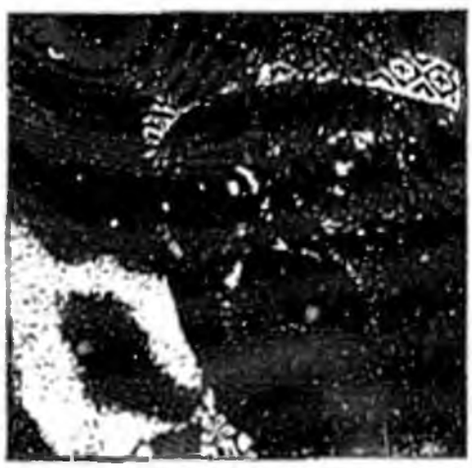
ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8886 SENATE JUDICIARY

377

times the percentage of the adult Native population with degrees.

"The AFN Report on the Status of Alaska Natives: A Call for Action"



Physical and Behavioral Health

The lack of adequate sanitation and water facilities in the villages has been cited as the primary cause of many health problems and the rampant amount of disease found in the villages; the villages in southwestern Alaska have the highest incidences of hepatitis B and other communicable diseases.

In 1950, heart disease was the cause of death for only one of every 20 Alaska Natives; today every sixth Alaska Native dies from this cause.

Alaska Natives are more vulnerable to serious injury and infectious diseases than non-Natives.

Although more than $1.3 billion has been spent building water and sewer systems in rural Alaska, many villages have only rudimentary water and sewer utilities.

For many years, Alaska Natives experienced cancer rates that were well below the rest of the nation, but that situation has clearly changed.

From 1985 to 1989, the rate of diabetes for Alaska Natives rose from 15.7 to 18.2 per 1,000 population; tuberculosis is far from eradicated even though the frightening statistics from 40 to 50 years ago are no longer prevalent.

Attention needs to be focused on the severe health and substance abuse problems in villages and the need to create functional communities at very basic levels.

The prevalence of tobacco smoking among all Alaskan adults is 26 percent, as compared to

39 percent among Alaska Natives; some Native villages have rates as high as 60 percent among adults.

Suicide

The Native suicide rate has continued its upward climb in recent years, reaching nearly 69 per 100,000 population in 1989; death from suicide of an Alaska Native occurred once every 10 days, on average, during the 1980's, and preliminary figures from 1990-1993 indicate that the Alaska Native suicide rate is continuing to climb.

While about one in four of non-Native suicides in Alaska are committed by 15- to 24-year-olds, virtually half in the Native community are committed by this age group.

The steep, steady rise in the Native suicide rate during the 1980s continues an upward trend that dates back to the mid-1950s; in the quarter century between 1964 and 1989, the rate of Alaska Native suicides increased 500 percent.

During the 1980s, males accounted for 86 percent of Native suicide victims; the suicide rate for the latter part of the 1980s for males aged 20 to 24 years was in excess of 30 times the national rate for all age groups combined.

Native suicides occur more frequently in rural Alaska, while 61 percent of Alaska Natives live in village Alaska, over two thirds of Native suicide deaths occurred in this geographic area during the 1988-89 period.

Alcohol: Deaths and Disorders

In the decade of the 1980s, 305 Alaska Natives (173 males, 132 females) were killed by alcohol and drugs. Put another way, between 1980 and 1989, once every 12 days an Alaska Native died from alcohol. In contrast, during that same time period alcohol killed 478 non-Native Alaskans (341 males, 137 females). Considering that Alaska Natives made up roughly 16 percent of the state's population throughout the 1980s, the alcohol mortality rate of Natives was three and one-half times that of non-Natives (4.1/10,000 Natives, and 1.2/10,000 non-Natives).

For the period 1980-89, it is estimated that the cumulative YPLL (Years of Potential Life Lost: the number of years that a person died prior to his or her 65th birthday) attributable to alcohol was 6,607 among Alaska's non-Native population; an almost equal number of years (6,323) of potential life was lost within the Alaska Native community as a direct result of alcohol during that same time period, despite the fact that there are five non-Natives in Alaska for every Native.

The rate at which alcohol is an underlying or a contributing cause of injury death among Alaska Natives is nearly triple that among non-Natives.

About one-half of fire deaths, which occur roughly twice as often, per capita, in the Native community than the non-Native community, were attributable to alcohol in 1987.

Seventy-nine percent of all Native suicide victims have detectable levels of blood alcohol.

There is a clear connection between the abuse of alcohol and the commission of criminal offenses in Alaska; this alcohol connection is particularly strong in rural areas, and among Alaska Natives wherever situated.

"1990 Annual Report," *Alaska Sentencing Commission*

TABLE OF RECOMMENDATIONS

This section of Volume I includes all recommendations made by the Alaska Natives Commission and its task forces and not otherwise contained in Part II of this volume. Several of the following recommendations do, however, relate closely and at times overlap recommendations made in Part II. Each of these recommendations can be found in Volume II of the Final Report of the Alaska Natives Commission. That volume also contains substantive discussions and analyses on each of the listed recommendations.

Economic Recommendations

Employment

1. Institute Native preference for all federal employment in or related to rural Alaska, at a minimum, every agency of the federal government that is available for contracting under P.L. 93-638 should have a Native hire requirement similar to that which is in place with the Indian Health Service and the Bureau of Indian Affairs.

2. Establish veteran's preference for service in the Alaska National Guard by changing the civil service employment procedures in order that those who have served in the Alaska National Guard receive veteran's preference.

3. Davis Bacon (i.e. the federal Davis Bacon Act and the Alaska "Mini-Davis Bacon") requirements should be applied effectively and rationally for village/rural capital projects by following the statutory rule of the "local prevailing wage."

4. Eliminate HUD requirements that prohibit local design and construction, enabling village councils, village corporations and ANSCA regional corporations to become directly involved in housing construction with provisions in place that will both ensure substantial Native hire, improved housing and contract stability for participating Native firms.

5. Facilitate contracting of land conveyance surveys, especially in rural areas of the state, and employ more Natives in the surveying field.

6. The state and federal governments should reorient training programs, with support from the Job Training Partnership Act, to develop and implement dedicated programs to prepare young Alaska Natives to participate fully in the burgeoning Information Age employment and services opportunities.

7. The Commission recommends that all Alaska Native corporations and organizations aggressively pursue employment and education opportunities that will soon be available through the new AmeriCorps (e.g., the National Service Corps).

8. Establish a State Office of Alaska Native Recruitment within the Governor's Office to develop and implement procedures within all departments to ensure more equitable Alaska Native hire practices.

Village Economies and Cottage Industry

9. Congress should create an Alaska Native Economic Development Trust, the principal of the trust to be used in the development of feasible, locally initiated economic projects in predominantly Native areas of the state that create real local employment and training opportunities for rural residents.

10. The federal government should improve outcomes for village planning and training in economic development by evaluating the Administration for Native Americans and the extent to which its social and economic development strategies are actually accomplishing stated goals in Alaska; programs should be restructured if it is found that more effective means are available to effect economic growth in Alaska Native villages.

11. All Alaska Regional Development Organizations (ARDORs) should expand their support for Native businesses and review their policies and procedures to ensure that Alaska Natives are receiving their share of assistance, training and support.

12. Government should increase support for Native tourism and ecotourism by promoting and assisting in the acquisition of capital investment by Alaska Native individuals, village councils and Native firms that wish to become involved in this growing industry.

13. It is recommended that the Community Development Quota (CDQ) program be expanded to include at least one other extraction industry, as a demonstration project, to be studied and further developed if its benefits resemble those that have already been realized from the CDQ for the pollock fishery.

14. A standing Bulk Fuel Task Force should be established by the State of Alaska to operate during the moratorium that the Coast Guard has given before forcing the cessation of fuel delivery to 75 villages that have unsafe storage facilities; and the Legislature, Congress and the private sector should set remediation of the bulk fuel storage problem as a high priority for future allocation of funds.

15. The Department of Housing and Urban Development should fund an Alaska

Native Housing Authority that: a) designs, manufactures and constructs houses for villages, with the participation of village residents; and b) has the long-term goal of substantially increasing rural local hire and other economic benefits to localities and regions in which major HUD construction activities are taking place.

Fish and Game Resources

16. The State of Alaska should convene a special task force, with strong representation of Alaska Native communities, to study the problems created for Alaska Natives by the Limited Entry system and to propose ways in which the program can either be expanded to allow additional permits to be acquired or, alternatively, replaced with a program that accomplishes more effectively the program's original objectives.

17. The CDQ program should be codified in the Magnuson Act through its inclusion by the North Pacific Fisheries Management Council in its final comprehensive rationalization plan; the percentage should be raised from 7.5 percent to 15.0 percent of the pollock fishery and the CDQ should be expanded to other fisheries in the future.

18. Both the federal and state governments should develop long-range plans in order to effect stabilization of the reindeer industry, along with development of outside markets, to accomplish the Reindeer Industry Act's goal of a self-sustaining economy for Alaska Natives;

specifically, existing state agencies dedicated to developing and promoting markets for other Alaska products should assist in the expansion of reindeer markets.

19. The federal and state governments should become more active in establishing training programs related specifically to reindeer herding, animal husbandry, product preparation, business skills, marketing and other issues related to this industry.

20. The growing shellfish mariculture industry in many Alaska Native villages should be fully supported by federal and state government agencies through increased training and redirected economic development funding.

21. The State should reconsider its ban on finfish farming and establish an Alaska Native demonstration project; oversight for the program should be federal, with support and technical assistance provided by the Alaska Department of Community and Regional Affairs and the F.R.E.D. Division of the Alaska Department of Fish and Game.

Judicial and Law Enforcement Recommendations

General

1. The Village Public Safety Officers should: (a) receive significantly more professional training in law enforcement; (b) be given greater compensation for their work; (c) enforce local ordinances; (d) be empowered to make arrests (in addition to "citizens' arrests"); (e) wear a distinctive, standard uniform throughout the state; (f) have the option of carrying a non-lethal weapon (such as a nightstick or sap) or be armed, with appropriate training provided by the State Troopers, and, (g) be sought out as the first source of recruitment for positions in the State Troopers when vacancies occur.

2. Village Public Safety Officers should enforce village ordinances as well as state statutes.

3. The State of Alaska should empower local councils to: (a) pass their own ordinances; (b) enforce local ordinances; (c) apprehend those who fail to obey ordinances; and, (d) pass on

to locally established dispute resolution or judicial bodies those who are so apprehended (see later recommendations).

4. The State of Alaska should enter into formal agreements with each village court (i.e. tribal councils or courts, or other dispute resolution body or individual established by consensus of the village residents) to determine which infractions or which classes of infractions will be the domain of the local jurisdiction and which will be the domain of the State.

5. The State of Alaska should convene a task force composed of representatives of the different Alaska Native groups involved in the judicial system and all three branches of state government to devise a structure of parameters within which village (and Native community) court systems can be given due respect by the State.

6. The State of Alaska must evaluate its entire judicial system, from the District Court to the Supreme Court, relative to its incorporation of Alaska Native law ways and ethics; it must also pursue options and alternatives to the current system, returning dispute resolution and decision making authority to Alaska Native villages and the Native communities that exist in the state's larger municipalities.

7. Village Councils should be encouraged to establish dispute resolution bodies and procedures that are consistent with the predominant tradition and culture of the village, and the state and federal governments should provide training and technical assistance to further this establishment; the Tribal Court in Minto should be looked at as an exemplary model for local dispute resolution bodies.

Correctional System Issues

8. The legislative and executive branches of state government need to revise perspectives regarding its correctional system and the ways in which its three purposes (punishment, rehabilitation and protection of society) can be met; punishment can, as recommended by the Alaska Sentencing Commission, be achieved through the use of alternatives to incarceration, and incarceration can be accomplished closer to "home" if appropriate means are provided regionally.

9. The state and federal governments should develop alternative punishments consistent

with the ethics and culture of the village or region in which they are to be implemented, such alternatives must also be integrated with alternative forms of dispute resolution.

10. The Indian Health Service, Bureau of Indian Affairs, Alaska Department of Health and Social Services and the Department of Corrections must combine their resources and support the development and maintenance of half-way houses and other transitional and supportive living arrangements for Native offenders who can receive rehabilitative treatment at least regionally, if not in their own communities, and for incarcerated Natives who are in the process of returning home.

11. The Alaska Department of Corrections should increase opportunities for Native inmates to participate in substance abuse counseling and to begin that participation earlier in their stay in corrections.

12. The Alaska Department of Corrections should waive academic requirements for hiring Alaska Native counselors to enable the hiring of more Natives who have extensive life experience and a demonstrated ability to assist in the healing and spiritual strengthening that is needed for those inmates who have substance abuse and addiction problems.

13. The Alaska Department of Corrections should: (a) review all cases of Native individuals now incarcerated who are in correctional facilities merely because of a violation of probation or parole and release back to their home villages any individuals who are not dangerous to themselves or others, (b) establish a means by which probation and parole can be carried out in the home village of the offender, utilizing the cultural and social structure of the community both to support and monitor the individual, in the spirit of rehabilitation and community healing, (c) eliminate the requirement that Alaska Natives from rural areas who are on probation and parole must relocate to and remain in an urban area, thereby allowing them to return to their home villages; and, (d) report all the changes made and their impact on probation/parole violations and recidivism to the Alaska Judicial Council no later than July 1994.

14. Consistent with the recommended decentralization of the judicial and correctional systems, village dispute resolution bodies should have the authority to establish monitoring and assistance teams that will supervise a parolee or probationer in the village.

15 An Office of Alaska Native Recruitment should be established within the Governor's Office to develop and implement procedures within other departments to ensure a more aggressive campaign of recruiting Natives into all levels of positions related to law enforcement, the judiciary and corrections.

Local Self-Determination Recommendations

Self-Governance Issues

1. The state and federal governments and their respective agencies should give full and complete recognition to whatever governmental entity that a community has chosen, whether it be a traditional council, an IRA council or a state chartered municipality.

2. Existing programs for assistance to local governments available through the state and federal governments should be reviewed and their use be monitored to determine their effectiveness in strengthening the governance skills of the community and, to the extent necessary, such programs should be augmented to accomplish effective self-governance.

3. Native organizations, such as regional non-profit corporations, the Native American Rights Fund, and similar institutions which have the financial and technical capabilities to do so, should, in addition to pressing for resolution of tribal governance powers questions, examine the existing governmental entities used by Native communities in order to identify ways in which such entities can be used more effectively to achieve the goals of the communities.

4. An evaluation of Bureau of Indian Affairs programs and fund utilization should be completed and, unless there is compelling evidence that would convincingly argue against it, the 103(a) grant program should be re-instated to provide stable financial support for tribal administrations in Alaska.

5. Using the training funds now incorporated into the BIA Area's administration, a coordinated program of decentralized training and assistance should be offered by the Bureau at the village level to accompany the re-instatement of the 103(a) grant program; and, the Administration for Native Americans, which also has a goal of strengthening tribal governments and which invests approximately $600,000 a year in pursuit of that goal in Alaska, should direct its funding into this statewide training and technical assistance effort.

6. Alaska Native regional non-profit corporations should be directed — as a requirement of their contracting with the Bureau of Indian Affairs and the Indian Health Service — to increase technical assistance to village tribal governments in their respective regions, and consideration should be given to establishing a matching-grant program under which regional non-profit corporations distribute portions of their administrative funds to tribal governments that become involved in the redesigned Section 103(a) and 103(b) grant programs.

7. The Alaska Native regional non-profit corporations, including health corporations, should work with member tribal governments to review significant shifts in programs and services from the regional to the village level, balancing community and tribal empowerment needs with the realities of providing cost-effective, high quality services throughout the state.

8. Federal and state departments that provide grants and contracts to Alaska Native non-profit corporations should be directed to evaluate the programs and fund utilization of the corporations for the purpose of limiting administrative costs and striving to move more of the funds, functions and services to village governments.

9. Congress should appropriate and specifically direct a minimum of $10 million annually for five years for use by Alaska Native tribes in solving Alaska Native social problems in culturally appropriate ways.

Local Resource Management Issues

10. The Governor and the State Legislature should reconfigure the Board of Fisheries and Board of Game to enable Alaska Natives to regain more local control over subsistence resources, harvests and traditional uses, and the federal government should augment the authority of the ANILCA (Alaska National Interest Lands Conservation Act) regional councils.

11. Each ANILCA regional board should have veto power over the application of hunting and fishing regulations impacting subsistence, and an oversight group, composed of representatives elected by the regional boards, should review subsistence policies and regulations no less often than annually.

12. The State of Alaska should establish a special task force — with strong representation of Alaska Native communities — to study the original intent of, and present problems with, the Limited Entry program and propose ways in which the program can either be expanded to allow additional permits to be acquired or, alternatively, replaced with a program that accomplishes more effectively the program's original objective while honoring Alaska Natives' traditions and needs.

Education Recommendations

1. The Alaska Department of Education should continue or take action necessary to create a three-component K-12 education system of Alaska Natives that includes home community K-12 schooling that is the right of every American child, distance education delivery that effectively redresses the limitations inherent in small rural schools, regional academic and vocational schools that effectively redress the limitations of small rural schools that cannot be overcome by internal improvements and distance education delivery, and vocational schools that adapt curric[illegible] regional and local needs.

2. The State of Alaska should establish total local control of schools by recasting advisory boards as policymaking boards, and increasing Native administrators and teachers through affirmative hiring and alternative certification.

3. The State of Alaska should establish a model curricula that meet the needs of Alaska Native students by engaging Native scholars and educators in developing: model K-12 curricula differentiated on a regional basis; model post-secondary programs that will aid Native students in the transition from high school to college or vocational education; and model programs that will aid Native students in becoming proficient in the skills necessary to continue the subsistence tradition and economy.

4. The State of Alaska and local school districts should substantially increase efforts to recruit and train educational staff, including local Native professionals, to meet the special needs of Alaska Native students by, among other means, providing: incentives to Native college students to become teachers; incentives for Native teacher aides to become certified; alternative certification avenues to encourage qualified Native professionals to enter the field of education; and incentives to Native teachers to become school administrators.

5. The Congress and the State of Alaska — in a concerted effort to make real improvements in the social and cultural linkages between schools and the villages — should encourage parents and community leaders to become and stay involved with the education of Native children by, among other means: initiating a program to develop parent and village government involvement in rural school districts and using, where appropriate, culturally relevant methods and materials; and creating an Alaska Native Heritage Trust, the funds from which to be granted to Alaska Native tribes for use in schools and in the community for enhancing Natives languages and cultures.

6. The State of Alaska should commit to making measurable improvements in the percentage of Native teachers and other employees in schools with predominantly Native student populations by ensuring that requirements for measuring teacher competency are balanced with local Native needs.

7. The State of Alaska should ensure a competent, stable work force of teachers in village schools to enhance student learning and to maintain stability in school programs by amending Sec. 14.20.150(2) of the Alaska Administrative Code (AAC) to extend years necessary to qualify for teacher tenure from two years (current) to five years (desirable), and instituting remedies mainly through increasing the local Native teacher work force outlined above, to decrease teacher turnover in village schools.

8. The federal government and the State of Alaska should address options for management and funding of schools in village Alaska and other funding issues by, in addition to other means: enabling, over a five-year period, the Regional Educational Attendance Area system to delegate authority for schools to tribal governments in partnership with the State Department of Education; requiring tribal governments, to the extent of their local capabilities, and the Bureau of Indian Affairs to participate in the funding of schools whose authority for management has been delegated to said tribal government on a per capita level equaling the minimum state support given schools currently operated by rural municipalities, and providing one-time federal funding of $50 million to $100 million for upgrading and/or replacing former Bureau of Indian Affairs schools that are now being used as elementary schools.

9. Congress should create and fund an Alaska Native Heritage Trust to be administered by the Alaska Inter-Tribal Council; the funds to be granted to Alaska Native tribes for use in schools and Native communities for enhancing Native languages and cultures.

Physical and Behavioral Health

General

1. The Alaska Natives Commission endorses the recommendations made by the Alaska Sanitation Task Force which include, among others: involvement of communities in the planning, design, and construction of their sanitation utilities; expansion of the remote maintenance worker program to ensure certified, trained operators for all sanitation systems; and awarding of direct grants only to those communities providing at least 10% of the total project costs or an equivalent amount of in-kind services.

2. A coordinated data system should be established that integrates the efforts of the Alaska Area Native Health Service, the Centers for Disease Control and Prevention, the State of Alaska, the Veterans Administration, other cognizant agencies and Native health corporations.

3. Current governmental expenditures supporting the diversified data gathering that now occurs should be focused to support a comprehensive statewide health needs and status-evaluation survey of Alaska Natives: to include behavioral health risk assessment information and wellness indicators; and provide direction to the new health promotion and disease/risk reduction programs recommended by the Commission.

4. The Governor and Congress should safeguard the continued funding for the Community Health Aide Program (CHAP), increasing wages over time to ensure the continuity of the program and reduce turnover among CHA's, and providing training funds and other support.

5. Congress should respond favorably to the need for increased support for patient travel in Alaska and appropriate funds to meet the authorization level of the Indian Health Care Improvement Act.

Child and Family Health

6. The Alaska Area Native Health Service should continue to set its objectives towards high rates of immunization in order that, by the end of the century, all Alaska Native children throughout Alaska will be age-appropriately immunized.

7. Present reductions in Bureau of Indian Affairs' funding for Indian Child Welfare Act grants and any plans for the eradication of that important program should be reversed and the Bureau should reinstate the funding to levels available for federal FY 1993 and offer even further assistance to tribes and tribal organizations in their efforts to eliminate child abuse and its consequences in the Alaska Native community.

8. Child abuse and neglect data should become part of a unified, comprehensive data system for Alaska Natives, and roles and responsibilities, especially between the Division of Family and Youth Services, the judiciary, Indian Health Service, regional health corporations and other tribal contractors, and federally recognized IRA and traditional councils need to be clarified.

Health Education and Preventative Health

9. The entire health care system for Alaska Natives must be re-oriented to emphasize primary prevention, and every primary prevention program must concentrate on families and communities, not on individuals.

10. The Indian Health Service, through contract with the Alaska Native Health Board and in conjunction with the Alaska Department of Health and Social Services, should develop a comprehensive infectious disease prevention education strategy geared directly to address Alaska Native tribes, families and children with materials developed by and for Alaska Natives and in Native languages; the effort to be made through all mediums, schools and other institutions found in the villages and should clearly recognize the linkages between physical health and cultural, spiritual and mental well-being.

11. Aggressive health education campaigns specific to avoiding HIV and AIDS should be initiated and a curriculum addressing the disease should be established in schools statewide; educating and raising the awareness of parents, and helping them to help their children, is an essential element of a successful anti-AIDS program.

12. It is incumbent upon all levels of government and the entire educational system of the state to revisit the need for health education for Native children, youth, adults and elders; and the Public Health Service should augment funding and support for health education and promotion programs.

13. The Alaska Native Health Service and the Alaska Department of Health and Social Services should aggressively pursue new approaches to increasing cancer screening and diagnostic capabilities while at the same time offering greatly enhanced health education and risk prevention activities for Alaska Natives.

14. The capability of the Indian Health Service should be enhanced to make effective and timely diagnoses so that when Alaska Natives do seek help in response to early signs of illness they will be assured appropriate intervention and timely care to prevent more serious consequences.

15. The Suicide Prevention Program administered by the State Department of Health and Social Services should be examined as a possible model for the development of additional government-supported endeavors, upholding the goal of empowering communities to design, implement and be responsible for their own creative solutions.

Substance Abuse

16. The Alaska Area Native Health Service, the Alaska Department of Health and Social Services, and other who provide funds for substance abuse prevention and treatment should conduct an outcome evaluation of the effectiveness of programs that they fund and, when relatively unsuccessful approaches are found, redirect the funding to fill in the gaps in the treatment system and implement new and different methods to reduce the incidence and prevalence of substance abuse.

17. The Alaska Department of Health and Social Services and the Alaska Area Native Health Service should use existing funds to support the establishment of an Alaska Native Family Development Center modeled after the successful Kakawis Centre in British Columbia, monitoring and evaluating its effectiveness over time for possible expansion.

18. Programs for early risk detection, for example the "Healthy Start" program that has proven to produce drastic reductions in child abuse, should be implemented for Alaska Natives with initial contact beginning prior to the birth of the child to also help prevent Fetal Alcohol Syndrome and Fetal Alcohol Effect.

19. There should be an immediate establishment of federal and state policies and procedures that will ensure: (a) consistent gathering of needs assessment data related to the incidence and prevalence of substance abuse among Alaska Natives, (b) routine sharing of data between the various agencies of the federal and state governments that collect information about substance abuse; (c) the establishment of a consistent evaluation methodology that will assess the performance of programs that receive funds from the state and federal governments to fight the substance abuse problems that have become endemic in Alaska Native communities; and, (d) research into the type of binge drinking common among Alaska Natives and evaluation of treatment approaches attuned to that type of client.

KEY FACTS & FINDINGS

he following are selected statistical and other
.gs of the Alaska Natives Commission.
ated by issue area, these data are intended to
int the reader with key information about the
topics studied by the Commission. Volumes II and III of
Report contain additional statistics and analyses by issue area. Unless otherwise noted,
nd findings were developed by the Alaska Natives Commission based on a number of
te and private sources, including 1990 Census data.

Social / Cultural

laska Native birthrate is 36.5 for each 1,000 population, therefore the demand for
ch as elementary schools, Head Start programs and community health care has
sing in the villages.

respect to Native children, the public education system must encompass two sets of
l values: the first set of skills is that necessary for success in traditional Native life-
second set is that necessary for success in Western society.

Native mortality rate is more than three times the national average, and a significant
e of Natives deaths is alcohol-related.

In response to inquiry by the Legislature about the decision, the Attorney general responded in a letter dated January 11, 1996 :

> "[T]he decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations. Instead, it was motivated by a commitment to working with Alaska villages to achieve a healthier, safer environment in which the community is an active participant in solutions. Litigation over the issue of tribal status was viewed as a major impediment to this state-local partnership."

The Attorney General's letter to the Legislature attempted to answer a variety of questions raised at the December hearing. The hearing and the letter taken together, however, indicate that several important questions remain unanswered--questions brought to legislative attention by the public about exactly what this new concept of Alaska Native tribal sovereignty means for the future of Alaska. It is with these concerns in mind that the Joint Judiciary Committees convene this hearing. It is hoped that the panel invited to participate can offer a broad perspective on tribal sovereignty's impact on Alaska.

The Legislature and the public remain concerned that the Administration's decision to abandon litigation over the validity of tribal status in Alaska may have been made too hastily. It is now clear that many of the troubling issues regarding tribal status, including jurisdiction, sovereign immunity, and overlapping membership, are unknown, both to the people and to the Attorney General's office, the State's legal authority and representative. If in fact the implications of this decision are so uncertain, the political policy decision must be examined further. For it is Alaska government's mandate to protect and advocate the interests of the state and all of its citizens.

Present today will be Attorney general Bruce Botelho, a representative from the Governor's office, a representative from the Alaska Federation of Natives, a representative from the Bureau of Indian Affairs, Anchorage attorney Don Mitchell, Washington Indian law attorney Jim Johnson, and South Dakota Indian law attorney Tom Tobin.

After the round table discussion, we hope to accomplish four things: 1.) determine whether and to what extent the Administrative action in question will benefit Alaskans, particularly in Native communities; 2.) commence an inquiry to determine specific impacts on the state government created by the Administration's decision; 3.) identify other effects created by the new tribal status recognition; and 4.) explore legislative options in response to the Administration's actions to protect the interests of all Alaskans, Native and non-Native alike.

FEBRUARY 21, 1996 JOINT JUDICIARY COMMITTEE HEARING

INVITED PANEL MEMBERS

1.) Bruce Botelho, Attorney General

2.) Representative from the Governor's Office

3.) Don Mitchell, attorney

4.) Bureau of Indian Affairs Representative

5.) Julie Kitka, Alaska Federation of Natives

6.) Gary Oskoloff, Vice-Chairman, Alaska Inter-Tribal Council

7.) David O. David, Chairman, Association of Village Council Presidents

8.) David Getsches, attorney

9.) Tom Tobin, attorney

10.) Jim Johnson, attorney (Telephonic Participation)

11.) Arthur Snowden II, Administrative Director,Alaska Court System

Alaska State Legislature

House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

NOTICE OF MEETING

Joint House/Senate Judiciary Committee Meeting

DATE: February 21, 1996

TIME: 1:00 P.M.

PLACE: Capitol 5th floor--Senate Finance Committee room

SUBJECT: Impact of Tribal Status Recognition in Alaska

Senate Members	House Members
Sen. Taylor, Chair	Rep. Porter, Chair
Sen. Green	Rep. Green
Sen. Miller	Rep. B. Davis
Sen. Adams	Rep. Bunde
Sen. Ellis	Rep. Finkelstein
	Rep. Toohey
	Rep. Vezey

OPENING STATEMENT

SENATOR ROBIN TAYLOR

CHAIRMAN, SENATE JUDICIARY COMMITTEE

JOINT ALASKA STATE SENATE/HOUSE JUDICIARY COMMITTEES HEARING

2/21/96

The Senate and House Judiciary Committees convene this joint hearing this afternoon as a follow-up to the December hearing held in Anchorage. The subject of inquiry is the Knowles Administration's decision to discontinue the State's opposition to the acknowledgment of tribal status for 226 Alaska Native Villages.

On October 21, 1993 the Bureau of Indian Affairs published a list of federally recognized Alaska Native Indian tribes. The list for the first time purported to acknowledge the existence of tribes in Alaska. The list claimed to grant "the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian Tribes with a government-to-government relationship with the United States." *58 Fed. Reg. 54,346 & 54,366 (October 21, 1993).* In other words, the list attempted to create 226 separate government entities within Alaska.

The State initially challenged the federal acknowledgment procedures in a U.S. District Court case called Native Village of Venetie I.R.A. Council v. State of Alaska, 1994 WL 730893, *1 (D. Alaska 1994). In October 1995, Judge Holland concluded in the Venetie case that the 1993 list granted sovereign tribal status. The State of Alaska, presumably at the behest of the Governor, challenged the District Court decision, arguing in a motion for reconsideration that the federal tribe list was invalid because the federal government had failed to follow its own regulatory acknowledgment procedures. See CFR part 83. Prior to the District Court's ruling on the State's motion for reconsideration, the Governor directed the Department of Law to withdraw the motion. The Governor proclaimed that the new state policy was to not challenge the federal government's failure to follow its own regulations and to acquiesce to the federal decision.

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P O BOX 110300
JUNEAU ALASKA 99811 0300
PHONE (907) 465-3600
FAX (907) 465-2075

January 11, 1996

The Honorable Gail Phillips
Alaska House of Representatives
State Capitol
MS 3100
Juneau, Alaska 99801

Dear Speaker Phillips:

At the conclusion of the Joint House-Senate Judiciary Committee hearing on tribal status held on December 4, 1995, I pledged to provide additional information about this important issue. This information is also being provided to legislators who did not participate in the committee hearing as a follow-up to my letter of November 27, 1995, on tribal status issues.

Let me emphasize once again that the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations. Instead, it was motivated by a commitment to working with Alaska villages to achieve a healthier, safer environment in which the community is an active participant in solutions. Litigation over the issue of tribal status was viewed as a major impediment to this state-local partnership.

Nevertheless, the Administration's decision to not pursue the litigation over tribal status is also supported by events that, taken together, lead one to conclude that the probability of prevailing in the federal courts was extremely low. Very few human endeavors are static. In this instance, litigation over tribal status began in the 1980's because, in the absence of any clear federal expression that tribes existed in Alaska, the state was unwilling to accept each and every assertion of tribal status. As discussed further below, there has been extensive federal activity

in the last two years that justified a fundamental reevaluation of the state's posture in the litigation.

THE FRAMEWORK FOR FEDERAL RECOGNITION OF TRIBES

Historically, the Alaska Supreme Court has held that for the most part, except for Metlakatla, no tribes exist in Alaska. The court extended sovereign immunity to Metlakatla in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), holding:

> Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a non-justiciable political question, the community is entitled to all of the benefits of tribal status.

569 P.2d at 163.

More recently, the court has declined to find sovereign immunity or has concluded that, if it did exist, it was waived by the tribe. These cases include *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992); *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992); *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988); and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983). No case, however, has questioned the fundamental holding of *Atkinson v. Haldane*.

Four events have occurred since the Alaska Supreme Court's last decisions in 1992 that suggest the court would, if presented the question, decide tribal status issues differently today, in keeping with its decision in *Atkinson*. Those events are: (1) the Secretary of Interior's tribal listings published in 1993 and 1995; (2) Congress' enactment of the Federally Recognized Indian Tribe List Act of 1994; (3) Judge H. Russel Holland's decision in *Native Village of Venetie v. State*, No. F86-0075 CIV (HRH), issued December 23, 1994, holding that the Native Village of Venetie Tribal Government is an Indian tribe under the common law criteria; and (4) Judge Holland's decision in the same *Venetie* case on the tribal status of Fort Yukon issued on September 20, 1995.

Department of Interior's 1993 and 1995 Tribal Lists

In 1993, the executive branch of the federal government took a significant step intended to remove any ambiguity as to the tribal status of certain Alaska Native entities. On October 21, 1993, the Secretary of Interior published a list of more than 220 Alaska Native villages identified as having the same status as tribes in the contiguous 48 states. The preamble to the 1993 list expressly declared:

> The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and *to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states.* Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to the other tribes; and are subject to the same limitations imposed by law on other tribes.

58 Fed. Reg. 54365-54366 (Oct. 21, 1993) (footnote omitted; emphasis added).

The tribal list published by the Secretary on February 16, 1995, reinforces this intent. The preamble to the 1995 list states that it constitutes the list of "federally acknowledged tribes in the contiguous 48 states and in Alaska."

60 Fed. Reg. 9250 (Feb. 16, 1995). The preamble further points out that subsequent to the publication of the 1993 list, Congress enacted the List Act of 1994 in which "Congress confirmed the Secretary's authority and responsibility to establish a list of Indian tribes and mandated that he publish such a list annually." The updated 1995 list was published in response to that Congressional mandate. 60 Fed. Reg. at 9251.

The List Act of 1994

In late 1994, Congress was called upon to address the 1993 tribal list because of the Department of Interior's failure to include two tribes on the earlier list. One of the excluded tribes was the Central Council of Tlingit and Haida Indian Tribes of Alaska.

The result was enactment of the "Federally Recognized Indian Tribe List Act of 1994." Public Law 103-454; 25 U.S.C. 479a. In the List Act of 1994, Congress directed that the Secretary annually publish a list of federally recognized tribes; under the Act, once recognized, an Indian tribe may be terminated only by an act of Congress. Title II of the Act noted that the Secretary's 1993 list did not include the Central Council and expressly reaffirmed the federal recognition of that tribe.

The House Natural Resources Committee report accompanying the legislation discusses the October 21, 1993, list of Alaska Native tribes and notes the continuing controversy over the existence of "Indian country" in Alaska. House Report No. 103-781; 1994 *U.S. Code Cong. and Adm. News*, p. 3768. The committee emphasized that the Act is neutral on the Indian country issue: "The Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized Indian tribes which are eligible to receive services." *Id.* at 3771.

The December 23, 1994, Decision in the Venetie Case

On December 23, 1994, Judge Holland ruled that the Native Village of Venetie Tribal Government (encompassing the Native Village of Venetie and Arctic

Village) is a tribe based on the federal common law criteria. Those criteria are: (1) the group is a group of Indians of the same or similar race; (2) it is united in a community; (3) it operates under one leadership or government; (4) it inhabits an area of some reasonable definition; and (5) it is the modern day successor to an historical sovereign entity which exercised at least minimal government functions. In applying these criteria to the evidence presented at trial, the court took a broad view of each one making it unlikely that any village would fail to meet the test.

The September 20, 1995, Decision in the Venetie Case (Fort Yukon)

The 1993 and the 1995 tribal lists, as well as the List Act of 1994, were considered by the U.S. District Court for Alaska when it was called upon to decide Fort Yukon's tribal status in the *Venetie* case. The state contested Fort Yukon's inclusion on the 1993 and 1995 lists because, in identifying the listed villages, the Secretary of Interior had failed to follow the Department of Interior regulations necessary to achieve tribal recognition.

In a decision issued on September 20, 1995, the court rejected the state's argument. The court held that the Secretary of Interior has the power to recognize tribes as a result of the historical acquiescence of Congress. The federal regulations established a procedure for unrecognized tribes themselves to initiate proceedings to gain the Secretary's recognition. However, the court concluded, this is not the exclusive means by which a tribe may receive federal recognition, and "[t]he Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power." Order, September 20, 1995, at 9. The court found that the ambiguity surrounding the status of the Alaskan entities on the tribal lists published by Interior from 1982 to 1988 was resolved by the publication of the October 21, 1993, list: "the executive's intent was clearly announced" on that date. *Id.* at 8. Thus, as of that date, the Native Village of Fort Yukon (as well as the other entities on the list) became a federally recognized tribe.

The court found support for its ruling on the tribal status of Fort Yukon in the List Act of 1994, stating:

> Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act, section 202(2). This leads to the conclusion that Congress approved of this list.

Order, September 20, 1995, at 10.

On October 20, 1995, the state moved for reconsideration of the court's decision, thus precipitating a careful policy review by Governor Knowles. The state's motion for reconsideration was later withdrawn. The plaintiffs also moved for reconsideration, arguing that Fort Yukon was a federally recognized tribe by virtue of its inclusion on the Department of Interior's tribal lists published from 1982 to 1988. On December 12, 1995, Judge Holland issued a decision reaffirming his previous ruling. The court stated that it had reconsidered its order of September 20 on the tribal status of Fort Yukon and concluded that it had made no error of fact or law in that order. The court reiterated its holding that as of October 21, 1993, Interior clearly declared the listed villages, including Fort Yukon, to be federally acknowledged tribes.

THE STATUS OF THE "INDIAN COUNTRY" ISSUE

In two recent decisions issued by Judge Holland, the *Venetie* case and the *Kluti Kaah* case, the court held that ANCSA lands are not Indian country. Both of these cases have been appealed to the Ninth Circuit Court of Appeals. As I stated in my November 27, 1995, letter, the Knowles Administration will defend Judge Holland's decisions in the Indian country cases on appeal.

The *Venetie* Indian country case arose out of Venetie's effort to impose a business activities tax on a school construction project in the village. The ability of a tribe to tax depends on the tribe having a territory, *i.e.*, Indian country, over which it exercises jurisdiction. In August 1995, Judge Holland determined that the

ANCSA lands owned by Venetie are not Indian country. Thus, the tribe cannot impose a tax on construction projects on ANCSA lands.

On November 28, 1995, Judge Holland ruled that the Kluti Kaah Native Village of Copper Center neither owns nor occupies land constituting Indian country. Therefore, Kluti Kaah lacks jurisdiction to impose a business activities tax on the section of the TransAlaska Pipeline System running through the area.

The essence of the *Venetie* and *Kluti Kaah* indian country decisions is: (1) the test for Indian country is whether the land has been validly set apart for the use of Indians as such, under the superintendence of the federal government; (2) it is the tribe, not the land, that must be under federal superintendence; (3) following ANCSA, Alaska Native tribes are not subject to the degree of Congressional and Executive agency control that evidences an intention that the federal government, rather than the state, be the dominant political institution in the area and are therefore not under the superintendence of the government; and (4) under the terms and structure of ANCSA, land conveyed to ANCSA corporations cannot be said to have been set aside for the use of Natives *as such*, and therefore is not Indian country.

While the decision to not pursue litigation over tribal recognition may focus the debate on the Indian country issue, it does not dilute the state's arguments on that issue. The federal court has already rejected arguments that tribal status establishes the existence of Indian country. As stated by the Department of Interior in its preamble to the 1995 list, "[i]nclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members. It only establishes that the listed tribes have the same privileges, immunities, responsibilities and obligations as other Indian tribes under the same or similar circumstances . . ." 60 Fed. Reg. at 9251. The department then noted the opinion of the Solicitor of the Department of Interior, which concluded, construing general principles of federal Indian law and ANCSA,

> that ANCSA largely controls in determining whether any territory still exists over which Alaska villages might exercise governmental powers. We also conclude that, notwithstanding

> the potential that Indian country still exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers.

60 Fed. Reg. at 9251 n.1 (quoting Opinion of the Solicitor of the Department of Interior, Thomas Sansonetti, M-36975, at 108, January 11, 1993). *See also* 58 Fed. Reg. at 54366 n.1.

SUMMARY OF ISSUES ADDRESSED

During the December 4 hearing, additional information was requested on a number of issues. One of the items requested was a list of tribal powers. Many of the issues discussed below concern the scope of powers of a recognized tribe without Indian country (*i.e.*, tribal authority over internal affairs and domestic relations of tribal members; the treatment of tribes under the Clean Water Act; sovereign immunity; alcohol control; criminal law enforcement; Indian gaming; and fish and game management). Questions were also raised concerning the relationship of certain sections of the Statehood Act and the Alaska Constitution to tribal recognition; the federal statutes in which Alaska Native villages are defined as tribes for specific federal purposes; and the budgetary impacts of the tribal status litigation. These questions are discussed below as well.

Before going into those issues, however, let me reiterate what I stated in my letter of November 27 on tribal recognition generally. Tribal recognition is a federal, not a state, function. Tribal recognition means that Alaska's tribes are eligible to receive funding and services from the federal government, are able to set rules for tribal membership and the domestic relations of their own members, and are immune from suit. Governmental powers such as the right to tax, manage fish and game, and prosecute criminal cases are only applicable in Indian country; in other words, without Indian country, tribes have no jurisdiction to exercise such powers.

Tribal Authority over Internal Affairs

It is well established in federal Indian law that each tribe has the power to set its own membership criteria. Identification of a person as a member of an Indian tribe is an issue solely within the control of the tribe, and perhaps the individual. Tribes can also choose the structure within which they govern themselves. They may consider traditional tribal councils, IRA councils, or some form which combines traditional and modern factors. Traditional councils and IRA councils are not subject to most state laws. Limitations on tribal action are governed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, and by Congress.

Child Protection - Indian Child Welfare Act Matters

The Division of Family and Youth Services, Department of Health and Social Services, responds to reports of harm regarding child abuse and neglect. Reports concerning Native children involve those living in villages, those living in urban areas, and those whose families travel back and forth. All of the villages listed in ANCSA have long been recognized as "Indian tribes" for purposes of the Indian Child Welfare Act (ICWA). *See* 25 U.S.C. 1903(8). Therefore, state acceptance that the listed Native villages are tribes does not change DHSS's longstanding practice of notifying tribes regarding Alaska Native children who come under the child protection statutes and the tribes' right to participate in state court child protection cases.

Not all tribes participate in state court ICWA cases involving their children. This happens for many reasons, including lack of funds, agreement with the state's position, and concern about lay representation instead of representation by counsel at state court proceedings.

Over the years the state has entered into formal agreements with a number of tribes regarding how they will interact in child protection cases, from the earliest reports through the completion of each case. Some tribes have not signed the agreements because they do not address tribal jurisdiction.

The issue of jurisdiction under ICWA bears some discussion. Through ICWA, "Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991). For instance, under ICWA, jurisdiction is exclusive in the tribe when the child custody proceeding involves Indian children who reside on their tribal reservations (exclusive jurisdiction requires proof of Indian country). In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, the state court may exercise jurisdiction (at least) concurrent with the tribal court. However, the state court must refer the dispute to the tribal court unless good cause is shown for the retention of state court jurisdiction.

For tribes in some states, the exclusive and referral jurisdiction provisions of ICWA took effect automatically. However, tribes located within Public Law 280 states, which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior and having been granted jurisdiction. Public Law 83-280 (commonly referred to as Public Law 280) gave enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts. The civil portion of this statute is codified at 28 U.S.C. § 1360.

The Alaska Supreme Court and the federal courts are not in agreement on their interpretation and application of Public Law 280 in the ICWA context. The disagreement is over whether, under Public Law 280 and ICWA, the state has exclusive jurisdiction or concurrent jurisdiction over child custody determinations when the tribe has not petitioned the Secretary for reassumption of jurisdiction.

The Alaska Supreme Court has held that, under Public Law 280, tribal courts in Alaska have no child custody jurisdiction (and the state court has exclusive jurisdiction) unless the tribe has petitioned for reassumption of jurisdiction under ICWA. *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992); *In re K.E.*, 744 P.2d 1173 (Alaska 1987); *Native Village of Nenana v. Department of Health and Social Serv.*, 722 P.2d 219 (Alaska 1986). In Alaska, only the Metlakatla Indian Community has petitioned for and been granted such jurisdiction.

The Ninth Circuit has held that under ICWA and Public Law 280, a tribe that has not petitioned for exclusive or referral jurisdiction may exercise concurrent jurisdiction with the state over child custody cases. *Village of Venetie I.R.A. Council*, 944 F.2d at 561-562. The *F.P.* case was decided after, and explicitly declined to follow, the Ninth Circuit's holding in *Village of Venetie* that any Alaska Native entity that proved itself a tribe retained inherent power over child welfare without going through the reassumption process.

Therefore, the state courts and agencies currently cannot, under Alaska law, agree that any Alaska Native tribe other than Metlakatla may assert exclusive jurisdiction under ICWA, 25 U.S.C. § 1911(a). Similarly, the Alaska courts cannot order the transfer of a case from state court to a tribal court, even though courts in other states have been transferring cases to tribal courts in Alaska for years.

Cultural Adoptions

The state currently issues substitute birth certificates when the appropriate parties attest that a cultural, or customary, adoption has taken place. Such adoptions, which are recognized under both federal and state law, are a traditional practice in which, for a variety of reasons, responsibility for a child is shifted from the natural parents to others. Before a substitute birth certificate can be issued, both natural parents must sign a state-provided form identifying the child and the child's tribe and affirming that an adoption has occurred under tribal custom. In addition, the governing body of the child's tribe must certify, in writing, that the adoption has followed tribal custom.

The legal effect of issuing the substitute birth certificate is unclear, as is the legal effect of a cultural adoption in any given tribe. The state does not recognize tribal court adoptions because of the existing Alaska case law mentioned above, although the federal court has ordered the state to give full faith and credit to the adoption decrees of the Native Village of Venetie to the same extent it gives full faith and credit to adoption decrees from other jurisdictions. *Native Village of Venetie, I.R.A. Council v. State*, Memorandum of Decision, December 23, 1994. The court will be issuing a similar order regarding adoption decrees of the Native Village of Fort Yukon in the Fort Yukon portion of the *Venetie* case.

Marriage, Divorce, and Child Custody

A tribe's authority over the domestic relations of its members may prompt regulation of marriage and divorce and setting of tribal rules for each relationship. As tribes increasingly regulate the relationships of their members, they may perform more marriages and divorces and make more child custody decisions. Since Alaska is a Public Law 280 state, state courts have at least concurrent jurisdiction over family matters. This may lead to jurisdictional questions between the state courts and tribes which will need to be resolved.

The Clean Water Act and Indian Tribes

A question was raised concerning whether Alaska's tribes may be treated as "states" under the Clean Water Act. Under the longstanding federal interpretation of the Act, the answer is "no," except for the Metlakatla Indian Community, because "treatment as a state" is limited to federal Indian reservations.

The Federal Water Pollution Control Act, more commonly known as the Clean Water Act, contains two sections expressly dealing with Native Americans. Section 113, which was part of the 1972 Act, is entitled "Alaska village demonstration projects." It authorizes the EPA to enter into agreements with the State of Alaska to carry out safe water projects and pollution control projects in "Native villages of Alaska." "Village" is defined to mean:

> an incorporated or unincorporated community with a population of ten to six hundred people living within a two-mile radius.

33 U.S.C. § 1263(g).

Section 113 also authorizes federal executive agencies to coordinate with the State of Alaska and "appropriate Native organizations" to develop comprehensive sanitation programs in the Native villages. The term "Native organizations" is defined by reference to the Alaska Native Claims Settlement Act. *Id.* at (e). Thus, the Clean Water Act has long recognized Alaska Natives as such.

In 1987, Congress added section 518 to the Act. 33 U.S.C. § 1377. Entitled "Indian Tribes," section 518 authorizes the EPA to promulgate regulations specifying how the agency will treat tribes in the same manner in which it treats states.[1] The statute specifies those programs in which an Indian tribe can be treated as a state and also lists three criteria that must be met to attain such status. *Id.* at (e). Essentially, a tribe may develop water quality standards and issue effluent permits only if: (1) the tribe has a governing body carrying out substantial governmental duties; (2) the affected water resources are held by or for the tribe or a tribal member "or [are] otherwise within the borders of an Indian reservation"; and (3) the tribe has the technical and legal ability to carry out the mandates of the Clean Water Act.

Section 518 expressly refers to Alaska Natives in several contexts. Some funds are expressly reserved for "Alaska Native Villages as defined in [ANCSA]." 33 U.S.C. § 1377(c). Subsection (g) expressly disclaims any effect section 518 may have on "the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe . . ." Notwithstanding these two references, it is doubtful that section 518 applies to any Alaska Native tribe other than the Metlakatla Indian Community because, as explained below, the section appears to be limited to "reservations." *See* subsections (e)(2) and (h)(1).

Pursuant to section 518, EPA has promulgated "treatment as a state" regulations. One set of rules governs tribal establishment of water quality standards. 40 C.F.R. 131, 56 Fed. Reg. 64875–96 (1991). Another pertains to dredge and fill permits (wetlands). 40 C.F.R. parts 232 and 233, 58 Fed. Reg. 8171 (1993). Another pertains to financial grants. 40 C.F.R. parts 35 and 130, 54 Fed. Reg. 14354 – 60 (1989). The most recent publication of which we are aware "specifies how Tribes will be treated in the same manner as States for various provisions of the CWA." 40 C.F R. 122, 123, 124 and 501, 58 Fed. Reg. 67966 (1993).

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[1] Similar language is found in the Clean Air Act and the Safe Drinking Water Act, 42 U.S.C. § 7601(d)(2)(B) and 42 U.S.C. § 300j-11(b)(1)(B) respectively.

A reading of the most recent rule shows EPA only treats tribes as states on matters related to resources within a reservation.[2] Thus, because Metlakatla is the only reservation tribe in Alaska, the decision to no longer contest the tribal status of Alaska Native villages on the 1993 and 1995 lists of federally recognized tribes will have no impact under the Clean Water Act "treatment as a state" provisions.

Sovereign Immunity

One of the attributes tribes enjoy is sovereign immunity. *See, e.g., Native Village of Eyak v. GC Contractors*, 658 P.2d at 758. This immunity extends to corporations created by the tribe, such as those chartered under the Indian Reorganization Act. The most common Native corporations in the state currently are ANCSA corporations, which do not enjoy sovereign immunity because they are state-chartered corporations.

Sovereign immunity bars suits against tribes. It also bars cross-claims and counterclaims. *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). It does not bar suits against individual tribal officials. Congress can waive the tribes' sovereign immunity, but the waiver must be clearly expressed and strictly construed. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Turner v. U.S.*, 248 U.S. 354 (1919).

The extent to which and manner in which tribes can waive their sovereign immunity is less clear. The Alaska Supreme Court has held that tribes can waive their sovereign immunity by contract. *Nenana Fuel v. Native Village of Venetie*, 834 P.2d at 1233; *Native Village of Eyak v. GC Contractors*, 658 P.2d at 759. However, federal law requires that to waive immunity by contract in matters relating to trust property, tribes must receive Secretarial or Congressional consent.

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[2] "EPA believes that it was the intent of Congress to limit Tribes to obtaining the status of Treatment in the Same Manner as a State for lands within the reservation. . . Tribes are limited to obtaining Treatment in the Same Manner as a State status for only water resources within the borders of the reservation over which they possess authority. . ." 58 Fed. Reg. 67970.

With respect to environmental laws, the federal courts generally hold that Congress has abrogated tribal sovereign immunity when the United States seeks to enforce federal environmental laws against tribes. Therefore, a tribe operating a business would not be immune from federal environmental standards and requirements. However, state enforcement of its standards and requirements against such an entity may be problematic. A few Native groups in Alaska have claimed sovereign immunity in response to efforts by ADEC to enforce the state's "little superfund law," AS 46.03. This could be an area of dispute with tribes in the future.

Alcohol Control

Under state law, both Native and non-Native residents of rural villages have been delegated significant authority to control the use of alcohol. AS 04.11.490--04.11.506. In addition to adopting restrictions on alcoholic beverages, "local governing bodies" may protest the issuance, transfer, relocation, or renewal of liquor licenses. Currently, the Alcoholic Beverage Control Board regulates the licensing of establishments that manufacture, sell, or otherwise deal in alcoholic beverages, including those located within Native villages.

If a particular tribe were recognized as having control over an area of Indian country, that tribe could adopt alcohol ordinances for enforcement in its tribal courts. In addition, the tribe could choose to adopt ordinances regulating the sale, importation, or possession of alcoholic beverages within its Indian country through a federal process instead of the state process, thereby making the ordinance enforceable by a federal court. *See* 18 U.S.C. § 116. Otherwise, federal and state laws concurrently govern the control and regulation of alcoholic beverages in Indian country. *Rice v. Rehner*, 463 U.S. 713 (1983).

Criminal Law Enforcement

Tribal recognition alone does not confer tribal jurisdiction over any criminal act. The criminal jurisdiction of a tribe is limited to the territory it controls. Without territorial jurisdiction, *i.e.*, Indian country, a tribe has no criminal jurisdiction.

A tribe can exercise criminal jurisdiction over its members within Indian country. Where Indian country exists, tribes have the power to make their own criminal laws and enforce them in tribal courts unless Congress limits that power. *U.S. v. Wheeler*, 435 U.S. 313 (1978). The Indian Civil Rights Act, 25 U.S.C. § 1302, limits how tribes exercise their powers of self-government. Tribes cannot exercise criminal jurisdiction over non-members unless Congress expressly grants that power. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Generally states have no criminal jurisdiction over tribal members within Indian country. *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Worcester v. Georgia*, 31 U.S.(6 Pet.) 575 (1832). However, in 1958 Congress gave the State of Alaska "jurisdiction over offenses committed by or against Indians in the areas of Indian country. . . ." 18 U.S.C. § 1162, Pub. L. 83-280. As a Public Law 280 state, Alaska has jurisdiction over all crimes committed in Indian country. Although 18 U.S.C. § 1162 refers to the state having "exclusive jurisdiction" within Indian country, courts have recognized concurrent tribal jurisdiction over minor crimes.

Indian Gaming

Tribal recognition does not impact Indian gaming in Alaska. The federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21 (IGRA), permits recognized Indian tribes to conduct Class III gaming on "Indian land" if such gaming is otherwise legal in the state, upon negotiation of a gaming compact that is approved by the federal Indian Gaming Commission. Class III gaming consists of all casino games except bingo, pull-tabs, and traditional social games of chance. Without Indian land, a tribe does not have the necessary territorial jurisdiction to conduct gaming. In addition, under current state law casino gaming is illegal and thus not allowed to Natives or non-Natives in Alaska.

Fish and Game Management

State recognition of Alaska tribes does not affect fish and game management. Indian rights to manage fish and game originate from three sources: (1) reservation status of land; (2) off-reservation treaty rights; and (3) federal preemption of state regulation. Only one reservation exists in Alaska (Metlakatla),

and no treaties exist between the federal government and Alaska Natives. Therefore, any Native rights to manage fish and game can only be based on federal statutes preempting state control. In Alaska, ANILCA grants rural residents, both Native and non-Native, a priority for the taking of fish and wildlife on public lands for subsistence uses. Tribal recognition does not impact this individual federal right.

Alaska Native Villages Defined as Tribes for Specific Federal Purposes

Although blanket federal recognition of Alaska Native villages as tribes did not occur until the October 21, 1993, listing, Congress has repeatedly chosen to treat Alaska Native villages as tribes for specific purposes.

The following statutes are examples of instances in which Alaska Native villages have been included in the statutory definition of Indian tribes or where Native villages have been included along with tribes in definitions of units of government affected by statutes (citations are primarily to the definition sections involved):

5 U.S.C. § 3371. Provisions for personnel assignments to and from states.

15 U.S.C. § 637. Aid to small businesses.

16 U.S.C. § 470w. Assistance in the conservation of historic sites, buildings, objects, and antiquities.

16 U.S.C. § 470bb. Programs for archaeological resources protection.

20 U.S.C. § 3232. Assistance in bilingual education programs.

20 U.S.C. § 4402. Assistance in development of American Indian, Alaska Native, and Native Hawaiian culture and art.

23 U.S.C. § 101. Assistance provided for public roads under the program for federal aid for highways.

25 U.S.C. § 472a. Included as a "tribal organization" in applying Indian preference laws.

25 U.S.C. 1452. The Indian Financing Act of 1974.

25 U.S.C. § 1603. The Indian Health Care Amendments of 1980.

25 U.S.C. § 1622. Eligibility of tribal organizations for health care grants and contracts.

25 U.S.C. § 1903. The Indian Child Welfare Act.

25 U.S.C. §§ 2011 and 2019. Establishing a new national Indian education system.

25 U.S.C. § 2401. Indian alcohol and substance abuse prevention and treatment.

26 U.S.C. § 4225. Exemption of articles manufactured or produced by Indians.

29 U.S.C. § 706. Provision of vocational rehabilitation and other rehabilitation services.

29 U.S.C. § 1671. Employment and training programs for Native Americans and migrant and seasonal farm workers.

31 U.S.C. § 7501. The single audit requirement for state and local governments.

42 U.S.C. § 628. HHS payments to Indian tribal organizations for child welfare services.

42 U.S.C. § 1471. USDA financial assistance for farm housing.

42 U.S.C. § 2991b. HHS financial assistance for Native American projects under the HHS Native American Program, administered by ANA.

42 U.S.C. § 2992c. HHS program for Native Americans.

42 U.S.C. 3002. HHS programs for older Americans.

42 U.S.C. § 5061. HHS programs for administration and coordination of domestic volunteer services.

42 U.S.C. § 5122. Provision of federal assistance to other levels of government for disaster relief.

42 U.S.C. §§ 5302 and 5316. Assistance in providing public facilities under the Housing and Urban Development Act of 1968.

42 U.S.C. § 6707. Grants for public works projects.

42 U.S.C. § 6723. Assistance under anti-recession provisions for public works employment.

42 U.S.C. § 5903. Assistance in the planning and administration of solid waste disposal.

42 U.S.C. § 8803. Assistance in the development of biomass energy and alcohol fuels.

42 U.S.C. § 9601, Special programs and assistance relating to hazardous substance releases, liability and compensation.

42 U.S.C. § 10101. Assistance in handling nuclear waste.

42 U.S.C. § 11472. Set-asides to assist in education, training, and community services for the homeless.

Section 4, Alaska Statehood Act and Article XII, Section 12, Alaska Constitution

A member of the public who testified at the hearing inquired about the relationship between section 4 of the Statehood Act and article XII, section 12 of the Alaska Constitution, and the tribal status and Indian country issues.

Both section 4 of the Alaska Statehood Act (Pub. L. 85-508, 72 Stat. 339 as amended) and article XII, section 12 of the Constitution of Alaska provide that the state and its people "forever disclaim all right and title to any lands or other property" owned or subject to disposition by the United States, and to any lands or other property, including fishing rights, the right or title to which may be held by or in trust for any Indians, Eskimos, or Aleuts. Both sections further provide that all such property shall be subject to the absolute control, jurisdiction, and right of disposal of the United States except as Congress otherwise provides.

These provisions have no relevance in the debate over tribal status; they do not address the issue. The Statehood Act expressly states that it shall not be construed to "recognize, deny, enlarge, impair, or otherwise affect" claims against the United States or to establish the validity or invalidity of any such claim. Tribes are not mentioned in either provision, and these sections have not been relied on by tribal advocates in the cases now in the federal courts. These provisions are cited as justification for permitting Native selections of state-selected lands under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, and exempting undeveloped ANCSA land from taxation, but beyond that, they are not germane to the current debates over tribal status and Indian country.

Budgetary Impacts of Tribal Status Litigation

Concern was expressed by a legislator that the Department of Law may have made representations about litigating the tribal status issue in order to secure funding for litigation.

The Department of Law made no commitment in any budget document to litigate the tribal status issue. The department has in the past sought CIP funding

to litigate other issues that concern or involve the interests of Alaska Natives. These include the Endangered Species Act cases, the fishing treaty cases, the submerged lands cases, and various ANILCA challenges, most notably *Katie John v. United States* and *Totemoff v. State*. This litigation continues. *See, e.g.*, CP Descriptions for FY 1995 and FY 1996.

CONCLUSION

Some participants in the December 4, 1995, hearing[3] characterized the decision to no longer contest the tribal status of Alaska Native villages as a wholesale reversal of prior executive and legislative branch policies and an abdication of responsibility. This view does not reflect the true complexity of the state's dealings with tribes.

Successive state administrations have recognized the need to work with tribal entities in various contexts. For example, as discussed earlier, since the early 1980's the state has entered into memoranda of agreement with tribes implementation of the Indian Child Welfare Act. Governor Cowper's Administrative Order No. 123 acknowledged the existence of tribes in Alaska. Although Governor Hickel later revoked Administrative Order 123 and declared that the state "opposes expansion of tribal governmental powers and the creation of 'Indian Country' in Alaska," his administration did not oppose tribal status in a wholesale fashion. Thus, my predecessor chose not to contest the tribal status of the Kluti Kaah Native Village of Copper Center in litigation over the tribe's right to impose a tax on the TransAlaska Pipeline System.

Since 1985 the legislature itself has authorized state aid to Alaska Native village councils to the extent they waive immunity from suit for claims arising out of activities related to the payment. AS 29.60.140.

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[3] During the hearing a legislator requested a copy of the report entitled *Legal Status of the Alaska Natives* by Robert E. Price (July 30, 1982; 1983 and 1989 supplements). Please let my office know if you would like a copy.

Finally, while people may disagree with the wisdom of this policy change, there should be no doubt that the Governor has the authority to adopt and implement the tribal status policy for his administration, just as his predecessors have done. As attorney general, I will continue to provide the best legal advice available to the state's chief executive and to support his policy choices to the extent they are consistent with the law. In this instance, I have no reservation in doing so.

Very truly yours,

Bruce M. Botelho
Attorney General

BMB:kh

PREPARED REMARKS OF LLOYD B. MILLER
BEFORE THE SENATE AND HOUSE JUDICIARY COMMITTEES
ALASKA LEGISLATURE

February 21, 1996

Members of the Committee, my name is Lloyd Miller and I am honored by the privilege of appearing before this joint session of the Senate and House Judiciary Committees.

This hearing has been convened to discuss the Attorney General's decision to abandon the State's legal challenge to the federally recognized tribal status of the Native Village of Fort Yukon, in a case recently concluded in the Federal District Court in Anchorage. I would like to confine my initial remarks to the legal issue of "recognized tribal status." After all, the concept is a legal one, and the guideposts for navigating this particular legal area are well known to all who practice law in this area. As I believe a dispassionate and impartial review of the law demonstrates, there is nothing remarkable about the Attorney General's decision in the Fort Yukon case.

There are ten steps that take us from the United States Constitution to the Attorney General's decision.

First, the Federal Government's authority to deal with Indian tribes comes from Article I, Section 8, Clause 3 of the United States Constitution. That is the clause which vests in the Congress the "power . . . to regulate commerce .

. . with the Indian tribes." We are dealing, then, in an area of exclusively federal law.

Second, the congressional power to legislate with regard to Indian tribes is "plenary", meaning that it is broad and general, rather than limited to specifically identified topic areas. Thus, Congress's exercise of its power under Article I is sustained so long as it has some rational basis. (This principle is discussed by the U. S. Supreme Court in *Delaware v. Weeks*, *Morton v. Mancari*, and *Sioux Nation v. United States*.)

Third, when Congress deals with Indian tribes under Article I, it deals with "political" entities -- entities whose rights to govern themselves predate even the Constitution. Legislation that deals with Indian tribes is thus legislation that deals with political entities, and not racial entities. And that is why issues of racial classification do not arise in this area. If you will, the fact that Alaska's Indian tribes happen to be of distinctive races other than Caucasian is legally irrelevant in analyzing Congress's power to legislate with regard to Indian tribes. (This principle was most clearly articulated by the U. S. Supreme Court in 1994 in *Morton v. Mancari*.)

Fourth, the power to accord "federal recognition" to tribes that may already exist -- and thus confer upon those tribes certain federally acknowledged rights -- is a part of Congress's overall general power under the Constitution under Article I.

Fifth, Congress's decision to accord federal recognition to a tribe is largely a "political" determination that is binding on federal and state courts and binding on the Executive Branch. As a practical matter, such decisions will not be reviewed by the courts. (The U. S. Supreme Court has frequently articulated this rule of law, in such cases as *U. S. v. Sandoval*, *U. S. v. Holliday*, and *U. S. v. Perrin*, and so has the Alaska Supreme Court in the Atkinson and Stevens Village cases.)

Sixth, in the area of Indian affairs, as in other areas of congressional power, Congress has the power to delegate to the Executive Branch the duty of implementing its Article I authority over Indian affairs.

Seventh, in 1832 Congress delegated to the Secretary of the Interior the implementation of its broad authority in the "management of Indian affairs", and in 1834 further authorized the President to issue regulations to carry out that authority "as he may think fit." The U. S. Supreme Court has long acknowledged the very broad authority conferred upon the Secretary of the Interior as a result of these two legislative enactments. (*See Morton v. Ruiz*) Moreover, in the specific area of identifying federally recognized tribes, Congress in 1994 expressly supplemented its earlier statutes by specifically delegating authority to the Secretary to "publish in the *Federal Register* a list of all Indian tribes which the Secretary recognizes" as such. (This very new statute is codified at 25 U.S.C. 479a-1(a).)

Eighth, the Executive Branch, through the Secretary of the Interior,

has for many years carried out the authority Congress has conferred upon it. From 1982 to 1995, it has issued seven lists of Alaska tribes. It is noteworthy that the most recent 1995 list was expressly published under the authority conferred by Congress in 1994.

The 1995 list, issued under an express delegation from Congress, identifies all federally recognized tribes in the United States, including approximately 200 tribes in Alaska.

Ninth, and though unnecessary, Congress has actually ratified the Secretary of the Interior's 1995 decisions identifying the federally recognized tribes that exist in Alaska. Specifically, in the Status Clarification Act Congress responded to the Secretary's omission of one tribe from the list in 1993 by ordering that the tribe be added to the next list. (The tribe involved was the Tlingit and Haida Central Council, and the statute is codified at 25 U.S.C. 1211 through 1215.) The Secretary has since complied with Congress' instructions.

Tenth, and finally, in a recent amendment to the Indian Reorganization Act, Congress expressly prohibited any federal agency from making any distinction among recognized tribes regarding their relative privileges and immunities. This new statute is codified at 25 U.S.C. 476(f) and (g).

To summarize, both Congress and the Secretary of the Interior have made a determination, binding on the courts, and binding on the State of Alaska under the Supremacy Clause of the Constitution, to accord federal recognition to

Alaska Native villages, including the Native Village of Fort Yukon.

Whatever strength, apparent or real, there might have been in past challenges to the federally recognized tribal status of Native villages before these recent developments, Congress's actions in this field have now definitively closed the door.

In the *Fort Yukon* case, the Federal District Court in Anchorage found these developments completely dispositive on the question of Fort Yukon's federally recognized tribal status today. It is clear from these developments that continuing to press a position against tribal status would have been foolish, wasteful and irresponsible. Indeed, so clear have the legal developments been in this area that a private litigant in the Attorney General's position might have been sanctioned for continuing to challenge the law. While there will always be some who do not accept that the law is as it is, here the more productive exercise is to explore constructive ways in which the State of Alaska and Alaska Native villages can now work more productively together for their mutual benefit.

Before closing, I did want to identify for the Committee one additional important legal issue which I think should inform any informed discussion in this area.

For many many years, the United States has devoted considerable financial resources to the well-being of Alaska Native villages. Indeed, by some estimates it has in recent years spent roughly $500 million annually (not including

such extraordinary one-time expenditures as the construction of the new Alaska Native Hospital in Anchorage).

Opponents of tribal status argue that these services are based on the special relationship between the Federal Government and Native Americans. But to be accurate -- and accuracy here is critical -- the provision of federal services to Alaska Natives, of federal employment opportunities for Alaska Natives, and of federal educational opportunities for Alaska Natives, is founded on what the United States Supreme Court has termed a "political rather than racial" classification that benefits "Indians not as a discreet racial group, but, rather, as members of quasi-sovereign tribal entities." These quotations are from the U.S. Supreme Court's 1974 *Morton v. Mancari* decision.

As many of you know, only last year the U. S. Supreme Court put into question many affirmative action race-based programs because they are based on racial distinctions. However, the U. S. Department of Justice shortly thereafter confirmed that the Supreme Court's decision would not cast a cloud over Native American programs because of their tribal, rather than racial, basis, as pointed out in the Mancari case.

I wanted to call this matter to the attention of the Joint Committees because, while the implications of retaining federal recognition in a host of jurisdictional areas may not be entirely known, the devastating consequences of losing federal recognition are a certainty.

I thank the Committee for the opportunity to share these observations and would be pleased to answer any questions you may have.

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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Joint House and Senate Judiciary
12-4-95 10:00am

Mary Pagenkopf

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 18, 1996

The Honorable Robin Taylor
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, Alaska 99801

Re: Tribal Sovereignty Questions

Dear Senator Taylor:

This is in response to your recent letter asking certain questions relating to tribal sovereignty that arose from the Joint House-Senate Judiciary Committee hearing held on February 21, 1996. I will address your questions in turn.

1. Under the Alaska Constitution, may the Legislature appropriate money for the use exclusively by racially-defined groups, such as Alaska Tribes? This question may apply to the unincorporated community capital project matching grant program and the revenue sharing for unincorporated communities program.[1]

At the outset, it is important to point out that Indian tribes are *federally recognized political entities*, they are not "racially-defined groups." *Worcester v. Georgia*, 31 U.S. 515 (1832); *Morton v. Mancari*, 417 U.S. 535 (1974). For purposes of the state programs discussed in this letter, however, the state has not dealt with the various Native village councils and other Native entities as "tribes," *i.e.*, political entities, but rather as entities eligible to serve as *contractors* with the state to deliver services in the unincorporated community. Nevertheless, the legislature may, in any case, appropriate

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[1] The questions posed in your letter have also been raised with respect to the village safe water program administered by the Department of Environmental Conservation. This response will address that program as well.

money to a racially-defined group under the conditions discussed below, all of which are requirements of the programs at issue here.

As we have opined several times in the past, the legislature may appropriate money for expenditure by a "racially-defined group" provided the money granted to the group is used for the benefit of the public generally. The use of public monies for the *private* benefit of a racially exclusive group would raise serious questions under article IX, section 6 of the Alaska Constitution, which prohibits expenditure of public money unless the expenditure is for a public purpose, and article I, section 1, which accords equal protection to all persons. 1981 Inf. Op. Att'y Gen. (April 27; J-66-335-81); 1981 Inf. Op. Att'y Gen. (Sept. 2; J-66-829-81). However, the test of whether a public purpose is being served does not depend on the nature of the recipient (*e.g.*, religious or non-religious, racially exclusive or non-racially exclusive, or some other limited group), but upon the character of the use to which the money will be put. *Lien v. City of Ketchikan*, 383 P.2d 721, 722 (Alaska 1963). The public purpose requirement is satisfied if the money is used for a public benefit. The distribution of state money to a racially exclusive group (or some other limited group) does not deny equal protection to persons who are not members of the group if the benefits provided with the funds are made available to the public-at-large in a non-discriminatory manner.

Both the public purpose and non-discrimination requirements, as well as the requirement for waiver of sovereign immunity discussed below, have long been included in the statutes, regulations, and administrative policies and practices governing the state revenue sharing program for unincorporated communities, the community capital project matching grant program for unincorporated communities, and the village safe water program.

State Revenue Sharing for Unincorporated Communities

The state revenue sharing program for unincorporated communities is set out in AS 29.60.140. That statute specifically addresses public purpose, waiver of sovereign immunity, and governmental authority or jurisdiction of a Native village council:

> **State aid to unincorporated communities.** (a) The department shall pay to each unincorporated community an entitlement each fiscal year ***to be used for a public purpose***. The department with advice from the Department of Law shall ***determine whether there is in each unincorporated community an incorporated***

> ***nonprofit entity or a Native village council that will agree to receive and spend the entitlement.*** If there is more than one qualified entity in an unincorporated community, the department shall pay the money under the entitlement to the entity that the department finds most qualified to receive and spend the money. ***The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law.*** If there is no qualified incorporated nonprofit entity or Native village council in an unincorporated community that is willing to receive money under an entitlement, the entitlement for that unincorporated community may not be paid. ***Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.*** If at least $41,472,000 is appropriated for all entitlements under AS 29.60.010 -- 29.60.310 for a fiscal year, the entitlement for each unincorporated community under this subsection for that year equals $40,000. Otherwise, the entitlement equals $25,000.
>
> (b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit.

(Emphasis added.)

The regulations governing the program address the standards which must be met by an unincorporated community to receive payment. 19 AAC 30.055 provides:

> (1) the applicant must agree to irrevocably dedicate for a public purpose the payment that the applicant receives under AS 29.60.140;
>
> (2) the applicant must be providing the residents of the unincorporated community with a public facility or service as of October 1 of the computation year;

(3) the applicant must have held a public meeting to give residents the opportunity to express their ideas and preferences for the use of money received under AS 29.60.140 and must have posted notice of the meeting in three public and prominent places in the community for at least 15 days before the meeting; and

(4) the applicant must agree to make a service or facility provided with the money received under AS 29.60.140 available to every person in the community regardless of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy, parenthood, or political affiliation.

Copies of the resolutions and budget document required to be adopted by the unincorporated community applicant are attached to this letter as Appendix A.[2]

We have been advised by the Department of Community and Regional Affairs (DCRA), the agency that administers this program, that it is not aware of any instance in which a Native village council or tribe refused or failed to execute a resolution waiving immunity from suit for claims arising out of activities of the council related to their entitlement under this program. According to DCRA, since FY81, the first year that unincorporated communities received funding under the revenue sharing program, DCRA is aware of only four instances in which notice was received regarding a problem with the program. The problem was related to Native and non-Native entities submitting competing

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[2] The former AS 29.89.050 provided that the state was to pay $25,000 annually to a "Native village government for a village which is not incorporated as a city. . . ." The attorney general's office concluded that this statute was unconstitutional if read literally to restrict aid to *only* Native villages because such a reading would exclude from participation a number of similarly situated communities which were not Native villages. Thus, the Department of Community and Regional Affairs was advised to interpret the statute to permit revenue sharing to all villages in the state, regardless of their racial composition or ancestry. 1981 Inf. Op. Att'y Gen. (Sept. 2; J-66-829-81). Included in Appendix A to this letter is a memorandum dated March 18, 1986, to then-Commissioner of DCRA, Emil Notti, setting out the history of the "State Aid to Native Village Governments" state revenue sharing program.

applications from within the same community for state revenue sharing funding. The unincorporated communities involved were: Cantwell (1983); Circle (1985); Chistochina (1993); and Chitina (1994). It is our understanding that each of these situations was resolved with the encouragement and assistance of DCRA, as appropriate, to help facilitate the parties working together to reach agreement on which entity would be the proper recipient; if necessary in this type of situation, DCRA makes the determination of the most qualified entity. 19 AAC 30.094.

Unincorporated Community Capital Project Matching Grant Program

The unincorporated community capital project matching grant program was established by the legislature in 1993. Under AS 37.06.020, an unincorporated community is eligible for an allocation in a fiscal year under this program if the community was eligible to receive state aid under AS 29.60.140 (state revenue sharing for unincorporated communities) during the preceding fiscal year. Incorporated nonprofit entities or Native village councils are eligible to receive and spend this grant money, and in the event there is more than one qualified entity in the unincorporated community, the Department of Community and Regional Affairs designates the entity that the department finds the most qualified. AS 37.06.020(d).

AS 37.06.020(g) specifically addresses the issues of sovereign immunity and governmental authority or jurisdiction of a Native village council. That subsection provides:

> (g) An entity designated by the department under (d) of this section that is *a Native village council may not draw money from an unincorporated community's individual grant account unless the council waives immunity from suit for claims arising out of activities of the council related to the draw.* A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law. *Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.*

(Emphasis added.)

The terms of the grant agreements for this program are further specified in 19 AAC 55.080, including a requirement that the unincorporated community must submit a resolution approving the capital project and accepting the terms of the grant agreement. 19 AAC 55.080(a)(5). In addition to the required resolution waiving sovereign immunity, the standard provisions of the grant agreement (which also must be approved by resolution of the recipient) provide that the project must be dedicated to a public purpose and that the "benefits of the project shall be made available without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood." Standard Provisions, article 19. Article 26 of the Standard Provisions addresses sovereign immunity:

> If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant agreement that the Grantee irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

Copies of the required resolution and the Standard Provisions of the grant agreement are attached to this letter as Appendix B.

DCRA has advised us that it is not aware of any instance in which a Native village council or tribe refused or failed to execute a resolution waiving sovereign immunity from suit for claims arising out of activities of the council related to its grant under this program. Also, DCRA is not aware of any instance in which a complaint or notice of improper action was received relating to a grant.[3]

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[3] Grants are also made to Native village councils under AS 44.47.130, the rural development assistance (RDA) grants. This program is targeted for rural communities with a population of 900 or less. 19 AAC 60.042. Participation in the program requires that the funds be spent for a public purpose, the facilities and services be available to all in a non-discriminatory manner, and, with respect to a tribal entity, that an express waiver of sovereign immunity be executed. 19 AAC 60.052; 19 AAC 60.082. DCRA advises that it is not aware of any instance in which a Native village council or tribe has failed or refused to execute a resolution waiving sovereign immunity related to this program, nor is it aware of any instance where a complaint or notice of improper action was received relating to a grant. Copies of the relevant portions of the RDA Standard Grant Provisions

(continued...)

Village Safe Water Program

The Village Safe Water Act, AS 46.07.010 -- 46.07.080, is a means of funding water and sewer projects in small unincorporated communities, second class cities, and first class cities with a population of under 600 people. AS 46.07.040 authorizes the Alaska Department of Environmental Conservation (ADEC) to contract with "public agencies or private non-profit organizations, or otherwise." In 1982, ADEC asked for advice on whether this language would allow the department to contract with an IRA council for the construction of water and sewer projects. The answer was yes, provided the IRA council agreed to perform all services rendered under the contract in a non-discriminatory manner, and provided that the council executed a clear and explicit waiver of sovereign immunity for all purposes connected with the contract. 1982 Inf. Op. Att'y Gen. (May 11; 366-654-82).

Based on the attorney general's 1982 opinion, ADEC developed and issued a policy, which is still in effect, on when it would use IRA councils for safe water projects. The policy requires that the IRA council must represent the community as a whole, that it must agree to waive sovereign immunity for the purpose of the grant, and that it must plan, design, build, operate, and maintain the state-funded facility in a non-discriminatory manner. The grant agreement also contains non-discrimination and waiver of sovereign immunity provisions. Copies of the ADEC "General Management Order" on the village safe water program and the grant agreement are attached as Appendix E.

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[3](...continued)
and the resolution waiving sovereign immunity are attached as Appendix C.

Similarly, under AS 37.05.316, grants to named recipients, and AS 37.05.317, grants to unincorporated communities, grants may be made to Native village councils. If the grant is to a Native entity, a resolution of the entity waiving its sovereign immunity is required. Copies of the required resolution and the relevant portions of the Standard Grant Provisions are attached as Appendix D. As with the other grant programs discussed here, DCRA reports that it is not aware of any instance in which a Native village council or tribe has failed or refused to execute a resolution waiving sovereign immunity related to these grant programs, nor is it aware of any instance in which a complaint or notice of improper action was received relating to a grant.

The Department of Environmental Conservation has advised that it is not aware of any instance in which a Native village council or tribe has refused or failed to execute a resolution waiving sovereign immunity with respect to its activities under this program, nor has it received any complaints or notice of improper action by a village council or tribe with respect to this program.

As discussed below, we believe that the waivers of sovereign immunity required for these programs are valid and enforceable under both state and federal law.

2. According to the Alaska Supreme Court, do tribes in Alaska exercise sovereign immunity from suit by the State or private parties? If so, may tribes then waive that immunity?

The Alaska Supreme Court and the federal courts agree that one of the sovereign privileges that Indian tribes possess is immunity from suit. The Alaska Supreme Court and the Ninth Circuit Court of Appeals also agree that a tribe can consent to a waiver of its sovereign immunity from suit by a state or private party, and that such immunity can be abrogated by Congress. Where the Alaska Supreme Court and the Ninth Circuit have disagreed is on the *existence* of tribes in Alaska and, thus, whether Alaska Native entities *have* sovereign immunity at all.

As discussed in my January 11, 1996, letter to the Legislature, the Alaska Supreme Court has held that judicial recognition of tribal sovereign immunity turns on whether Congress or the executive branch of the federal government has recognized the particular group in question as a tribe. In *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977), the court determined that Metlakatla was entitled to sovereign immunity, holding:

> Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the community is entitled to all of the benefits of tribal status.

The court in *Atkinson* went on to consider whether Metlakatla's sovereign immunity had been waived by the congressional act establishing state civil jurisdiction over action involving Indians (28 U.S.C. § 1360(a), commonly known as Public Law 83-280), by the purchase of liability insurance by the Community, or by the "sue and be sued" clause in the Community's corporate charter. The court concluded that none of these actions constituted or effected a waiver of Metlakatla's sovereign immunity. In the

absence of any clear waiver of sovereign immunity in the language of Public Law 83-280 or its legislative history, the court held that it should not imply one. 569 P.2d at 167. With respect to liability insurance, the court held that a waiver of sovereign immunity should not be implied from an act which was intended to protect tribal resources, *i.e.*, the purchase of liability insurance. *Id.* at 169. Finally, the court held that the "sue or be sued" clause in the corporate charter of the Metlakatla Indian Community had no effect on the suit involved because the suit was concerning acts of the Community in its governmental capacity (as organized by constitution and by-laws under section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476), not its corporate capacity (as organized by corporate charter under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, as made applicable to Alaska Native groups by the Act of May 1, 1936, 25 U.S.C. § 473a).

More recently, the court has declined to find sovereign immunity or has concluded that, even assuming that such immunity did exist, it was waived by the tribe. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), the court held that an Indian tribe can waive its sovereign immunity from suit, and did so in that case by agreeing to contract terms inconsistent with sovereign immunity. In reaching this conclusion, the court relied on a number of decisions from the Ninth Circuit and other circuits holding that an Indian tribe may waive its sovereign immunity.

A waiver of sovereign immunity, to be valid, must be clear and unequivocal. In *Eyak*, the court found a valid waiver expressed in an arbitration clause in a construction contract for a building constructed on land leased from a private party. The Native Village of Eyak argued that the entire contract was void, including the waiver of immunity contained in it, because the Secretary of the Interior had not approved the contract under 25 U.S.C. § 81. That section requires that the Secretary of the Interior approve contracts made by Indian tribes that relate to tribal property or to claims against the United States. As tribal property was not involved, and no one had even argued that the contract involved a claim against the United States, the court found that the contract did not require Secretarial approval.

In *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), the court ruled, in a 3-2 decision, that a contract action against Stevens Village was not barred by sovereign immunity because Stevens Village was not a sovereign and therefore did not possess sovereign immunity. The court, reiterating its conclusion in *Atkinson v. Haldane*, 569 P.2d at 161-63, that "judicial recognition of tribal sovereign immunity turn[s] on whether Congress or the executive branch of the federal government, ha[s] recognized the particular group in question as a tribe," found that neither the Indian

Reorganization Act nor any subsequent Congressional legislation had granted or recognized sovereign status to Alaska Native groups.[4] 757 P.2d at 34-35.

In *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992), the Alaska Supreme Court again considered the issue of sovereign status of an Alaska Native entity, the Hydaburg Cooperative Association (HCA), and waiver of sovereign immunity. The court found that HCA had failed to make any argument on appeal, or offer any evidence in the trial court, that the federal government had recognized the association as a tribe and noted that reorganization under section 16 of the Indian Reorganization Act by itself is not sufficient to establish tribal status for purposes of sovereign immunity. 826 P.2d at 754.

The court in *HCA* held that even assuming that HCA would be entitled to sovereign immunity based on its historical tribal status, HCA had waived its immunity by agreeing to arbitrate its dispute with Hydaburg Fisheries. *Id.* The court distinguished the facts in *HCA* from those in a Ninth Circuit decision which concluded that a consent to arbitrate disputes arising out of a management agreement between an Indian tribe and the non-Indian operator of the tribe's bingo enterprise on the reservation did not constitute a waiver of the tribe's sovereign immunity. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989). In *Pan American*, the arbitration clause did not unequivocally and expressly indicate the tribe's consent to waive its sovereign immunity because, among other reasons, the tribe had not subjected itself to the jurisdiction of either the state or federal courts, as was the case in the arbitration clause in the HCA contract. 826 P.2d at 755. In addition, *Pan American* involved a challenge to a tribal ordinance and a direct attack on the tribe's authority to regulate matters on its reservation, not a suit to compel arbitration or enforce an arbitration award as in *HCA*. 826 P.2d at 754.

The Alaska Supreme Court also found an express waiver of sovereign immunity in *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992). In *Nenana Fuel*, the court held that a "Remedies on Default" clause contained in a note and security agreement between the tribal government and the seller of fuel effected a waiver of sovereign immunity. The clause provided that in the event of default, Nenana Fuel could bring an action upon the note or invoke any other remedy allowable under Alaska

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[4] As discussed in my January 11, 1996, letter, at pages 2-6, several events have occurred at the federal level (executive, congressional, and judicial) since the *Stevens Village* decision which suggest that the court would, if presented with the question, decide the tribal status issue differently today.

law. The court concluded that the clause expressly waived any sovereign immunity which Venetie might possess.

3. According to the Ninth Circuit Court of Appeals, do tribes in Alaska exercise sovereign immunity from suit by the State or private parties? If so, may tribes then waive that immunity?

It is well-established law that federally recognized Indian tribes possess sovereign immunity from suit. *Pit River Home and Agricultural Coop. Ass'n v. United States*, 30 F.3d 1083, 1100 (9th Cir. 1994); *State v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988) (tribe recognized by the federal government or that establishes tribal status based on historical factors possesses sovereign immunity). "Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants." *Pan American Co.*, 884 F.2d at 418. A tribe's immunity remains intact absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 (1940). A waiver of sovereign immunity cannot be implied, but must be unequivocally stated. *Id.* However, even if the tribe is immune, individual officers of the tribe will not be immune unless they were acting in their representative capacity and within the scope of their authority, nor does tribal immunity extend to individual members of an Indian tribe. *Native Village of Venetie*, 856 F.2d at 1387; *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

These are virtually the same legal standards as are applied by the Alaska Supreme Court. As discussed above, the major difference between the Alaska Supreme Court and the Ninth Circuit has been whether tribes exist in Alaska, not whether tribes, once established, possess sovereign immunity, or whether and how that sovereign immunity may be waived. A tribe can consent to suit, and the critical question for both the state and the federal courts is whether the consent is unequivocally stated, or waived in unmistakable terms.

Are the waivers of sovereign immunity required by the State for participation by a Native tribe in the unincorporated community revenue sharing program for unincorporated communities, the unincorporated community capital project matching grant program, and the village safe water program effective to waive that immunity?

The answer to this question is yes. The waiver of sovereign immunity required for participation by an Alaska tribe or Native village council in these programs is express and unequivocal. In executing the waiver, the tribe waives its sovereign immunity from suit by the state in connection with the administration of the state grant or contract dollars at issue. Since at least the early 1980's, the state has required an express and unequivocal waiver of sovereign immunity from a Native entity when it has entered into a contractual relationship with that Native entity, as a precaution in the event the entity possessed sovereign immunity. *See* 1986 Inf. Op. Att'y Gen. (Dec. 5; 663-87-0110). We believe these waivers are fully enforceable under both Alaska Supreme Court and Ninth Circuit precedent, as does counsel for the Alaska Federation of Natives who was present at the February 21 Joint House-Senate Judiciary Committee hearing. *See* February 23, 1996, letter from Lloyd B. Miller to Senator Robin Taylor and Representative Brian Porter, p. 2.

4. Could the State's granting of monies to tribal entities contribute to a future argument in support of a finding of "Indian Country"? If so, how?

The state's granting of money to Alaska tribes for the programs discussed above will not contribute to a future argument in support of a finding of Indian country in Alaska. The state is not, by granting funds to a Native village council or tribe under any of these programs, acknowledging or endorsing any tribal authority over lands. In addition, the key element to a determination of Indian country is *federal superintendence*, not state involvement; in fact, state presence as the dominant political institution in the area cuts against, not in favor of, an Indian country argument.

First, when state monies are granted to a qualified recipient in an eligible unincorporated community under the state revenue sharing, capital project matching grant, and village safe water programs, whether that recipient is a Native village council or an incorporated nonprofit, the transaction is not an inter-governmental transfer of money. Rather, the state is *contracting* with an appropriate entity to deliver services in the

unincorporated community. These funds are provided to eligible entities across the state, regardless of their racial ancestry or make-up.[5]

Second, all of these programs include requirements that, to receive the funds, the recipient must agree that the funds will be used for public purposes and the facilities and services funded must be available to all persons in a non-discriminatory manner. In granting such funds to an eligible Native village council, the state does not treat the village or tribe as a special jurisdictional enclave, nor does the state allow the funds to be used solely for tribal purposes or solely for Native Alaskans or tribal members. The facilities and services provided by the grant recipient must be made available to all residents of the community without regard to tribal membership or tribal affiliation.

Third, an express waiver of sovereign immunity is required of any Native tribe or village council as a condition of receipt of the grant monies. Finally, the enabling statutes for both the revenue sharing program and the capital matching grant program specifically provide that neither of the programs, nor any action taken under them, enlarges or diminishes the governmental authority or jurisdiction of a Native village council. AS 29.60.140(a); AS 37.06.030(g).

Thus, when granting money to a Native village council or tribe as the qualified recipient in an eligible unincorporated community, the state requires that the tribe administer and expend the money in the same manner as would a non-Native grant recipient. Receipt of the state monies does not enlarge or diminish the governmental authority or jurisdiction of a tribe.

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[5] A decision *not* to grant funds under these programs to Native tribes *because* of their racial composition would clearly raise equal protection concerns. Similarly situated persons must be treated in a similar manner, and to selectively exclude an otherwise qualified entity from participation in a state program, because its members are of a particular racial group, would undoubtedly present serious constitutional questions.

The term "Indian country" has a long legislative and judicial history. Between 1913 and 1938, the Supreme Court issued four opinions from which the current definition is derived.[6] In 1948, Congress codified the holdings of these cases in 18 U.S.C. § 1151, which provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The litigation in Alaska on the issue of Indian country has to date focused on § 1151(b), the "dependent Indian community" portion of the definition.

The Supreme Court, both before and after the enactment of 18 U.S.C. § 1151, has consistently phrased the test for a "dependent Indian community" as whether the land at issue has been set aside for the use and occupancy of Indians as such, under the superintendence of the federal government. *United States v. John*, 437 U.S. 634, 648-49 (1978); *United States v. McGowen*, 302 U.S. 535, 539 (1938). As stated by the Ninth Circuit Court of Appeals in *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1391 (9th Cir. 1988), these decisions "turned on the dependent nature of the communities and the federal government's role as regulator and protector of those communities."

The Supreme Court recently reaffirmed its holdings on this issue in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993),and *Oklahoma Tax Comm'n v. Potawatami Indian Tribe*, 498 U.S. 505, 510 (1991). In *Sac and Fox Nation*, the Court held that Indian country includes "all lands set aside by whatever means for the residence of tribal Indians under federal protection. . . ." *Id.*

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[6] The cases are *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914); *Donnelly v. United States*, 228 U.S. 243 (1913); and *United States v. Sandoval*, 231 U.S. 28 (1913).

In two recent decisions issued by Judge Holland, the *Venetie* case and the *Kluti Kaah* case, the court held that ANCSA lands are not Indian country. The essence of these decisions is that (1) the test of Indian country is whether any land has been validly set apart for use of Indians as such, under the superintendence of the federal government; (2) following ANCSA, Alaska Native tribes are not subject to the degree of congressional and executive agency control that evidences an intention that the federal government, rather than the state, be the dominant political institution in the area and are, therefore, not under the superintendence of the government; and (3) under the terms and structure of ANCSA, land conveyed to ANCSA corporations cannot be said to have been set aside for the use of Natives *as such*, and therefore is not Indian country.[7]

Thus, the critical factors are *federal superintendence*, an intention that the federal government, rather than the state, be the dominant political institution in the area, and that *the lands be set aside for Indians as such*. ANCSA land is conveyed in unrestricted fee title to Native corporations formed under state law, not tribes. To the extent the residents' lives are intertwined with the state and the services and programs the state provides, which is extensive throughout Alaska and has been for many years, it is all the more apparent that the land occupied by tribes in Alaska is not under federal superintendence and is not set aside by Congress for the use, occupancy, and protection of Indian people as such.

Given the test for Indian country, as well as the requirements and conditions for receipt and expenditure of state grant funds by Native village councils and tribes under the state revenue sharing and capital matching grant programs for unincorporated communities and the village safe water program, we conclude that the state's granting of monies to tribal entities under these programs does not contribute to an argument in support of a finding of Indian country.

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[7] A copy of the federal court's decision in the *Kluti Kaah* Indian country case is attached as Appendix F. This decision and the *Venetie* Indian country decision are on appeal to the Ninth Circuit.

Conclusion

For the reasons discussed above, we conclude that (1) the granting of state monies under the programs discussed above to Native village councils and tribes does not violate the Alaska Constitution; (2) the waivers of sovereign immunity required of Native village councils and tribes in order to receive these grant funds are enforceable under both state and federal law; and (3) the granting of monies to tribal entities does not contribute to a future argument in support of Indian country.

Please do not hesitate to contact me if you have questions about this letter or if we can be of further assistance on these issues.

Very truly yours,

Bruce M. Botelho
Attorney General

BMB:kh

Enclosures (Appendices A - F)

cc: Members of the Alaska Legislature
Annalee McConnell, Director, Office of Management and Budget
Pat Pourchot, Legislative Director, Office of the Governor
Mike Irwin, Commissioner, Department of Community and Regional Affairs
Michele Brown, Commissioner, Department of Environmental Conservation

APPENDIX A

State Revenue Sharing for Unincorporated Communities

STATE REVENUE SHARING
FOR
UNINCORPORATED COMMUNITIES

FY 96 BUDGET

List how the FY 96 revenue sharing funds for your unincorporated community will be spent during **July 1, 1995 - June 30, 1996.**

All State Revenue Sharing funds must be spent for a public purpose. A public purpose is defined as: *"a purpose the objective of which is to promote the public health, safety, and general welfare of the residents of an unincorporated community."*

PUBLIC SERVICE or FACILITY	BUDGET AMOUNT
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
TOTAL	$ 7,769

Describe each public service or facility:

STATE REVENUE SHARING
FOR
UNINCORPORATED COMMUNITIES

FY 96
FUNDING AGREEMENT

RESOLUTION NO. _____

WHEREAS, the _____ represents the
(organization)
unincorporated community of _____ ; and,
(community)

WHEREAS, the Department of Community and Regional Affairs provides funding for unincorporated communities under the State Revenue Sharing Program; and,

WHEREAS, the _____ advertised to all community
(organization)
residents that state revenue sharing funds were available to provide public services/facilities; and,

WHEREAS, a public meeting was held on _____ by the
(date)
_____ to give residents an opportunity
(organization)
to comment on the use of the FY 96 funds; and,

WHEREAS, the services or facilities listed in the approved budget will be paid for with state revenue sharing funds; and,

WHEREAS, the _____ agrees to follow the
(organization)
conditions of the Funding Agreement, State laws, regulations, and policies related to the State Revenue Sharing Program; now,

THEREFORE, be it resolved that the _____
(organization)
applies for state revenue sharing funding to pay for public services/facilities available to all residents of the community of _____ .
(community)

(Continued, over please)

Further, the applicant agrees to:

- Use all state revenue sharing funds for a public purpose.
- Account for state revenue sharing funds separately.
- Report income and expenses for each fiscal year funds were received. F rms will be supplied by the Department.
- Have a public meeting so residents can comment on the use of revenue sharing money. Notice of the meeting must be posted in three public places for at least 15 days before the meeting.
- Send copies of a signed resolution giving the date of the public meeting and a budget of how the revenue sharing funds will be spent.
- Let the Department of Community and Regional Affairs and/or its representative audit, examine, and copy any records related to State Revenue Sharing Program funds.
- Make services/facilities available to every person in the community regardless of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy, parenthood or political affiliation.
- Offer any facility built, repaired, or improved with State Revenue Sharing money to any new municipality the community may become part of.

Resolution No. _____ was passed at a meeting held on _____.
(number) (Date)

_____ _____
Signature of President/Chief Name (print)

Attest: _____ _____ Date: _____
Secretary/Clerk

Please send the completed Budget, Funding Agreement resolution and Waiver of Immunity resolution (for Native village councils only) to:

State Revenue Sharing Program
Municipal and Regional Assistance Division
P.O. Box 112100
Juneau, AK 99811

STATE REVENUE SHARING
FOR
UNINCORPORATED COMMUNITIES

WAIVER OF IMMUNITY

RESOLUTION NO. _____

WHEREAS, the _____ wishes to receive money under an entitle-
(Native village council)
ment to the State Aid to Unincorporated Communities program for the unincorporated community of _____ _____ _____ ; and
(community)

WHEREAS, the State of Alaska, Department of Community and Regional Affairs, is required by law to obtain from the council a waiver of immunity from suit for claims arising out of activities of the council related to the entitlement; now,

THEREFORE, BE IT RESOLVED THAT the _____ hereby gives
(Native village council)
its irrevocable consent to allow it to be sued by the State of Alaska upon any claims arising out of its activities under the entitlement, and hereby waives any immunity from suit by the State of Alaska for such claims. The _____
(Native village council)
hereby consents to the execution of any judgement obtained pursuant to this waiver of immunity against any of its property, whether real or personal, including money.

This resolution was adopted at a duly convened meeting of the _____
on _____ _____, 19 ____. (Native village council)
(Date)

By: _____
Chief or President

Attest: _____
Secretary/Treasurer

MEMORANDUM

State of Alaska

Community and Regional Affairs

TO: Emil Notti
Commissioner

DATE: March 18, 1986

FILE NO: 0534j/JP/rr

THRU: Doug Griffin
Deputy Director

TELEPHONE NO: 465-4733

FROM: Jim Plasman
Local Government Specialist IV
Municipal and Regional
Assistance Division

SUBJECT: History of "State aid to Native village governments"

We have been requested by Senator Sackett's office to furnish him with a history of the Aid to Native village governments section of the state revenue sharing program. What follows is my best reconstruction of that history.

The Revenue Sharing Program was enacted by Chapter 155, SLA 1980 and became law in July 1981. It provided at AS 29.89.050, "State aid to Native village governments", the following:

> The state shall pay to a Native village government $25,000. In this subsection, "Native village government" means
>
> (1) a local governing body organized by authority of the Act of Congress of June 18, 1934 (25 U.S.C. sec. 476); or
>
> (2) a tradicional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village which meets the requirements of the Alaska Native Claims Settlement Act (43 U.S.C. sec. 1601 - 1628).

House Bill 192, the bill ultimately passed as Chapter 155, SLA 1980, did not include this "State aid to Native village government" language when it was introduced. This language was added in the Senate Finance committee substitute (SCS CSHB 192 (Fin)) reported to the Senate on May 26, 1980. Although there was apparently little or no discussion on this issue at the Senate Finance Committee hearing (see attached minutes), there was written testimony on the bill regarding the inclusion of Native village governments apparently submitted to the committee and retained in committee files (see attached "CSHB 192 WRITTEN TESTIMONY").

Additionally, of possible peripheral import is SB 565, "An Act relating to Native village governments" (copy attached) which had been introduced by the Senate State Affairs Committee on April 17, 1980 and provided that a Native village government in some circumstances may be treated by the state as a second class city, including, significantly, eligibility for "state programs". That bill ultimately died in committee.

Upon enactment of Chapter 155, SLA 1980, questions were raised by the Department of Community and Regional Affairs as to the administration of this section. Advice of the Attorney General was sought and the Department of Law responded with various memoranda on this subject (copies attached). The thrust of these opinions was that to administer the program in a constitutional manner the Department should make funding available to all unincorporated communities, rather than just those with "Native village governments". The Department proceeded to administer the program consistent with this advice from the Attorney General. Additionally, the Attorney General advised the Department that unincorporated communities within an organized borough or incorporated municipality would not be eligible for funding and this advice was also followed by the Department.

Concern with this provision of the Revenue Sharing program was apparently shared by the legislature, as the Title 29 Revision passed in 1982 by the legislature but vetoed by then-Governor Hammond included a provision which amended the Native village government section with language which, consistent with the practice of the Department, opened the program to all unincorporated communities. (See SB 180 from the 12th Legislature, proposed section AS 29.60.140.) This language was the same as ultimately adopted by the 14th Legislature and enacted in Chapter 74, SLA 1985, which had an effective date of January 1, 1986. That provision now provides at AS 29.60.140:

> (a) The department shall pay to each unincorporated community an entitlement of $25,000 each fiscal year to be used for a public purpose. The department with advice from the Department of Law shall determine whether there is in each unincorporated community an incorporated nonprofit entity or a Native village council that will agree to receive and spend the entitlement.

If there is more than one qualified entity in an unincorporated community, the department shall pay the money under an entitlement to the entity the department finds most qualified to receive and spend the money. The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law. If there is no qualified incorporated nonprofit entity or Native village council in an unincorporated community that is willing to receive money under an entitlement, the entitlement for that unincorporated community may not be paid. Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.

(b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit.

Enclosures

cc: Marty Rutherford, Director, MRAD
Doug Griffin, Deputy Director, MRAD
Bill Rolfzen, Admin. Assistant, MRAD

File code: 1413

APPENDIX B

Unincorporated Communities Capital Project

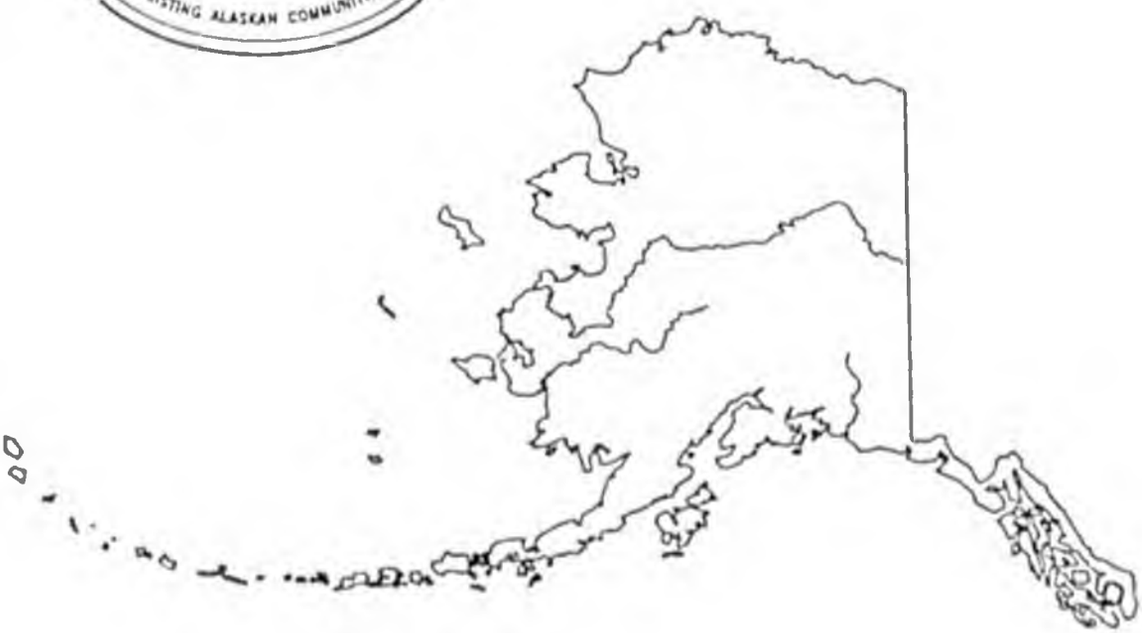
Matching Grant Program

FY96

UNINCORPORATED COMMUNITY

CAPITAL MATCHING GRANTS

PROJECT QUESTIONNAIRE



VIII. RESOLUTION FOR TRIBAL ENTITIES

RESOLUTION NUMBER _____

A RESOLUTION of the _____ _____ 1
accepting a State Matching grant in the amount of $ _____ 2 for
_____ _____ 3 and providing for a waiver of
sovereign immunity from legal prosecution by the State for claims which may arise from the utilization of said grant.

WHEREAS, the _____ 1
wishes to provide the above described equipment/project for the community; and

WHEREAS, the Department requires as a condition of the grant that _____
_____ 1 hereby irrevocably waives any sovereign immunity which it may possess, and consents to suit against itself or its officials in the court of the State of Alaska or any other court of competent jurisdiction, as to all causes of action by the State of Alaska or any other person arising out of or in connection with _____ ;3

NOW THEREFORE BE IT RESOLVED THAT _____ _____ 4
is hereby authorized to negotiate, execute, and administer any and all documents and contracts required for granting funds to the _____ 1 and managing funds on behalf of this entity. _____ 4 is also authorized to execute any subsequent amendments to said contract to provide for adjustments to the project within the scope of services or tasks, based upon the needs of the project.

BE IT FURTHER RESOLVED THAT: this Alaska Native Village, acting through its _____
_____ 1 hereby grants to the State of Alaska its irrevocable consent to be sued in the name of the Native Village for any unlawful act arising out of any contractual obligation entered into as a result of this resolution, and hereby waives immunity from execution of judgements obtained pursuant to the above against any property whether real or personal, including money, provided that such execution of judgement not exceed $ _____ . 2

PASSED AND APPROVED BY THE _____ 1
on _____ , 19 ____ .

IN WITNESS THERETO:

By: _____ _____ 4 _____
Signature Title

Attest: _____ 5 _____
Signature Title

1 Name of Community
2 Amount of Grant
3 Description of Equipment/Project
4 Chief Administrative Officer (Chief, President)
5 Clerk or Secretary of Organization

ATTACHMENT A - STANDARD PROVISIONS

Article 1. Definition of "Certifying Officer". In this grant agreement, attachments, and amendments, "Certifying Officer" means the person who signs this grant agreement on behalf of the Department and includes a successor or authorized representative.

Article 2. State Saved Harmless. The Grantee shall indemnify, hold and save the State, its officers, agents and employees harmless from liability of any nature or kind, which may arise from the grantee's performance of this grant agreement in any way whatsoever. Such liability may include, but is not limited to, costs and expenses for or on account of any and all legal actions or claims of any character whatsoever resulting from injuries or damages sustained by any persons or property which may arise from the grantee's performance of this grant agreement in any way whatsoever.

Article 3. Inspections and Retention of Records. The State may inspect, in the manner and at reasonable times it considers appropriate, all of the Grantee's facilities, records and activities under this grant agreement. The Grantee shall retain financial and other records relating to the performance of this grant agreement for a period of three years from completion of the project, or until final resolution of any audit findings, claims or litigation related to the grant.

Article 4. Disputes. Any dispute concerning a question of fact arising under this grant agreement which is not disposed of by mutual agreement, shall be decided without bias by the Certifying Officer. The decision shall be in writing and mailed or otherwise furnished to the Grantee. The decision of the Certifying Officer is final and conclusive, unless, within 30 days from the receipt of the Certifying Officer's decision, the Grantee mails or otherwise furnishes a written appeal of the Certifying Officer's decision in accordance with 19 AAC 55.150. The Department will render a decision in accordance with the provisions of 19 AAC 55.150.

Article 5. Equal Employment Opportunity (EEO). The Grantee may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood. The Grantee shall post in a conspicuous place, available to employees and applicants for employment, a notice setting out the provisions of this paragraph.

The Grantee shall state in all solicitations and advertisements for employees to work on State funded projects, that it is an Equal Opportunity Employer and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood.

The Grantee shall include the provisions of this EEO article in every contract relating to this grant agreement and shall require the inclusion of these provisions in every agreement entered into by any of its contractors, so that those provisions will be binding upon each contractor and subcontractor.

Article 6. Termination. The Certifying Officer, by written notice, may terminate this grant agreement, in whole or in part, when it is in the best interest of the State. The State is liable only for payment in accordance with the provisions of this grant agreement for services rendered before the effective date of termination.

Article 7. No Assignment or Delegation. The Grantee may not assign or delegate this grant agreement or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Certifying Officer.

Article 8. No Additional Work or Material. No claim will be allowed for services, not specifically provided for in this grant agreement, which are performed or furnished by the Grantee.

Article 9. Independent Grantee. The Grantee and any agents or employees of the Grantee act in an independent capacity and are not officers or employees or agents of the State in the performance of this grant agreement.

Article 10. Payment of Taxes. As a condition of this grant agreement, the Grantee shall pay all Federal, State and Local taxes incurred by the Grantee and shall require their payment by any contractor or other persons in the performance of this grant agreement.

Article 11. Workers' Compensation Insurance. The Grantee shall provide and maintain workers' compensation insurance as required by AS 23.30 for all employees engaged in work under this grant agreement. The Grantee shall require any contractor to provide and maintain workers' compensation insurance for its employees as required by AS 23.30.

Article 12. Insurance. The Grantee is responsible for obtaining any necessary liability insurance.

Article 13. Current Prevailing Rates of Wage and Employment Preference. Certain grant projects are constrained by the provisions of AS 36. PUBLIC CONTRACTS. To the extent that such provisions apply to the project which is the subject of this grant agreement, the Grantee shall comply with the law.

Article 14. Budget Flexibility. Notwithstanding the provisions in Article 18, Attachment A, "Changes," the Grantee may revise the project budget in Attachment B without a formal amendment to this agreement. Such revisions are limited to a maximum of 10% of the total amount of this agreement or $10,000, whichever is less over the entire term of this agreement. Such budget revisions shall be limited to changes to existing budget line items. The creation of new budget line items may only be done through a formal amendment to the grant agreement. Budget revisions may not be used to increase any budget item for project administration expenses without prior written approval by the Certifying Officer.

Changes to the budget beyond the limits authorized by this provision may only be made by a formal amendment to this agreement.

Article 15. Governing Law. This grant agreement is governed by the laws of the State of Alaska. The Grantee shall perform all aspects of this project in compliance with all appropriate laws and regulations. It is the responsibility of the Grantee to ensure that all permits required for the construction and operation of this project by the Federal, State and/or Local governments have been obtained.

Article 16. Officials Not to Benefit. No member of or delgate to Congress or the Legislature, or officials or employees of the State or Federal government may share any part of this grant agreement or benefit to arise from it. This does not preclude officials or employees from sharing in the common benefits of the grant project.

Article 17. Covenant Against Contingent Fees. The Grantee warrants that no person or agency has been employed or retained to solicit or secure this grant agreement upon an agreement or understanding for commission, percentage, contingent fee, or brokerage except employees or agencies maintained by the Grantee for the purpose of securing business. For the breach or violation of this warranty, the State may terminate this agreement without liability or, in its discretion, deduct from the grant agreement price or consideration the full amount of the commission, percentage, brokerage or contingent fee.

Article 18. Changes. Any changes which have been agreed to by both parties will be attached and made a part of this grant agreement by use of an Amendment. Any such Amendment must be dated and must be signed by both parties before the change is considered official and approved.

Article 19. Public Purposes. The Grantee agrees that the project to which this grant agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

If the Grantee is a non-profit corporation that dissolves, the assets and liabilities from this grant project are to be distributed according to statutory law, AS 10.20.290-10.20.452.

Article 20. Site Control. If the grant project involves occupancy and use of real property, the Grantee shall acquire the legal right to occupy and use such real property for the purposes of the grant, and further that there is legal access to such property.

Article 21. Operation and Maintenance. Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

Article 22. Assurance. The Grantee shall spend monies appropriated under this grant only for the purposes specified in the grant agreement.

Article 23. Remission. The Grantee shall return all unexpended grant monies to the State within 90 days of the project completion.

Article 24. Reporting Requirements. The Grantee shall submit progress reports to the Department according to the schedule established in Attachment B of this grant agreement. The Department shall provide forms and instructions necessary for the preparation of such reports.

Article 25. Right to Withhold Funds. The Department may withhold payments under this grant agreement for any violation of the provisions of the grant agreement or of 19 AAC 55.10-55.160.

Article 26. Sovereign Immunity. If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant agreement that the Grantee irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

Article 27. Audit Requirements. The Grantee shall comply with the audit requirements established by 02 AAC 45.010, set forth in Appendix A and B of this grant agreement.

Article 28. Local Share of Project. The Grantee shall contribute a local share to this grant project as specified in Attachment B of this grant agreement and in accordance with 19 AAC 55.60. The valuation and verification of this local share of the project will be made in accordance with 19 AAC 55.110.

Article 29. Americans with Disabilities Act. The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities. Title I of the ADA prohibits discrimination against persons with disabilities in employment and provides that a reasonable accommodation be provided for applicants and employees. Title II of the Act prohibits public agencies from discriminating against individuals with disabilities in the provision of services, programs or activities. Reasonable accommodations must be made to ensure or allow access to all services, programs or activities. This section of the Act includes physical access to public facilities and requires that public entities must, if necessary, make modifications to their facilities to remove physical barriers to ensure access by persons with disabilities. All new construction must assure accessability for persons with disabilities. Programs and services provided by public entities must also be accessable to persons with disabilities. A public entity's subgrantees or contractors must also comply with the ADA provisions. Grantees are responsible for assuring their compliance with the ADA.

APPENDIX C

Rural Development Assistance Grants

Appendix

B

Resolution for Tribal Entities

Who must submit this appendix with their application?

Every Tribal applicant for RDA funds, regardless of project or category.

What is the purpose of this appendix?

Every Tribal applicant for RDA grant funds must submit a resolution, motion, or similar action granting authority to participate in the program which includes a Waiver of Sovereign Immunity from legal prosecution by the State for claims which may arise from the utilization of said grant. The resolution also establishes signatory authority to an appropriate official to conduct normal and usual business regarding the project.

On the following pages is a sample format for this resolution. You may change the format only to the extent that it does not eliminate the key components, including the amount of the grant funds requested, the project description, Waiver of Sovereign Immunity, and the signatory authority.

Resolution for Tribal Entities

RESOLUTION NUMBER _____

A RESOLUTION of the _____ authorizing participation in the Rural Development Assistance (RDA) program and providing for waiver of sovereign immunity from legal prosecution by the State for claims which may arise from the utilization of said grant.

WHEREAS, the _____ wishes to provide a _____ for use in the community, and

WHEREAS, this tribal council is an applicant for a grant in the amount of $ _____ from the Alaska Department of Community and Regional Affairs (hereinafter "Department"), under the RDA program authorized by AS 44.47 as amended; and WHEREAS, the Department requires as a condition of the grant that an Alaskan Native Village Tribal or IRA governing body waive sovereign immunity from legal prosecution for claims by the State which may arise from its activities under the grant.

NOW THEREFORE BE IT RESOLVED THAT: the _____ is authorized to negotiate and execute any and all documents required for granting and managing funds on behalf of this entity. The _____ is also authorized to execute any subsequent amendments to said grant agreement to provide for adjustments to the project within the scope of services or tasks, based upon the needs of the project.

BE IT FURTHER RESOLVED THAT: this Alaska Native Village, acting through its _____ _____ hereby grants to the State of Alaska its irrevocable consent to be sued in the name of the Native Village for any unlawful act arising out of any contractual obligation entered into as a result of this resolution, and hereby waives immunity from execution of judgments obtained pursuant to the above against any property whether real or personal, including money, provided that such execution of judgment not exceed $ _____

PASSED AND APPROVED BY THE _____ on _____, 199____.

IN WITNESS THERETO:

BY: _____
Signature and Title

ATTEST: _____
Signature and Title

Attachment B

Standard Provisions

Article 1. Definition

"Department" refers to the Department of Community and Regional Affairs within the State of Alaska.

Article 2. Indemnification

It is understood and agreed that this Grant Agreement is solely for the benefit of the parties to the Grant Agreement and gives no right to any other party. No joint venture or partnership is formed as a result of this Grant Agreement.

The Grantee, its successors and assigns, will protect, save, and hold harmless the Department and the State of Alaska and their authorized agents and employees, from all claims, actions, costs, damages, or expenses of any nature whatsoever by reason of the acts or omissions of the Grantee, its subcontractors, assigns, agents, contractors, licensees, invitees, employees, or any person whomever arising out of or in connection with any acts or activities authorized by this Grant Agreement. The Grantee further agrees to defend the Department and the State of Alaska and their authorized agents and employees in any litigation, including payment of any costs or attorney's fees for any claims or action commenced thereon arising out of or in connection with acts or activities authorized by this grant agreement. This obligation shall not include such claims, costs, damages, or expenses which may be caused by the sole negligence of the Department or the State of Alaska or their authorized agents or employees: Provided, that if the claims or damages are caused by or result from the concurrent negligence of (a) the Department and the State of Alaska and their agents or employees, and (b) the Grantee, its agents or employees, this indemnity provision shall be valid and enforceable only to the extent of the negligence of the Grantee, or Grantee's agents or employees.

Article 3. Legal Authority

The Grantee certifies that it possesses legal authority to accept grant funds under the State of Alaska and to execute the project described in this Grant Agreement by signing the Grant Agreement document. The Grantee's relation to the Department and the State of Alaska shall be at all times as an independent Grantee.

Article 4. Waivers

No conditions or provisions of this Grant Agreement can be waived unless approved by the Department in writing. The Department's failure to insist upon strict performance of any provision of the Grant Agreement, or to exercise any right based upon a breach thereof, or the acceptance of any performance during such a breach, shall not constitute a waiver of any right under this Grant Agreement.