

LEGAL SERVICES

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MEMORANDUM

April 6, 2011

SUBJECT: Village Safe Water Act (CSHB 183(CRA);
Work Order No. 27-LS0601\B)

TO: Representative Alan Dick
Attn: Sheila Peterson

FROM: Tamara Brandt Cook
and
Alpheus Bullard
Legislative Counsel

TBC

You have supplied me with a letter from the Department of Law dated April 15, 1981, recognizing that limiting revenue sharing for unincorporated communities to those organized under the Indian Reorganization Act of 1934 or eligible as Native villages under the Alaska Native Claims Settlement Act would probably be unconstitutional under the equal protection clause of the state constitution. You ask whether the same legal problem exists with respect to CSHB 183(CRA). It does. The bill would limit the receipt of the benefits of the Village Safe Water Act to certain municipalities and to only those villages listed under the Alaska Native Claims Settlement Act, but not to other villages in the state. While the federal government has a special duty to protect and benefit American Native peoples and may discriminate in the provision of those benefits in favor of Natives, the state does not have the power to discriminate in favor of Natives over others.

You ask how the bill might be changed to avoid the constitutional problem. The state may treat some people differently from others without violating equal protection requirements if the different treatment furthers a legitimate state goal. Please appreciate that discriminating on the basis of race or ethnicity is particularly difficult for the state to justify.

However, an approach occurs to me that would have a greater probability of success than the current approach in CSHB 183(CRA), although it might not include the exact recipients currently identified in CSHB 183(CRA). This approach, rather than focusing on Native status, would be to focus on the existence of a governing body within the community that represents the people, in a governmental rather than a business capacity, that the state may legitimately work with. The concept of the state working with a local governing body is already contained in the Village Safe Water Act. (See AS 46.07.030(b) and AS 46.07.050) A village may only be listed under the Alaska

Native Claim Settlement Act and eligible for benefits under that Act if it has organized a business for profit or nonprofit corporation. A governing body is not required. (43 USC 1602(c) and 43 USC 1607) Nonetheless, many villages do have governing bodies and state statutes already recognize and require the existence of such bodies for some purposes. (See AS 29.60.599(9); AS 46.03.900(34); AS 46.04.900(28); and AS 46.08.900(16)) Using this approach section 1 would become two sections, as follows:

* **Section 1.** AS 46.07.080(2) is amended to read:

(2) "village" means an unincorporated community **with a governing body** that has between 25 and **1,000 residents** [600 PEOPLE RESIDING WITHIN A TWO-MILE RADIUS], a second class city, [OR] a first class city, **or a home rule city** with not more than **1,000** [600] residents.

* **Sec. 2.** AS 46.07.080 is amended by adding a new paragraph to read:

(3) "governing body" means a

- (i) city council;
- (ii) council organized under 25 U.S.C. 476 (sec. 16 of the Indian Reorganization Act);
- (iii) traditional village council recognized by the United States as eligible for federal aid to Indians; or
- (iv) a traditional council recognized by the commissioner of commerce, community, and economic development under regulations adopted by the Department of Commerce, Community and Economic Development for purposes of AS 44.33.755(b).

Please note that I have eliminated the reference to "home rule municipalities," which includes both home rule cities and home rule boroughs, in favor of "home rule cities."

In conclusion, I cannot state that the approach suggested above would survive a constitutional challenge, but it would stand a reasonable chance. Also, the differences in the villages that would qualify under this approach from those that qualify under the existing bill language will need to be identified and considered.