F.R. § 4.410(a), its motion is properly barred on the grounds of administrative finality. This was the clear holding of the Board's decision in Minchumina Homeowners Association, supra, and it was MNI's obligation to timely seek reconsideration of this holding (see 43 C.F.R. § 4.403) or to raise it in the Federal court proceedings which it initiated after the Board's decision in MHA v. MNI, supra. Having failed to pursue either avenue of relief, MNI is barred from attempting to relitigate the matter at this time. 5/

Arguments on Remand

In its decision in Minchumina Natives, Inc. v. U.S. Department of the Interior, supra, the Court of Appeals recognized that ANCSA itself did not define "locality," and that the Court had earlier, in Chugach Alaska

4/ To the extent that MNI is attempting to go back to the original Board decision in Minchumina Homeowners Association, supra, which had ordered the hearing before an administrative law judge, we agree with MHA and the State that its motion is barred by the doctrine of administrative finality as well as the doctrine of judicial estoppel based on appellant's failure to challenge this aspect of the Board's adjudication before the Federal courts in the subsequent litigation which it pursued.

5/ To the extent that MNI now suggests that the effect of the Board's holding is to deprive itself of subject matter jurisdiction, MNI is simply wrong. Contrary to MNI's assertions, the Board's subject matter jurisdiction over matters relating to land selections under ANCSA does not arise from 43 C.F.R. § 4.410. Rather, the Board's subject matter jurisdiction is established by 43 C.F.R. § 4.1(b)(3) and includes all questions relating to the use and disposition of the public lands. While it is true, as MNI suggests, that the Board does not generally review decisions issued by the BIA, this is not a function of subject matter jurisdiction but rather is the result of the fact that those aggrieved by decisions issued by the BIA, even where they involve the use and disposition of the public lands, do not have a general right of appeal to this Board (such as is granted, with respect to those aggrieved by BLM decisions, by 43 C.F.R. § 4.410(a)) and, therefore, cannot invoke the Board's jurisdiction. See generally Marathon Oil Corporation, 108 IBLA 178 (1989). However, in the instant case, the right to appeal from BIA decisions relating to Native group eligibility determinations is expressly granted by 43 C.F.R. § 2653.6(a)(7).

Corporation v. Lujan, 915 F.2d 454, 457-58 (9th Cir. 1990), upheld Departmental regulations setting forth some of the characteristics of a locality (43 C.F.R. § 2653.6(a)(4)-(5)). The Court noted that the Board had supplemented these regulations in its decision in Tanalian, Inc., *supra*:

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 service may be received as indicative of the geographic area of the locality.

60 F.3d at 1367 (quoting Tanalian, Inc., *supra* at 320-21). The Court expressly "accept[ed] the Board's Tanalian approach as a reasonable and consistent interpretation of locality." 60 F.3d at 1367. It is in the application of the relevant considerations delineated in Tanalian to the facts of this case, particularly with respect to the Holmeses, that the parties to the present proceeding fundamentally disagree.

In support of their contention that the Holmeses should be included in the Lake Minchumina locality, the State and MHA point out that the "District Court acknowledged this Board's finding that amenities, facilities and services located at the Holmeses's residence (including the electrical power plant, store and telephone) were used extensively by residents of the locality" and that this holding was not disturbed by the Court of Appeals. (Joint State/MHA Brief on Remand at 3.) Therefore, they contend that the only question before the Board is whether the Holmeses lived in sufficient "proximity" to other residents within the MNI locality to support their inclusion within the locality.

Arguing that application of the Tanalian factors plainly support a finding that the Holmeses satisfy the "proximity" factor, the State and MHA point to the District Court finding that

When the Holmes property is included with the Flood, Blackburn, Granroth, and FAA properties * * * the resulting locality includes every residence on the FAA side of the Lake and includes all permanent residents anywhere in the vicinity as of April 1, 1970, except the Collinses and Slim Carlson, who lived on the other side of the lake. Thus, this locality provides a grouping in which there is a significant break in population density between the recognized community and the next nearest people who are quite some distance away, while excluding the Holmeses would not do so * * *. Certainly, there is substantial evidence to support a finding that the Holmeses are part of the "locality."

Id. at 4, quoting the District Court Opinion at 15. The State and MHA emphasize that, even without considering what the Ninth Circuit characterized as an "improper factor," i.e., the fact that MNI's selections could impact upon the Holmeses, the District Court determined that substantial

evidence supported a finding that the Holmeses' residence satisfied the "relative proximity" prong of Tanalian. This, they assert, is a conclusion well supported in the record before the Board. Id. at 4-5.

MNI, for its part, maintains that the State and MHA overstate the factual record, apply only half of the Tanalian analysis, and ignore the Tanalian decision test as described by the Ninth Circuit. To the extent that their contention that the Holmeses should be included in the MNI locality is based on the Board's holding in MHA v. MNI, supra, that the Holmeses shared amenities with the members of the Native group, MNI argues that their analysis fails in a number of respects.

First, reliance on shared amenities, MNI contends, ignores the other prong of the Tanalian test (i.e., proximity/density), which is to be considered in the totality of the circumstances. MNI contends that reliance on the shared amenities component of the Tanalian decision wholly ignores the other factors to be considered by the Board, specifically (1) the relative distance between the homes and (2) whether there is a break in population density. Thus, MNI argues the State and MHA overlook the specific finding by the Board that the Holmeses did not live in the same relative proximity to the locality as other residents of the locality. MNI urges that any holding by the Board herein must rely on this factual holding. (MNI's Reply Brief at 2.)

Addressing the relative proximity issue, MNI notes that, while there is a break in the population density beyond the Holmeses property, there is also a substantially greater distance between the Holmeses' residence and others in the area when compared to the distance between other residents of the locality. Thus, MNI notes that "the Holmeses lived slightly less than two miles from the buildings at the FAA site; further than the Floods from the Blackburn lodge [citing the Board's decision in MHA v. MNI, supra at 398]. Most other residents in the locality lived about a quarter mile from each other." (MNI Reply Brief at 3.)

MNI employs the phrase "core of the locality" to describe "a cluster of lots and cottages comprised of the Floods, Blackburns, Froshauges, Cary's and Granroth properties, on which the Floods, Blackburns and Granroth resided on a year round basis." The Holmeses property, it adds "was not part of that cluster and [was] physically separated from the cluster by a substantial distance." Id. This distance factor, MNI contends, demonstrates that the Holmeses "are not in the same relative proximity to the group locality as other members are to each other." (MNI's Brief on Remand at 8.)

MNI disputes the position of the State and MHA that the Holmeses and other residents of the locality shared all the amenities in common or that this is the test under Tanalian. MNI challenges the notion that mere sharing of common amenities is sufficient to meet the Tanalian test, maintaining that "evidence of shared amenities is to be received by the Board as indicative of the geographic area of the locality." Tanalian, Inc., supra at 321. Consequently, MNI argues that the Board should examine the scope and extent to which amenities are shared to determine if the sharing is indicative of a community.

MNI urges the Board to examine "whether the pattern of sharing is inclusive of locality residents and exclusive of non-residents." (MNI's Brief on Remand at 4.) MNI suggest that application of this standard would show that none of eight alleged local amenities, facilities, and services in the area as of April 1, 1970, were shared in a manner indicative of a community boundary, i.e., used by all of the residents of the locality and no one other than those residents. Id. at 4. Thus, MNI challenges the reliance by the Court of Appeals (60 F.3d at 1369), the District Court (Opinion at 12-13), and the Board (122 IBLA at 398) on the use of the phone, power plant, and store as indicative of shared amenities supporting the inclusion of the Holmeses' residence, arguing that the record failed to establish that all of the residents of the locality used any one of the facilities relied upon. (MNI Brief on Remand at 6-15.)

Discussion

[1] As the Board noted in MHA v. MNI, supra, a Native group locality is the area where houses and other structures have been constructed, amenities are present, and daily life takes place. Locality, we observed, includes both the land on which group members live and the greater area in which other residents lived in relative proximity, as compared with the population density of lands beyond the area so designated. The factors of relative proximity, amenities, and other aspects of community are, as recognized by the Court of Appeals, interrelated in a total balance in determining "locality." MNI correctly observes, however, that striking a balance does not involve elevation of the shared amenities factor over the factor of relative proximity. Rather, it requires consideration of all of the factors which go into making a community a cohesive whole.

[2] Nonetheless, we do not agree with MNI's assertions that the Holmeses did not reside in relative proximity to others in the locality. MNI's analysis on this point looks solely to the distance between the Holmeses' residence and that of other members of the locality. 6/ On this point, there is no dispute that the distance separating the Holmeses from their nearest neighbor, Frank White, was greater than the distance separating any other person on the northern shore of Lake Minchumina from the nearest residence. 7/ See MHA v. MNI, supra at 398.

6/ In its attempts to establish that the Holmeses did not live in relative proximity to the locality, appellant continuously casts the question as whether or not the Holmeses lived in relative proximity "to the Native group residents." The effect of this articulation is to require that all distances be calculated using the Blackburn lodge as ground zero for all determinations of "relative proximity." This is not the proper test. On the contrary, as we expressly held MHA v. MNI, supra, "[t]he 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." Id. at 397.

7/ In this case, the greatest distance between permanent residences was that separating the Floods from the Blackburn Lodge, a little more than a mile.

Even so, our decision in Tanalian Inc., supra, requires that we examine relative proximity beyond a mere linear measurement of absolute distances between residences. Thus, the Tanalian decision expressly noted that determination of "relative proximity" requires a comparison of "the population density of lands beyond the area so designated" with those within the area ultimately deemed part of the locality. Tanalian, Inc., supra at 320.

A significant break in population density existed between those living on the northern shore on the western side of Lake Minchumina, including the Holmeses' residence, and those residences across the Lake, on the east side of Lake Minchumina. More to the point, the record discloses that the distances separating those on the eastern side from those on the western side were qualitatively different (both in amount and in effects) than those that existed among those who dwelt on the western side. On this issue, our prior decision pointed out these differences with respect to those who permanently resided on the eastern side, Slim Carlson and the Collinses (Dick, Florence, and their three children):

They lived 5 miles from the buildings on the FAA site (Tr. 164-166; joint ex. 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 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 the Collinses lived outside the area where the events of daily life occurred for most residents of the area.

MHA v. MNI, supra at 398.

Further examination of testimony adduced at the hearing reveals that, although those living on the eastern side of the lake exerted efforts in maintaining contact with the community on the western side of Lake Minchumina, witnesses repeatedly confirmed that the distance involved, particularly when coupled with weather or illness, was an impediment for those residing on the eastern side to sharing in community life with those who lived on the western side of Lake Minchumina. See Tr. 116-17, 175, 192, 207, 209-10, 217, 227-28, 238-39, 263, 702-703. Because of the distance and time it took to travel across the lake, people living on the eastern side of the Lake talked and visited less frequently than those on the western side (Tr. 207, 238-39), even those who had originally lived on the western side of Lake Minchumina community (Tr. 227-28, 263).

This break in population density was indicative of the geographic boundaries of the Native locality where distance alone was an impediment to sharing in community life for those on the eastern side of Lake Minchumina that was not shared by those living on the western side of lake, including the Holmeses. Our review of the record fails to show that

the relative distance between residences on the western side of the lake, or more specifically the fact the Holmeses' residence did not lie in the same close proximity as others, was indicative of any geographical boundary of the Native locality. The Holmeses, we conclude met the relative proximity requirement whereas those who resided on the eastern side of Lake Minchumina on the critical date, including Slim Carlson and the Collinses, did not.

[3] In Tanalian, Inc., supra, we held that "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 geographical area of the locality." Id. at 321.

MNI contends that extent of use of the amenities was under inclusive of all the members of the locality such that the claimed locality use was not indicative of any geographical boundary. However, the amenities at issue were not found at different locations. All the amenities at issue - the phone, electrical power and store - were located at the Holmeses. While MNI does not dispute that the Blackburns and the Thompsons used the store, MNI contends there is no evidence that Tom Flood and Kenny Granroth used the store. ^{8/} However, both Flood and Granroth used the phone located in the store (Tr. 201; MHA Exhs. 8, 9, 12) and Granroth used the electrical power (Tr. 201; MHA Exh. 20).

Taken together, use of all the amenities located at the Holmeses by various members of the group indicates that the locality of the Native group included the Holmeses. Moreover, the record establishes that, during the 1970's, the Holmeses residence served as the meeting place (i.e. shared facility) for the ladies community sewing club (Tr. 210), as did the Blackburn Lodge on at least one occasion. Id. Thus, notwithstanding the fact that the Holmeses' residence was located somewhat at a greater distance from the general cluster of residences (centering around the Blackburn lodge) of those dwelling on the western side of Lake Minchumina, the general use made by the residents of the locality of the amenities provided by the Holmeses at their residence, supports the conclusion that the Holmeses' residence was as much of a part of the Native group's locality as was the Blackburn lodge.

Based on the record, we conclude that application of the Tanalian criteria in this case supports inclusion of the Holmeses within the boundary of the Native locality. Having concluded that the Native locality embraces the Holmeses, we need not reexamine the status of the FAA site. See Minchumina Natives, Inc. v. U.S. Department of Interior, supra at 1369.

^{8/} It should be noted, however, that not one question was ever posed of any witness as to whether Granroth or White used the store. There is simply no evidence one way or the other whether or not either of these individuals used the store and appellant's argument is essentially based on an inference drawn from a lack of evidence.

As a result of including the Holmeses, six non-Native members resided within the locality on April 1, 1970. Because 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 as a Native group was improper under 43 U.S.C. § 1613(h)(2) (1994).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and, on remand from the Federal District Court for the District of Alaska, the decision of Administrative Law Judge Sweitzer finding that, MNI's 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 to MNI as a Native group, is affirmed as modified.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge