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02–576(2/77)

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I. THE APPLICABLE STANDARD OF REVIEW IS THE REASONABLE BASIS TEST

Appellant urges this court to substitute its judgment for that of the LBC in this case, claiming that this controversy arises from the construction of a state statute and not with issues within the LBC's area of expertise. In particular, appellant claims that the LBC misinterpreted AS 29.18.011 as applied to the facts of this case.

Appellant has completely failed to acknowledge the exclusive powers given to the LBC under Alaska Constitution article X, section 12 and statutory law as the agency committed to make determinations of a petitioner's compliance with dissolution standards. See AS 44.47.569 and AS 29.68.560.

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commission in the Department of Community & Regional Affairs (DCRA), the power to adopt regulations to implement AS 29.68.500 -- 29.68.580. AS 44.47.980. The LBC adopted 19 AAC 10.130 -- 19 AAC 10.150, which sets out standards for dissolution of cities.

Based on such overwhelming legal authority, it is apparent that a determination of the adequacy of Akiachak's dissolution petition is an issue which is within the intended scope of the LBC's constitutional and statutory powers.

The Alaska Supreme Court has frequently examined and discussed the reasonable basis standard of review as it applies to administrative decisions. In Matanuska-Susitna Borough v. Hammond, 726 P.2d 166 (Alaska 1986), a case involving DCRA's determination of "population" of municipalities for revenue-sharing and tax-limitation purposes, the Alaska Supreme Court applied the reasonable basis standard of review. The court noted the two standards under which it has reviewed agency interpretations of statutory terms, as follows:

> The reasonable basis standard, under which the court gives deference to the agency's interpretation so long as it is reasonable, is applied where the question at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions. The independent judgment standard, under which the court makes its own interpretation of the statute at issue, is applied where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute.

Id. (emphasis added, citations omitted).

In summary, the court's rationale for applying the reasonable basis standard was, "[w]e believe that the reasonable

basis standard is the appropriate standard of review here because both agency expertise and fundamental policy decisions are involved in the determination of "population" and because the legislature intended to place the decision in the hands of the department." Id. (emphasis added).

> See also Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971). The reasonable basis test requires deference to be given to an administrative determination if it has a reasonable basis in law and fact. Alaska Public Utilities Comm'n v. Chugach Electric Ass'n, 580 P.2d 687, 694 (Alaska 1978), overruled on other grounds.)

Storrs v. State Medical Board, 664 P.2d 547, 554-555 (Alaska 1983). See Hammond v. North Slope Borough, 645 P.2d 750, 758 (Alaska 1982); State, Dept. of Natural Resources v. Universal Education Society, Inc., 583 P.2d 806, 811-812 (Alaska 1978); Union Oil Co. v. Dept. of Revenue, 560 P.2d 21, 23 (Alaska 1977).

The reasonable basis standard of review may be applicable even though a question of law is presented. The supreme court has stated,

> We have oftentimes noted that the deferential "reasonable basis" standard of review is appropriate where a question of law implicates the agency's expertise as to complex matters or as to the formulation of fundamental policy. Compare Weaver Bros., Inc. v. Alaska Transportation Comm'n, 588 P.2d 819, 821 (Alaska 1978) (reasonable basis) with State, Commercial Fisheries Entry Comm'n v. Templeton, 598 P.2d 77, 80 (Alaska 1979) (independent judgment). See generally Jager v. State, 537 P.2d at 1107; Kelly v. Zamarello, 486 P.2d 906, 916-917 (Alaska 1971).

As to the fundamental policies which the LBC is to develop and, in this case, uphold, the Alaska Supreme Court in

Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974), held that the reasonable basis standard applied to an appeal from a decision of the LBC because it involved broad judgments of political and social policy and that the LBC had been given a broad power to decide in the unique circumstances presented by each petition whether borough government was appropriate. The court also found that the statement of purpose of article X, section 1 of the Alaska Constitution favors upholding organization of boroughs by the LBC whenever the requirements for incorporation have been minimally met. Id.

The decision by the LBC to deny the City of Akiachak's dissolution petition clearly involves formation and application of fundamental policy and agency expertise. It involves a determination which the framers of the Alaska Constitution and the Alaska legislature clearly intended to place in the hands of the LBC.

Appellant cites Madison v. Alaska Dept. of Fish & Game, 696 P.2d 168 (Alaska 1985), as its authority for this court's application of the substitution of judgment standard. However, the court provided no probative analysis of the facts in that case to base its decision in applying the standard.

Accordingly, this court should apply the reasonable basis standard regarding the LBC's interpretation of AS 29.18.-011.

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II. THE CITY CONTINUES TO MEET THE MINIMUM STANDARDS FOR INCORPORATION

Appellant alleges that the LBC based its decision to deny Akiachak's dissolution petition on an erroneous interpretation of AS 29.18.011(a)(5), claiming there is no longer a "need" for local government.

The LBC must review a dissolution petition to determine if it has met the requirements of AS 29.68.520. See AS 29.68.-560. AS 29.68.520 reads, in pertinent part, "a municipality may petition for dissolution when ... (2) either it no longer meets the minimum standards prescribed for incorporation by AS 29.18 or...." The minimum standards of incorporation are found in AS 29.18.011. Of importance to this section of the argument is paragraph (a)(5), which reads, "there is a demonstrated need for local government." Akiachak must prove there is no demonstrated need for local government.

Appellant argues that the term "need," as used in AS 29.18.011(a)(5), should be equated with the term "desire." Appellant claims the standard for AS 29.18.011(a)(5) is that where there is no desire for municipal government, there can be no need for such government. Appellant supports this argument with a statement from DCRA's report to the LBC, which reads, "The petition request clearly demonstrates that the municipal form of government is not perceived as necessary by a substantial number of residents.... If an incorporation election were held at this time, it would most likely fail." R. at 421. DCRA's conclusion

on this issue is unfounded in law and fails to apply the correct standard. Also, DCRA's conclusion is not binding on the LBC. The "need" for incorporation as used in AS 29.18.011(a)(5) has been defined in the regulations. 19 AAC 10.010(d) reads,

> In determining whether there is a demonstrated need for local government in a community for the purposes of AS 29.18.011(a)(5), the commission will, in its discretion and without limitation, consider existing and anticipated social and economic problems, whether major economic development is anticipated, adequacy of existing services, and other factors which reflect the need for local government.

The LBC considered the factors of 19 AAC 10.010(d) in making their decision that there was a continued need for the provision of basic municipal types of local governmental services in Akiachak. R. Vol. 4 at 226. This was the correct application of the law. The LBC looked at projected revenue losses (R. at 278); community services, debts, and ownership of municipal assets as contained in DCRA's report. R. at 339. While the LBC certainly did acknowledge that the dissolution petition was strongly desired by appellant, it properly concluded that not all of the standards necessary for dissolution under AS 29.68.520 had been met. R. at 671.

One of the factors which is not relevant to a dissolution of a city is whether or not an incorporation election would fail if presently held. Appellant urges this court to read this concept into the statute. Such an interpretation of AS 29.18.011 by this court would be beyond its reviewing powers. As previously noted, the Alaska Constitution and the legislature have placed

the discretionary power of all local boundary issues in the hands of the LBC. In adopting dissolution standards, the legislature did not make "[w]hether or not an incorporation election would fail if presently held" a standard for dissolution under AS 29.-68.500, et seq. This court should not adopt a standard for dissolution which is not included in statutory law. We also note that appellant has cited no legal authority for its argument on this matter.

Appellant alleges that AS 29.68.520 does not authorize the LBC to substitute its subjective judgment for the will of the people. Appellant further alleges that the petition processes are available to affect the needs of the affected citizens, not to restrict local control without good reason.

Appellant is off-point on both of these arguments. AS 29.68.560 clearly mandates the LBC to review a dissolution petition to determine if it meets the necessary standards. The LBC's powers are found throughout Title 29 and in the Alaska Constitution. Furthermore, the LBC is committed by the purpose clause of article X, section 1 of the Alaska Constitution, to uphold organization of boroughs and cities. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974). If, as appellant suggests, the LBC must approve a dissolution petition merely based upon the will of the people, such an interpretation of AS 29.68.-560 would simply make the LBC a conduit for the division of elections. There would be no purpose for AS 29.68.560. The report and recommendations of DCRA would be sufficient and a review by

the LBC unnecessary. However, the Alaska Supreme Court has held that "[t]here is a presumption that every word, sentence, or provision in a statute was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used." Alaska Transportation Comm'n v. Airpac, Inc., 685 P.2d 1248 (Alaska 1984).

When the legislature adopted AS 29.68.560, it named the LBC, not DCRA or petitioners, as the reviewing agency to determine compliance with the statutory and regulatory standards for dissolution. The LBC must exercise its constitutional and statutory discretion in making this determination. And, contrary to appellant's claim, no right attaches to the petitioners to have an election under AS 29.68.570 unless the petition meets all the standards for dissolution. The LBC found the petition failed to comply with statutory and regulatory law and appropriately denied it.

> Where an agency interprets its own regulation, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue. K. Davis, Administrative Law Treatise § 7.22 at 105-108 (2d ed. 1979).... Accordingly, our inquiry is limited to determining whether there is a reasonable basis to the Commission's interpretation of the regulations.
>
> It follows, further, that once the interpretation of the regulations is resolved, the Commission's application of the "law" to the particular factual circumstances presented ... is a matter committed to the Commission's sound discretion. Consequently, "our scope if review is limited to whether the decision was arbitrary, unreasonable

> or an abuse of discretion." State v. Dept. of Administration v. Bowers Office Products, Inc., 621 P.2d 11, 13 (Alaska 1980) quoting North Slope Borough v. LeResche, 581 P.2d 1112, 1115 (Alaska 1978).

Therefore, this court should uphold the LBC's interpretation on the issue of "need," as defined by 19 AAC 10.010(d) under the reasonable basis test and as a matter committed to agency discretion.

III. THE CITY OF AKIACHAK DID NOT CEASE TO USE EACH AND EVERY ONE OF ITS MANDATORY POWERS

Appellant has dismissed the issue of whether or not the city ceased to use each and every one of its mandatory powers by relying solely on DCRA's independent conclusion that Akiachak had no mandatory powers under AS 29.43.040 -- 29.43.105. See R. at 422; Appellant's Br. at 14. Appellant therefore claims that it has met the second requirement of AS 29.68.520(a)(2) by default.

However, DCRA's conclusion that the city had no mandatory powers lacks legal authority. While it is true that DCRA is required under AS 29.68.550 to report its findings to the LBC with its recommendation regarding a dissolution petition, its recommendations and conclusions are not binding upon the LBC. It is the LBC which has been given the constitutional and statutory authority to determine whether or not a dissolution petition meets the standards. Alaska Const. art. X, § 2; AS 29.68.560.

The LBC had a reasonable basis for determining that the city had not ceased to use each and every one of its mandatory powers, and found that DCRA had made an erroneous conclusion to

the contrary.

First of all, the section of the regulations pertaining to dissolution of cities references different municipal powers than those determined by DCRA (AS 29.43.040 -- 29.43.105) as being the only mandatory powers at issue. 19 AAC 10.130(a) reads, in pertinent part, "a city may dissolve ... if the following standards are met: (1) the city has ceased, for two or more consecutive years, to exercise any of the municipal powers set forth in AS 29.48.030 -- 29.48.035." (Emphasis added.) AS 29.-48.030 -- 29.48.035 list a number of municipal facilities and services, garbage collection and solid waste services, and other municipal regulatory powers. Akiachak has continued to exercise such powers as an active, operating city. R. Vol. 4 at 112. Even though 19 AAC 10.130(a)(1) does not specifically refer to the above-referenced statutory powers as being "mandatory," it certainly appears that the intent of the LBC was to consider the exercise of such powers as being "mandatory powers" as defined in 19 AAC 10.840(12), especially, for standards of dissolution. This interpretation of these powers being "mandatory" is supported by legislative history and pertinent statutory law, as discussed further below.

19 AAC 10.840(12) defines "mandatory powers" as "those powers required to be exercised by a municipality under AS 29." (Emphasis added.) "If the legislature considers the provisions sufficiently important that exact compliance is required, then the provision is mandatory. If the statute is merely a guide for

the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory." 1A N. Singer, Sutherland Statutory Construction § 25.03 (4th ed. 1985) (footnote omitted). Still, the intent of the legislature is controlling behind what is seemingly, on its face, a mandatory provision. See 2 E. McQuillan, The Law of Municipal Corporations (3d ed. 1979). Key mandatory powers of municipalities are voting, taxation, and planning. See, e.g., AS 29.18.120 and AS 29.23 (election of officials), AS 29.13.070 (adoption and adherence to a charter), and AS 29.13.100 (limits of home rule powers). The legislature also requires certain municipal actions to be by ordinance. AS 29.48.130. And, once a municipality enacts a charter or ordinance creating a power, that charter or ordinance becomes a "mandatory power." Other general powers in AS 29.33 become "mandatory powers" if assumed by a municipality. AS 29.33.010 -- 29.33.070 define mandatory areawide powers as education, assessment and collection of taxes, and planning, platting, and land use regulation. Accord AS 29.48.035, AS 29.-43.010 (powers of cities in and outside of boroughs).

The legislature originally provided for dissolutions in 1955 when it enacted former AS 29.80.020 and defined that a city ceases to function when several acts occur.

> WHEN A CITY CEASES TO FUNCTION. A city ceases to function as a city government when (1) no election for officers of the governing body has been held for three or more successive years; (2) no municipal taxes have been levied for at least the last two of those years; and (3) it has no outstanding indebtedness either general or special.

Sec. 2, ch. 35, SLA 1955. While not specifically labeled mandatory powers, the legislature seemed to intend voting, taxes, and indebtedness to be relevant powers in all classes of municipalities.

The legislature's power to provide for municipal dissolution derives from article X of the Alaska Constitution. Article X, while not outlining mandatory powers, does provide that "[a] liberal construction shall be given to the powers of local government units." Alaska Const. art. X, § 1. The legislature is directed to prescribe the powers of boroughs (Id., § 3), and cities have powers "conferred by law or charter." Id., § 7. Local government boundary changes, including dissolution, are provided for in section 12, which establishes the LBC and gives the LBC exclusive powers under the constitution and statutory laws.

In the minutes of the constitutional convention, the framers intended to "just draw the outline of ... local government structure" leaving to the state to set up "the exact boundaries and the exact laws and rules under which they shall operate." 4 Proceedings of the Alaska Constitutional Convention 2611 (1956) (statement of Delegate Rosswog). "The powers of boroughs shall be provided by law." Id. at 2612. An illuminating colloquy between delegates White and Fischer addresses mandatory powers of a municipality as close as anything in the minutes: Delegate White inquired, "Could you construe the words 'shall be conferred by law' on line 15 to mean that the legislature 'must'

confer all powers and functions appropriate to local government?" Id. at 2638-2639 (statement of Delegate White). Delegate Fischer's response was "I think the way that should be interpreted is that they derive their powers through law." Id. at 2639 (statement of Delegate V. Fischer). Thus, it seems reasonable to conclude that a municipality's mandatory powers may be contained in (1) state laws and regulations, (2) local charter or ordinance, and (3) the constitution.

The LBC found that the City of Akiachak continued to exercise mandatory powers as listed in AS 29.48.030 -- 29.48.035 (R. at 669). In fact, even DCRA considered Akiachak to be an active, operating city throughout the petition period. R. Vol. 4 at 112.

Under the reasonable basis test, this court should give deference to the LBC's interpretation of "mandatory powers" in AS 29.68.520(a)(2) as defined by 19 AAC 10.130(a) and 19 AAC 10.840-(12), and, further, find that the LBC had a reasonable basis to conclude that Akiachak failed to satisfy AS 29.68.520(a)(2).

IV. AKIACHAK'S IRA COUNCIL IS NOT A LEGALLY RECOGNIZED LOCAL GOVERNMENT UNDER THE ALASKA CONSTITUTION OR THE FEDERAL GOVERNMENT

In anticipation that appellant may, at a later time in this appeal, attempt to assert that the state should recognize Akiachak's IRA 1/ council, or other types of Native councils, as

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1/ 25 U.S.C. § 476; 25 U.S.C. § 473(a).

a local government, the LBC is addressing that potential issue at this time.

Throughout its brief, appellant continually attempts to give the court the impression that there are two existing local "governments" for Akiachak: one being the municipal government (the subject of the dissolution petition) and the other being an IRA government.

Furthermore, appellant asserts that the citizens of Akiachak are, through the dissolution petition, expressing their desire to have an IRA government rather than a municipal form of government as though they are making a choice between two legal governments presently in place. This assertion is simply not true.

Appellant's use of the term "IRA government" is in itself misleading and inaccurate. As will be discussed below, Alaska IRA councils are not legally recognized as local governments under the Alaska Constitution nor are they recognized by the federal government as having governmental powers.

A. Alaska Constitution article X, section 12

Pursuant to article X, section 2 of the Alaska Constitution, "[a]ll local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only." Only boroughs and cities are granted or mandated governmental powers under article X of the Alaska Constitution and Title 29 of the Alaska Statutes. As long

as the subject is state powers of local government, the constitution clearly states that the legislature can grant them only to cities and boroughs.

Appellant references in its brief that Akiachak's IRA Council received community approval pursuant to a general election to collect a two percent sales tax and service tax effective July 1, 1986. Appellant's Br. at 3. This tax is illegal and unenforceable. In State v. Alex, 646 P.2d 203 (Alaska 1982), the Alaska Supreme Court found unconstitutional a legislative delegation of taxing authority to private aquaculture associations. The associations, like IRA councils, were not state-created local governments. The court was explicit. "We think article X, section 2 of the state constitution makes it clear that the legislature may not delegate its taxing power to an entity other than a borough or city." Alex, 646 P.2d at 211 (emphasis added). The IRA's attempt to act as a "government" by imposing the tax will not alter its legal existence nor make it a recognized local government under the Alaska Constitution. The only legal local government of Akiachak is the municipality.

Also of interest is when the IRA council adopted two resolutions respecting affairs of the city. The resolutions specifically ordered a halt to the exercise of municipal powers, forbid the conduction of regular city elections, and delegated authority to an administrative team. R. at 437-438.

The IRA council has no authority under the Alaska Constitution or state law to adopt resolutions affecting the City of

Akiachak's municipal powers. Alaska Const. art. X, § 2; AS 29, *et seq*. In summary, these actions by the IRA council should be disregarded by the court as ineffective and illegal actions having no bearing on the issue of the city's compliance with dissolution standards.

B. Federal Government

Akiachak's IRA Council is also not recognized by the federal government as a government. In a series of Acts, Congress has made clear that Native villages were subject to territorial and state law, not village law. 2/ Later, when it passed the Indian Reorganization Act, Congress made clear that the Act's grant of governmental powers was to apply to IRA councils *on reservations*, 3/ and the Interior Department issued instructions that IRA constitutions with governmental powers were to be approved *only* for reservation councils. 4/ Akiachak is not a reservation and, therefore, its IRA council has no governmental powers.

Finally, ANCSA 5/ is permeated with Congress' intent that Alaska Native villages not have independent governments, but

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2/ *See* summary in Report of the Governor's Task Force at 66-100.

3/ *Id.* at 100-112.

4/ Instructions for Organizations in Alaska under the Reorganization Act of June 18, 1934 (Dec. 22, 1937).

5/ P.L. 92-203, 85 Stat. 688 (1971), 43 U.S.C. § 1601, *et seq*.

intended all off-reservation communities in Alaska to be fully subject to state law without any independent legal authority.

Throughout ANCSA, Congress provided clear evidence of how it viewed the status of Alaskan Natives and their future relationship to the state. Congress set the tone in the very beginning of the Act, in its "Declaration of Policy."

> Congress finds and declares that --
>
> * * *
>
> (b) The settlement should be accomplished rapidly, with certainty, in conformity with economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, <u>without establishing any permanent racially defined institution, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States government and the State of Alaska</u>;

Sec. 2 (emphasis added). The substantive provisions of ANCSA carry out this intention. For example,

-- The Act grants fee title to Alaskan Natives of the 44-million-acre Native entitlement, without restrictions, thus ending all existing or potential federal trusteeship over these lands;

-- After a temporary period, the Act subjects all of the Native ANCSA lands to state and local taxation, directly inconsistent with the principle of federal Indian law that states may not tax on Indian reservations;

-- The Act assumes that every Native village already is or will become a state-chartered municipality. It gives either a municipal government or the state itself a major voice in village life. State regulatory power would not be permitted in Indian country, so Congress must have assumed the villages were not Indian country.

-- The Act's definition of "Native village" at section 3(c) is far broader than "tribe," encompassing "groups" and "associations," so the fact that land has been conveyed to a "Native village" cannot be taken as an indication that that village has the self-governing powers of a tribe.

-- The Act's legislative history shows that the drafters saw an option between using corporations or state municipalities as vehicles for receiving and holding Native lands, but never considered Native governments to be an option. 6/

-- Nowhere in the legislative history is there any hint that unincorporated villages or IRA councils are recognized as having any governmental role at all.

ANCSA is the most comprehensive and far-reaching federal legislation even to affect Alaska Natives. Yet it does not, in any way, support the view that Congress has permitted Native communities outside reservations to have self-governing enclaves. On the contrary, it mandated involvement by the state or a state-

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6/ Report of the Governor's Task Force on Federal-State Tribal Relations at 132-133 (Feb. 14, 1986).

chartered municipality in the life of every single Native village. Should the issue arise in this appeal, this court must find that Akiachak's IRA Council is not a local government in Alaska and cannot serve in place of a state municipality.

V. IN THE EVENT THIS COURT FINDS IN FAVOR OF APPELLANT, THIS CASE SHOULD BE REMANDED TO THE LBC WITH PROPER INSTRUCTIONS

Appellant urges this court to order the LBC to accept Akiachak's dissolution petition without remanding this case to the LBC. Appellant's Br. at 7. Appellant is requesting this court to act beyond its statutory jurisdiction. AS 44.62.570.

Alaska's superior courts possess general appellate authority. AS 22.10.020. In the context of an administrative appeal of a decision of an administrative agency such as this, the Alaska Supreme Court has held that the superior court's authority includes the power to remand a case and direct the entry of an appropriate judgment or order, or to direct the agency to conduct further proceedings as may be appropriate under the circumstances. City of Juneau v. Cropley, 429 P.2d 21, 31 (Alaska 1967). See also City of Nome v. Catholic Bishop of Alaska, 707 P.2d 870, 876-877 (Alaska 1985) (where board misconceived applicable laws, and after clarification by the court, the superior court correctly exercised its equitable power to remand portions of the case). Therefore, this court has the authority to remand the captioned matter with proper instructions, if necessary. Furthermore, if the standard of review is the reasonable basis

test, it limits judicial review of discretionary administrative policy decisions committed to an agency by the Alaska Constitution and the law. See Alaska Const. art. X, § 7; AS 44.47.567.

Analogous provisions of the Alaska Administrative Procedures Act, specifically AS 44.62.570(e), provides, "The court shall enter judgment setting aside, modifying, remanding, or affirming the order or decision, without limiting or controlling in any way the discretion legally vested in the agency." (Emphasis added.) A determination of a petition's compliance with dissolution standards is clearly, legally vested with the LBC.

For the foregoing reasons, the proper course of action by this court (in the event this court finds in favor of appellant) is to remand this case to the LBC with proper instructions.

VI. CONCLUSION

The LBC is not attempting to prevent the dissolution of the City of Akiachak, nor is it attempting to usurp the will of the citizens of Akiachak. To the contrary, the LBC's legal duty in this case is to make certain that a city's [illegible] for dissolution complies with applicable law. When the LBC found that Akiachak's petition failed to satisfy the requirements for dissolution, it could not, by law, approve the petition. The issue here is not whether the LBC is preventing Akiachak from choosing an IRA government over a municipal form of government, since IRA councils are not recognized governments in Alaska. It is whether or not Akiachak has satisfied the statutory and regulatory re-

quirements to dissolve. The LBC has been given the authority to make the determination and its determinations are governed by the constitution and statutory law in making that determination.

The court should find that the LBC complied with the existing law in denying Akiachak's dissolution petition, and affirm the LBC's decision.

DATED: December 2, 1986

RONALD W. LORENSEN
ACTING ATTORNEY GENERAL

By: Marjorie L. Odland
Marjorie L. Odland
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IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

PETITIONERS' REPRESENTATIVE WILLIE KASAYULIE,

APPELLANT,

vs.

LOCAL BOUNDARY COMMISSION,

APPELLEE.

Case No. 4 BE-85-00441 Civil

Appeal from the Local Boundary Commission Decision Regarding the Dissolution of the Municipality of Akiachak

APPELLANT'S REPLY BRIEF

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FILED Jan. 5, 1987 in the Superior Court of the STATE OF ALASKA

HILMA SHAVINGS, Clerk
APPELLATE COURTS

By: ______________________
Deputy Clerk of the Appellate Courts

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PRIMARY AUTHORITIES RELIED UPON

ALASKA STATUTES

AS 29.89.011 (Repealed eff. Jan. 1, 1986, § 88 ch 74 SLA 1985).

INCORPORATION OF CITIES

(a) A community that meets the following standards may incorporate as a first class city:

(1) the community has 400 or more permanent residents;

(2) the boundaries of the proposed city include all areas necessary to provide municipal services on an efficient scale;

(3) the economy of the community includes the human and financial resources necessary to provide local services; in considering the economy of the community, the Local Boundary Commission shall consider property valuations, economic base, personal income, resource and commericial development, anticipated functions, and the expenses and income of the proposed city, including the ability of the community to generate local revenue;

(4) the population of the community is stable enough to support local government;

(5) there is a demonstrated need for local government.

(b) A community that meets all the standards established in (a) of this section except (a) (1) may incorporate as a second class city.

AS 29.68.500-.580 (Repealed eff. Jan 1, 1986 § 88 ch 74 SLA 1985).

DISSOLUTION OF CITIES

Sec. 29.68.500. Methods of dissolution. (a)Two petition methods may be used to initiate dissolution of home rule and general law municipalities:

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(1) petition to the Local Boundary Commission under regulations adopted by the commission; or

(2) the local option method specified in AS 29.68.510 - 29.68.580.

(b) A home rule or general law borough is dissolved when its entire territory is included within a home rule or first class city or cities. A city is dissolved when all its powers become areawide borough powers.

(c) The Department of Community and Regional Affairs shall investigate a municipality which it considers to be inactive and shall report to the Local Boundary Commission on the status of the municipality. The commission may submit its recommendation to the legislature that the municipality be dissolved in the manner provided for submission of boundary changes in § 12, art. X of the state constitution.

Sec. 29.68.510. Petition.(a)Municipal residents may file a dissolution petition with the Department of Community and Regional Affairs in the form prescribed by the department. The petition must be signed by a number of municipal voters equal to at least 25 per cent of the number of votes cast in the last regular municipal election.

(b) The petition includes

(1) the name of the municipality;

(2) maps, documents, and other information showing that the municipality meets the standards for dissolution.

Sec. 29.68.520. Standards.(a)Except as provided in (b) of this section, a municipality may petition for dissolution when

(1) it is free of debt, or if in debt, each of its creditors is satisfied with a method of repayment; and

(2) either it no longer meets the minimum standards prescribed for incorporation by AS 29.18, or it ceases to use each and every one of its mandatory powers.

Sec. 29.68.530. Review. The Department of Community and Regional Affairs shall review a petition for content and signatures and shall return a deficient petition for correction or completion.

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Sec. 29.68.540. Investigation. If the petition contains the required information and signatures, the Department of Community and Regional Affairs shall investigate the proposal.

Sec. 29.68.550. Report and hearing.(a)The Department of Community and Regional Affairs shall report its findings to the Local Boundary Commission with its recommendation regarding the dissolution.

(b) The Local Boundary Commission shall hold at least one public hearing in the area proposed to be dissolved.

Sec. 29.68.560. Decision. If the Local Boundary Commission determines that the municipality fails to meet the standards for dissolution, it shall reject the petition. If the commission determines that the municipality meets the standards, it shall accept the petition.

Sec. 29.89.570. Election. (a) The Local Boundary Commission shall immediately notify the lieutenant governor of its acceptance of a dissolution petition. Within 30 days after notification, the lieutenant governor shall order an election within the municipality to determine whether the voters desire dissolution. The election is at least 30 and not more than 90 days after the election order.

(b) A person who is a qualified voter of the municipality may vote in the dissolution election.

(c) The lieutenant governor shall supervise the election in the general manner prescribed by the Alaska Election code (AS 15). The state shall pay all election costs.

(d) The lieutenant governor shall certify the election results. If dissolution is approved, the lieutenant governor shall declare that the municipality is dissolved effective on the date of certification.

Sec. 29.68.580. Succession. The government succeeding to a dissolved municipality succeeds to all its rights, powers, duties, assets, and liabilities as provided in AS 29.18.130 and 29.18.140.

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ARGUMENT

I. THE SUBSTITUTION OF JUDGMENT STANDARD APPLIES IN THIS ACTION ATTACKING THE LOCAL BOUNDARY COMMISSION'S INTERPRETATION OF THE MUNICIPAL DISSOLUTION STATUTE.

Petitioners seek dissolution of the municipality of Akiachak pursuant to the local option method authorized by AS 29.68.500(a)(2) and detailed in AS 29.68.510 - 29.68.580.[1] The standards and procedures for dissolution under the local option method are provided entirely by statute. The legislature authorized the Local Boundary Commission (LBC) to develop its own procedures and standards for the dissolution of municipalities by petition in AS 29.68.500(a)(1).[2] The legislature did not envision development of agency regulations with respect to the local option method and none exist. The LBC's role in evaluating petitions submitted under the local option method is best described as ministerial. If the statutory standards for dissolution are met, the Commission must accept the petition. AS 29.68.560.

The issue in this case centers on the proper meaning to be given the standards embodied in AS 29.68.520(a). Appellee contends that because it is charged with determining compliance with statutory standards for dissolution, the reasonable basis standard of review is appropriate. As discussed below however,

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1 All statutory references are to Title 29 as codified at the time this appeal was filed.

2 Regulations found at 19 AAC 10.130 - 19 AAC 10.150 implement the method of dissolution authorized by AS 29.68.500(c) and

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the mere fact that the LBC applies statutory standards to particular factual contexts does not remove its action from the independent judgment standard of review. This is especially true where, as here, in applying the statutory standards, the LBC has had to interpret or give meaning to them.

It is black letter law in this state that the independent judgment standard of review applies where the asserted agency error is misconstruction of statutory language, the understanding of which neither implicates the agency's special knowledge or expertise in a particular field. As the Supreme Court explained:

> "The independent judgment standard, under which the court makes its own interpretation of the statute at issue, is applied where the agency's specialized knowledge and expertise would not be particularly probative on the meaning of a statute."

Matanuska-Susitna Borough v. Hammond, 726 P.2d 166,175 (Alaska 1986)(citations omitted). At issue here is the proper meaning to be given the statutes establishing the local option method of municipal dissolution. Among the questions this court must decide are whether any "mandatory powers" exist within the meaning of AS 29.68.520(a)(2), as well as the legislature's intent underlying the statutory authorization for dissolution in the event a com-

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impose more stringent standards then provided under the local option method for dissolution. The LBC did not apply these regulatory standards in this action. See Record at 671.

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munity "no longer meets minimum standards for incorporation." Id.
These are purely issues of law. They do not implicate any expertise the LBC may have with respect to the alteration of local boundaries. This is not a case where adjustments are being made between two or more state-chartered governmental units so that a neutral party need be involved to protect the state's interests. The LBC was established primarily to settle local boundary disputes which are incapable of settlement at the local level. Oesau v. City of Dillingham, 439 P.2d 180,183-184 (Alaska 1968). Thus, no expertise of the Commission is implicated, no important state policies are at issue and no deference to its action need be given.

Because the issues here turn entirely on an analysis of the legislative standards for local option municipal dissolution, as well as the fact that the LBC has no long standing interpretation of those standards, any interpretation offered by the LBC is entitled to little deference. See e.g., Nat. Bank of Alaska v. State, Dep't of Rev., 642 P.2d 811,815 (Alaska 1982). This is especially true since the Department of Community and Regional Affairs (DCRA), which is staff to the LBC, and the LBC differ on the interpretation of the statutory standards for local option municipal dissolution.

The situation presented by this case is nearly identical to that in State, Comm'l Fisheries Entry Comm'n v. Templeton, 598

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P.2d 77 (Alaska 1979). In that case, the Supreme Court applied the substitution of judgment standard since the challenged agency action was based "solely on the interpretation of a [statute] ...." Id. at 80. Templeton involved the construction of statutory standards for issuance of limited entry fishery permits by the Commercial Fisheries Entry Commission. The key issue involved the determination of legislative intent. The court proceeded to substitute its judgment for that of the agency in light of its finding that the agency was not using its "expertise" to define qualifications for the statutory program, "but rather made a judgment" regarding the legislature's concern over the matter at issue. Id. at 80-81. Here, as in Templeton, the agency decision does not involve an application of its expertise. Rather, the record is clear that the LBC was making a judgment, more accurately described as a guess, respecting the legislature's intent in enacting the statutory local option dissolution procedure. Record at 229.[3]

Appellee relies heavily on Matanuska-Susitna Borough v. Hammond, 726 P.2d 166 (Alaska 1986) for the proposition that the reasonable basis test ought to be applied on the ground that the matter is committed to agency discretion. That case involved the DCRA's determination of population for various taxing jurisdictions. A dispute arose over the method used by the DCRA to deter-

[3] Chairman Eder stated that "apparently the founding fathers never anticipated the city continuing to function wanting to

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mine population on the North Slope. The statute partially defined "population" and went on to specifically authorize the DCRA to use the statutory method or "other population data which, in the judgment of the department, is reliable." Id. at 169, quoting AS 29.88.015(a). Not surprisingly, the court found that definition of the term was left to agency discretion and the reasonable basis standard of review was appropriate. Id. at 175. Here, however, there is no indication of legislative intent to defer to the agency respecting dissolution standards wholly defined by statute. The LBC's sole function under the local option method is to determine whether the standards are met, not what the standards are.

The LBC attempts to distinguish Madison v. Alaska Dep't of Fish and Game, 696 P.2d 168 (Alaska 1985) on the feeble ground that the court provided no probative analysis of the facts in that case. Brief of Appellee at 11. To the contrary, Madison provides solid support for Appellant's position. In Madison the court considered the Board of Fisheries' ten criteria developed to identify subsistence uses of fish which were defined by statute as the "customary and traditional" uses of fish. The regulations were developed based on the Board's interpretation of the subsistence law. Accordingly, the court held that the issues in the case involved statutory interpretation and as such the substitution of

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dissolve...." Record, vol. 3 at 229; see also Record at 671.

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judgment standard applied because "[s]uch issues fall into the realm of special competency of the courts." Id. at 173 (citations omitted). Here, the LBC erroneously interpreted the statutory criteria for dissolution and thus denied Appellants their right to a dissolution election. Their situtation parallels that of the Madison plaintiffs who were denied their statutory subsistence rights by the erroneous agency interpretation of the subsistence law.

In sum, the issue presented is whether the LBC correctly interpreted and applied the standards provided by law. No agency expertise is implicated in the challenged decision. Consequently, this court should carefully review the legal authorities presented and substitute its judgment for that of the LBC in giving meaning to the statutory standards for local option municipal dissolution embodied in AS 29.68.510-580.

II. THE COMMUNITY NO LONGER MEETS THE MINIMUM STANDARDS FOR INCORPORATION AND HAS CEASED TO USE ANY MANDATORY POWERS.

A. Under Any Standard of Review the Local Boundary Commission Incorrectly Construed the Minimum Standards for Incorporation in the Context of a Dissolution Petition.

The local option method was enacted by the legislature to provide citizens of unincorporated communities an opportunity to vote on whether to dissolve their municipality. As such, this statute effectuates the policy of local control and self-determination embodied in art. X, sec. 1 of the Alaska

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Constitution. That section surely does not mandate forcing unwanted governments upon the citizens of Alaska as the LBC argues. Brief of Appellee at 14. Local control means not only the ability to form a municipality, but also the ability to achieve freedom from such an institution. The LBC decision removes the latter ability and frustrates legislative intent. This court should substitute its judgment for that of the Commission and overturn the LBC's erroneous interpretation of the law.[4]

The LBC determined that the standards for dissolution had not been met because the minimum standards for incorporation are still met. Record at 670. The standards provided by the legislature set forth that a community may incorporate as a second class city if, among other things, "there is a demonstrated need for local government." AS 29.18.011(a)(5). The issue presented is whether the LBC correctly construed the meaning of this legal standard for incorporation in the context of a municipal dissolution proceeding. Statutes must be read in light of their purpose and construed in a manner to effect that purpose. Wien Air Alaska v. Arant, 592 P.2d 352,356 (Alaska 1979). The LBC determined the statutory scheme inapplicable to this type of factual setting. See Record Vol. 4 at 227-231; and note 4 supra.

The LBC asserts that whenever there is a need for the

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4 The LBC's action so completely frustrates legislative intent that this court should remand with instructions to accept the

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provision of any local government type services there is necessarily a corresponding need for municipal government. Brief of Appellee at 13; Record at 670. The LBC also found that since revenues would be lost by reverting to unincorporated status there was still a need for local municipal government.[5] Because of this construction of the statutory standard, no populated municipality will ever be able to dissolve pursuant to the local option method. This is absurd and runs counter to the presumption that every provision in a statute was intended for some useful purpose. Alaska Transportation Comm'n v. Airpac, Inc., 685 P.2d 1248,1253 (Alaska 1984). The meaning of a statutory provision is determined by the language of the particular provision construed in light of the purpose of the whole instrument. Wien Air Alaska v. Arant, 592 P.2d at 356. Commercial Fisheries Entry Comm'n v. Apokedak, 680 P.2d 486,489-490 (Alaska 1984). The LBC's construction of the incorporation standard renders the entire local option dissolution section ineffective and valueless. Surely, that is not what the legislature intended when it provided for the dissolution of municipal governments by the petition process.

When the "demonstrated need for local government" provision is read in light of the purpose of the statutory scheme of which it is a part, it is clear that the LBC erred. When citizens

petition even if the reasonable basis test is applied.

5 Because the state revenue sharing scheme provides greater financial aid for incorporated communities, however, this will

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are petitioning for establishment of a municipal government the fact that there is some need for local government "type services" may be enough to trigger an incorporation election, if the other criteria are met. Here, however, the term is incorporated as part of a statutory scheme designed to permit communities which may no longer desire municipal government to vote on whether to dissolve that local government. As such, the least restrictive construction of the statute which makes sense and gives effect to legislative intent should be adopted.[6]

A construction of the standard which equates need with desire in this context most effectively implements legislative intent behind the dissolution statute. Thus, when a substantial demonstration is made by petition that local municipal government is no longer desired, there is no longer a "demonstrated need" for local municipal government within the meaning of the dissolution statute. The LBC's narrow reading of the dissolution standard makes no sense and results in forcing an unwanted form of local government upon a community. When an incorporation election would appear to certainly fail if held, as the DCRA concluded here, it can not fairly be claimed that there is a demonstrated need for local municipal government. This court should reverse the decision of the LBC in order to effect the purpose of the local option

be the case in any and every instance where the loca[illegible] [illegible]ption dissolution process is initiated. See AS 29.89 et. se[illegible]

6 The DCRA adopted such a construction in its Report to the LBC. Record at 421.

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method of dissolution and allow the citizens of Akiachak to decide whether to maintain their municipality.

B. The Local Boundary Commission Incorrectly Determined that the City of Akiachak Did Not Satisfy the Second Requirement of AS 29.68.520(a)(2) by Default.

The Department of Community and Regional Affairs' determined that since the city has no mandatory powers it satisfied the dissolution requirement of AS 29.68.520(a)(2) by default. Record at 422. The DCRA found it appropriate not to read the standard restrictively but in a manner which would facilitate use of the local option method. Record at 422. The LBC, on the other hand, concludes without analysis that the "City of Akiachak has not ceased to use each and every of its manadatory powers." Record at 671. The LBC attempts to avoid the force of the DCRA's conclusion by asserting that it "lacks legal authority" and that "its recommendation and conclusions are not binding upon the LBC." Brief of Appellee at 16. Notwithstanding these after the fact protests by the LBC, a plain reading of the statutory standard indicates the construction adopted by the DCRA is correct. Accordingly, this court should substitute its judgment for that of the LBC and construe this statute in the same manner as the DCRA. Additional arguments presented in the LBC brief constitute "post hoc rationalizations" of the Commission's action and as such should be disregarded by this court. See State, Comm'l Fisheries Entry Comm'n v. Templeton, 598 P.2d at 80.

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Appellee goes on at great length regarding allegedly mandatory powers set forth in regulations governing dissolution. Brief of Appellee at 17. Under the local option method of dissolution, however, it is the legislature which has set the dissolution standards. Thus, any municipal powers referenced as mandatory in regulatory dissolution standards are simply inapposite to proceedings brought under the local option method. In any event, Appellee concedes that mandatory powers defined by regulations are those "required" to be exercised by a municipality under AS Title 29. Brief of Appellee at 17. A review of AS Title 29 reveals no such powers for second-class cities.

It is clear that the legislature knows how to designate certain muncipal powers as mandatory when it wishes. Such powers are defined in AS 29.43.030 by directive and through the use of the mandatory "shall" in AS 29.43.040. These statutes apply only to home rule and first class cities. The latter statute goes on to provide that second-class cities may exercise the planning and zoning powers which are mandatory for home rule and first class cities. The LBC references numerous statutes setting forth various governmental powers, apparently on the assumption that such powers are mandatory for second-class cities. Brief of Appellee at 18. Such a claim is unfounded. The general powers found in AS 29.48.010 do not speak in the mandatory "shall," but rather are permissive.[7] Appellee also cites to AS 29.13.070 and

[7] It is telling that the LBC concedes that powers it argues are

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29.13.100 which apply to home rule municipalities, not second class cities like Akiachak. Mandatory powers in AS 29.33 apply only to first or second class boroughs and powers outlined in AS 29.48.035 may be assumed by second-class cities, but are not required to be exercised.

The LBC incorrectly interpreted this alternative dissolution standard. There are no mandatory powers for second class cities. This court should hold that the standard is satisfied by default as the Department of Community and Regional Affairs concluded. Accordingly, petitioners are, as a matter of law, entitled to have their petition accepted.

III. THE EXISTENCE OF A FEDERALLY RECOGNIZED TRIBAL GOVERNMENT IS RELEVANT TO THE DETERMINATION OF WHETHER THERE IS A NEED FOR LOCAL MUNICIPAL GOVERNMENT.

The LBC found "it has been amply demonstrated that dissolution of the City of Akiachak and the vesting of all local government powers in the local IRA council is strongly desired by petitioners...." Record at 670. The existence of such a government, while not dispositive, is certainly relevant to the issue of whether there is a "demonstrated need" for local municipal government. Appellee, however, erroneously asserts that the Akiachak IRA council is not a government recognized as such by

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mandatory such as "voting, taxing and indebtedness" are not specifically designated as such by the legislature. Brief of Appellee at 19.

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either the federal or state governments and that accordingly it is inappropriate to cast this case as involving a choice between alternative local governments. Native governments in the United States exercise inherent powers of self-government which do not depend on a grant from the state or federal governments for their existence. United States v. Wheeler, 435 U.S. 313,323-24 (1978).[8] This court should not labor under the illusion that IRA councils in Alaska lack the same governmental status as lower forty-eight Indian tribes.

A recent federal district court decision refutes nearly every argument set forth by the LBC respecting the governmental status of IRA councils. In Native Village of Tyonek v. Puckett, et. al., Civ. No. A82-364, (Dec. 3, 1986) (opinion attached) Judge Fitzgerald considered the status and authority of the Native Village of Tyonek IRA Council, which is organized under the same act as the Native Village of Akiachak. 25 U.S.C. SS 473a, 476 (1982). The Tyonek IRA government passed an ordinance in 1965 prohibiting non-members of the village from leasing private housing constructed at the village's expense without the IRA

[8] The LBC's argument based on the State Constitution and State v. Alex, 646 P.2d 303 (Alaska 1982) are off point. Brief of Appellee at 21-23. Appellant's do not claim the IRA government's authority to tax or that their existence is based on the grant of such powers from the state, but rather through the exercise of inherent authority as a federally recognized tribal government. See Kerr McGee v. Navajo Tribe, ___U.S.___, 105 S.Ct. 1900 (1985).

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government's approval.[9] The IRA government sought eviction of certain non-members who were leasing homes in Tyonek from members without the IRA council's permission.

The tribe's claims for enforcement were dismissed because they arose under tribal law rather than federal law and as such, there was no federal question present to give the federal court jurisdiction pursuant to 28 U.S.C. § 1331 or § 1362. Counterclaims filed by the defendants seeking damages based upon claims of racial discrimination by the tribe were dismissed because the Tyonek IRA "possesses sovereign immunity from suit like that of any other Indian tribes in the contiguous United States." Tyonek at 21. Further, the court reached the issue of whether the IRA council possessed the governmental authority to adopt and enforce ordinances excluding non-tribal members from certain housing. The court held that such powers are possessed by IRA governments, so that the named tribal officers were acting within the scope of their authority and thus were protected from suit by derivative sovereign immunity. Id. at 34.

Appellee argues that the Alaska Native Land Claims Settlement Act (ANCSA) somehow indicates that IRA councils such as Tyonek and Akiachak are not governments. The Tyonek court rejected any notion that ANCSA sub silentio wiped out powers of self-government. "The Claims Act did not expressly change the

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[9] Tribal governmental authority as well as federal and state authority to distinguish between members and non-members

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status of Tyonek or its IRA village government, nor did the Claims Act expressly revoke or amend Tyonek's Family Plan or Ordinance 65-32." Id. at 9. The fallacy in the position that various provisions of ANCSA implicitly revoked tribal powers, is that it totally ignores the fundamental canon of construction that tribal powers of self-government cannot be extinguished except by a "clear and plain" expression of intent by Congress. United States ex. rel Hualpai Indians v. Santa Fe Pacific RR., 314 U.S. 339,353-354 (1941); see also Bryan v. Itasca County, 426 U.S. 373,392 (1976) and see cases cited in Cohen, supra at 221-225. Nowhere in ANCSA are Native governmental powers even mentioned, much less "clearly and plainly" terminated. Since ANCSA, Congress has repeatedly enacted laws to strengthen tribal governments in Alaska.[10]

The LBC also argues that the legislative history of ANCSA shows that Congress never considered placing the settlement lands in tribal ownership - that the only two options discussed were Native corporations or municipalities. From this silence with respect to tribes the state concludes that Congress intended to

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without running afoul of equal protection guarantees is rooted in the fact that Native governments are recognized as political institutions with governmental powers and not racial institutions. Also, the 5th and 14th amendments to the United States Constitution do not apply to actions of Native governments. See Morton v. Mancari, 417 U.S. 535 (1974); F. Cohen, Handbook of Federal Indian Law 653-660 (1982 ed.).

10 Every piece of federal legislation passed in recent years designed to promote tribal existence has expressly included

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terminate them.[11] Again, this argument of implied extinguishment must be rejected since tribal rights may only be extinguished by explicit Congressional action. ANCSA was a land settlement, not a termination act. Further, the declaration of policy in section 2(b) of ANCSA is entirely consistent with the continued existence of Native governments. That section, 43 U.S.C. § 1601(b), merely expresses a policy opposed to the establishment of new racial institutions not the continued existence of tribal governments which pre-date statehood.

Another defect in the LBC's "implicit extinguishment" argument is demonstrated by that portion of the legislative history which it chooses to ignore. As initially drafted, ANCSA would have terminated all federal services to Alaska Natives at the conclusion of five years. This provision was deleted from the final version after Senator Fred Harris strongly opposed it as terminationist legislation. See 116 Cong. Rec. at 24216,24220-27, 24234-35 and 24378-82.

The LBC also argues that under the Indian Reorganization Act only IRA councils located on reservations were to have governmental powers and that accordingly even the federal government

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Alaska Native tribes. See e.g. Indian Self-Determination Act, 25 U.S.C. § 450b(b) the Indian Financing Act, 25 U.S.C. § 1452(c); Indian Child Welfare Act, 25 U.S.C. § 1903(8); Indian Tax Status Act, 26 U.S.C. § 7701(a)(40)(A).

11 The existence of a municipality within Indian Country is not, as Appellee infers, inconsistent with the existence of a tri-

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does not recognize IRA councils as governments. Brief of Appellee at 23. This position is based on an interpretation of departmental instructions published in 1937 providing that tribal constitutions with governmental powers were only to be approved for reservation councils. The exercise of inherent tribal powers is not conditioned upon the existence of a reservation. Such powers may be exercised in "Indian Country", which encompasses allotments and dependent Indian communities as well as reservations. 18 U.S.C. § 1151; and see Cohen, supra at 27 and 39. Moreover, the Bureau of Indian Affairs did not adopt this interpretation of the IRA or the instructions in question. To the contrary, it approved IRA Constitutions recognizing governmental powers for 69 Alaska villages, only a handful of which had reservations. See Exhibit A to Appellant's opening brief. This contemporaneous administrative interpretation of the IRA, by the agency charged with carrying it out, assumed that tribes had governmental powers regardless of whether they had reservations.[12]

That there are federally recognized tribes in Alaska is further confirmed by the ever growing line of federal cases which expressly or implicitly recognize tribes in Alaska. In addition to the Tyonek case, two recent cases granting preliminary injunc-

bal government. See Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153, 1158-59 (8th Cir. 1985); cert. denied, 54 U.S.L.W. 3555 (Feb. 25, 1986).

[12] Tyonek has no reservation and yet the governmental authority of its IRA government was recognized by the federal district

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tions are directly on point. In Graybeal v. Alaska, Civ. No. A 85-666 (Preliminary Injunction, D. Alaska, Dec. 30, 1985) the federal district court explicitly recognized the authority of the Northway village tribal court in domestic relations matters and enjoined State officials from interfering with a tribal adoption decree. Three months later, in a case involving the constitutionality of state revenue sharing with tribal governments, the court held that "Native village councils . . . are beyond any question federally recognized as . . . quasi-governmental entities." Akiachak, et al. v. Notti, Civ. No. A 85-503 (Preliminary Injunction, D. Alaska March 3, 1986).

The administrative and Congressional actions and court decisions outlined above provide ample support for the proposition that Alaska Native tribes have the same political and governmental status as lower 48 Indian tribes. If there were no "tribes" there would be no constitutional basis for all of the special Alaska Native programs -- and the "solemn commitment of the government to the [Natives] would be jeopardized." Morton v. Mancari, 417 U.S. 535,552 (1974). This commitment is fulfilled through the numerous BIA and Indian Health Service programs designed to benefit only Alaska Natives. All of these programs assume tribal existence and thus the corresponding right to single out tribal

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court.

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members for special benefits.[13]

Residents of many Native villages such as Akiachak view tribal governments as the most desirable form of local government and reject the notion that additional institutions are necessary for local governance. See T. Berger, Village Journey, The Report of the Alaska Native Review Commission at 150 (Hill & Wang 1985) (specifically discussing the Akiachak dissolution); cf. State v. Aleut Corp., 541 P.2d 730,737-738 (Alaska 1975). The LBC is wrong in its assertion that there is no such thing as an IRA government in Alaska and the decision in this case should not be made while operating under this unfounded assumption. The existence of such a government is relevant to the inquiry of whether there is a demonstrated need for local municipal government.

IV. THIS CASE SHOULD BE REMANDED TO THE LBC WITH INSTRUCTIONS TO ACCEPT THE DISSOLUTION PETITION.

Contrary to the contention of the LBC, this court does have authority to order the LBC to accept the dissolution petition. This power is specifically provided for in AS 44.62.570(e) and should be exercised in this case. Such action is not without precedent. In State, Comm'l Fisheries Entry Comm'n v. Templeton, 598 P.2d 77,78 (Alaska 1979) the superior court ordered issuance of a limited entry permit following a finding that the Commission

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[13] The State of Alaska too, deals with tribal governments through its revenue sharing program. AS 29.89.050, repealed and reco-

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erroneously construed statutory standards regarding issuance of permits. If the statutory standards for dissolution are met, the statute directs that the LBC shall accept the petition. AS 29.68.560. The LBC decided that the first standard was met. If this court determines that Appellants' construction of either of the remaining alternative standards is correct, there will be nothing for the LBC to decide, since there will be no discretion to be exercised. This court has authority to enter judgment modifying or setting aside the erroneous LBC decision with appropriate instructions. AS 44.62.570(e). The case should be remanded with instructions to accept the petition and notify the lieutenant governor so an election regarding dissolution can be held as provided in AS 29.68.570.

CONCLUSION

For the reasons stated above and in Appellants' opening brief, this court should reverse the decision of the Local Boundary Commission.

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dified at AS 29.68.140, and provides Natives special benefits through many other programs. See e.g. AS 18.10.010-050.

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Respectfully submitted,

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DATED: Jan. 5, 1987

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IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

PETITIONERS' REPRESENTATIVE WILLIE KASAYULIE,

APPELLANT,

vs.

LOCAL BOUNDARY COMMISSION,

APPELLEE.

Case No. 4 BE-85-00441 Civil

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant, Robert T. Anderson, hereby requests oral argument in the above captioned appeal pursuant to Alaska Rule of Appellate Procedure 213.

DATED this 5th day of January, 1987.

By: Robert T. Anderson

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1 IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
2 AT BETHEL

3

PETITIONERS' REPRESENTATIVE WILLIE KASAYULIE,	)	
APPELLANT,	)	Case No. 4 BE-85-00441 Civil
vs.	)	
LOCAL BOUNDARY COMMISSION,	)	
APPELLEE.	)	

9

10 ORDER

11 Oral argument in the above captioned case is hereby sche-

12 duled for____________________.

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14 DATED this ______ day of _____________, 19____.

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17 ______________________________
Superior Court Judge

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CERTIFICATE OF SERVICE

I Rita Pitka, legal secretary for Native American Rights Fund certify that on January _5_, 1987, I mailed true copies of: Appellant's Reply Brief and Request for Oral Argument in the case captioned Kasayulie v. Local Boundary Commission, postage prepaid to:

Grace Schaible
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Marjorie Odland
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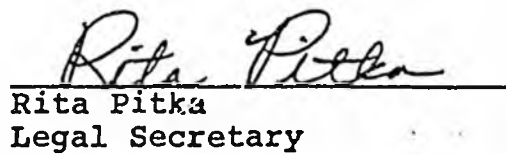
Dated this 5th day of January 1987.



Rita Pitka
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

PETITIONERS' REPRESENTATIVE WILLIE KASAYULIE, APPELLANT, vs. LOCAL BOUNDARY COMMISSION, APPELLEE.	No. 4 BE-85-00441 Civil

APPEAL FROM THE LOCAL BOUNDARY COMMISSION
DECISION REGARDING THE DISSOLUTION OF THE MUNICIPALITY
OF AKIACHAK

BRIEF OF APPELLANT

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Filed ______________, in
in the Supreme Court
STATE OF ALASKA

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1 PRIMARY AUTHORITIES RELIED UPON

2

3 ALASKA STATUTES

4 AS 29.89.011 (Repealed eff. Jan. 1, 1986, § 88 ch 74 SLA 1985).

5

6 INCORPORATION OF CITIES

7 (a) A community that meets the following standards may
8 incorporate as a first class city:

9 (1) the community has 400 or more permanent residents;

10 (2) the boundaries of the proposed city include all areas
11 necessary to provide municipal services on an efficient scale;

12 (3) the economy of the community includes the human and
13 financial resources necessary to provide local services; in considering the economy of the community, the Local
14 Boundary Commission shall consider property valuations, economic base, personal income, resource and commericial
15 development, anticipated functions, and the expenses and income of the proposed city, including the ability of the community to generate local revenue;

16 (4) the population of the community is stable enough to
17 support local government;

18 (5) there is a demonstrated need for local government.

19 (b) A community that meets all the standards established
20 in (a) of this section except (a) (1) may incorporate as a second class city.

21 AS 29.68.500-.580 (Repealed eff. Jan 1, 1986 § 88 ch 74 SLA 1985).

22

23 DISSOLUTION OF CITIES

24 Sec. 29.68.500. Methods of dissolution. (a)Two petition
25 methods may be used to initiate dissolution of home rule and general law municipalities:

26

(1) petition to the Local Boundary Commission under regulations adopted by the commission; or

(2) the local option method specified in AS 29.68.510 - 29.68.580.

(b) A home rule or general law borough is dissolved when its entire territory is included within a home rule or first class city or cities. A city is dissolved when all its powers become areawide borough powers.

(c) The Department of Community and Regional Affairs shall investigate a municipality which it considers to be inactive and shall report to the Local Boundary Commission on the status of the municipality. The commission may submit its recommendation to the legislature that the municipality be dissolved in the manner provided for submission of boundary changes in § 12, art. X of the state constitution.

Sec. 29.68.510. Petition.(a)Municipal residents may file a dissolution petition with the Department of Community and Regional Affairs in the form prescribed by the department. The petition must be signed by a number of municipal voters equal to at least 25 per cent of the number of votes cast in the last regular municipal election.

(b) The petition includes

(1) the name of the municipality;

(2) maps, documents, and other information showing that the municipality meets the standards for dissolution.

Sec. 29.68.520. Standards.(a)Except as provided in (b) of this section, a municipality may petition for dissolution when

(1) it is free of debt, or if in debt, each of its creditors is satisfied with a method of repayment; and

(2) either it no longer meets the minimum standards prescribed for incorporation by AS 29.18, or it ceases to use each and every one of its mandatory powers.

Sec. 29.68.530. Review. The Department of Community and Regional Affairs shall review a petition for content and signatures and shall return a deficient petition for correction or completion.

1 Sec. 29.68.540. Investigation. If the petition contains the required information and signatures, the Department of
2 Community and Regional Affairs shall investigate the proposal.

3 Sec. 29.68.550. Report and hearing.(a)The Department of Community and Regional Affairs shall report its findings to
4 the Local Boundary Commission with its recommendation regarding the dissolution.
5

(b) The Local Boundary Commission shall hold at least one
6 public hearing in the area proposed to be dissolved.

7 Sec. 29.68.560. Decision. If the Local Boundary Commission determines that the municipality fails to meet the
8 standards for dissolution, it shall reject the petition. If the commission determines that the municipality meets the
9 standards, it shall accept the petition.

10 Sec. 29.89.570. Election. (a) The Local Boundary Commission shall immediately notify the lieutenant governor of
11 its acceptance of a dissolution petition. Within 30 days after notification, the lieutenant governor shall order an
12 election within the municipality to determine whether the voters desire dissolution. The election is at least 30 and
13 not more than 90 days after the election order.

14 (b) A person who is a qualified voter of the municipality
15 may vote in the dissolution election.

16 (c) The lieutenant governor shall supervise the election in the general manner prescribed by the Alaska Election
17 code (AS 15). The state shall pay all election costs.

18 (d) The lieutenant governor shall certify the election results. If dissolution is approved, the lieutenant
19 governor shall declare that the municipality is dissolved effective on the date of certification.

20 Sec. 29.68.580. Succession. The government succeeding to
21 a dissolved municipality succeeds to all its rights, powers, duties, assets, and liabilities as provided in AS 29.18.130
22 and 29.18.140.

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JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Local Boundary Commission approved December 31, 1985 rejecting the Petition for Dissolution of the City of Akiachak. This Court has jurisdiction to entertain this appeal pursuant to AS 44.62.560 and 22.10.020(a).

ISSUES PRESENTED FOR REVIEW

1. Whether the Local Boundary Commission applied the correct legal standard in determining that the City of Akiachak still meets the minimum standards prescribed for incorporation and thus does not meet the standards for dissolution.

2. Whether the Commission was correct in determining that the City of Akiachak has ceased to use each and every one of its mandatory powers.

STATEMENT OF THE CASE

The Native Village of Akiachak incorporated as a second class municipality through the petition process in 1974 after a vote of sixty-one for and eighteen against. According to the 1980 census it has a population of 438, ninety per cent of whom are Native. The community has had a federally-chartered and recognized Indian Reorganization Act (IRA) government in place since 1948. Record at 408; Constitution and Bylaws of the

Akiachak Native Community, Approved August 6, 1948 by the Secretary of Interior (attached as appellant's Exhibit A); See 51 Fed.Reg. 25115 (July 10, 1986). In 1971 Akiachak was determined to be a Native Village eligible to participate in the Alaska Native Claims Settlement Act. 43 U.S.C. § 1610 (1985 supp). By 1983 community residents had agreed that the municipal form of government was ill-suited to the needs of Akiachak. The IRA government is the preferred form in Akiachak. Record at 421.

On September 15, 1983 a joint meeting of the Akiachak IRA Council and the Akiachak City Council was held at which the entire City Council resigned. The following day the IRA Council adopted two resolutions respecting affairs of the City which had now, in the eyes of the residents of Akiachak, been dissolved. The first ordered a halt to the exercise of municipal powers and forbade conducting of regular city elections. It also called for negotiations with the State of Alaska respecting winding up City affairs. Record at 437-438. As the City still had projects underway and funds in the bank, the IRA Council passed Resolution 83-09-02 which delegated authority to an "administrative team" to carry out city projects and services until dissolution was formally effected. Record, Vol. 3 at 53. Since then, to the extent the City has operated, it "has been functioning as a subsidiary of the IRA ...." Record, Vol. 4 at 117.

This "administrative team" set up by the IRA operated

with the approval of the Alaska State Department of Community and Regional Affairs (DCRA) and continues to operate some special projects. The City has not collected a sales tax since September 15, 1983, nor has it met or held elections. *See Record, Vol. 3* at 55-60. The city did not apply for revenue sharing funds in fiscal year 1986 and is considered inactive by the DCRA. *Record* at 672. The IRA received community approval pursuant to a general election to collect a two percent sales tax and service tax effective July 1, 1986. It is the only operating government in the community.[1]

Following the resignation of the City Council, the IRA Council called a public meeting on November 10, 1983 and a vote was held on the issue of whether the municipality should be dissolved. The vote was 103 in favor of dissolution with 0 opposed. *Record* at 438. All registered voters, Native and non-Native, were allowed to vote in the election and participate in discussions surrounding the dissolution, regardless of membership in the IRA. *Record* at 48. Willie Kasayulie, President of the IRA Council, received a letter dated October 28, 1983 from the Commissioner of the Department of Community and Regional Affairs, Mark Lewis, informing him that as a matter of State law the resignation of the Akiachak City Council did not dissolve the City government. Additionally, it was Lewis' understanding that the City Council would not rescind its resignation. *Record* at 49.

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[1]The continued existence of the City as a legal entity, however, has left the community in a no-man's land vis-a-vis the State. A recent Rural Development grant application was returned

Commissioner Lewis then suggested the Community use the local option method found at AS 29.68.510-580[2] to dissolve the municipality and outlined the procedures which he believed could result in dissolution of the municipality "within four months". Record at 50. Petitioners seek their right under State law to have an election to determine the fate of the City.

A petition for dissolution signed by 62 residents of Akiachak was sub mitted to the DCRA in April of 1984, but returned for proper documentation of the signatures on the petition. The petition was resubmitted in August, 1984 and was determined by the DCRA to be in conformity with submission requirements. Record at 403. The DCRA issued a twenty-four page "Report to the Alaska Local Boundary Commission on the Petition for the Dissolution of the City of Akiachak" (Report) in February of 1985. Record at 399. The Report recommended that the Local Boundary Commission accept the petition for dissolution with the condition that the petitioners "clearly demonstrate that the municipality will be debt free at dissolution." Record at 423. A hearing regarding the dissolution petition was conducted by the Local Boundary Commission in Akiachak on March 2, 1985. Jeff Smith, Deputy Commissioner of the DCRA, summarized the State administration's

to the Akiachak IRA Council because of the "unique legal circumstance of a municipality still existing ...." Letter to Willie Kasayulie from Marty Rutherford, Director, DCRA Municipal and Regional Assistance Division, attached as Exhibit B.

[2]The revision of Title 29 of the Alaska Statutes resulted in the codification of the local option method of dissolution at AS 29.06.460-.520. All statutory references are to Title 29 as

position respecting dissolution as follows:

> In summary, let me say that the department very much appreciates the efforts which you have made in addressing this important question through the process provided in state law, your leadership of Willie Kasayulie and Sam George and the other ones have worked, I feel, very closely with the department to ensure that the proper process was followed and they are to be commended for that. We strongly believe in the concept of citizens petitioning the government for a hearing and asking for an election to be held which will provide the residents of this community with the opportunity to clearly demonstrate their desire on the issue. The department has recommended that the Akiachak petition be accepted by the Local Boundary Commission and they will provide for an election on the question should the municipality of Akiachak be dissolved. <u>While we feel very strongly that dissolving your municipality is not the right thing to do, we argue strenuously that it's only you, the citizens of Akiachak, who can make that choice</u>. If the municipality is to continue or if it is to be dissolved must be made by you. And us in Juneau or in Anchorage or anywhere else besides Akiachak cannot make that decision for you. <u>That's why we are urging the Local Boundary Commission to accept your petition, let the election be held and let your voice be heard</u>. Whatever that decision is, the state will support you in that decision and will work with you whether it is to continue your municipality or to dissolve it to unincorporated status (sic).

<u>Record, Vol. 3</u> at 23 (emphasis added).

The Local Boundary Commission held a decisional session on May 18, 1985 and by a 2-2 vote decided not to accept the Petition for dissolution. <u>Record</u> at 514. A Motion for

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codified prior to the revision.

Reconsideration was granted pursuant to AS 44.62.540 and a second decisional session was held on November 9, 1985. The Commission found that Petitioners had clearly demonstrated the City was free of debt, thereby complying with the first requirement for dissolution under AS 29.68.520(a). Record at 6[illegible]. Turning to the alternative dissolution standards constituting the second half of the test, however, it found the City still met the minimum standards for incorporation and had not ceased to use each and every one of its mandatory powers. It accordingly rejected the dissolution petition by a 3-1 vote. The Notice of Appeal was filed on December 16, 1985.

SUMMARY OF ARGUMENT

Petitioners have been attempting to dissolve the municipal government in Akiachak since September of 1983. The wisdom of dissolving a municipality is not at issue. That is for the people of Akiachak to decide. The only issues before this Court are whether the two standards for dissolution prescribed by statute are met. The first standard requires that the municipality demonstrate "it is free of debt." AS 29.68.520(a)(1). The Local Boundary Commission found that this standard was met. Record at 669. The second standard requires a demonstration that "either [the city] no longer meets the minimum standards prescribed for incorporation by AS 29.18, or [the city] ceases to

use each and every one of its mandatory powers." AS 29.68.520(a)(2). The DCRA, in its Report to the Commission, concluded that both of these requirements had been satisfied in that (1) the community no longer meets minimum incorporation standards and (2) that the second portion of this standard was satisfied by default because second class cities have no mandatory powers. Record at 421, 422. As noted, the Commission found to the contrary.

The uncontradicted allegations in Petitioners' dissolution petition, the undisputed testimony at the Local Boundary Commission hearing on March 2, 1985 and the unanimous decision of the voters at the dissolution election in 1983, clearly demonstrate that there is no need or desire for local municipal government. This was also the conclusion of the Department of Community and Regional Affairs. This Court should find that the Commission incorrectly interpreted the applicable legal standards for dissolution by concluding there is no available means by which a quasi-functional municipality may dissolve. In the face of such overwhelming rejection of municipal government this Court should find that the Commission abused its discretion in finding that there is a demonstrated need for municipal government as required for incorporation under AS 29.18.011(a)(5). Thus, the Local Boundary Commission is required to accept the Petition and permit an election on the issue to be held. This Court should so order.

There is no need to remand for further fact finding.

ARGUMENT

I. The Applicable Standard Of Review Permits The Substitution Of The Judgment Of This Court For That Of The Local Boundary Commission.

This controversy arises over the construction of a State statute, not with issues within the Commission's area of expertise. In cases where the application of agency expertise is not involved courts may freely substitute their judgment for that of a state agency. Madison v. Alaska Dep't. of Fish and Game, 696 P.2d 168 (Alaska 1985) (citations omitted). "Application of this standard allows the reviewing court to substitute its judgment about a statute's meaning for the [agency's] interpretation even if the [agency's] interpretation had a reasonable basis in law." Id. at 173. "It is the courts which have the specialized knowledge and experience in statutory construction and [courts] need not defer to an agency's construction of a statute." Alaska Transp. Comm. v. Airpac, 688 P.2d 1248 (Alaska 1984).

The Local Boundary Commission Decision of Dec 31, 1985 concludes that "there is a demonstrated need for local government services in Akiachak" within the meaning of AS 29.18.011. Record at 670. The evidence in the Record is overwhelming to the effect that there is no desire to retain the municipality, yet the Commission's interpretation of the law prevents an election from

1 being held. The Commission and the DCRA Report express confusion
2 respecting the meaning of this statute and its applicability to
3 this situation. See Record at 422-423 and 670-671. Accordingly,
4 this Court need given no deference to the agency in its construc-
5 tion of the law.
6
7 II. The Minimum Standards For Incorporation Are No Longer Met.

8 The Local Boundary Commission refused to accept the peti-
9 tion for the dissolution of the City of Akiachak on November 9,
10 1986. The written opinion dated December 31, 1985 sets forth the
11 rationale for denial of the petition. Record at 669. The
12 Commission interpreted the statute incorrectly as a matter of law,
13 and abused its discretion in its application of the facts to its
14 construction of the law.
15 It concluded that the City continued to meet the minimum
16 standards for incorporation. Those standards are as follows:
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> Sec. 29.18.011. Incorporation of cities. (a) A community that meets the following standards may incorporate as a first class city:
>
> (1) the community has 400 or more permanent residents;
>
> (2) the boundaries of the proposed city include all areas necessary to provide municipal services on an efficient scale;
>
> (3) the economy of the community includes the human and financial resources necessary to provide local services, in considering the economy of the community, the Local Boundary Commission shall consider property valuations, economic base, personal

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income, resource and commercial development, anticipated functions, and the expenses and income of the proposed city, including the ability of the community to generate local revenue;

(4) the population of the community is stable enough to support local government;

(5) there is a demonstrated need for local government.

(b) A community that meets all the standards established in (a) of this section except (a)(1) may incorporate as a second class city.

The DCRA in its Report found that "[t]here is demonstrably very little, if any, support for the municipal form of government in Akiachak." Record at 421. Accordingly, the DCRA concluded that the minimum standards for incorporation were no longer met:

> The determination of whether or not the petitioners satisfy this dissolution standard rests upon an interpretation of the last of the above minimum standards for incorporation. The petition request clearly demonstrates that the municipal form of government is not perceived as necessary by a substantial number of community residents. In fact, the opposite is apparently the case. If an incorporation election were held at this time, it would most likely fail. On that basis, DCRA concludes that the minimum incorporation requirements would not be met, and consequently the dissolution standard is satisfied.

Record at 421 (emphasis added).

The Commission's written decision, on the other hand, states that "it was determined that there is a continued need for the provision of basic municipal types of local government services in

Akiachak." Record at 670. Accordingly, since the other four standards for incorporation were still met, the Commission found that the second standard for dissolution was not satisfied. The Commission is wrong. When there is no desire for municipal government, there can be no need for such government.

The local government clause of the State Constitution expresses a policy favoring "maximum local self-government with a minimum of local government units ...." Alaska Const. Art. I, sec. 1. The citizens of Akiachak obviously feel that a government in addition to their IRA government is not necessary. See Record at 47. If that is their will, statutes permitting dissolution of overlapping units should be liberally construed in accordance with this Constitutional preference for local control and decision making. A liberal construction was not adopted by the Local Boundary Commission. Further, under the Commission's decision there appears to be no way a functioning government may dissolve. Record at 227. If that is so, the "local option method" of dissolution is reduced to a meaningless provision. The local option method is intended to allow local residents the option of dissolving their functioning municipality.

Whether a "demonstrated need for local government" exists cannot be determined in a vacuum. It must take into account the views and wants of the citizenry. Otherwise, functioning municipalities could never dissolve -- because, viewed objectively,

there will always be a need for some "municipal type services." Again, the dissolution statute would simply be a nullity. The people of a city might, however, prefer to provide "municipal type" services through other organizations, such as volunteer fire departments, co-ops, private enterprise or as in the case of Akiachak, through their IRA government. The Commission, however, threw up its hands and found that if there is a need for the type of services ordinarily provided by a municipality, dissolution is prohibited. This construction of the law could not even withstand the "reasonable basis" test much less pass muster under the "substitution of judgment" standard.

Former Local Boundary Commission Chairperson Smythe noted that "the process of incorporation and dissolution of cities is sort of like getting married and divorced, it's a [illegible] easier to get into than out." Record, Vol. 4 at 114. Chairman Etter and members Hanson and Bettisworth of the Commission, each of whom voted to reject the Petition, expressed their views at the decisional session on November 9 that a change in State law would be necessary to allow villages such as Akiachak to dissolve their municipalities. Record at 228, 230, 232. The Commissioners are in error. Under a proper interpretation of the law, dissolution should have been permitted without additional legislation. The existing statutory scheme was obviously intended to make the dissolution of municipalities a matter of local choice, just as

1 the decision to incorporate.

2 The Commission itself noted that it has been "amply
3 demonstrated that dissolution of the City of Akiachak and the
4 vesting of all local government powers in the local IRA Council is
5 strongly desired by petitioners ...." Record at 670. The DCRA
6 concluded that an incorporation election would certainly fail if
7 held at this time. Record at 421. If this were equally clear
8 when evaluating a petition for incorporation, surely the Local
9 Boundary Commission would determine that the minimum standards for
10 incorporation were not met. This would be true even if the
11 Commission members sensed a need for the provision of municipal
12 services. AS 29.68.520 does not authorize the Local Boundary
13 Commission to substitute its subjective judgment for the will of
14 the people. Petition processes are available to effect the needs
15 of the affected citizens, not to restrict local control without
16 good reason.[3]

17 This Court should hold that if a petition demonstrates a
18 likelihood that an incorporation election would fail if held, the
19 minimum standards for incorporation are not met within the meaning
20 of this statute. Thus, a dissolution election may be held to
21 determine the actual will of local residents. Where there is no
22 will to have a city, there is no need. The fact that local
23 leaders were responsible enough to negotiate with the State and
24

25 [3]The State does have an interest in looking out for the
creditors of cities which dissolve, both because of the State's
26 obligation to protect creditors and because the State is the suc-

walk through the charade of having a "functioning city" in order to wind up city affairs, should not preclude community members from having a vote on the question.

III. The City Has Ceased To Use Each And Every One Of Its Mandatory Powers.

In addition to requiring acceptance of a petition for dissolution when the minimum standards for incorporation are no longer met, a petition may be accepted if a City has ceased to use each and every one of its mandatory powers. The DCRA, in its Report, concluded that this standard was satisfied by default since second-class cities have no "mandatory powers." Record at 422. Under the statutory scheme only home rule cities and first class cities have mandatory powers. See AS 29.43.040 -.105 (now codified at AS 29.35.250-260). The second-class city of Akiachak has demonstrated it is free of debt and has not exercised any mandatory powers. Accordingly, as the DCRA concluded, under the terms of the statute, the community residents are entitled to a vote on the dissolution question.

CONCLUSION

The residents of the community of Akiachak have no desire

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cessor government to dissolved cities. AS 29.68.580. This legitimate interest was satisfied here since the city was found to be free of debt.

1 to maintain a municipal government. The State municipal govern-
2 ment code provides for incorporation by a petition and election
3 process and for dissolution by the same process. Where there is
4 no <u>desire</u> for municipal government there necessarily is no <u>need</u>
5 for it. The City has operated under the auspices of the IRA
6 government in a limited capacity since 1983, but according to the
7 Local Boundary Commission, that will prevent it from ever meeting
8 the standards for dissolution under the local option method. As a
9 result the community is in legal limbo. The City must be
10 dissolved to enable the community to participate in programs for
11 unincorporated areas and manage its affairs in an orderly fashion.
12 The Local Boundary Commission's construction of the sta-
13 tute is unreasonable and thwarts the ability of communities to
14 determine their local form of government. This Court should
15 reverse the Local Boundary Commission decision and order accep-
16 tance of the petition for dissolution. At that point the eligible
17 voters of Akiachak may decide whether to maintain their municipa-
18 lity.
19
20 DATED Sept. 10, 1986
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22 Respectfully submitted,
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24
25 By: Robert T. Anderson
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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

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CONSTITUTION AND BY-LAWS

OF THE

AKIACHAK NATIVE COMMUNITY

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APPROVED AUGUST 6, 1948

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1950

Apellant's Exhibit A p. 1