

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 86/2

2512 SJ SB 196 - SB 228 2512

\$1,500 in attorney's fees. If the City Council could qualify as the prevailing party entitled to attorney's fees in that case, it was capable of full party status in this case.

Furthermore, the City failed to object to its capacity to be sued in this action. Rule 9(a) of the Alaska Rules of Civil Procedure provides in part:

When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

We recently relied on this provision in holding that "failure to raise the issue of capacity to sue results in waiver of the defense." *King v. Petroleum Services Corporation*, 536 P.2d 116, 118 (Alaska 1975). The failure to raise the issue of lack of capacity to be sued has the same waiver effect, and the City has thus waived this defense.

#### b. Failure to join the Borough

[4] The City next argues that since the superior court's decision on the merits of the case turned entirely on the invalidity of the G.A.A.B. ordinance and not on an abuse of discretion by the City Board of Adjustment, the Borough was an indispensable party to the case. Although the City never objected during trial to the plaintiff's failure to join the Borough, this court may, in its discretion, review this issue for the first time on appeal. *Padgett v. Theus*, 484 P.2d 697, 700 (Alaska 1971).

[5, 6] We have defined an indispensable party as "one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party." *State, Department of Highways v. Crosby*, 410 P.2d 724, 725 (Alaska 1966). In determining at the trial level whether a party is indispensable, the court must balance the danger that judgments will lack finality against the desirability of having some determination of a dispute. Since the lower

court was able to dispose of the merits of this case in an equitable manner, without the presence of the Borough, and there is no possibility that any further litigation of the matter will ensue, the Borough was not an indispensable party under *Crosby* standards.

[7, 8] Even if at the trial level the Borough could have qualified as an indispensable party to the action, in reviewing the issue for the first time, we must consider the additional factor of whether failure to overturn the judgment will substantially prejudice the interest of the party who was not named. *Padgett v. Theus*, 484 P.2d at 702. In this case, the G.A.A.B.'s interests will not be affected by this court's affirmance of the judgment of attorney's fees against the City, since subsequent to the commencement of this litigation, the G.A.A.B. and the City of Anchorage merged to form the present Municipality of Anchorage.

#### c. Carlstrom's liability for fees

[9] The City also argues that appellee Carlstrom was the real party at interest in this case and should have been liable for all or at least a portion of the fees. In support of this contention, the City cites *First National Bank of Alaska v. Enzler*, 537 P.2d 517 (Alaska 1975), in which we upheld an award of attorney's fees against a party not named in the suit. In that case, the trial court perceived the bank as the "true prosecutor of the action—in effect the real plaintiff," and awarded fees against it on the grounds that "[o]f the parties appearing, only the bank stood to profit by a judgment in favor of the named plaintiff." *Id.* 537 P.2d at 525. The nominal plaintiff, a trustee, was not charged with any portion of the fees awarded since it was not the real party at interest. In the instant case, however, Carlstrom was not the only party who stood to profit from the superior court's affirmance of the grant of a special exception; the Board of Adjustment had an interest in seeing its decision upheld—that of protecting the public interest in having zon-

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ing ordinances enforced—and was therefore more than a nominal party to the action.<sup>8</sup>

The superior court's exclusion of Carlstrom from any obligation to pay attorney's fees appears to have been based in part on this court's decision in *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975). In that case we held that it was unfair to impose attorney's fees on a plaintiff who had relied upon an attorney general's opinion which was held to be invalid. In the case before us now, Carlstrom relied on a P.U.D. ordinance which was found to be invalid, and to assess him for fees would also be unfair. In light of the *Girves* case, it is clear that the superior court did not abuse its discretion by charging only the City with the judgment of fees.

#### AWARD OF FULL AMOUNT OF FEES INCURRED

At the time that the superior court overturned the Board of Adjustment's decision, the McCabes moved for attorney's fees in the amount of \$4,612.50. This requested amount was calculated at 92½ hours at \$50 per hour and, according to the attorney's accompanying affidavit, represented compensation for the total amount of work she performed in the case. Judge Carlson granted the entire amount requested.

The City argues that if the McCabes were to be compensated at all, they should only have been partially compensated. The McCabes respond by citing *Palfy v. Rice*, 473 P.2d 606 (Alaska 1970), for the proposition that the court may reasonably award attorney's fees which are commensurate with the actual amount of legal work performed by the attorney in the case. This interpretation of *Palfy* is presumably based on our consideration of the amount of legal work involved in that case in deciding that the award of attorney's fees was too low.

8. See *Board of Adjustment of City of Fort Worth v. Stovall*, 147 Tex. 366, 216 S.W.2d 171 (Tex.1949) in which the court, quoting from *Rommell v. Walsh*, 127 Conn. 16, 15 A.2d 6 (Conn.1940), stated:

[T]he function of protecting and advancing the public interest in establishing and maintaining a proper and adequate zoning system

However, it is unconvincing in light of this court's recent decisions in *Malvo v. Penney*, 512 P.2d 575 (Alaska 1973) and *Continental Insurance Company v. United States Fidelity and Guaranty Company*, 552 P.2d 1122 (Alaska 1976).

[10, 11] In *Malvo*, we held that the trial court abused its discretion by automatically awarding the full amount of attorney's fees incurred by the prevailing party. This holding was based on the underlying purpose of Rule 82 "to partially compensate a prevailing party for the costs and fees incurred where such compensation is justified and not to penalize a party for litigating a [claim in] good faith." 512 P.2d at 588. In *Continental*, we extended the *Malvo* partial compensation rule to cases in which the award of full fees was not automatic but instead was made after the trial judge considered the progress of the case. We held in *Continental* that since the losing party's claims were not "frivolous, vexatious, or devoid of good faith" and did not "in any way unreasonably [prolong] the litigation," the award of full attorney's fees must be set aside.<sup>9</sup> In the instant case, the City was litigating a good faith claim in attempting to uphold the G.A.A.B. ordinance regulating P.U.D.s, and, were it not for the public interest nature of this case, an award of full attorney's fees would ordinarily be set aside under the reasoning of *Continental*. We find, however, that requiring a court to award an amount less than that which constitutes full compensation is contrary to the rationale of decisions in *Gilbert v. State*, *supra*, and *Girves v. Kenai Peninsula Borough*, *supra*. In those cases, we held that since it was not the purpose of Rule 82 to penalize plaintiffs who in good faith litigate important public questions, such plaintiffs, even if unsuccessful, should not be charged with attorney's fees. It follows that the

is entrusted to certain boards, who, in that respect, exercise a large discretion.

[B]ecause of the function they perform they should represent the public interests entrusted to them in appeals taken from their decisions. 216 S.W.2d at 174.

9. 552 P.2d at 1129

successful public interest plaintiff, acting as a "private attorney general," should not be penalized by Rule 82 by failing to receive full compensation for the costs of litigating issues of public importance. We hold, therefore, that the trial court may, in its discretion, award full attorney's fees to public interest plaintiffs. The award of full attorney's fees against the City is thus AFFIRMED.

RABINOWITZ, Justice, with whom ERWIN, Justice, joins concurring.

While I agree with the court's disposition of this matter, I disagree with the court's treatment of the "capacity to be assessed" issue. The majority reasons that since the Board of Adjustment was accorded full party status in *Munroe v. City Council for City of Anchorage*, 545 P.2d 135, *reh'g granted and opinion modified*, 547 P.2d 839 (Alaska 1976), it is capable of full party status in the instant case and has the capacity to be assessed attorney's fees. I think it is necessary to examine those factors which set a zoning board apart from other quasi-judicial administrative boards and thus compel the decision that the zoning board in the case at bar should be assessed attorney's fees.

Many quasi-judicial administrative boards, such as the Workmen's Compensation Board, are charged with adjudicating the rights of individual parties according to the terms of administrative law. However, the zoning board's duties go far beyond determining the relative rights of the par-

1. In explaining the difference between the discretion exercised by an administrative agency in promulgating rules and adjudicating rights, one commentator has noted that when an agency is adjudicating rights, the discretionary power is more subtle.

[A]gencies engaged in adjudication may be enabled to exercise their discretionary powers to reach results which go far beyond, and which may even be quite at odds with the underlying legislative purpose. It is not meant to imply that agencies always stretch the legislative fabric. However, the freedom to exercise discretion in deciding individual cases on a basis of *ad hoc* adjudication may

ties in quasi-judicial proceedings; the zoning board is granted a large degree of discretion to be exercised in the public interest. That discretion is particularly obvious in cases such as the one at bar where a party is seeking a variance or special exception to a zoning ordinance.<sup>1</sup> The exercise of the zoning board's discretionary authority may seemingly involve only a few individuals, but the impact of its decision may be felt by the entire community. In explaining its decision that the zoning board involved had sufficient party status to maintain an appeal from a lower court reversal of its decision, the Connecticut Supreme Court stated:

In some appeals from administrative boards the question at issue is of consequence only to certain parties who will be directly affected, as, for example, where the public utilities commission is called upon to apportion between a municipality and a railway company the cost of the construction of a highway bridge over a railway track. . . . In other cases, however, there is a definite public interest to be protected. This is true, for instance, of many orders of the public utilities commission, and is particularly true with respect to zoning regulations.

While [zoning] boards have ordinarily no corporate existence as such but are merely agencies of the municipality, and while they have no direct interest in this litigation, it would be a logical conclusion that because of the function they perform they should represent the public interest entrusted to them in ap-

enable them at times to read new and unanticipated meanings into legislative language, when the agency heads feel that the accomplishment of their broad social purposes will be furthered thereby.

1. F. Cooper, *State Administrative Law* 33 (1965).

The potential for variance from the stated purpose is even greater in situations like the one at bar where a board is being requested to grant special exceptions to particular parties. In such circumstances it is appropriate to grant the board full party status and, when its decision is not upheld, to grant an award of attorney's fees against it.

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peals taken from their decisions.<sup>2</sup> (citation omitted)

Representing the public interest in appeals from its decisions may often imply justifying its decision. Because of the extent of its discretion, the zoning board has a far greater interest in attempting to uphold its decision than does a quasi-judicial administrative body like the Workmen's Compensation Board and thus should be granted full party status. Given these factors, I conclude that it is appropriate for the zoning board to be accorded full party status and assessed attorney's fees in the instant case.

BOOCHEVER, Chief Justice, dissenting.

I do not believe that attorney's fees should have been awarded against the City in this matter. When a city or administrative body actively participates in an appeal from its decision, it should be regarded as a party for the purpose of awarding fees. Where, however, it is a mere nominal participant, attorney's fees should not be awarded either for or against it.<sup>1</sup>

At the outset, the City of Anchorage heard the appeal from the Planning and Zoning Commission in a quasi-judicial capacity. On the subsequent appeal to the superior court, it was properly named as a party. If it had deemed that the public interest required it to advocate a particular position, the City could have actively participated in the appeal.<sup>2</sup> Here, however, the City apparently decided that there were no significant municipal interests justifying opposition to the appeal. The only party who actively disputed the contentions raised by the McCabes was Mr. Carlstrom, who was primarily interested in the construction

of the planned unit development. Under these circumstances, he was the one who lost on the appeal; and, in my opinion, the costs and attorney's fees should have accordingly been awarded against him rather than the City.

I also differ from the majority in regard to the court's role in public interest litigation. The opinion seems to take the position that such litigation should be actively encouraged. In my view, our function is not to encourage litigation of any sort. On the other hand, I believe that we should strive to prevent our courts from becoming inaccessible, as a practical matter, to those who seek to vindicate rights shared by the public. This concern is similar to that evinced by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 81 S.Ct. 964, 19 L.Ed.2d 1263 (1968). The Court noted that few parties would be in a position to advance the public interest if successful plaintiffs were routinely forced to bear their own attorney's fees. For similar reasons, I agree that in appropriate cases, it is proper to deny an award of fees against an unsuccessful plaintiff.<sup>3</sup> Moreover, where a sufficient public interest is involved, it may be appropriate to award full attorney's fees to a successful plaintiff to the extent that they are reasonable.

In any "public interest" litigation, the plaintiff must also have some direct and immediate interest.<sup>4</sup> Moreover, in most litigation, a party can usually contend that his position represents some public interest. For example, a plaintiff in an automobile collision case can say that he is promoting the public interest in preventing negligent driving. Although specific standards for

2. *Rommell v. Walsh*, 127 Conn. 16, 15 A 2d 6, 9 (1940). *Accord, Zimmerman v. Kramer*, 29 Misc.2d 413, 217 N.Y.S.2d 438 (Sup.Ct.1961); *Board of Adjustment v. Stovall*, 147 Tex. 366, 216 S.W.2d 171 (1949). *See generally Simpson v. Kennedy*, 327 A.2d 763 (Del.Super.1974); *Boyd & Usher Transport v. Southern Tank Lines, Inc.*, 320 S.W.2d 120 (Ky.1959).

1. For example, it is customary not to assess fees against the Alaska Workmen's Compensation Board when it does not actively participate in appeals from its awards although it is named as a party. *See, e.g., Alaska Workmen's Com-*

*pensation Board v. Marsh*, 550 P.2d 805 (Alaska 1976); *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264 (Alaska 1974).

2. *Cf. Munroe v. City Council for the City of Anchorage*, 545 P.2d 165, *opn. on rehearing*, 547 P.2d 839 (Alaska 1976).

3. *See Gilbert v. State*, 526 P.2d 1131 (Alaska 1974).

4. *Sierra Club v. Morton*, 405 U.S. 727, 732-36, 92 S.Ct. 1361, 31 L.Ed.2d 636, 641-42 (1972).

determining whether the requisite public interest exists have not been articulated, a few general principles do emerge from those cases where the issue has been raised.

Where the sums at stake in the controversy are sufficiently large to prompt suit regardless of the public interest, an award of attorney's fees against the losing party has been found reasonable. In such cases, the concern that fear of expenses will significantly deter citizens from litigating questions of general interest to the community is inapplicable. *Mobil Oil Co. v. Local Boundary Comm.*, 518 P.2d 92, 109 (Alaska 1974). Similarly, questions which primarily affect the rights of the parties before the court lack the requisite public character to prohibit an award, even if some public or constitutional issues are involved. *Munroe v. City Council for the City of Anchorage*, *supra* (challenge to denial of application for special exception to applicable zoning ordinances); *Kelly Supply Co., Inc. v. City of Anchorage*, 516 P.2d 1206, 1211 (Alaska 1973) (challenge to refusal to permit nonconforming use).

In each case, the court must weigh the private motivation for the lawsuit against the extent of the public interest involved. Here, as owners of property adjoining the proposed development, the McCabes had a significant personal interest. While their interest was doubtlessly shared by others in the neighborhood, and to some extent generally by others in Anchorage, it hardly manifests the same degree of public importance as the residency requirement for candidates for political office,<sup>5</sup> prohibiting racial discrimination in restaurants<sup>6</sup> or enforcing compliance with federal statutes in construction of highways.<sup>7</sup> As in *Munroe v. City Council for the City of Anchorage*, the private property interests of the McCabes appear the paramount motivation for the lawsuit, while the public interest seems of somewhat marginal significance. Accordingly, I would remand for a redetermina-

5. *Gilbert*, *supra*.

6. *Newman v. Piggie Park Enterprises, Inc.*, *supra*.

tion of reasonable attorney's fees sufficient to partially compensate plaintiff.<sup>8</sup>



Richard J. HERSCHER, Appellant,

v.

STATE of Alaska, DEPARTMENT OF  
COMMERCE, Appellee.

STATE of Alaska, DEPARTMENT OF  
COMMERCE, Cross-Appellant,

v.

Richard J. HERSCHER, Cross-Appellee.

Nos. 2927, 2967.

Supreme Court of Alaska.

Sept. 9, 1977.

The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., affirmed decision of Board of Fish and Game revoking hunter's license as a guide for violation of fish and game regulations. The Supreme Court, Dimond, J. pro tem., held that: (1) authority was vested in Board to revoke hunter's guide license for violations of regulations relating to transferring a bear from an unregistered camp and transporting a bear hide without a skull; (2) proprietary interest of hunter in his guide license was of sufficient importance to warrant protection under constitutional requirements relating to due process; (3) prohibited conduct was sufficiently set forth and determined according to objective standards where it was clearly alleged in accu-

7. *La Raya Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal.1972).

8. *Malvo v. J. C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

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# COMMITTEE REPORT

## SENATE

3/25/63

FURTHER:

Date: 3/25/63

Mr. President:

The Committee on Judiciary has had ED 404

Extending the Expiration Date of the Alcoholic Beverage Control Board and Eff. Date.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for \_\_\_\_\_  same title  
 new title
- and recommends \_\_\_\_\_
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

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CHAIRMAN



JUNEAU, ALASKA

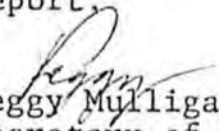
# Alaska State Legislature Senate

March 17, 1983

MEMORANDUM: Senator Ray, Chairman Judiciary

President Kerttula referred A Report on the Department of Revenue, Alcoholic Beverage Control Board, dated December 15, 1982 to the Judiciary Committee on March 8.

This report was not received in this office until this date. Please return A Special Performance Report on the Department of Health and Social Services, State Office of Alcoholism and Drug Abuse unless the Judiciary Committee is interested in retaining this report.

  
Peggy Mulligan  
Secretary of the Senate

Encl: 1

A REPORT ON THE  
DEPARTMENT OF REVENUE  
ALCOHOLIC BEVERAGE CONTROL BOARD

December 15, 1982

Audit Control Number

04-1071-83-R

Commissioner, Department  
of Revenue

Robert D. Heath

Deputy Commissioners, Department  
of Revenue:

Taxation  
Treasury

Joseph K. Donohue  
Vacant

Members of the  
Alcoholic Beverage Control Board

Chairman  
Member  
Member  
Member  
Member

William Gordon  
Donald J. House  
William K. Smith  
Joseph W. Berberich  
Chuck J. Green

# STATE OF ALASKA

AUDIT DIVISION  
POUCH W—ALASKA OFFICE BUILDING

## THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

JUNEAU, ALASKA 99811

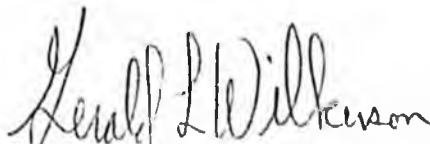
December 15, 1982

Members of the  
Legislative Budget and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

### A REPORT ON THE DEPARTMENT OF REVENUE ALCOHOLIC BEVERAGE CONTROL BOARD

December 15, 1982



Gerald L. Wilkerson, CPA  
Legislative Auditor  
Division of Legislative Audit

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## PURPOSE OF THE REPORT

In accordance with the provisions of Alaska Statutes 24.20.271(1) and 44.60.050 (Sunset Legislation) an examination of the Alcoholic Beverage Control Board was conducted to determine whether there is a demonstrated need to continue liquor regulation in its present form. To determine that need we reviewed Board activities for Fiscal Year 1982 to see if the Board has been operating in an efficient and effective manner.

AS 44.66.010 specifies that the Alcoholic Beverage Control Board will terminate on June 30, 1983, but will continue until June 30 of the following year for the purpose of concluding its affairs. This report should be considered during the legislative oversight function in determining whether the Board should be allowed to terminate, be reestablished in its present form or be reestablished in a modified form.

## ORGANIZATION AND FUNCTION

In 1933 the Territorial Legislature created the Board of Liquor Control with full power, authority, and control to prescribe (1) rules and regulations to govern the manufacture, barter, sale and possession of intoxicating liquors, (2) qualifications of those engaged in that business, and (3) license fees and excise taxes. The present Alcoholic Beverage Control Board (hereinafter referred to as the ABC Board or the Board) was established in 1959, and the same broad powers and duties conferred on the Board of Liquor Control were transferred to the new ABC Board at that time.

Members are appointed for three-year terms by the Governor and serve at his pleasure subject to confirmation by the Legislature. Membership is limited by statute to five persons (two liquor industry representatives, three non-industry representatives). A director, also appointed by the Governor, serves as executive officer and is responsible for enforcement of Title 4 liquor laws and regulations developed by the Board. Although he is not a member of the Board, the director may cast a tie-breaking vote.

The ABC Board is a regulatory, quasi-judicial agency, vested with the powers, duties, and responsibilities for the control of alcoholic beverages, including the power to propose and adopt regulations, and to hear appeals. The Board may order the director to issue, renew, revoke, transfer, or suspend licenses and permits.

Title 4 prescribes the type of licenses, fees, and specific activities allowed under each license classification (see schedule of license types and fees in Appendix C). Fees are payable at the time of application and are not reduced or prorated in any way for periods less than the statutory calendar year. To renew an already existing liquor license, the application must be filed (and the corresponding fees paid) on or before February 28.

The staff of the ABC Board is divided into three major functions: administration, licensing, and enforcement. A brief description of the services provided by those functions follows:

Administration. The director of the ABC Board provides all administrative support needed by the Board including overseeing all staff functions, preparing budget documents, and directing the preparation and implementation of administrative and public hearings, and directing special enforcement investigations.

Licensing. The licensing staff currently consists of three full-time employees responsible for issuing and receiving application forms, maintaining records and files for all licenses, collecting fees, issuing all licenses and permits authorized by the Board, and answering inquiries from the general public on routine licensing matters.

Enforcement. The ABC Board currently employs five investigators - three operating from the Anchorage central office, one operating from the Fairbanks field office, and one operating from the Juneau field office. One Anchorage Investigator position is vacant. Services provided include (1) surveillance and inspections of licensed premises, (2) investigations to obtain information to be used in criminal and civil proceedings and investigations into suspected licensing violations, (3) public appearances relating to ABC laws and regulations, and (4) assisting the licensing staff in handling inquiries from the general public.

## REPORT CONCLUSION

### Policy Issues

This review contains policy issues raised as a result of our evaluation of various Board practices. The final policy decisions affecting those practices are not within the scope of this review but require legislative consideration. In debating these decisions the legislative oversight committees should take into consideration the findings and alternatives presented in this report, so that the potential impact of the policy changes can be evaluated.

### Report Conclusions

Title 4 of the Alaska Statutes established the ABC Board to control the manufacture, barter, possession and sale of alcoholic beverages in the State in order to protect the public's health, safety and welfare. We believe this control should continue to exist, however, it is our opinion, the ABC Board has not met its mandated enforcement responsibilities of Title 4 of the Alaska Statutes. We recommend the ABC Board reevaluate its interpretation and application of the enforcement requirements of Title 4.

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## FINDINGS AND RECOMMENDATIONS

### Recommendation No. 1

The Alcoholic Beverage Control Board should reevaluate its interpretation and application of the enforcement requirements of Title 4.

Alaska Statute 04.06.075 states that the director of the ABC Board shall enforce Title 4 and regulations adopted by the Board. Title 4 also provides that a person who violates a provision of the Title or adopted regulations is guilty, upon conviction, of a class A misdemeanor. To enable the Director and enforcement personnel to accomplish this task, Title 4 also provides for the exercise of peace officer powers, upon concurrence of the Commissioner of Public Safety.

Although these statutes clearly show that the ABC Board is mandated to enforce Title 4, it is ABC's opinion the primary responsibility for enforcement rests with State and local law enforcement agencies. As a result, few criminal complaints have resulted from ABC enforcement activities. During Fiscal Year 1982, only eight criminal complaints were filed, five of which were originated by ABC personnel.

The ABC Board utilizes a Notice of Violation to communicate to licensees that a violation allegedly occurred. However, Notices of Violation of and by themselves carry no penalty. Again, the ABC Board relies primarily on State and local law enforcement agencies to provide information to generate a Notice. Over 60 percent of the Notices issued during Fiscal Year 1982 were the result of work performed by local law enforcement agencies.

State and local law enforcement agencies are required to investigate and report violations of Title 4 to the ABC Board. However, this responsibility is only a small part of their total criminal enforcement responsibilities in the State of Alaska. As a matter of priority, these agencies cannot devote sufficient time to the enforcement of Title 4. Therefore, this responsibility must and does rest with the ABC Board.

It is our opinion that the ABC Board should reevaluate its interpretation of the enforcement responsibilities of Title 4 and, within staffing limitations, reconsider the direction of current ABC enforcement efforts.

Recommendation No. 2

The Office of the Governor should keep appointments to the Alcoholic Beverage Control Board current and staggered as required by AS 04.06.030.

During our review of appointments to the ABC Board we noted the following exceptions:

1. Past appointments to the Board have not been made in accordance with the provisions of AS 04.06.030(b) which requires the Governor to fill vacancies to unexpired terms within 30 days of the vacancies. Our review of appointments showed one position remained vacant for 92 days and another position was vacant for 152 days.
2. AS 04.06.030(a) requires appointments to be overlapping terms of 3 years. We found that the terms of two members will expire on January 31, 1984, and the terms of two other members will expire January 31, 1985.

We recommend the Office of the Governor appoint new members or reappoint current members to vacant ABC Board seats in a timely manner and in compliance with AS 04.06.030. We also recommend that the appointment terms be staggered as required by law.

We further recommend the Office of the Governor establish a talent pool for Board appointments. The concept of a talent pool is to have a list of persons available and desiring to serve as a Board member. Many sources exist in the State to establish such a pool. Liquor industry associations could be requested to provide a list of members who would like to serve as an industry representative on the Board.

## ANALYSIS OF PUBLIC NEED

### Limited Analysis

The following analysis indicates both positive and negative attainments of the ABC Board and how its activities relate to the public need factors defined by AS 44.66.050. This analysis is not intended to be comprehensive in nature.

I. The extent to which the board, commission or program has operated in the public interest.

Public protection gained through licensing to control liquor manufacture and traffic has been adequately provided by the ABC Board. However, the Board is also charged with enforcement of the alcoholic beverage control laws, rules, and regulations. As previously documented in this report, it is our opinion the ABC Board has not met its statutory responsibilities in protecting public health, safety, and welfare (see Recommendation No. 1).

II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personal matter.

The 1980 revisions to Title 4 have, for the most part, been beneficial to the operation of the ABC Board. However, those sections which deal with suspension and revocation of licenses and permits place severe restrictions upon the ability of ABC to suspend and revoke licenses for the illegal act of licensee employees.

The Board is also restricted in meeting its statutory responsibilities in protecting the public health, safety and welfare by the size of the enforcement staff which consists of one agent in Juneau, one in Fairbanks and three, including a supervisory agent in Anchorage. Including the supervisory agent, there are only five agents with inspection and enforcement responsibilities for 1,483 licensed premises. However, one other Anchorage Investigator position is vacant.

- III. The extent to which the board, commission or agency has recommended statutory changes which are generally of benefit to the public interest.

The last major revisions to Title 4 of the Alaska Statutes were the result of action by the 1980 session of the Legislature. The ABC Board participated in the process of developing those revisions.

- IV. The extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

The ABC Board has met an average of ten times during 1980 and 1981. During each year they have met at least once in each of the four judicial districts. Each meeting has been adequately advertised and open to all interested persons. Staff of the ABC Board are located in Anchorage, Juneau and Fairbanks and are available to answer inquiries of the general public during all normal business hours. We believe this has provided an adequate forum for allowing public input on Board regulations and decisions.

- V. The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.

As noted in IV above, the Board has provided an adequate forum for obtaining input from the public.

- VI. The efficiency with which public inquiries or complaints regarding the activities of the board, commission or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of the ombudsman have been processed and resolved.

As noted in past reviews the number of formal hearings continue to be few in number. However, the ABC Board has the authority to hold its own hearings on protests which it exercises as a part of its regularly scheduled meetings. Hearings in this manner have been accomplished in a timely manner since the Board meets at least ten times each year.

VII. The extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public.

Our review of licensing activity of the ABC Board to determine whether all statutory qualifications of licensees were being met revealed no exceptions. The Board has therefore, presented qualified applicants to serve the public.

VIII. The extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity or interest.

No discrepancies were noted during our review of the ABC Board affirmative action program.

IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to I and II above and to the previous section, Findings and Recommendations.

(Intentionally left blank)

APPENDIXES

APPENDIX A

STATE OF ALASKA  
DEPARTMENT OF REVENUE  
ALCOHOLIC BEVERAGE CONTROL BOARD  
REVENUE COMPARED WITH EXPENDITURES  
Fiscal Years 1980, 1981 and 1982  
(UNAUDITED)  
(Note 1)

	<u>1980</u>	<u>1981</u>	<u>1982</u>
Revenue (See Schedule 1)	\$1,028,982	\$1,494,489	\$1,548,393
Expenditures	<u>(493,121)</u>	<u>(556,589)</u>	<u>(562,178)</u>
<u>Excess of Revenue Over Expenditures</u>	<u>\$ 545,861</u>	<u>\$ 937,900</u>	<u>\$ 986,215</u>

Schedule 1  
Revenue Collected

<u>Types of License</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
Liquor License Application	\$ 76,050	\$ 83,250	\$ 86,350
Pub	494	100	400
Beverage Dispensary	501,850	771,050	773,200
Club	24,650	39,300	39,300
Common Carrier	14,150	25,800	29,050
Restaurant	44,250	60,750	69,600
Roadhouse	3,250	-0-	-0-
Retail Store	248,350	330,700	335,400
Wholesale General	79,500	138,500	156,000
Wholesale Malt Beverage	15,300	13,200	21,600
Miscellaneous (Note 2)	<u>21,138</u>	<u>31,639</u>	<u>37,493</u>
<u>Total</u>	<u>\$1,028,932</u>	<u>\$1,494,489</u>	<u>\$1,548,393</u>

Note 1

This revenue/expenditure comparison was prepared from available records and discussions with ABC Board personnel. The records were not audited by us and accordingly we do not express an opinion on the ABC Board Revenue Compared with Expenditures, nor the Schedule of Revenue Collected.

Note 2

Includes recreational-site licenses, caterer's, special events and conditional contractor's permits.

APPENDIX B

STATE OF ALASKA  
DEPARTMENT OF REVENUE  
ALCOHOLIC BEVERAGE CONTROL BOARD  
NUMBER OF LICENSES BY TYPE  
Fiscal Years 1980, 1981 and 1982

<u>Types of License</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
Pub	1	1	1
Beverage Dispensary	607	620	634
Club	61	63	65
Common Carrier	64	72	88
Restaurant	146	182	215
Roadhouse	20	-0-	-0-
Retail Store	431	438	445
Wholesale General	16	15	16
Wholesale Malt Beverage	6	7	7
Miscellaneous (Note 1)	<u>10</u>	<u>9</u>	<u>12</u>
<u>Total</u>	<u>1362</u>	<u>1407</u>	<u>1483</u>

Note 1

Includes recreational-site licenses, caterer's, special events and conditional contractor's permits.

APPENDIX C

STATE OF ALASKA  
DEPARTMENT OF REVENUE  
ALCOHOLIC BEVERAGE CONTROL BOARD  
DESCRIPTION OF LICENSE TYPES AND FEES

<u>Source</u>	<u>Description</u>	<u>Annual Fee</u>
Application Fee	For each license application.	\$ 50
Beverage Dispensary	To sell or serve on the licensed premises alcoholic beverages for consumption on the licensed premises only.	1,250
Restaurant or Eating Place	To sell beer and wine for consumption only on the licensed premises.	300
Club	To sell alcoholic beverages for consumption only on the licensed premises.	600
Bottling Works	To operate a bottling works where beer and wine may be bottled and sold.	250
Brewery	To operate a brewery where beer is manufactured and bottled or barreled for sale.	500
Winery	To operate a winery where wine is manufactured and bottled or barreled for sale.	250
Package Store	To sell alcoholic beverages to a person in response to a verbal solicitation for purchase received from the person present on the licensed premises or in response to a written solicitation made by a person known to the licensee for a purchase to be received by the person making the solicitation.	750

<u>Source</u>	<u>Description</u>	<u>Annual Fee</u>
Retail Stock	To sell the remaining stock of a package liquor store when the owner wishes to close or terminate business. Sale may only be to licensed persons.	\$ 100
General Wholesale	To sell alcoholic beverages in the original package, and wine in bulk, in quantities of not less than five gallons to holders of licenses.	1,000 First \$100,000 of sales plus \$500 - 10,000 on additional sales
Wolesale Malt Beverage and Wine	To sell malt beverages and wine in the original packages in quantities of not less than five wine gallons to holders of licenses.	200 First \$20,000 of sales plus \$300 - 10,000 based on additional sales
Distillery	To operate a distillery where alcoholic beverages are distilled and bottled or barreled for sale.	500
Community Liquor	Authorizes a municipality to operate a beverage dispensary or a package store or both subject to the same conditions and fees applicable to beverage dispensary or package liquor store licenses.	1,250 Beverage Dispensary 750 Package Store
Common Carrier Dispensary	To sell alcoholic beverages for consumption aboard a vehicle, boat, aircraft, or railroad buffet car licensed by the State or federal agency for passenger travel.	350 Per vehicle, boat, aircraft or railroad car
Recreational Site	To sell beer and wine at a recreational site during and one hour before and after a recreational event which is not a school event, for consumption on designated areas at the site.	400

<u>Source</u>	<u>Description</u>	<u>Annual Fee</u>
Pub	To sell beer and wine for consumption only at designated premises located on the campus of an accredited college or university.	\$ 400
Caterer	Authorizes the holder of a beverage dispensary license to sell or dispense alcoholic beverages at conventions, picnics, social gatherings, sporting events or similar affairs held off the holder's licensed premises.	50
Special Events	To sell or dispense beer or wine for consumption at designated premises for a specific occasion and limited period of time. Only a nonprofit organization may acquire the permit.	50 Per day
Conditional Contractor	To sell beer or wine for consumption only on designated premises for one year from the date of issuance of the permit at construction sites which are located outside a city and inside the boundaries of a military or naval reservation.	600

# STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

## DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

POUCH 5  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-2300

March 2, 1983



Mr. Gerald I. Wilkerson, CPA  
Legislative Auditor  
Division of Legislative Audit  
Pouch W  
Juneau, AK 99811

Dear Mr. Wilkerson:

This letter is in response to your Recommendation No. 1 contained in your preliminary audit report of the Alcoholic Beverage Control Board dated December 15, 1982.

Without generating a lengthy dissertation about staff and budgetary limitations, utilization of present staff, and administrative/judicial due process, we generally believe your recommendation has merit. However, if we understand your perception of enforcement by the board to be criminally oriented, under present law heavy reliance on other state and local law authority is required, and no single agency could fill a void which the report implies exists.

The board at each and every monthly meeting evaluates its enforcement function through granting or denying license applications, sitting in informal conference, and reviewing hearing officer decisions. The board has scheduled "workshop" sessions during its two-day April meeting in Juneau and will review law and regulations in light of your opinion.

Thank you for the opportunity to respond.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert D. Heath". The signature is fluid and cursive.

Robert D. Heath  
Commissioner of Revenue

cc: Patrick L. Sharrock, Director  
ABC Board

ABC Board Members

S

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2

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8

# COMMITTEE REPORT

## SENATE

FURTHER:       

Date: 12/2/85

Mr. President:

The Committee on        has had       

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for         same title  
 new title
- and recommends
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the        Committee

MEMBERS SIGNING  
DO PASS

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MEMBERS HAVING  
OTHER RECOMMENDATIONS:

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\_\_\_\_\_  
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\_\_\_\_\_  
CHAIRMAN

DRAFT  
COMMITTEE LETTER OF INTENT  
ON  
CS FOR SENATE BILL 228 (JUDICIARY)

In the Legislature of the State of Alaska  
13th Legislature - 1st Session

The purpose of Senate Bill 228 is to extend to the Metlakatla Indian Community the benefits of two ongoing state revenue sharing programs, the Municipal Assistance Fund, AS 43.20.016, and the Municipal Tax Resource Equalization Program, AS 28.88.010 et seq. Under existing state law, the Metlakatla Indian Community is not eligible to participate in these programs because it is not technically a state-law "municipality." Senate Bill 228 applies only to the Metlakatla Indian Community and does not affect the legal status or rights of any Indian Reorganization Act entities, traditional councils or village or regional corporations organized under the Alaska Native Claims Settlement Act.

The Committee believes that in fairness the Metlakatla Indian Community must be distinguished from other Native organizations in Alaska with respect to state revenue sharing. The Metlakatla Indian Community has a legal status in Alaska that is absolutely unique. Because the Metlakatla Indian Community elected to forgo the benefits of the Alaska Native Claims Settlement Act, the reservation status of the Annette Islands Reserve was preserved. Metlakatla was the only reserve in Alaska to make this choice. Thus section 19 of the Alaska Native Claims Settlement Act extinguishes all previously existing federal Indian reserves in Alaska

but specifically excepts the Annette Islands Reserve. As a federal Indian reservation, located on federal trust land, the Community cannot incorporate under state law.

It is true that the Metlakatla Indian Community is eligible for various federal assistance programs made available to tribes throughout the United States. However, the Metlakatla Indian Community enjoys no special advantage vis-a-vis other Alaska Native groups in this regard. Section 2(c) of the Alaska Native Claims Settlement Act provides that the Act does not diminish the responsibility of the federal government to Alaska Natives and Alaska Native groups. The various federal statutes extending benefits to Indian tribes have therefore been amended to provide that the term "tribe" includes the traditional councils, the Indian Reorganization Act entities, and the village and regional corporations located in Alaska. These entities, as well as the Metlakatla Indian Community, therefore receive federal aid under the Indian Self-Determination Act and other federal programs. Unfortunately, this federal aid for Indian entities throughout the United States has substantially eroded. According to the Bureau of Indian Affairs, the federal cutbacks in Indian programs under the Reagan administration have averaged 45%. The Metlakatla Indian Community must now look to other sources for funding.

With respect to state aid, the Metlakatla Indian Community is at a special disadvantage compared to non-Native and predominately Native communities in Alaska. The Metlakatla Indian Community provides substantial governmental services for the approximately

1300 persons who reside on the Annette Islands Reserve, including both members and non-members of the Community. Its governmental expenses are commensurate with these responsibilities, averaging approximately \$1.7 million per year. But because the Metlakatla Indian Community is chartered under federal, not state, law, it is not eligible for the state revenue sharing benefits that are extended to other Alaska communities. In contrast, the other Native communities in Alaska, at least those of a size comparable to Metlakatla, are incorporated under state law and the Alaskans resident there enjoy the indirect benefits of state revenue sharing. For example, the City of Hydahurg is organized as a first class city and is eligibile to receive state revenue sharing. At the same time, this predominately Native community also receives substantial federal benefits, under the Indian Self-Determination Act and other programs, because of the presence there of the Haida Corporation, an ANCSA village corporation, and the Haida Cooperative Association, an Indian Reorganization Act entity set up pursuant to section 16 of the Indian Reorganization Act. The Metlakatla Indian Community is eligible to receive the federal but not the state benefits. Senate Bill 228 will eliminate this disparity of treatment between state citizens by extending the state revenue sharing benefits that other Alaska communities now enjoy to the Metlakatla Indian Community.

At the Committee hearing, concern was expressed that the phrase "local government," referring both to state law municipalities and to the Metlakatla Indian Community, was unnecessarily

broad. The Committee has discussed this matter with legislative counsel and recommends that this language be eliminated and that the phrase "municipality and federal Indian reserve tribe" be used to refer to the legal entities eligible for revenue sharing under these two state programs. The existing definition section, clarifying that the "federal Indian reserve tribe" refers only to Metlakatla, should be retained.



- File

# THE CITY AND BOROUGH OF JUNEAU

CAPITAL OF ALASKA

155 SOUTH SEWARD ST. JUNEAU, ALASKA 99801

LAW DEPARTMENT - 586-5242

June 13, 1983

The Honorable Robert H. Ziegler, Sr.  
Alaska State Senator  
107 Capitol Building  
Juneau, Alaska 99801

File: Legislature - 1983 - General Correspondence

Subject: CSSB 228 (C&RA)

Dear Senator Ziegler:

Following your telephone conversation this morning I reviewed CSSB 228 (C&RA) to determine whether it would have any effect on Juneau area Indian tribes or the Indian-owned property on Willoughby Avenue often referred to as the Juneau Indian Village or the village.

It is my reading of the bill, particularly in light of the intent section, that it will have no effect on any Juneau area Indian tribe or on the village. The bill affects only those Indian tribes located on a "federally established Indian reserve" and there are no federally established Indian reserves in Juneau. In fact, all Indian reserves in Alaska except the Annette Island Reserve (Metlakatla) were revoked by Section 19(a) of ANCSA.

The village is a 1964 townsite plat known as the Juneau Indian Village Addition to the Juneau Townsite. The federal townsite trustee conveyed property to Alaska Natives occupying property within the Juneau Indian Village Addition by means of deeds entitled "Native Restricted Trustee Deed." The deeds, pursuant to 43 USC 733, provided that the land

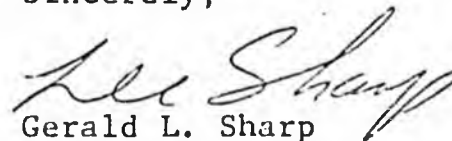
shall not be alienated or encumbered without the consent of the Secretary of Interior, and shall not be subject to taxation, to levy and sale in satisfaction of debts, contracts or liabilities, or to any claim of adverse occupancy or law of prescription . . .

With the consent of the Secretary of Interior the restricted status of much of the village property has been lifted and the property conveyed to non-natives. The village is now a patchwork of restricted and non-restricted titles. In any event, the village created by the Juneau Indian Village Addition townsite plat was not then, and is not now, a federally established Indian reserve and would not be affected by CSSB 228 (C&RA).

In reading sections 27 and 28, the addition of the phrase "Indian tribe and" to the sections of Title 29 being amended caused me some concern over the fact that "Indian tribe" was not defined and could be read to mean any Indian tribe. However, upon reading AS 29.95.020 (a), (b) and (c) as amended by sections 26 through 28 of the bill, it becomes clear that the term "Indian tribe" is limited to Indian tribes qualifying for state aid under AS 29.88 and AS 29.89.

In summary, I do not believe the subject bill would have any effect on the Juneau Indian Village on Willoughby Avenue nor on any Indian tribe in the Juneau area.

Sincerely,

  
Gerald L. Sharp  
City-Borough Attorney

GLS:jr

cc: Senator Bill Ray

STATEMENT IN SUPPORT

OF

SENATE BILL 228

Before the Senate Judiciary Committee

Presented by:

Steven S. Anderson  
Attorney for the Metlakatla  
Indian Community

SUMMARY STATEMENT  
IN SUPPORT OF  
SENATE BILL 228

Existing Alaska state law makes substantial sums of state money available to local governments on an ongoing basis under several legislative programs, the Municipal Assistance Fund, AS 43.20.016, and the Municipal Tax Resource Equalization Program, AS 28.88.010. At the present time, the Metlakatla Indian Community does not qualify to participate in these programs because it is not a "municipality" as defined in these state statutes. Although the Metlakatla Indian Community provides the same kinds of governmental services as other local governments in Alaska, it is organized under federal, not state, law, and is not a qualifying "subdivision" of the State. Although Metlakatla has received funding from the State of Alaska, that has been either through special legislation, or because the State has held Metlakatla eligible as an "unincorporated community." The money made available under the unincorporated communities programs, however, are substantially less than those made available to organized local governments and certain programs, like the Municipal Assistance Fund, have not been extended to unincorporated communities at all.

The purpose of Senate Bill 228 is to extend the benefits of these state revenue sharing programs to the Metlakatla Indian Community. Although Metlakatla is organized under federal law,

it performs governmental functions that are closely analogous to those performed by state municipalities, and the state citizens resident there should receive the same indirect benefits.

The Metlakatla Indian Community is a federally-recognized Indian tribe located on the Annette Islands Reserve, which is the only remaining federal Indian reserve now existing in Alaska. Section 19(a) of the Alaska Native Claims Settlement Act abolished all Indian reserves in Alaska with the express exception of Metlakatla. Metlakatla's government is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, which authorized Indian tribes throughout the United States to establish written constitutions to formally organize their governments. The Metlakatla Indian Community performs substantial local government functions for the Reserve. The Community provides police and fire protection, water, sewer, and electric services, and garbage collection. Metlakatla's twelve-man governing council passes civil and criminal ordinances governing the conduct of persons on the Reserve, has established a judicial program, and conducts various social programs for the benefit of the residents of the Annette Islands Reserve. Under federal law, the Metlakatla Indian Community also enjoys the authority to levy taxes for the support of the Community's government. In short, the Metlakatla Indian Community performs governmental functions that closely resemble the functions of Alaska municipalities, the principal difference being that Metlakatla's authority arises pursuant to federal, not state, law.

The cost of providing these services to the more than 1300 residents of the Annette Islands Reserve is very substantial. In fiscal 1982, for example, Metlakatla's budget was approximately \$1.7 million. In the past, substantial proportions of this budget have been provided through grants and loans from the United States government. Under the Reagan administration, however, the cutbacks in the various federal programs extended to Indian tribes have been extraordinarily substantial, averaging 15% nationwide. Metlakatla, like other Indian tribes throughout the United States, has been substantially affected.

As a result of these cutbacks, and because of the general slowdown in the Community's economy due to the downturn in the salmon market and because of the depressed timber industry, the Metlakatla Indian Community has substantial need for State assistance. Senate Bill 228 would correct a serious inequity in state law by extending to the state citizens residing on the Annette Islands Reserve, the same indirect benefits of state revenue sharing now enjoyed by other Alaska state citizens located in similar communities throughout the state. The Metlakatla Indian Community therefore respectfully requests the enactment of Senate Bill 228.

MK/52383  
M1/MIC/BILL

File

W013-1128

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT  
ATTORNEYS AT LAW

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WASHINGTON, D.C. 20036  
(202) 331-4650

March 4, 1983

PLEASE REPLY TO SEATTLE OFFICE

\* WASHINGTON AND ALASKA STATE BARS  
\*\* DISTRICT OF COLUMBIA BAR  
ALL OTHERS WASHINGTON STATE BAR

Senator Robert H. Ziegler, Sr.  
Pouch V  
Juneau, Alaska 99811

Re: Metlakatla Indian Community Eligibility for State  
Revenue Sharing

Dear Senator Ziegler:

I am writing on Metlakatla's behalf, as a follow-up to our conversation in Juneau, to request your assistance in securing legislation making the Metlakatla Indian Community eligible for State revenue sharing and other State financial aid which is available to Alaska's other municipalities, including a number of like size and comparable governmental responsibilities.

Although I know you are quite familiar with Metlakatla's status and its treatment under state law, I thought it might be helpful if I provided you with a detailed explanation of the basis for the Community's position. I have prepared a paper outlining Metlakatla's arguments which I enclose for your reference. It discusses the legal status of the Community, and what I see as the primary basis for expanding the eligibility requirements of the various State municipal assistance programs. The paper is preliminary because, except for the revenue sharing programs, it does not identify precisely the programs in which Metlakatla seeks to participate. I believe that will have to wait for additional discussions with you and Representatives Wendte and McBride.

As you know, the State of Alaska has in the past provided assistance to the Metlakatla Indian Community as it has to other communities throughout the State of Alaska. Most often, as in the case of the swimming pool project, the money has been made available as part of a specific legislative grant. The Community is well aware that this has been made possible primarily through your sponsorship.

Senator Robert H. Ziegler, Sr.

Page 2

March 4, 1983

There are many on-going State assistance programs, however, for which the Community does not currently qualify. In several instances, the Community has received funds from the Department of Community and Regional Affairs under programs making the so-called "unincorporated communities" eligible for State financing. Metlakatla's classification as an "unincorporated community," however, is problematic.

Although the Metlakatla Indian Community is organized under federal law and is therefore not technically a state "municipality," in form and function it more closely resembles a "municipality" than it does an "unincorporated community." Metlakatla does not resemble those communities in the unorganized borough with no organized local government. The distributions authorized by the legislature for the unincorporated communities have been much less substantial than the distributions to the municipalities. Since Metlakatla has substantial "municipal" responsibilities, it has a correspondingly greater need for revenues than do the unincorporated communities, and it would seem that Metlakatla's eligibility for those programs should turn on the functions it performs for the Alaska citizens who reside on the Reserve, rather than on the fact that it is chartered by the United States rather than the State of Alaska.

At the present time, Alaska citizens who reside on the Annette Islands Reserve do not share the same opportunity as other state citizens residing in similar communities to enjoy the indirect benefits of state revenue sharing. The Legislature, it seems to me, has made a policy decision that some of Alaska's wealth should be made available to its citizens indirectly through the various state programs that provide direct financial aid to local governments. Such a distribution scheme has the advantage of ensuring that a substantial part of the money distributed will be invested in permanent civic improvements of long-range benefit to state citizens. When oil and gas revenues are distributed directly to individual state citizens, there is, of course, no such assurance. Considered from the perspective of the individual state citizen who lives on the Annette Islands Reserve, therefore, the State does not extend to the Metlakatlans the same indirect benefits it does to other state citizens residing in similar communities. This inequality of treatment is most clearly evident in the Municipal Assistance Fund where the State has elected to distribute 30% of the oil and gas income tax revenues to municipalities.

Senator Robert H. Ziegler, Sr.  
Page 3  
March 4, 1983

I am aware that some of the arguments the Community advances could also be made by other Native groups in Alaska. Neither I nor the Community have any desire to debunk the efforts of other needy Alaska Natives to obtain help from the State of Alaska. At the same time, the Community's status in Alaska law is unique and I do not think there is any unfairness in extending eligibility for municipal revenue sharing only to the Annette Islands Reserve, at least as a first step. Metlakatla's governmental and reservation status is crystal clear. The problem of treatment of other Alaska Natives can be approached on an ad hoc basis by determining which other Native communities provide governmental services similar to Metlakatla and yet are ineligible for State aid.

Most if not all of the other Native communities in Alaska with populations of the same magnitude as the Annette Islands Reserve are incorporated under state law as first or second class cities, or are located within an organized borough. As a result, Natives resident there enjoy the indirect benefits of the State distributions that Metlakatla is denied. And, as I explain more fully in the attached paper, these Native groups are also eligible for the same federal aid that is extended to Metlakatla since the various federal statutes extending aid to Native Americans have expanded the definition of "Indian tribe" to include the villages, the ANCSA village and regional corporations, and the traditional councils located throughout the State of Alaska. It is also significant, concerning equality of treatment, that the Metlakatla Indian Community and its members have been ineligible to participate in the Alaska Native Claims Settlement Act benefits that other Alaska Natives have enjoyed.

I would like to specifically request that you ask Tamara Cook of the Legislative Affairs Agency to assist on this project. As we discussed, she is currently working on the redraft of Title 29, the State Municipal Code, and is very familiar with the various State programs for municipal assistance. In addition, Senator Ziegler, I would also request that you authorize her to discuss these matters with me so that I can remain involved in the drafting process.

In analyzing the various State statutes, I have had considerable difficulty in determining which statutes the Community should seek to have amended. The clearest candidates are the two principal revenue sharing measures--the Municipal Assistance Fund, AS 43.20.016 discussed above, and the Municipal Tax Resource Equalization Program codified in AS 29.88.010 et seq., and along with them, the

Senator Robert H. Ziegler, Sr.  
Page 4  
March 4, 1983

corresponding program for State aid for miscellaneous municipal purposes found in AS 29.89. Not only do these revenue sharing measures clearly implicate the Community's concerns for unequal treatment of Metlakatla residents, but if extended to Metlakatla they would provide the advantage of an on-going source of support to replace, in part, the federal funding which has been evaporating under the Reagan administration.

At the same time there are a number of State programs providing monies to individual communities for particular purposes. An example is the Department of Environmental Conservation's program for assistance to municipalities for water, sewer and solid waste systems. The Attorney General has ruled that Metlakatla is ineligible for such assistance because it was not a "municipality." The problem I am having is that an attempt by Metlakatla to amend such statutes would substantially overlap with the proposal advanced to you independently by the Community for State aid for various priority projects. I am also concerned that the Metlakatla Indian Community not jeopardize its chances for increased State assistance by asking for too many changes at once. On the other hand, at least as a matter of logic, it might make sense to seek to make Metlakatla eligible for all State municipal aid programs. It seems to me that the Community and I will need your counsel on this point. A further complication arises because to the extent that the Community receives specific appropriations for individual projects (the water supply dam discussed in the Community's proposal, for example), it may not be necessary to seek to amend the general State statutes. I am clearly not in a position to make a unilateral decision as to which specific programs should be included.

Because of that uncertainty, the attached position paper is preliminary in certain respects and will probably have to be modified as the Community's position becomes more refined. I have no objections if you wish to distribute the paper and will leave that to your judgment. In light of the meeting you had last week with Governor Sheffield, I thought I should send copies of the paper to Representatives McBride and Wendte. I will ask them to consult with you as to whether they think the paper should be kept confidential at this point. I am also taking the liberty of sending a copy to Governor Sheffield's Aide for Indian Affairs, Sandra Borbridge, who has called me several times for briefing on the Community's position. I will also ask her to withhold distribution of the paper.

Senator Robert H. Ziegler, Sr.  
Page 5  
March 4, 1983

I would like to have another meeting along with a Metlakatla delegation with you, Representative McBride and Wendte and Wally Kubley. I will be available to come back to Juneau at your convenience and will, of course, be happy to testify in any hearings or provide any other assistance I can in attempting to secure these amendments. In addition, I am sure that Mayor Casey Nelson and the members of the Council and staff will be available to testify or help if that becomes useful.

Once again, I would want to express my thanks and the Community's thanks for your assistance and advice.

Very truly yours,

ZIONTZ, PIRTLE, MORISSET,  
ERNSTOFF & CHESTNUT

*Steven S. Anderson*

Steven S. Anderson

cc: Representative Ron Wendte  
Representative Jack McBride  
Mayor Casey Nelson,  
Metlakatla Indian Community  
Council Members,  
Metlakatla Indian Community  
Wally Kubley  
Gordon Thompson

Enclosure

SSA:asr/mm/mk

MK/3483  
F2/MIC/ZIE/L

I. REQUEST  
 Bill/Resolution No: SB 228  
 Title: State aid for Indian tribes  
 Sponsor: Ziegler  
 Requestor: Senate Comm. & Reg. Affairs

II. FISCAL DETAIL  
 Agency Affected: Revenue  
 Program Category Affected: Rev. Coll & Mgmt.  
 BRU, Program of Subprogram(s) Affected:  
 Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES	-	-	-	-	-	-
200 TRAVEL	-	-	-	-	-	-
300 CONTRACTUAL	-	-	-	-	-	-
400 COMMODITIES	-	-	-	-	-	-
500 EQUIPMENT	-	-	-	-	-	-
600 LANDS & STRUCTURES	-	-	-	-	-	-
700 GRANTS, CLAIMS, ETC.	-	-	-	-	-	-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-	-	-	-	-	-
---------	---	---	---	---	---	---

REVENUE	-	-	-	-	-	-
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER (Specify Source)	-	-	-	-	-	-

POSITIONS:

FULL-TIME	-	-	-	-	-	-
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis.

Prepared By: Ervin B. Jones Phone: 465-2313  
 Division: Administrative Services Date: 5/16/83  
 Approved by Commissioner: Joseph McDonnell Date: 5/17/83  
 Department: Revenue

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

SB 228

IV. ANALYSIS:

This bill will have no effect on the administrative cost of the municipal assistance program in the Department of Revenue. The effect of section 30 will be to dilute the amount to be shared per capita, as a result of increasing the base amount shared. Since the population of the only known such Indian Reserve (Metlakatla) is approximately 1200 persons, the effect on other communities will be minimal.

Assumptions: I assume the substitution of the word "municipalities" in place of "organized boroughs and cities of any class" does not further broaden the field of eligible recipients of municipal assistance.

# Alaska State Legislature

SENATOR  
ROBERT H. ZIEGLER, SR.  
307 BAWDEN STREET  
KETCHIKAN, ALASKA 99901

While in Juneau  
POUCH V  
JUNEAU, ALASKA 99811



Senate

VICE CHAIRMAN  
SENATE RESOURCES COMMITTEE

MEMBER  
SENATE JUDICIARY COMMITTEE

WESTERN STATES LEGISLATIVE  
FORESTRY TASK FORCE

WESTERN CONFERENCE COUNCIL  
OF STATE GOVERNMENTS

April 26, 1983

Mr. G. Thomas Koester,  
Assistant Attorney General  
Department of Law  
Pouch K  
Juneau, Alaska 99811

Dear Tom:

I had anticipated that SB 228 would require careful handling along the way.

I have taken the liberty of furnishing copies of your April 21st letter to all those people who are actively involved in the legislation. At the moment, Tamara Cook, in-house counsel, is working with us and Metlakatla counsel to get the bill in order before I endeavor to prevail upon Senator Ferguson to move the bill.

Accordingly, at such time as Ms. Cook has had the time to digest the contents of your letter, we can put together our proposed committee substitute and run it by your office for your review and comments.

Very truly yours,

Robert H. Ziegler, Sr.

RHZ:lk

cc: Billy Berrier w/enc.  
Tamara Cook w/enc.  
Steve Anderson w/enc.

**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

April 21, 1983

The Honorable Robert H. Ziegler, Sr.  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: SB 228 (Relating to State aid for Indian tribes located  
on federally-established Indian reserves)

Dear Senator Ziegler:

Assistant Attorney General Larry D. Wood of the Department of Law office in Fairbanks recently brought this bill to my attention. In particular, he noted that the provisions of the bill would apply to an "Indian tribe located on a federally established Indian reserve." Neither "Indian tribe" nor "federally established Indian reserve" are defined or further identified in the bill.

As you may know, there is considerable uncertainty regarding those terms and concepts in Alaska. However, everyone seems to agree that the Metlakatla Indian Community qualifies as an "Indian tribe located on a federally established Indian reserve." Accordingly, if it is your intent to ensure that the Metlakatla Indian Community may receive state aid, we believe it would be desirable to amend the bill to reach only the Metlakatla Indian Community. We recognize that this may present some problem under the prohibition on local and special legislation in Art. II, sec. 19 of the Alaska Constitution. However, that provision of the Constitution prohibits local and special legislation only if a general law cannot be made applicable. Given the uncertainty regarding the concepts of "Indian tribe" and "federally established Indian reserve," we believe there is sufficient justification for limiting the reach of this bill to the Metlakatla Indian Community.

We will be happy to work with you, a designated legislative committee, or the Legal Affairs Division of the

The Honorable Robert H. Ziegler, Sr.

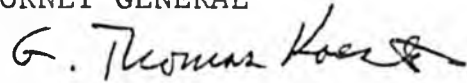
April 21, 1983

Page 2

Legislative Affairs Agency in working on this measure. We look forward to hearing from you at your convenience.

Sincerely,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:   
G. Thomas Koester  
Assistant Attorney General

GTK/rm

cc: Billy G. Berrier  
Larry D. Wood

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

May 16, 1983

The Honorable Donald E. Gilman  
Senator  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: CSSB 228

Dear Senator Gilman:

At your request we have reviewed the proposed CSSB 228. You asked whether the bill would affect the State's relationship with unincorporated communities or Native village governments. The bill amends the revenue sharing (AS 29.88 and AS 29.89) and municipal assistance (AS 43.20.016) programs to include Indian tribes located on federally established reserves which were not revoked by the Alaska Natives Claims Settlement Act (ANCSA), 43 U.S.C. 1601-1628. The only community which fits this description is the Metlakatla Indian community.

We see no legal problem with including Metlakatla as a recipient of the various programs established to benefit local governments. However, we believe that the use throughout the bill of the term "Indian tribe", and the omission of any reference to Metlakatla, may suggest to a reader not intimately familiar with AS 29 and ANCSA, that the effect of the bill is much broader. This effect could be avoided by replacing all references to "Indian tribe" with "the Metlakatla Indian community." We believe that the specific reference to Metlakatla would not cause the bill to be viewed as a local or special act in violation of Alaska Const. art. II, § 19, because it would have precisely the same effect as the use of the term "Indian tribe" as defined in CSSB 228 -- that is, "Indian tribe" as defined in the bill is a class of one, Metlakatla being the only federally established Indian reserve in Alaska not revoked under ANCSA. In order to simplify the statute and avoid confusing the reader we suggest referring to Metlakatla specifically, as well as identifying it as the only federally established Indian reserve in Alaska.

We note that AS 29.89.050 "State Aid to Native Village governments" is amended in the bill, to clarify that Metlakatla may not qualify both as a local government and as a Native village government. We have advised in the past that AS 29.59.050

The Honorable Donald E. Gilman

May 16, 1983  
Page 2


could be challenged on equal protection grounds by an unincorporated community which is not a Native village. We suggest repealing AS 29.89.050, and supplanting it with a provision for aid to unincorporated communities generally.

As a general practice in drafting legislation affecting Native villages in Alaska, you should consider including a provision of legislative intent to the effect that neither the act nor any action taken under it shall be interpreted to either expand or diminish the authority or jurisdiction any Native village council may have. This would reduce the possibility that any legislative act benefitting Native village communities may be interpreted to alter the relationship between the State and those communities.

We hope that this brief response is helpful in your consideration of CSSB 228.

Very truly yours,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:   
Laura L. Davis  
Assistant Attorney General

LLD:d1m

cc: Tam Cook  
Legislative Affairs Agency

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT  
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---

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(202) 331-8690

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PLEASE REPLY TO SEATTLE OFFICE

March 4, 1983

Sandra Borbridge  
Special Assistant  
Office of the Governor  
Pouch A  
Juneau AK 99811

Re: Metlakatla Indian Community's Eligibility for  
Municipal Aid

Dear Sandra:

As we discussed the other day on the telephone, I have prepared a paper for Senator Ziegler outlining the basis for the Metlakatla Indian Community's request that various state statutes be amended so that the Metlakatla Indian Community qualifies for state revenue sharing and other state municipal aid programs. I enclose a copy for your reference. Since the Community's position as to precisely what programs it will seek to have amended is not yet clear, I would prefer that you withhold distribution of the paper.

In light of our earlier conversations, I would particularly call your attention to the section of the paper that discusses Metlakatla's position relative to other Native communities in Alaska. As I have explained to you, the Community does not in any way want to interfere with the efforts of other predominantly Native communities from securing state aid. At the same time, however, it must be recognized that the situation of the Metlakatla Indian Community is legally and practically unique.

Sandra Borbridge  
Page Two  
March 4, 1983

It is my position that it makes the most sense to approach the question of Metlakatla's inequality of treatment first and then approach the problems of state treatment of other Native communities on an ad hoc basis. As I emphasized in the paper, it is important to realize that other Native communities, as well as the Metlakatla Indian Community, receive substantial federal aid. They qualify under federal statutes for Indian Self-Determination Act funding and most other federal programs made available to Indian tribes generally. It is also important to recognize that most Alaska Natives residing in communities of a size comparable to Metlakatla are either at or near a state municipality. Such communities, of course, are eligible for state municipal aid, and the individual Natives who live there receive the indirect benefits of such aid.

The only Natives who would not receive indirect benefits on a scale comparable to Metlakatla, if the requested amendments are enacted, would be those Natives in the unorganized borough who live in smaller communities which are not organized under state law. To my knowledge, none of these communities approach the size of Metlakatla or deliver governmental services on a scale that Metlakatla does. They do not have the same need for revenues that the Community does. If there are any such communities, however, that do deliver substantial governmental services, I see no reason that their situation could not also be remedied by an amendment to the state law. They would be in a much stronger position, however, if Metlakatla got its amendments through first so that they could point to similarities in their situation to that of the Metlakatla Indian Community. On the other hand, for communities that are organized under state law, duplication of state funding would occur if revenue sharing were made available to traditional or IRA councils within the same geographic boundary.

My greatest concern is that the problems that Metlakatla faces should not be ignored simply because it is difficult to deal with the problems concerning the treatment of other Alaska Natives. Metlakatla's situation is not controversial - its governmental status and the extent of its responsibilities are quite clear.

Sandra Borbridge  
Page Three  
March 4, 1983

I will be happy to discuss this matter with you further at your convenience. Thank you again for your attention to Metlakatla's concerns.

Very truly yours,

ZIONTZ, PIRTLE, MORISSET,  
ERNSTOFF & CHESTNUT



Steven S. Anderson

SSA:mk

Enclosure

cc: Senator Robert H. Ziegler, Sr.  
Representative Ron Wendte  
Representative Jack McBride  
Mayor Casey Nelson,  
Metlakatla Indian Community  
Council Members,  
Metlakatla Indian Community  
Gordon Thompson  
Wally Kubley

MK/3483  
F2/MIC/BOR/L

ELIGIBILITY OF THE METLAKATLA INDIAN COMMUNITY FOR  
STATE REVENUE SHARING AND MUNICIPAL AID PROGRAMS

March 4, 1983

Prepared By:

Steven S. Anderson  
ZIONTZ, PIRTLE, MORISSET,  
ERNSTOFF & CHESTNUT  
1600 Metropolitan Park  
1100 Olive Way  
Seattle, WA 98101

Attorneys for the  
Metlakatla Indian Community

## INTRODUCTION

The purpose of this paper is to show the justification for amending Alaska's laws to make the Metlakatla Indian Community eligible for various state municipal aid programs. At the present time, the Community's treatment under Alaska law is somewhat confusing and inconsistent. On the one hand, the Alaska Attorney General has ruled that the Metlakatla Indian Community is not a "municipality" as that term is defined in various state statutes making state monies available to local governments. At the same time, however, the Attorney General has ruled that the Metlakatla Indian Community can be classified as an "unincorporated community" for certain purposes so as to be eligible for various state programs extending aid to such communities.

This paper will demonstrate that although the Metlakatla Indian Community is organized under federal law, and is therefore not a state law municipal corporation, it nevertheless functions as an established unit of local government, a fact recognized both by the State of Alaska and the United States.

Unlike the so-called "unincorporated communities," the Metlakatla Indian Community operates a "municipal" government and provides governmental services to the more than 1,300 residents of the Annette Islands Reserve. These services include police and fire protection, water, sewer and electrical service, as well as general government. Like other local governments, the Community enacts and enforces laws and has an established judicial system. For these reasons, classification of the Metlakatla

Indian Community as an "unincorporated community" ignores the realities of Metlakatla's extensive governmental operations and the needs it has for funding the services it provides. This paper will discuss in some detail the Community's status under federal and state law, the need for state revenues, and the reasons that Metlakatla's unique status justifies its inclusion within these state municipal aid programs.

THE METLAKATLA INDIAN COMMUNITY'S ELIGIBILITY FOR  
STATE FINANCIAL ASSISTANCE UNDER EXISTING ALASKA LAW

The State of Alaska now makes substantial sums of money available to local units of government throughout the state. This occurs not only through the State's revenue sharing programs but also through state statutes that make monies available to local governments for specific projects within local government responsibility. The primary revenue sharing programs include the Municipal Assistance Fund administered by the Department of Revenue, AS 43.20.016 and the Municipal Tax Resource Equalization Program found in AS 28.88.010 et seq. The examples of state aid for miscellaneous municipal purposes are numerous including such programs as state aid to municipalities seeking to build or improve water and sewer systems, AS 46.03.030, as well as the state program found in AS 29.89.030 et seq. providing aid for municipalities maintaining roads, operating health facilities, and maintaining volunteer fire departments.

For the most part, the Metlakatla Indian Community is not eligible for these programs because it is not a "municipality"

within the meaning of the various state statutes that make these programs available to local governments. Last year, for example, the Metlakatla Indian Community applied for aid to the Department of Environmental Conservation for a grant under AS 46.03.030 for improvements to the Community's public water system. The Department of Environmental Conservation requested an opinion from the Alaska Attorney General as to whether Metlakatla was eligible, and the Attorney General, on July 28, 1982, issued an opinion noting that the Metlakatla Indian Community was an Indian tribe organized under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 and was "not incorporated as a city or organized as a borough under the laws of the State of Alaska." As a result, the Attorney General ruled, Metlakatla was not a "municipality" within the meaning of the statute and was not eligible for state aid. The Attorney General went on to note, however, that there was no legal prohibition on the Legislature making grants available to the Metlakatla Indian Community if the Community were designated as eligible. A copy of the Attorney General's Opinion is attached.

On the other hand, the Metlakatla Indian Community has qualified for state aid in certain circumstances, either because the statute makes state aid available to persons or organizations other than "municipalities," or in the case of a number of state programs, because the aid has been made available to "unincorporated communities." For the most part, the amounts made available to the "unincorporated communities" are substantially less than

the amounts made available to "municipalities." For example, AS 29.88 makes a maximum grant of \$25,000 available to communities not incorporated under state law, while that amount is the minimum grant for municipalities and is subject to adjustment upward based on a formula set out in the statute. The singular exception was the Municipal Aid Program, Chapter 60, SLA 1981, which made grants available to both municipalities and incorporated communities calculated on a \$1,000 per capita basis. Metlakatla, like other incorporated and unincorporated communities throughout the State of Alaska will receive a substantial grant from the State under this program.

Presumably, there are several principal reasons that the Legislature has chosen to make larger sums available to municipalities than to unincorporated communities. First, municipalities have governmental responsibilities to perform and therefore need more assistance. Second, their stable governmental structures ensure that State monies are spent or invested in a responsible fashion; they are more accountable than "unincorporated communities." Third, in contrast to State programs distributing State wealth to individual Alaskans on a per capita basis, distributions of state money to local governments ensures that substantial portions of the money will be invested in permanent improvements of long-standing benefit to the citizens of the State.

Although the Metlakatla Indian Community is organized under federal rather than state law, it more closely resembles a "muni-

cipality" than it does an "unincorporated community." If the State of Alaska were to make its revenue sharing programs available to the Community, it would be assured that the money would be utilized responsibly by the Community in helping to meet its very substantial governmental responsibilities. It would result in permanent benefit to the State citizens who reside on the Annette Islands Reserve, both members and nonmembers of the Community.

#### THE UNIQUE LEGAL STATUS OF THE METLAKATLA INDIAN COMMUNITY IN ALASKA

The Metlakatla Indian Community is the governing body of the only remaining federal Indian reservation in Alaska, the Annette Islands Reserve. The Reservation was established by Act of Congress in 1891 and a stable council-form tribal government has been in effect continuously since that date. In 1944, the Metlakatla Indian Community adopted a Constitution under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476, which provided a new federal framework for Indian tribal government. The form of the Community's government, however, remained essentially the same.

The Community's chief executive officer is the Mayor; it has a Secretary and Treasurer and its legislative body is a 12-person Council. The Community also has a judicial system headed by a federally-trained Magistrate. As a federally recognized Indian tribe the Metlakatla Indian Community enjoys the legal power to perform traditional local government functions. Like other tribes, it enacts and enforces civil and criminal laws and has

power to levy taxes, although its tax base is very limited. While Indian tribes enjoy a status in American law that is unique, for present purposes the Metlakatla Indian Community can be described as a federally chartered municipal corporation because it carries out the same types of governmental functions as do state-chartered municipal governments.

In Alaska, after the Alaska Native Claims Settlement Act was passed by Congress in 1971, Metlakatla's situation became unique. Under § 19(a) of ANCSA, all Indian reservations in Alaska, with the sole and express exception of the Annette Islands Reserve, were abolished. In addition, § 19(a) provides that no person enrolled in the Metlakatla Indian Community is eligible for benefits under the Act.

The unique status of the Metlakatla Indian Community was explicitly recognized by Congress in the Indian Tribal Governmental Tax Status Act of 1982. That statute provides that for certain federal tax purposes, Indian tribal governments shall be treated as states. The legal effect of the statute was to provide that Indian tribes, like state and local governments, would receive favorable tax treatment under the Internal Revenue Code. Thus, contributions made to Indian tribes are now tax deductible as are contributions made to state and local governments. Indian tribes are now entitled to immunity from certain federal excise taxes. And Indian tribes, like state and local governments, can now issue certain kinds of bonds, the interest on which is exempt from

federal income tax. The definition section of the statute provides that

The term 'Indian tribal government' means the governing body of any tribe, band, community, village, or group of Indians which is determined by the Secretary, after consultation with the Secretary of Interior, to exercise substantial governmental functions and in Alaska shall include only the Metlakatla Indian Community.

Section 203.

Consistent with its clear governmental status, the responsibilities of the Metlakatla Indian Community for the governance of the more than 1,300 people resident on the Annette Islands Reserve are substantial. For the fiscal year ended September 30, 1982, the Metlakatla Indian Community had total expenses of more than 1.7 million dollars. Of this sum, approximately one million dollars are associated with general government operations including expenses for building operations, road and street maintenance as well as the expenses of general accounting and administration. The other single most important expense was the Community's Police Department which accounted for 16.4% of the total budget. The following chart shows the breakdown of expenditures by the Metlakatla Indian Community on a dollar and percentage basis.

	Expenditures	Percent of Total
General Government	\$1,029,882	57.4%
Fire Department	\$ 55,284	3.1%
Rental Expenses	\$ 144,683	8.1%
Public Health and Sanitation Department	\$ 32,263	1.8%
Sewer System	\$ 6,088	0.3%
Police Department	\$ 294,368	16.4%
Water Department	\$ 30,928	1.7%
Garbage Department	\$ 52,730	2.9%
Cable Television Department	\$ 69,743	3.9%
Forestry Project	\$ 76,853	4.4%

This data does not include the operation of Metlakatla Power & Light, which is responsible for providing electric power to the Reservation. Metlakatla Power & Light is fully owned and operated by the Metlakatla Indian Community and generates power from both hydrogenerators and diesels.

In sum, although the Metlakatla Indian Community is organized under federal law, not under the laws of the State of Alaska, it nevertheless performs governmental functions and has governmental responsibilities that are every bit as extensive as the municipalities of the State of Alaska serving similar population bases. It has a corresponding need for revenues to meet these expenditures.

REASONS FOR EXTENDING MUNICIPAL REVENUE SEARING  
AND OTHER STATE BENEFITS MADE AVAILABLE TO LOCAL COMMUNITIES  
TO THE METLAKATLA INDIAN COMMUNITY

1. The Residents of the Annette Island Reserve Are Citizens of the State of Alaska and Should Not Be Denied Benefits Enjoyed By Other State Citizens Through Their Units of Local Government.

It is important to remember that the residents of the Annette Islands Reserve, both members and nonmembers of the Metlakatla Indian Community, are state citizens. As such they qualify for any distributions of Alaska's wealth made available on a per capita basis to state citizens. Rather than distributing money directly to state citizens on a per capita basis, the Legislature has determined that state revenues should be shared with state citizens indirectly, through grants to individual municipal governments. The best example of this is the Municipal Assistance Fund, AS 43.20.016, under which 30% of the oil and gas corporate income tax revenues are distributed to state municipalities, the amount of the grant being directly proportional to the population of each municipality.

Metlakatla fully supports the substantial policy justification for distributing state wealth through this method. By giving the money to stable local governments, the Legislature is assured that the money will be spent responsibly. The Legislature can reasonably expect that the monies so distributed will be invested in ways that will be of lasting benefit to the citizens of the State, as when the local governments utilize the state grants to build public facilities used by state citizens.

But if the rationale for distributing state wealth to units of local government is that the Legislature wants to see substantial portions of the money permanently invested by responsible governments in a way that will be of lasting benefit to state citizens, there is no reason to distinguish the Metlakatla Indian Community. Although the Metlakatla Indian Community is chartered under federal, not state law, it exercises governmental functions just as state municipalities do. The Metlakatla Indian Community has had a stable and continuous tribal government for more than eight continuous decades. The Legislature can be assured that money distributed to Metlakatla will be applied in a responsible fashion and in ways that will provide lasting benefit to the state citizens who reside there. To deny Metlakatla participation in state revenue sharing and other municipal aid programs, is to deny Alaska state citizens residing at Metlakatla substantial benefits other citizens enjoy.

2. Because of the Very Substantial Cutbacks in Federal Aid to Indian Tribes, the Metlakatla Indian Community Is in Substantial Need of State Assistance.

Although in the past the Metlakatla Indian Community has received substantial federal aid, the situation has changed dramatically for the Metlakatla Indian Community, as for other Indian tribes, under the Reagan administration. On a national level, it is estimated by the National Tribal Chairmen's Association in Washington, D.C. that with the budget cuts of October, 1982, there has been a 45% reduction in federal dollars made available to Indians and Indian tribes on the various reservations through-

out the country. Even the Bureau of Indian Affairs concedes that there has been at least a one-third cutback in federal dollars made available to the tribes.

By way of illustration, on the Annette Islands Reserve, the following programs have received the following cutbacks:

Program	Fiscal Year 1982 Entitlement	Fiscal Year 1983 Entitlement	Percentage Reduction
CETA	\$326,000	\$162,000	50%
Indian Community Health Program	\$ 80,000	\$ 55,000	31%
EDA Grant	\$ 40,000	\$ 30,000	25%
Senior Citizens Program	\$112,000	\$ 82,000	29%
BIA Welfare Assistance	\$ 20,000	-0-	100%

The Metlakatla Indian Community has had very substantial difficulties in making up for these federal cutbacks. At the present time, the level of unemployment on the Annette Island Reserve is 61%. Employment does vary seasonally, but the primary reason for the extraordinarily high level of unemployment now is that the sawmill run by Louisiana-Pacific has closed.

Metlakatla also suffers substantially because of the depressed salmon market. Although the Community itself has had no salmon recalled from its Community operated cannery, the botulism scare has had a substantial impact. This directly impacts funding of the Community's government because profits from the Community cannery and cold storage enterprise are traditionally

applied to the Community's governmental operating expenses rather than being distributed on a per capita basis to the members of the Community.

In addition, although the Community has in the past been able to enjoy substantial revenues from timber sales, the prospect for future sales looks glum. Not only is the timber market presently depressed, but first growth timber has already been largely harvested and it will be many decades before the second growth timber is marketable. The Community estimates that only ten million board feet of original growth timber remain.

3. The Metlakatla Indian Community Functions More Like a "Municipality" Than an "Unincorporated Community" and Should Be Funded Accordingly.

As explained above, the Metlakatla Indian Community, like municipalities organized under state law, has considerable governmental functions and responsibilities. It provides a stable government, substantial municipal services such as water, sewer, and electricity, and police and fire protection to name only a few examples. It also provides substantial social services to the members and nonmembers of the Community who reside on the Annette Islands Reserve.

Unlike the "unincorporated communities" in the unorganized borough, the Metlakatla Indian Community has a need for revenue that is parallel to the governmental services it provides. The mere fact that its charter derives from federal law rather than state law is not a reasonable basis for disqualifying Metlakatla from state revenue sharing programs and other types of state

municipal aid. Amendment of the State statutes to give Metlakatla entitlement will substantially help to equalize the treatment of citizens of the Metlakatla Indian Community and other citizens resident in comparable communities throughout the State.

4. Extension of State Aid to the Metlakatla Indian Community Will Not Give the Community or Its Residents More Favorable Treatment Than Other Similarly Situated State Citizens.

Although the Metlakatla Indian Community does have a unique legal status in Alaska because it is a reservation and because it is excluded from the Alaska Native Claims Settlement Act, the Community believes that its residents would not receive any undue advantage over other Alaska Natives if state laws were amended to make Metlakatla eligible for municipal revenue sharing. First, although the Metlakatla Indian Community gets federal aid because of its status as a federally recognized Indian tribe, it is important to recognize that the other Indian Reorganization Act entities and traditional councils in Alaska also receive the same aid. For example, the Indian Self-Determination Act of 1975 provides that the United States can contract with Indian tribes to allow the tribes to perform various functions that were formerly performed by the Bureau of Indian Affairs or other United States entities. Substantial federal funds, usually referred to as 638 funds, are provided to the Metlakatla Indian Community and other tribes under this program.

But Metlakatla enjoys no special benefit here because the Act defines "Indian tribe" to include not only the Metlakatla

Indian Community but also other Native groups in Alaska. The statute provides that the word "tribe" includes "any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Similarly, the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq., the Indian Health Care Amendments of 1980, 25 U.S.C. § 1601 et seq., the Tribally Controlled Community College Assitance Act of 1978, 25 U.S.C. § 1801 et seq., and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq., have all been extended to include other Native communities in Alaska.

Other federal programs, not administered by the Bureau of Indian Affairs, such as HUD, CETA and EDA programs, have been extended to other Alaska Native communities as well as to Metlakatla.

On the other hand, while ANCSA provides that the Metlakatla Indian Community was allowed to retain its reservation status, the statute also provides that the Metlakatla Indian Community and its members are not eligible for the benefits of the Act.

It is also important to realize that as to Natives who reside in communities of substantial size, similar to Metlakatla, state benefits are extended to them because, in most if not all situations, there is a municipality, either a first or second class city or a borough, located there. Attached to this paper is a document prepared by the Tribal Operations Office of the

Bureau of Indian Affairs showing the status of the various Native communities in Alaska. As can be seen, a very substantial number of the communities determined to be eligible by the BIA for federal assistance because of their "Indian" status are also incorporated under state law as a first or second class city. The Natives who reside in such communities, therefore, like other state citizens generally, are eligible for the benefits of state revenue sharing.

Also attached is a computer run by the Department of Community and Regional Affairs showing the amount of state revenue sharing entitlements for various state law municipalities under Title 29 for fiscal year 1982. Looking at those communities with populations similar to that of Metlakatla, one can see that the amounts of state money distributed under Title 29 to such communities are substantial. A few examples will suffice:

<u>Municipality</u>	<u>Population</u>	<u>Fiscal Year 1982 Entitlement</u>
Bristol Bay Borough	1,182	\$ 257,237
<u>First Class Cities:</u>		
Craig	560	\$ 142,110
Haines	1,017	\$ 177,619
<u>Second Class Cities:</u>		
Akolmiut	695	\$ 151,277

Even communities with relatively small populations are receiving substantial amounts of state money. The community of

Lower Kalskag, with a population of 244, for example, qualifies for \$98,540 in revenue sharing for fiscal year 1982.

STATE PROGRAMS FOR WHICH THE METLAKATLA INDIAN COMMUNITY  
DOES NOT QUALIFY

Revenue Sharing Measures.

The most important programs for which the Metlakatla Indian Community does not presently qualify are the on-going state revenue sharing programs. There are now two such primary programs in existence:

1. Municipal Assistance Fund--AS 43.20.016. Under this program, administered by the Department of Revenue, 30% of the general and petroleum corporate income tax revenues received by the State are distributed to municipalities--"organized boroughs and cities of any class." There is no specific statutory requirement as to how the funds should be used but the statute expresses the desire of the Legislature that local governments which levy property taxes should reduce those levies in reasonable proportion to the amount of increased state aid received.
2. Municipal Tax Resource Equalization--AS 29.88.010 et seq. The Department of Community and Regional Affairs administers a program under which the Department distributes state revenues to municipalities which are calculated based on a complex formula. The primary variable are population and the "millage rate equiva-

lent" which is determined according to the assessed property values in the locality. Metlakatla is not eligible for the revenue sharing program because it is not a municipality under the statute. AS 29.89.050 does provide, however, that Native Village governments, including local governing bodies organized under the Indian Reorganization Act, are eligible for a \$25,000 payment. Under the Revenue Sharing Program, however, \$25,000 is the minimum, not the maximum payment.

As noted above, the revenue sharing entitlements for various local governments in the State with a population similar to Metlakatla are often very substantial. The Bristol Bay Borough, with a population of 1,182, for example, has a 1982 entitlement of \$157,000. Haines, a first class city with a population of 1,017, has a 1982 entitlement of \$177,000. Akolmiut, a second class city with a population of 695, has a 1982 entitlement of \$111,734. It is impossible to determine at this time what Metlakatla's entitlement would be, but it would presumably be substantially more than the \$25,000 it is now eligible to receive.

#### Other State Programs for Aid to Municipalities.

1. State Aid for Miscellaneous Municipal Purposes. AS 29.89 provides for additional state aid to municipalities for various purposes. AS 29.89.020 provides for state aid to municipalities for road maintenance. Metlakatla does not qualify for this program. The same

chapter also provides for state aid to municipalities for health facilities and hospitals. The Community does not qualify for this program. Title 29 does contain a program for which the Community does qualify, a \$10 per capita grant to volunteer fire departments which does not turn on the presence of a state law "municipality."

2. Public Library Construction Grants. AS 14.56.350 provides for the administration of a program of grants to municipalities for the construction and equipping of libraries. Metlakatla does not qualify under this grant program since it is not a municipality. Presumably Metlakatla also does not qualify for library assistance grants under AS 14.56.300.
3. Water, Sewer and Solid Waste Aid. AS 46.03.030 provides that the Department of Environmental Conservation may make grants up to 50% of the eligible costs for water supply, sewerage and solid waste facilities. Only municipalities are eligible. The State has also established a village safe water program, but Metlakatla does not qualify for this program either because only unincorporated communities with populations less than 600 persons are eligible.
4. Outdoor Recreational, Open Space and Historic Properties Development. AS 41.22.010 provides for a grant

program to municipalities to acquire, preserve or protect historic sites, buildings and monuments. Only municipalities qualify.

5. AS 41.20.355 established a program for the establishment of public ways for trails and footpaths. Again, only municipalities qualify.
6. Municipal Airport Aid. AS 35.05.020 et seq. provides for state aid to "political subdivisions" for airports. Presumably the Community would not qualify.
7. Port Facilities Development. AS 30.15.010 provides for state grants for port facilities construction to municipalities.

This list may not be exclusive.

#### CONCLUSION

This paper has been designed to provide general background concerning the State of Alaska's treatment of the Metlakatla Indian Community with respect to state municipal aid programs. It has demonstrated that although the Metlakatla Indian Community is organized under federal, not state law, it nevertheless performs governmental functions and has governmental responsibilities that are every bit as extensive as the municipalities in the State of Alaska serving similar population bases. The Community believes that its disqualification from participation in such programs, particularly the revenue sharing programs, discriminates against Alaska citizens residing on the Annette Island Reserve compared to state citizens in other similar communities. This disparate

treatment is not a result of a policy decision by the state legislature to exclude Metlakatla. It should be corrected by amendment of the State statutes.

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F3/MIC/ELJG/P

TRIBAL OPERATIONS OFFICE - JAO  
Alaska Tribal Status

JULY 1982

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY BIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HOME RULE	1ST CLASS CITY	2ND CLASS CITY
Afognak		X	X						
Akhiok		X	X		X	X			X
Akiachak	X	X	X	X		X			X
Akiak	X	X	X	X		X			X
Akutan		X	X		X	X			X
Alakanuk	X	X	X		X	X			X
Alatna	X	X	X		X				
Aleknagik		X	X		X	X			X
Aleutian Pribilofs	X								
Alexander Creek									
Algaacig (St. Mary's)	X	X	X		X	X		X	
Allakaket	X	X	X		X	X			X
Ambler	X	X	X		X	X			X
Anaktuvuk Pass		X	X		X	X			X
Andreafsky (Andreafsky)		X	X		X				
Angoon	X	X	X	X		X			X
Aniak	X	X	X		X	X			X
Anvik	X	X	X		X	X			v
Arctic Village		X	X		X	X			

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY BIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HOME RULE	1ST CLASS CITY	2ND CLASS CITY
Atka	X	X	X	X		X			
Atkasook (Atquasuk)	X	X	X		X				
Atmantlauk	X	X	X		X	X			X
Ayakulik			X						
Barrow		X	X		X	X		X	
Beaver	X	X	X		X	X			
Belkofsky		X	X		X	X			
Bells Flats			X						
Bethel (Orutsaramuit)	X	X	X		X	X			X
Bettles (Bettles Field)	X		X		X	X			
Bill Hoore's		X	X						
Biorka		X							
Birch Creek	X	X	X		X	X			
Brevig Mission		X	X		X	X			X
Bristol Bay						X			
Buckland	X	X	X	X		X			X
Candle		X				X			
Cantwell	X	X	X		X	X			
Canyon Village		X				X			
Chalkyitsik	X	X	X		X	X			

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY BIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HOME RULE	1ST CLASS CITY	2ND CLASS CITY
Chalonswick			X		X	X			
Chaneliak						X			
Chanilut		X							
Chefornak (Cherfornak)	X	X	X		X	X			X
Chenega	X		X	X		X			
Chevak	X	X	X		X	X			X
Chickaloon	X		X		X				
Chignik	X	X	X		X	X			
Chignik Lagoon	X	X	X		X	X			
Chignik Lake	X	X	X		X	X			
Chilkat (Klukwan)	X	X	X	X		X			
Chistochina	X	X	X		X	X			
Chitina	X	X	X		X				
Chuathbaluk	X		X		X				X
Chukvuktoiganute		X							
Churabalik (Russian Mission-Kuskokwim)						X			
Circle	X	X	X		X	X			
Clark's Point		X	X		X	X			X
Cook Inlet	X								
Copper Center	X	X	X		X	X			

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY HIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HOME RULE	1ST CLASS CITY	2ND CLASS CITY
Cordova						X	X		
Council			X						
Craig	X	X	X	X		X		X	
Crooked Creek	X	X	X		X	X			
Deering	X	X	X	X		X			X
Delta Junction						X			X
Dillingham	X	X	X		X	X		X	
Dot Lake	X	X	X		X	X			
Douglas				X		X			
Eagle	X	X	X		X	X			
Eek	X	X	X		X	X			X
Egegik	X	X	X		X	X			
Eklutna	X	X	X		X	X			
Ekuk		X	X		X	X			
Ekwok		X	X		X	X			X
Elim		X	X	X		X			X
Emmonak		X	X		X	X			X
English Bay	X	X	X		X	X			
Eyak	X		X		X				
Fairbanks	X						X		

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY BIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HONE RULE	1ST CLASS CITY	2ND CLASS CITY
False Pass	X	X	X		X	X			
Farewell						X			
Flat						X			
Fort Yukon	X	X	X	X		X			X
Gakona		X	X		X				
Galena		X	X		X	X		X	
Gambell	X	X	X	X		X			X
Georgetown		X	X			X			
Golovin		X	X		X	X			X
Goodnews Bay	X	X	X		X	X			X
Grayling (Holikachuk)	X	X	X	X		X			X
Gulkana	X	X	X		X	X			
Haines (Chilkoot)	X			X		X		X	
Hamilton		X	X			X			
Healy Lake			X		X				X
Holy Cross	X	X	X		X	X			X
Hoonah	X	X	X	X		X		X	
Hooper Bay	X	X	X		X	X			X
Hughes	X	X	X		X	X			X
Huslia	X	X	X		X	X			X

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY BIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HOME RULE	1ST CLASS CITY	2ND CLASS CITY
Hydaburg	X	X	X	X		X		X	
Igiugig	X	X	X		X				
Iliamna	X	X	X		X	X			
Inalik (Diomedea)		X	X	X		X			X
Inupiat CAS				X		X			
Ivanof Bay		X	X		X	X			
Juneau	X	X	X				X		
Kaguyak		X	X						
Kake	X	X	X	X		X		X	
Kaktovik	X	X	X		X	X			X
Kalskag (Upper Kalskag)		X			X	X			X
Kaltag	X	X	X		X	X			X
Kanatak				X		X			
Karluk	X	X	X	X		X			
Kasaan		X	X	X		X			X
Kasigluk	X	X	X		X	X			
Kenaitze	X			X		X			
Kenai		X	X						
Ketchikan	X			X		X	X		
Kiana	X	X	X		X	X			X

Village Name	638 GRANTS	ANCSA VILLAGE	DETERMINED ELIGIBLE BY BIA	IRA COUNCIL	TRADITIONAL COUNCIL	BIA MARCH 72 LIST	HOME RULE	1ST CLASS CITY	2ND CLASS CITY
King Cove		X	X		X	X		X	
King Island	X		X	X		X			
Kipnuk	X	X	X		X	X			
Kivalina	X	X	X	X		X			X
Klawock	X	X	X	X		X		X	
Knik			X		X				
Kobuk		X	X		X	X			X
Kodiak	X	X	X				X		
Kokhanok		X	X		X	X			
Koliganek	X	X	X		X	X			
Kongiganak	X	X	X		X	X			
Kotlik	X	X	X		X	X			X
Kotzebue	X	X	X	X		X			X
Koyuk		X	X	X		X			X
Koyukuk	X	X	X		X	X			X
Kwethluk	X	X	X	X		X			X
Kwigillingok	X	X	X	X		X			
Larsen Bay (Anton)	X	X	X		X	X			X
LeLida						X			
Levelock	X	X	X		X	X			