ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9794 HOUSE COMMUNITY & REGIONAL AFFAIRS

No: 1

FISCAL NOTE

Bill Version: HB 304
(H) Publish Date: 1/21/00

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____
Dept. Affected Revenue
Title Drinking Water Fund Bonds
BRU Revenue Operations
Component Treasury Division
Sponsor Rules Committee
Requester Governor
Component Serial No. 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY00) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The Alaska Drinking Water Fund will pay all costs of issuance, administration, and debt service for bonds issued. Bond proceeds will be deposited in the Drinking Water Fund to make loans to municipalities.
There is no other fiscal impact on state funds.

Prepared by Deven Mitchell, Debt Manager Phone 465-3750
Division Treasury Division Date/Time December 22, 1999
Approved by
Commissioner Wilson L. Condon Date December 22, 1999
Agency Department of Revenue

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COMMITTEE COPY
2000drinkingwater - 12/22/1999

HB 304

TONY KNOWLES

STATE OF ALASKA

JUNEAU

January 20, 2000

The Honorable Brian Porter
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Porter:

Low-interest state loans from the Alaska Drinking Water Fund and the Alaska Clean Water Fund offer municipalities the means to build drinking water and sewage facility projects. This bill I transmit today will allow the state to use revenue bonds to capitalize the Alaska Drinking Water Fund.

Both the Drinking Water and Clean Water funds are capitalized by annual federal grants that require a 20 percent state match. Bond revenues will help provide the state match for federal drinking water project money. But the state is only authorized to sell bonds for the Clean Water Fund. It makes sense to extend this leveraging power to the Drinking Water Fund.

As with existing law, the bill requires the state bond committee to conduct its activities in the best interests of the state, in a manner that will accomplish the most advantageous sale of the bonds. The bill also provides for a new, self-supporting structure to pay for the costs of operating these important loan programs.

I urge your prompt consideration and passage of this bill.

Sincerely,

Tony Knowles
Governor

HB

334

AMENDMENT

OFFERED IN THE HOUSE

TO: HB334 BY:

Page 3, line 5, insert new subsection (f) as follows:

"(f) The department shall not assess nor collect administrative charges under this section from CDQ groups, representing communities not eligible for the CDQ program as of the effective date established in section 6 of this Act, for a period of two years from the actual award of fishery quota to that newly formed CDQ group."

Re-letter subsequent sections accordingly.

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 334 BY: Rep. Joule

Page 3, line 5, insert new subsection (f) as follows:

"(f) The department shall not assess nor collect administrative charges under this section from CDQ groups, representing communities not eligible for the CDQ program as of the effective date established in section 6 of this Act, for a period of three years from the actual award of fishery quota to that newly formed CDQ group."

Re-letter subsequent subsections accordingly.

Bristol **B**ay **E**conomic **D**evelopment **C**orporation

P.O. Box 1464 • Dillingham, Alaska 99576 • (907) 842-4370 • Fax (907) 842-4336 • 1-800-478-4370

114 S. Franklin, Suite 202 • Juneau, Alaska 99801 • (907) 463-5054 • Fax (907) 463-5056 • E-mail bbedc@ptialaska.net

February 14, 2000

The Honorable Carl Morgan, Co-Chair
The Honorable John Harris, Co-Chair
House of Representatives, Community & Regional Affairs Committee
State Capitol
Juneau, Alaska 99801-1182

RE: House Bill 334

Dear Co-Chairs Morgan and Harris,

Bristol Bay Economic Development Corporation (BBEDC) is one of the six Community Development Quota (CDQ) groups formed under the Western Alaska Community Development Quota Program. BBEDC represents 5,607 residents in the 17 member communities located in Southwest Alaska.

BBEDC would like to comment on House Bill 334; "An Act relating to the establishment of and accounting for an administrative cost charge for the state's role in the community development quota program and to the appropriation of receipts from the charge; and providing for and effective date."

In conjunction with the other CDQ groups and the State of Alaska CDQ Team, BBEDC contributed to the development of the CDQ fee proposal before you today. BBEDC would like to express our support for House Bill 334 and urge the committee to implement the Bill as written.

Respectfully,

Eric A. Olson

FOR H. Robin Samuelsen, Jr.,
Chairman of the Board, BBEDC

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Municipal & Regional Assistance Division
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Sponsor Statement

HB 334

"An act relating to the establishment of and accounting for an administrative cost charge for the state's role in the Community Development Quota program and to the appropriation of receipts from the charge; and providing for an effective date."

In 1996 the Magnuson/Stevens Fisheries Conservation and Management Act authorized the Secretary of Commerce (Secretary) to collect and recover the costs associated with the management and enforcement of the CDQ program. The National Marine Fisheries Service, under the Secretary, has not taken any action yet on initiating a Community Development Quota (CDQ) fee program.

In view of an eventual CDQ fee program and in recognition of state budget reductions, the CDQ groups and the Department of Community & Economic Development (department) have decided to pursue a statutory fee program in advance of the implementation of a federal fee program.

HB 334 will switch the funding source for the CDQ program from the General Fund to Statutory Designated Program Receipts authority. The CDQ groups and the department support the fee as a method of making the CDQ program self-supporting. The total cost of state management is approximately $250,000.

The proposed fee structure has two components. First, each group will pay a standard, flat amount that will total half the state's administrative costs. Second, each group will pay a variable share of the remaining administrative costs based upon the value of that group's fisheries quota allocation. The department would administer the cost charge.

The fee would be effective at the beginning of the new fiscal year, July 1, 2000.

Cc: Pat Pourchot, Governor's office

HOUSE BILL NO. 334

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/2/00
Referred: Community and Regional Affairs, Labor and Commerce, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to the establishment of and accounting for an administrative cost charge for the state's role in the community development quota program and to the appropriation of receipts from the charge; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 37.05.146(b)(4) is amended by adding a new subparagraph to read:

(X) the administrative cost charge under AS 44.33.113 for the state's role in the federal community development quota program;

*** Sec. 2.** AS 44.33 is amended by adding a new section to read:

Sec. 44.33.113. Charges for community development quota program. (a) If the governor delegates duties as described in AS 44.33.020(11) to the department, the department shall determine and assess an annual administrative cost charge for the administration of the state's role in the federal community development quota program. The department shall by regulation establish the method for implementing the charge

in accordance with the provisions of this section. The department shall assess the charges on community development groups with approved community development plans for the fiscal year for which the charge is applicable. The community development quota group shall pay the charge.

(b) The administrative cost charge under this section for a CDQ group shall be determined by the department no later than the June 30 immediately preceding the start of the applicable fiscal year. The department shall promptly notify the CDQ group of the amount of the charge. The CDQ group shall pay the charge no later than 45 days after the department provides notice to the CDQ group of the amount of the charge.

(c) The aggregate total of administrative cost charges to all CDQ groups for a fiscal year

(1) shall approximately equal, but may not exceed, the appropriations authorized for that fiscal year for the state's role under AS 44.33.020(11), less

(A) appropriations from sources of program receipts under AS 37.05.146(b) not collected under this section; and

(B) any reappropriations of charges collected under this section; and

(2) may not exceed $400,000.

(d) Fifty percent of the aggregate total of administrative cost charges assessed on all CDQ groups for a fiscal year shall be recovered through the standard portion of the charges and 50 percent of the aggregate total shall be recovered through the variable portion of the charges. The administrative cost charge assessed on a CDQ group for a fiscal year shall consist of a standard portion and a variable portion. The CDQ group's standard portion is calculated by dividing the aggregate total amount to be recovered through this portion by the number of CDQ groups to be assessed a charge. The CDQ group's variable portion is calculated by multiplying the aggregate total amount to be recovered through this portion by a percentage that represents the ratio of the value of the CDQ group's fisheries resource quota allocation to the total value of fisheries resources allocated under the CDQ program for the applicable year.

(e) Notwithstanding any contrary provision of this section, the department may

adjust the administrative cost charge for a fiscal year to one or more CDQ groups if the department finds that an inequitable result will occur absent the adjustment, but the aggregate total of the charges to be paid by all CDQ groups after the adjustment must equal the amount originally calculated for that fiscal year under (c) of this section.

(f) The department shall collect and enforce the administrative cost charge assessed under this section. The receipts from the charge assessed under this section shall be deposited in the community development quota program account in the state treasury. Under AS 37.05.146(b), receipts from charges collected under this section shall be accounted for separately and appropriations from the account are not made from the unrestricted general fund. The legislature may appropriate money from the community development quota program account for expenditures by the department for necessary costs incurred by the department in implementing any assigned role under AS 44.33.020(11) or for any other public purpose.

(g) The Department of Administration shall identify the amount of the appropriations for the state's role under AS 44.33.020(11) that lapses into the general fund each year. The legislature may appropriate an amount equal to the lapsed amount to the community development quota program for its operating costs for the next fiscal year.

(h) The department may adopt regulations under AS 44.62 (Administrative Procedure Act) to interpret or implement its duties under this section.

(i) In this section,

(1) "CDQ group" or "community development quota group" means an applicant under 16 U.S.C. 1855(i), or a successor program, with an approved community development plan;

(2) "CDQ program" or "community development quota program" means the federal community development quota program established under 16 U.S.C. 1855(i), or a successor federal program approved by the United States Secretary of Commerce;

(3) "fiscal year" has the meaning given in AS 37.05.920;

(4) "value" has the meaning given in AS 43.75.290.

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section

to read:

APPLICABILITY. This Act applies to administrative cost charges under AS 44.33.113, enacted by sec. 2 of this Act, applicable for state fiscal years beginning on or after July 1, 2000.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The Department of Community and Economic Development may proceed to adopt regulations necessary to interpret or implement this Act. Regulations to interpret or implement a provision of this Act take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of sec. 2 of this Act.

*** Sec. 5.** Section 4 of this Act takes effect immediately under AS 01.10.070(c).

*** Sec. 6.** Except as provided in sec. 5 of this Act, this Act takes effect June 30, 2000.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. _____

Revision Date/Time (Note if correction) _____ Dept. Affected Community and Economi

Title Administrative charge for the state's role in the CD(BRU Community and Economic Developme

Component Community and Economic Developme

Sponsor Rules

Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	250.0	250.0	250.0	250.0	250.0	250.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(250.0)	(250.0)	(250.0)	(250.0)	(250.0)	(250.0)
1005 GF/Program Receipts						
1037 GF/Mental Health						
Statutory Designated P/R	250.0	250.0	250.0	250.0	250.0	250.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: 250.0

POSITIONS

Full-time	0	0	0	0	0	0
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill will switch the funding source for the Community Development Quota (CDQ) program from the general fund to statutory designated program receipts, through the implementation of a fee structure on the groups benefiting under the program. This fee structure is supported by the CDQ groups and the department as a method of making this successful and lucrative program self-supporting.

Prepared by: Jeffrey W. Bush Phone _____

Division Commissioner's Office Date/Time 2/1/00 2:56 PM

Approved by Commissioner _____ Date 2/1/00

Agency _____

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Tony Knowles, Governor

Alaska Department of Community and Economic Development

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MEMORANDUM

February 10, 2000

TO: Rep. Carl Morgan, Co-Chair
Rep. John Harris, Co-Chair
Community & Regional Affairs Committee

FROM: Bryce Edgmon, CDQ Manager
Department of Community & Economic Development

RE: Sectional analysis of House Bill 334

" An Act relating to the establishment of an accounting for an administrative cost charge for the state's role in the community development quota program and to the appropriation of receipts from the charge; and providing for an effective date."

Section One:

Creates a new subparagraph (X) to 37.05.146 adding the "CDQ administrative cost charge" to the list of program receipts that exist in statute. Other examples of program receipts include International Airport Fund, Fish and Game fund, Alaska Children's Trust, Highway Working Capital Fund, etc.

Section Two:

AS 44.33 is amended to give the Department of Community and Economic Development the authority to determine and assess the annual administrative cost fee to the CDQ groups. It provides the department the authority to provide regulations in accordance with this section.

(b) The department must determine the administrative costs no later than June 30 before the start of the applicable fiscal year. Upon being notified, a CDQ group has 45 days to pay the department their share of the administrative cost charge.

(c) The total cost of the administrative cost charge cannot exceed $400,000. This "ceiling" is higher than the cost of currently managing the program, which is approximately $250,000.

The rationale is that future legislation will not be needed if a higher amount of program receipt authority is deemed necessary. The CDQ groups agreed to this provision with the understanding that any upward adjustment in the administrative cost charge would involve a mutual decision-making process with the state.

This section also addresses any adjustments to the administrative cost charge from "carryover funds" and reappropriations.

(d) The administrative cost charge is broken down into two categories; a pro rata share, which is by definition the standard portion, and represents 50% of the total administrative cost charge.

The second category is the variable portion, which is assessed through a formula to the CDQ groups. The formula comes from royalties derived by multiplying the remaining 50% administrative cost charge by the ratio of the value of quota allocated to each group to the total value of the CDQ quota for the applicable year.

Variable portion = One half of administrative cost charge * the ratio of value of CDQ group's quota relative to the value of all CDQ quota (for the applicable year).

(e) The department may adjust the fee for a fiscal year for the CDQ groups if an inequitable result occurs. This will the department and the groups to use different specie's in relation to fluctuating harvest returns and prices. The aggregate amount assessed to the CDQ groups must be enough to compensate the state for the management costs in (c).

(f) The department will collect and enforce the fee, which will be deposited in the Community Development Quota Program Account in the state treasury.

(g) The Department of Administration shall identify the amount of the appropriation that lapses into the general fund each year. The legislature may appropriate an amount equal to operating costs of the CDQ program for the next fiscal year.

(h) Technical section.

Section Three:

Applicability section, which authorizes the administrative cost charge to begin on or after July 1, 2000.

Section Four:

Authorizes the Department of Community and Economic Development to adopt necessary regulations.

Section Five:

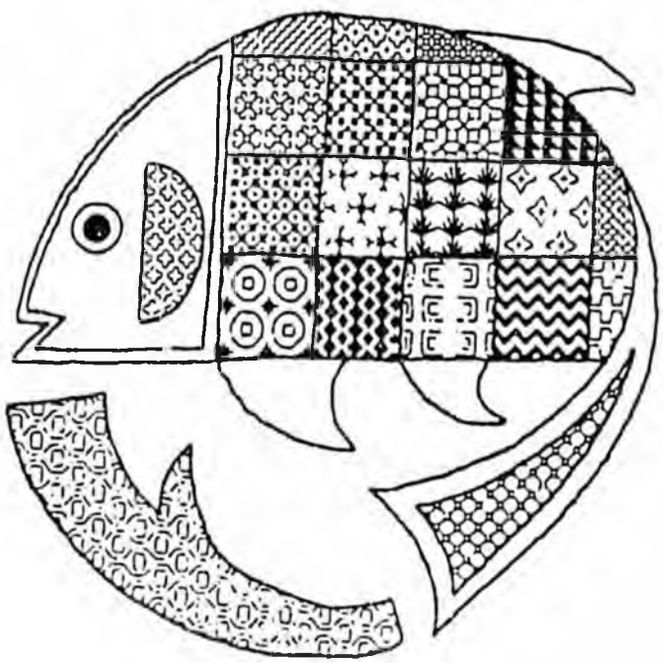
Grants the department the authority to adopt regulations.

Section Six:

Effective date -- This act takes effect June 30, 2000.

Magnuson-Stevens Fishery Conservation and Management Act

As Amended Through October 11, 1996



U.S. Department Of Commerce
Michael Kantor, Secretary

National Oceanic and Atmospheric Administration
D. James Baker, Under Secretary for Oceans and Atmosphere

National Marine Fisheries Service
Rolland A. Schmitten, Assistant Administrator for Fisheries

NOAA Technical Memorandum NMFS-F/SPO-23
December 1996

(2) (A) The Western Pacific Council and the Secretary may establish a western Pacific community development program for any fishery under the authority of such Council in order to provide access to such fishery for western Pacific communities that participate in the program.

(B) To be eligible to participate in the western Pacific community development program, a community shall--

(i) be located within the Western Pacific Regional Fishery Management Area;

(ii) meet criteria developed by the Western Pacific Council, approved by the Secretary and published in the Federal Register,

(iii) consist of community residents who are descended from the aboriginal people indigenous to the area who conducted commercial or subsistence fishing using traditional fishing practices in the waters of the Western Pacific region;

(iv) not have previously developed harvesting or processing capability sufficient to support substantial participation in fisheries in the Western Pacific Regional Fishery Management Area; and

(v) develop and submit a Community Development Plan to the Western Pacific Council and the Secretary.

(C) In developing the criteria for eligible communities under subparagraph (B)(ii), the Western Pacific Council shall base such criteria on traditional fishing practices in or dependence on the fishery, the cultural and social framework relevant to the fishery, and economic barriers to access to the fishery.

(D) For the purposes of this subsection "Western Pacific Regional Fishery Management Area" means the area under the jurisdiction of the Western Pacific Council, or an island within such area.

(E) Notwithstanding any other provision of this Act, the Western Pacific Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.

(3) The Secretary shall deduct from any fees collected from a community development quota program under section 304(d)(2) the costs incurred by participants in the program for observer and reporting requirements which are in addition to observer and reporting requirements of other participants in the fishery in which the allocation to such program has been made.

(4) After the date of enactment of the Sustainable Fisheries Act, the North Pacific Council and Western Pacific Council may not submit to the Secretary a community development quota program that is not in compliance with this subsection.

Bristol Bay Economic Development Corporation

P.O. Box 1464 • Dillingham, Alaska 99576 • (907) 842-4370 • Fax (907) 842-4336 • 1-800-478-4370

114 S. Franklin, Suite 202 • Juneau, Alaska 99801 • (907) 463-5054 • Fax (907) 463-5056 • E-mail bbedc@ptialaska.net

February 14, 2000

The Honorable Carl Morgan, Co-Chair
The Honorable John Harris, Co-Chair
House of Representatives, Community & Regional Affairs Committee
State Capitol
Juneau, Alaska 99801-1182

RE: House Bill 334

Dear Co-Chairs Morgan and Harris,

Bristol Bay Economic Development Corporation (BBEDC) is one of the six Community Development Quota (CDQ) groups formed under the Western Alaska Community Development Quota Program. BBEDC represents 5,607 residents in the 17 member communities located in Southwest Alaska.

BBEDC would like to comment on House Bill 334; "An Act relating to the establishment of and accounting for an administrative cost charge for the state's role in the community development quota program and to the appropriation of receipts from the charge; and providing for and effective date."

In conjunction with the other CDQ groups and the State of Alaska CDQ Team, BBEDC contributed to the development of the CDQ fee proposal before you today. BBEDC would like to express our support for House Bill 334 and urge the committee to implement the Bill as written.

Respectfully,

Eric A. Olson

FOR H. Robin Samuelsen, Jr.,
Chairman of the Board, BBEDC

Coastal Villages Region Fund

711 H Street, Suite 200 • Anchorage, Alaska 99501 • Phone 907-278-5151 • Fax 907-278-5150

February 10, 2000

The Honorable Brian Porter
Speaker of the House
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Porter:

The Coastal Villages Region Fund supports HOUSE BILL NO. 334 relating to the establishment of and accounting for an administrative cost charge for the state's role in the community development quota (CDQ) program and to the appropriation of receipts from the charge to cover the state's administrative cost of the program. The Coastal Villages Region Fund is a CDQ group that represents twenty villages in the Kuskokwim River region of western Alaska.

The CDQ program has created jobs and expanded economic opportunity in the Coastal Villages region. It is essential that we ensure the continuance of this federal fisheries resource program. I urge your prompt and favorable action on this measure.

Sincerely,

Edgar Hoelscher, Vice President
Board of Directors

Cc: Fred Phillip, President
Senator Lyman F. Hoffman
Senator Al Adams
Representative Mary Kapsner
Representative Richard Foster
Governor Tony Knowles

Yukon Delta Fisheries Development Association

☐ 2200 6th Avenue • Suite 707
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☐ P.O. Box 2626
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February 14, 2000

The Honorable Carl Morgan
Alaska State Legislature
State Capitol, Room 409
Juneau, AK 99801-1182

Dear Representative Morgan:

Yukon Delta Fisheries Development Association, a Community Development Quota organization representing the communities of Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village and Sheldon Point, fully supports the passage of HB 334, "An Act relating to the establishment of and accounting for an administrative cost charge for the state's role in the community development quota program".

Our organization wholeheartedly endorses the oversight provided to the CDQ program by the State of Alaska. We feel it is our responsibility to reimburse the State of Alaska for our share of the administrative costs involved in providing oversight for this Federal Community Development Quota Program.

Respectfully yours,

Ragnar Alstrom

[redacted]. Alstrom
[redacted] Director

NORTON SOUND ECONOMIC DEVELOPMENT CORPORATION

Serving the fisheries of the Bering Straits Region

Brevig Mission Diomede Elim Gambell Golovin Koyuk Nome Saint Michael Savoonga Shaktoolik Stebbins Teller Unalakleet Wales White Mountain

February 14, 2000

The Honorable John Harris, Co-Chair
The Honorable Carl Morgan, Co-Chair
State Capitol
Juneau, AK 99801-1182

Re: Support For HB 334

Dear Representatives Harris and Morgan:

Norton Sound Economic Development Corporation (NSEDC) is in support of the concept of an administrative cost charge for the reasonable and necessary expenses of the state for their participation in the administration of the federal Community Development Quota (CDQ) program. HB334 sets forth a mechanism for the six groups participating in the CDQ program to pay the cost.

The CDQ program is a relatively new program. There are significant issues regarding the program which can affect its nature and success. Because at this time there is no Alaska statutory direction governing the state's participation, NSEDC suggests that the bill be amended to require periodic legislative reauthorization of the bill, such as every three years.

Subject to a modification of the bill which would require periodic reauthorization, NSEDC is in support of HB 334.

Sincerely yours,

Eugene Asicksik

Eugene Asicksik
President and CEO

601 W. 5th Ave Suite 415 Anchorage, Alaska 99501-2258 (907) 274-2248 FAX: (907) 274-2249

Alaska
Municipal & Regional Assistance Division
Department of Community and Economic Development

BRYCE EDGMON
CDQ Manager

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WEBSITE: www.dced.state.ak.us/mra/Home.htm

Tony Knowles, Governor

Alaska Department of Community and Economic Development

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Email: mrad@dced.state.ak.us • Website: www.dced.state.ak.us/mra/Home.htm

MEMORANDUM

February 10, 2000

TO: Rep. Carl Morgan, Co-Chair
Rep. John Harris, Co-Chair
Community & Regional Affairs Committee

FROM: Bryce Edgmon, CDQ Manager
Department of Community & Economic Development

RE: Sectional analysis of House Bill 334

" An Act relating to the establishment of an accounting for an administrative cost charge for the state's role in the community development quota program and to the appropriation of receipts from the charge; and providing for an effective date."

Section One:

Creates a new subparagraph (X) to 37.05.146 adding the "CDQ administrative cost charge" to the list of program receipts that exist in statute. Other examples of program receipts include International Airport Fund, Fish and Game fund, Alaska Children's Trust, Highway Working Capital Fund, etc.

Section Two:

AS 44.33 is amended to give the Department of Community and Economic Development the authority to determine and assess the annual administrative cost fee to the CDQ groups. It provides the department the authority to provide regulations in accordance with this section.

(b) The department must determine the administrative costs no later than June 30 before the start of the applicable fiscal year. Upon being notified, a CDQ group has 45 days to pay the department their share of the administrative cost charge.

(c) The total cost of the administrative cost charge cannot exceed $400,000. This "ceiling" is higher than the cost of currently managing the program, which is approximately $250,000.

The rationale is that future legislation will not be needed if a higher amount of program receipt authority is deemed necessary. The CDQ groups agreed to this provision with the understanding that any upward adjustment in the administrative cost charge would involve a mutual decision-making process with the state.

This section also addresses any adjustments to the administrative cost charge from "carryover funds" and reappropriations.

(d) The administrative cost charge is broken down into two categories; a pro rata share, which is by definition the standard portion, and represents 50% of the total administrative cost charge.

The second category is the variable portion, which is assessed through a formula to the CDQ groups. The formula comes from royalties derived by multiplying the remaining 50% administrative cost charge by the ratio of the value of quota allocated to each group to the total value of the CDQ quota for the applicable year.

Variable portion = One half of administrative cost charge * the ratio of value of CDQ group's quota relative to the value of all CDQ quota (for the applicable year).

(e) The department may adjust the fee for a fiscal year for the CDQ groups if an inequitable result occurs. This will the department and the groups to use different specie's in relation to fluctuating harvest returns and prices. The aggregate amount assessed to the CDQ groups must be enough to compensate the state for the management costs in (e).

(f) The department will collect and enforce the fee, which will be deposited in the Community Development Quota Program Account in the state treasury.

(g) The Department of Administration shall identify the amount of the appropriation that lapses into the general fund each year. The legislature may appropriate an amount equal to operating costs of the CDQ program for the next fiscal year.

(h) Technical section.

Section Three:

Applicability section, which authorizes the administrative cost charge to begin on or after July 1, 2000.

Section Four:

Authorizes the Department of Community and Economic Development to adopt necessary regulations.

Section Five:

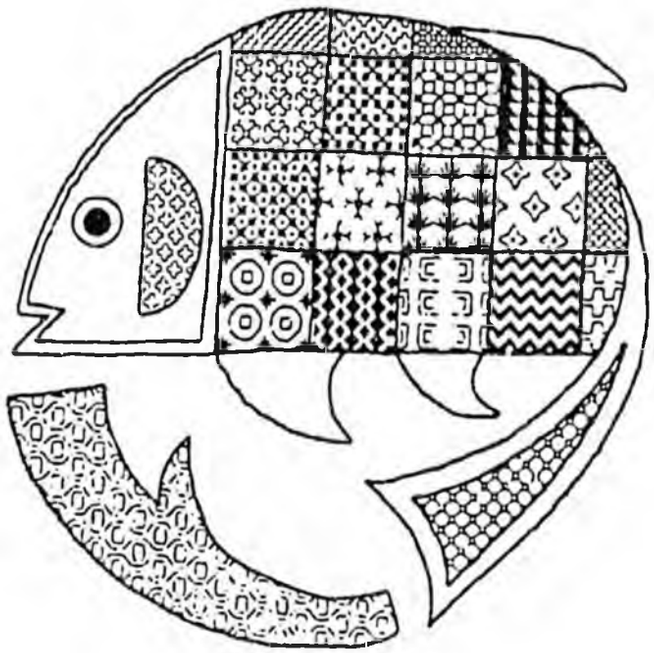
Grants the department the authority to adopt regulations.

Section Six:

Effective date -- This act takes effect June 30, 2000.

Magnuson-Stevens Fishery Conservation and Management Act

As Amended Through October 11, 1996



U.S. Department Of Commerce
Michael Kantor, Secretary

National Oceanic and Atmospheric Administration
D. James Baker, Under Secretary for Oceans and Atmosphere

National Marine Fisheries Service
Rolland A. Schmitten, Assistant Administrator for Fisheries

NOAA Technical Memorandum NMFS-F/SPO-23
December 1996

(2) (A) The Western Pacific Council and the Secretary may establish a western Pacific community development program for any fishery under the authority of such Council in order to provide access to such fishery for western Pacific communities that participate in the program.

(B) To be eligible to participate in the western Pacific community development program, a community shall--

(i) be located within the Western Pacific Regional Fishery Management Area;

(ii) meet criteria developed by the Western Pacific Council, approved by the Secretary and published in the Federal Register;

(iii) consist of community residents who are descended from the aboriginal people indigenous to the area who conducted commercial or subsistence fishing using traditional fishing practices in the waters of the Western Pacific region;

(iv) not have previously developed harvesting or processing capability sufficient to support substantial participation in fisheries in the Western Pacific Regional Fishery Management Area; and

(v) develop and submit a Community Development Plan to the Western Pacific Council and the Secretary.

(C) In developing the criteria for eligible communities under subparagraph (B)(ii), the Western Pacific Council shall base such criteria on traditional fishing practices in or dependence on the fishery, the cultural and social framework relevant to the fishery, and economic barriers to access to the fishery.

(D) For the purposes of this subsection "Western Pacific Regional Fishery Management Area" means the area under the jurisdiction of the Western Pacific Council, or an island within such area.

(E) Notwithstanding any other provision of this Act, the Western Pacific Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.

(3) The Secretary shall deduct from any fees collected from a community development quota program under section 304(d)(2) the costs incurred by participants in the program for observer and reporting requirements which are in addition to observer and reporting requirements of other participants in the fishery in which the allocation to such program has been made.

(4) After the date of enactment of the Sustainable Fisheries Act, the North Pacific Council and Western Pacific Council may not submit to the Secretary a community development quota program that is not in compliance with this subsection.

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Office of the Commissioner
P.O. Box 110800, Juneau, AK 99811-0800
Telephone: (907) 465-2500 • Fax: (907) 465-5442 • TDD: (907) 465-5437
Email: questions@dced.state.ak.us • Website: www.dced.state.ak.us/

MEMORANDUM

February 10, 2000

TO: Representative Carl Morgan, Co-Chair
House Committee & Regional Affairs Committee

FROM: Jeffrey Bush, Deputy Commissioner
Department of Community & Economic Development

RE: Scheduling request for House Bill 334

"An act relating to the establishment of and accounting for an administrative cost charge for the state's role in the Community Development Quota program and to the appropriation of receipts from the charge; and providing for an effective date."

This letter is to request a bill hearing for House Bill 334, by the Rules Committee by request of the Governor, and relating to administrative charges associated with the funding of the Community Development Quota Program (CDQ).

Under House Bill 334 Community Development Quota groups that participate in the CDQ program will pay assessment fees to the state. The proposed fee structure has two components. First, each group will pay a standard, flat amount that will total half the state's administrative costs. Second, each group will pay a variable share of the remaining administrative costs based upon the value of that group's fisheries quota allocation.

The Department of Community and Economic Development would administer the cost charge, which is added to the statutory list of program receipts subject to separate accounting procedures.

Participants of the CDQ program recognize their future success hinges on the ability of the state to continue to administer the program. To that end, the groups proposed the funding plan forwarded in this bill and are in agreement with the contents of House Bill 334.

For further information please contact Jeffrey Bush at 465-2500, or Bryce Edgmon, CDQ Manager, at 465-5536. Thank for you considering this request.

Cc: Pat Pourchot, Legislative Liaison

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Municipal & Regional Assistance Division
P.O. Box 110800, Juneau, AK 99811-0800
Telephone: (907) 465-4750 • Fax: (907) 465-5085 • Text Telephone: (907) 465-5437
Email: mrad@dced.state.ak.us • Website: www.dced.state.ak.us/mra/Home.htm

Sponsor Statement

HB 334

"An act relating to the establishment of and accounting for an administrative cost charge for the state's role in the Community Development Quota program and to the appropriation of receipts from the charge; and providing for an effective date."

In 1996 the Magnuson/Stevens Fisheries Conservation and Management Act authorized the Secretary of Commerce (Secretary) to collect and recover the costs associated with the management and enforcement of the CDQ program. The National Marine Fisheries Service, under the Secretary, has not taken any action yet on initiating a Community Development Quota (CDQ) fee program.

In view of an eventual CDQ fee program and in recognition of state budget reductions, the CDQ groups and the Department of Community & Economic Development (department) have decided to pursue a statutory fee program in advance of the implementation of a federal fee program.

HB 334 will switch the funding source for the CDQ program from the General Fund to Statutory Designated Program Receipts authority. The CDQ groups and the department support the fee as a method of making the CDQ program self-supporting. The total cost of state management is approximately $250,000.

The proposed fee structure has two components. First, each group will pay a standard, flat amount that will total half the state's administrative costs. Second, each group will pay a variable share of the remaining administrative costs based upon the value of that group's fisheries quota allocation. The department would administer the cost charge.

The fee would be effective at the beginning of the new fiscal year, July 1, 2000.

Cc: Pat Pourchot, Governor's office

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. _____

Revision Date/Time (Note if correction) _____ Dept. Affected Community and Economl

Title Administrative charge for the state's role in the CDC BRU Community and Economic Developme

Component Community and Economic Developme

Sponsor Rules

Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	250.0	250.0	250.0	250.0	250.0	250.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(250.0)	(250.0)	(250.0)	(250.0)	(250.0)	(250.0)
1005 GF/Program Receipts						
1037 GF/Mental Health						
Statutory Designated P/R	250.0	250.0	250.0	250.0	250.0	250.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: 250.0

POSITIONS

Full-time	0	0	0	0	0	0
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill will switch the funding source for the Community Development Quota (CDQ) program from the general fund to statutory designated program receipts, through the implementation of a fee structure on the groups benefiting under the program. This fee structure is supported by the CDQ groups and the department as a method of making this successful and lucrative program self-supporting.

Prepared by: Jeffrey W. Bush Phone _____

Division Commissioner's Office Date/Time 2/1/00 2:56 PM

Approved by Commissioner _____ Date 2/1/00

Agency _____

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HB 340

Ketchikan Indian Corporation

David Landis
Programs Manager

429 Deermount
Ketchikan, Alaska 99901
email: kictribe@ktn.net

Office (907) 225-5158
Fax (907) 247-0429

Ketchikan Indian Corporation

Charles W. (Charlie) White
General Manager

429 Deermount
Ketchikan, Alaska 99901
email: kictribe@ktn.net

Office (907) 225-5158
Fax (907) 225-0212

We Have
Bob Weinstein
on Line
in Ketchikan
(mayor of KTN)

Is there any other regional housing authority currently serving the Ketchikan area?

Alaska State Legislature

HOUSE COMMITTEE ON COMMUNITY AND REGIONAL AFFAIRS

Representative John Harris, Representative Carl Morgan, Co-Chairmen
State Capitol, Room 110, Juneau, Alaska 99801-1182
(907) 465-3882

AGENDA

February 10, 2000

1. Call meeting to order

2. Roll call
   Rep. Dyson
   Rep. Kookesh
   Rep. Halcro
   Rep. Murkowski
   Rep. Joule
   Rep. Morgan
   Rep. Harris

3. Consideration of bills on agenda

   HB 340 – Designating Ketchikan Indian Corporation as a regional housing authority.

4. Announcements or other business

   Next meeting: Tuesday, February 15 – HB 334 CDQ assessments

5. Motion to adjourn

Alaska State Legislature

Member:
House Finance
Subcommittee Chair:
Transportation
Environmental Conservation
Subcommittee Member:
Fish and Game

During Session:
State Capitol
Juneau, AK 99801-1182
(907) 465-3424
Fax (907) 465-3793

In Ketchikan:
50 Front Street, Suite 203
Ketchikan, AK 99901
(907) 247-4672
Fax (907) 225-7157

Representative William K. Williams

SPONSOR STATEMENT

House Bill 340, 'Ketchikan Indian Corporation as a Regional Housing Authority'

House Bill 340 was introduced at the request of the Ketchikan Indian Corporation. KIC, the governing body for the Natives of the Ketchikan area, was formed in 1940 and currently has over 4,000 enrolled members.

KIC has contracted with the Department of Housing and Urban Development under the Native American Housing Assistance and Self-Determination Act (NAHASDA) to provide housing for low-income Indians/Alaska Natives in the Ketchikan area.

NAHASDA requires that the low-income housing provided by tribes be tax exempt. Adding KIC to the list of regional housing authorities will allow KIC to enter into HUD required agreements with the appropriate local government.

Mr. Chairman thank you for hearing this legislation on such short notice. Passage of HB 340 will allow the expenditure of federal NAHASDA money in the Ketchikan area and provide sorely needed low-income housing to area residents.

I urge your favorable consideration and will be available for questions.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 340

Revision Date/Time (Note if correction) _____ Dept. Affected Revenue

Title: Ketchikan Indian Corporation as a Regional Housing Authority

BRU: Alaska Housing Finance Corp.

Component: Operations

Sponsor: Rep. Williams

Requester: House Community and Regional Affairs

Component No.: 110

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

HB340 would add the Ketchikan Indian Corporation as a regional housing authority under AS18.55.996. Regional housing authorities are separate entities under state law that administer federal Indian housing, low-income housing and other such programs. Their operating funds are self-generated largely through the administration of federal housing programs, along with varied support from regional Native corporations and private sources. No operating dollars are provided through the state budget. A regional housing authority listed under AS18.55.996 is eligible to apply to AHFC for Supplemental Housing Development grants. Under this program, the Ketchikan Indian Corporation could apply for up to 20% of the total development cost of a housing project funded by the U.S. Department of Housing & Urban Development. (Housing authorities are prohibited from using the Supplemental Development funds for administrative expenses.) Funding availability under the Supplemental Housing Development Program is subject to the annual appropriation process of the Executive Budget Act (AS37.07).

Prepared by: John Bitney, Legislative Liaison — Phone 330-8445

Division: Alaska Housing Finance Corporation — Date/Time 2/7/00 2:52 PM

Approved by Commissioner: Wilson Condon — Date _____

Agency: Department of Revenue

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Tony Knowles, Governor

Alaska Department of Community and Economic Development

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Email: questions@dced.state.ak.us • Website: www.comregal.state.ak.us/mrad-dced/home.htm

December 12, 1999

Mr. Dennis Finegan, Assessor
Ketchikan Gateway Borough
344 Front Street
Ketchikan, AK 99901

Dear Mr. Finegan,

You have asked for my opinion as to whether or not the City of Ketchikan and the Ketchikan Gateway Borough may, under existing law, exempt certain property which will be used as low income housing and will be owned by the Ketchikan Indian Corporation (KIC).

As you state in your letter, if the property were to be owned by a regional housing authority, there would be no question as to the exemption. However, since KIC does not meet the necessary criteria, that does not appear to be an option. In *Valentine v. City of Juneau*, 36 F.2d 904 (9th Cir. 1929) the court held that the city could not exempt property from taxation unless expressly conferred by law, so unless the property in question meets the criteria for either the mandated exemptions in AS 29.45.030 or one of the optional exemptions contained in AS 29.45.050, there can be no exemption.

While I am not familiar with the property in question, nor am I privy to the workings of KIC and in particular with the property at issue, I might suggest that you and the City look at the optional exemption contained in AS 29.45.050(m). This statute allows a municipality to exempt certain "economic development property", if it meets certain criteria. First, it would have to be newly constructed property that had not been taxed before, consequently it could not be existing buildings that had been purchased. Second, it would have to either create employment, generate sales of goods or services outside KGB or reduce importation of goods or services. And last, the property could not have been used for the same business in another municipality within the last six months. Other than this, I know of no other way the City and Borough might exempt the property.

For your information, federally subsidized housing exists in other jurisdictions and are subject to taxes within those jurisdictions. I don't believe I have told you anything you didn't already know about this exemption issue. I will be on vacation from December 20-December 31, 1999. Any other questions you may have will have to wait until after I return to the office.

Happy Holidays

Steve Van Sant
State Assessor

RECEIVED
DEC 29 1999
BOROUGH MANAGER'S OFFICE

K
I
C

Ketchikan Indian Corporation
General Manager
429 DEERMOUNT
KETCHIKAN, ALASKA 99901
(907) 225-5158
FAX (907) 247-0429

February 4, 2000

The Honorable Bill Williams
Representative, Alaska Legislature

By Facsimile 907-465-3793

Dear Bill,

The intent of this letter is to request your sponsorship and support for a proposed bill to designate Ketchikan Indian Corporation (KIC) as a regional housing authority pursuant to AS 18.55.996.

The reason for this request is quite simple: KIC, under the federal Native American Housing Assistance And Self Determination Act (NAHASDA) law has assumed the role of providing housing for low-income Indians/Alaska Natives in the Ketchikan area. This responsibility was previously undertaken only by the regional housing authorities identified in AS 18.55.996(a). Adding KIC to this enumeration of housing authorities simply updates this list and accurately reflects current recipients of the same HUD dollars which assist the same segment of the population.

This amended statute will enable KIC to be recognized by local government(s) as an entity eligible to enter into HUD-required cooperation agreements for tax exemption and payments in lieu of taxes. To date, KIC has had difficulty engaging in these required agreements since we have no "housing authority" designation.

Our local governments are also in favor of this clarification, enabling them to put KIC in an organizational category that they understand in the context of their laws. In

fact, the City Council of Ketchikan has already enacted ordinance 99-1423 that allows for KIC's inclusion in the "housing authority" category (see attached).

Thank you for your consideration of this request. I will be available to answer any questions or supply you with additional information.

Respectfully,

Charles W. White

Charles W. White
General Manager, Ketchikan Indian Corporation

CITY OF KETCHIKAN, ALASKA

ORDINANCE NO. 99-1423

AN ORDINANCE OF THE COUNCIL OF THE CITY OF KETCHIKAN, ALASKA; ESTABLISHING A PROPERTY TAX EXEMPTION FOR CERTAIN LOW INCOME HOUSING OWNED OR MANAGED BY A TRIBAL CORPORATION UNDER THE NATIVE AMERICAN HOUSING ASSISTANCE AND SELF-DETERMINATION ACT OF 1996; AUTHORIZING THE CITY TO ENTER INTO A COOPERATION AGREEMENT WITH KETCHIKAN INDIAN CORPORATION TO EXEMPT UP TO TEN RESIDENTIAL UNITS FROM PROPERTY TAX; AND PROVIDING FOR THE FILING OF PETITIONS FOR REFERENDUM

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF KETCHIKAN, ALASKA, AS FOLLOWS:

Section 1: Amendment. Section 3.21.020 of the Ketchikan Municipal Code, entitled "Interest in Low-Income Housing," is hereby amended to read as follows:

"3.21.020. Interest in Low-Income Housing. An interest, other than record ownership, in real property of an individual residing in the property is exempt from real property taxes if the property has been developed, improved, or acquired with federal funds for low-income housing and is owned or managed as low-income housing by the Alaska [~~State Building Authority~~] Housing Finance Corporation under Alaska Statutes 18.55.100-18.55.960; a tribal corporation under the Native American Housing Assistance and Self-Determination Act of 1996 pursuant to a cooperation agreement with the city; or a regional housing authority formed under AS 18.55.996. This section does not prohibit the city from receiving payments in lieu of taxes authorized under federal law."

Section 2: Authorization to enter into Cooperation Agreement. The City of Ketchikan is hereby authorized to enter into an agreement with the Ketchikan Indian Corporation to exempt up to ten (10) residential units from real property taxes and to provide for certain payments to be made by Ketchikan Indian Corporation to the City of Ketchikan in lieu of some or all of the taxes which would otherwise be imposed. The city manager or his designee is hereby authorized to negotiate with Ketchikan Indian

Corporation for an agreement consistent with this section and containing such other terms and conditions as he deems necessary or convenient. Any such agreement must be approved by motion of the city council.

Section 3. Petition for Referendum and Effective Date. If one or more referendum petitions with signatures are properly filed within one month after the passage and publication of this ordinance, this ordinance shall not go into effect until the petition or petitions are finally found to be illegal and/or insufficient, or, if any such petition is found legal and sufficient, until the ordinance is approved at an election by a majority of the qualified voters voting on the question. If no referendum petition with signatures is filed, this ordinance shall go into effect one month after its passage and publication.

PASSED ON FIRST READING _____

FINAL PASSAGE _____

_____
Bob Weinstein, Mayor

ATTEST:

_____
Katherine M. Suiter, City Clerk

EFFECTIVE DATE			
ROLL CALL	YEA	NAY	ABSENT
BUTLER			
COYNE			
HARPOLD			
NORTON			
WEST			
L. WILLIAMS			
S. WILLIAMS			
MAYOR			

HB 342

Catelin

Chrykoog

Dhud gpea

254

Keith Lawler

Agra Legal & For Affairs

Joe Mayer -
586-5565

Alaska State Legislature

HOUSE COMMITTEE ON COMMUNITY AND REGIONAL AFFAIRS

Representative John Harris, Representative Carl Morgan, Co-Chairmen
State Capitol, Room 110, Juneau, Alaska 99801-1182
(907) 465-3882

COMMITTEE SCHEDULE

Unless otherwise indicated, meeting time is 8:00 a.m., Room 124, Capitol Building

THURSDAY, APRIL 13, 2000

HB 342 *+ AIDEA bonds and rural development

* First public hearing of bill
+ Teleconference

SB 248--HB 342
AIDEA Bill
Sectional Analysis

Section 1 – Clarifying changes to Property Tax Exemption Provisions
Section 1 together with Sections 6, 7, and 8 make clarifying changes in tax exemption and payment in lieu of tax provisions relating to AIDEA owned projects.

Background. Under AIDEA's development finance program, AIDEA can own development projects that further the Authority's mission. Examples of these projects include the DeLong Mountain Transportation System serving the Red Dog Mine and the Federal Express Maintenance Facility at Anchorage International Airport.

By statute, AIDEA's interests in development finance projects are exempt from property taxes. Other statutory provisions allow for local jurisdictions to exempt the property interests of private users of AIDEA's facilities from property taxation and authorize local jurisdictions to enter into payment in lieu of tax agreements with these users.

The bill makes technical changes to clarify how the property tax and the payment in lieu of tax agreement mechanisms operate.

Section 1. Permissive Property Tax Exemption for AIDEA Owned Projects. Section 1 amends the provisions to AS 29.45.050 to allow municipalities to grant tax exemptions with respect to interests of private users in AIDEA property. Current law (AS 44.88.140 (b)) authorizes the use of payment in lieu of tax agreements for private interests held in AIDEA owned projects but does not clearly describe the methods that can be used to implement those agreements. Section 1 allows municipalities to grant, by ordinance, partial or total property tax exemptions in private property interests held by users of the Authority's assets. While other statutory provisions allow municipalities to grant various tax exemptions including an exemption fo. economic development property, none of the exemptions specifically relate to AIDEA owned projects. Adding a specific permissive exemption together with the clarifying changes to the payment in lieu of tax agreement provisions will provide municipalities with appropriate mechanisms and simplify the process by which municipalities can implement these property tax provisions.

Sections 2 through 4 – Transfer of Rural Development Initiative Fund Program (RDIF)

Section 2-4 together with Sections 9-11 and 13-14 transfer the Rural Development Initiative Fund Program (RDIF) to AIDEA.

Background -- The RDIF program encourages economic development in rural Alaska by providing loans to small businesses in communities with populations of less than 5,000. The program was originally administered by the Department of Community and Regional Affairs and with the passage of HB 40 last year, is now within the Department of Community and Economic Development (DCED).

Because the RDIF program advances the Authority's economic development mission, AIDEA has supported the program over the last several years. The Authority has coordinated its Business and Export Assistance Loan Guarantee program with the RDIF program to increase the effectiveness of both programs. In 1993 and again in 1996, the Legislature authorized AIDEA to purchase loan portfolios from the State as an investment for the Authority. These loan purchases helped to re-capitalize the RDIF fund so that the fund had sufficient cash assets to make additional loans.

With the consolidation accomplished under HB 40, it is appropriate to transfer the RDIF program to the Authority. Transferring the program to AIDEA furthers AIDEA's mission in rural Alaska. In addition, the transfer will allow the program to continue to operate from year to year without the need for periodic AIDEA loan purchases or other legislative appropriations to re-capitalize the program. AIDEA will contract with DCED to administer the program utilizing the Department's rural program staff. This will help maximize efficiencies and ensure the continued effectiveness of the program in rural Alaska.

There are two steps to accomplishing the RDIF transfer to AIDEA. First, the bill statutorily creates a new RDIF loan program within AIDEA. This new program mirrors the existing statutory program. Second, upon the purchase by AIDEA of the existing RDIF loan portfolio, the bill repeals DCED's existing program. An appropriation will be required to authorize AIDEA's purchase of the existing portfolio.

> **Sections 2-4**. Sections 2, 3 and 4 rename the existing DCED Rural Development Initiative Fund to the Rural Economic Development Initiative Fund. Under the bill (Sections 10, 13 and 14), the existing DCED program is not repealed until AIDEA completes the purchase of the existing RDIF loan portfolio from the State. Pending this purchase, the existing DCED statutes are modified to rename DCED's fund. This action is necessary so there is no statutory conflict with the AIDEA Rural Development Initiative Fund created under the bill.

Section 5 – Extension of AIDEA's Bonding Authority

Section 5 extends AIDEA's general bonding authority, which would otherwise sunset on July 1, 2000. Bonds for development finance projects in excess of $10,000,000 will continue to require legislative authorization.

Background. Effective July 1, 2000, AIDEA's ability to issue bonds, other than refunding bonds, will sunset. The sunset would prevent AIDEA from issuing any new bonds (other than refunding bonds) without legislative approval and severely curtail AIDEA's ability to fulfill its statutory mission.

The sunset would prevent AIDEA from issuing bonds to assist key development projects, bonds to fund loan participations and conduit revenue bonds that do not involve the credit of AIDEA or the State. In recent years, AIDEA has issued tax-exempt conduit revenue bonds to help finance the Fort Knox gold mine ($71 million), the Goat Lake Hydroelectric project ($23 million), the South Central Alaska chapter of the American Red Cross ($2.2 million), the Fairbanks Sewer and Water project ($6 million) and the Association of Village Council Presidents ($916,000). These bonds helped lower the cost of financing for these projects without any financial risk to AIDEA or the State.

The bill extends the sunset until July 1, 2003. In addition, the bill clarifies that the sunset does not apply to conduit revenue bonds, which do not impact the State's or AIDEA's credit. Bonds in excess of $10 million for development finance projects will continue to require specific legislative approval.

Sections 6 through 8 – Clarifying changes to Property Tax Exemption Provisions

Section 6 – This section amends AS 44.88.140(a) to recognize the permissive property tax exemption (adopted under Section 1 of the bill) that local governments may grant for AIDEA own projects.

Section 7 – This section amends AS 44.88.140(b) to clarify the mechanism to be used by local governments and users of AIDEA projects for entering into payment in lieu of tax agreements. The bill makes clear that these agreements are to be made directly between the local governments and the project users.

Section 8 – This section amends AS 44.88.140 to add a clarifying definitional section for "local political subdivision." The provision provides that the political subdivision in which the AIDEA project is located is the "local political subdivision" for purposes of the statute.

Sections 9 through 11 -- Transfer of Rural Development Initiative Fund Program (RDIF)

Section 9 – Creation of AIDEA RDIF Program. Section 9 establishes the RDIF program within AIDEA by enacting AS 44.88.600-620. With minor changes to reflect the program's status within AIDEA, these provisions mirror the provisions of the existing DCED RDIF program (AS 44.33.765-775).

AS 44.88.600 – This section establishes the RDIF within AIDEA outside of the AIDEA revolving fund. The section allows AIDEA to transfer funds between the revolving fund and the RDIF.

AS 44.88.610 – This section establishes the basic parameters of the RDIF program and mirrors the provisions of the current DCED program (See AS 44.33.770). Under the program, loans of up to $200,000 ($100,000 for individuals) may be made to businesses located in communities of less than 5000. These loans require that collateral be pledged to secure repayment and that a reasonable amount of money from non-State sources also be pledged to the project. The Authority may, by regulation establish interest rates of not less than 6% and other conditions for RDIF loans.

AS 44.88.620 – This section grants AIDEA the power to dispose of property acquired through foreclosure of defaulted RDIF loans.

Section 10 – Repeal of DCED Program. This section repeals the existing RDIF program within DCED. However, as noted below (see Sections 13 and 14), this section only becomes effective upon AIDEA's purchase from the State of the existing RDIF portfolio.

Section 11 – Transitional Provisions. This section enacts several transitional provisions related to the transfer of the RDIF program to AIDEA.

Sections 11(a) and 11(b) – These sections provide that regulations adopted under DCED's RDIF program will continue to apply to AIDEA's RDIF program until such time as AIDEA adopts new regulations for the program.

Section 11(c) – This section clarifies that the existing legal contracts, liabilities and obligations created under the DCED RDIF program remain in effect notwithstanding the transfer of the program under the bill.

Section 11(d) – This section provides that any amounts retained within DCED's RDIF, following AIDEA's purchase of the assets and the repeal of the DCED program, lapse into the general fund.

Sections 12 through 15 – Effective Date Provisions

Section 12 – Effective Date -- Bonding Sunset Extension. This section provides that the effective date of the bonding sunset extension provision of the bill (Section 5) is June 30, 2000. This effective date is necessary to insure that the current July 1, 2000 sunset date does not become effective.

Section 13 and 14 – Effective Date – RDIF Transfer. These sections provide special effective dates related to the transfer of the RDIF program to AIDEA. Specifically, these sections provide that the repeal of the DCED program (Section 10) and the transition provisions (Section 11) become effective on the day after AIDEA purchases the existing assets in the RDIF fund. A separate appropriation will be required to authorize AIDEA to purchase the existing RDIF assets from the State.

Section 15 – General Effective Date. This section provides that the remainder of the bill becomes effective July 1, 2000 to coincide with the beginning of the next fiscal year.

FISCAL NOTE

No: 1

Bill Version: HB 342
(H) Publish Date: 2/7/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/1 1/25/2000
Dept. Affected DCED
Title AIDEA bonding authority
BRU AIDEA
Component
Sponsor
Requester
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Corporate Funds)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill has a positive fiscal effect on the General Fund. Passage of this bill allows AIDEA to continue fulfilling its mission, generating revenues, and in turn, providing an annual dividend to the General Fund. The bill extends AIDEA's bonding authority, clarifies procedures available to municipalities to grant tax exemptions for privately held interest in AIDEA-owned assets, and transfers the rural development initiative fund program to AIDEA. AIDEA funds its operations and projects through corporate receipts and through the sale of bonds and does not use General Fund money.

Prepared by: D. Randy Simmons, Executive Director
Phone
Division AIDEA
Date/Time 1/27/00 11:53 AM
Approved by Commissioner Deborah B. Sedwick
Date 1/27/00
Agency

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HB 342

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 3, 2000

The Honorable Brian Porter
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Porter:

The Alaska Industrial Development and Export Authority (AIDEA) has been a key player in many of Alaska's economic successes through the years. AIDEA programs have financed smaller projects, such as the Unalaska Marine Center dock, and the multi-million dollar Red Dog mine and Federal Express aircraft maintenance facility. This bill I transmit today continues AIDEA's role in boosting economic development and creating jobs in the state by extending its bonding authority for development projects of up to $10 million and for conduit bond financing that does not involve the assets or credit of AIDEA or the state.

Under the bill, AIDEA's general bonding authority for projects up to $10 million would be extended for three years, until June 30, 2003. The bill also clarifies that the sunset provision does not apply to conduit revenue financing transactions. Projects larger than $10 million would still require specific legislative authorization.

In addition, this bill clarifies the procedures available to municipalities to grant tax exemptions for privately held interests in AIDEA-owned assets and projects, and instead enter into agreements and receive payments in lieu of taxes.

The bill also provides for the transfer of the rural development initiative fund (RDIF) program from the Department of Community and Economic Development (DCED) to AIDEA. This makes formal the program transfers authorized in last year's departmental merger bill. Transferring the RDIF program would enable AIDEA to further its economic development mission in communities of 5,000 or less.

The state is fortunate to have a financially healthy agency like the AIDEA to forge public-private partnerships that can strengthen Alaska's economic base. This bill will enhance the tools available to the AIDEA to further this mission.

Sincerely,

Tony Knowles
Governor

1-GS2009\A.3
Cook
4/12/00

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 342

Page 1, line 6, following ";":
Insert "**relating to staff of the Alaska Energy Authority;**"

Page 2, following line 24:
Insert new bill sections to read:

"*** Sec. 5.** AS 44.83.040(a) is amended to read:

(a) [THE CHAIR AND VICE-CHAIR OF THE ALASKA INDUSTRIAL DEVELOPMENT AND EXPORT AUTHORITY SHALL SERVE AS OFFICERS OF THE ALASKA ENERGY AUTHORITY.] The powers of the Alaska Energy Authority are vested in the directors, and three directors of the authority constitute a quorum. Action may be taken and motions and resolutions adopted by the Alaska Energy Authority at a meeting by the affirmative vote of a majority of the directors. The directors of the Alaska Energy Authority serve without compensation, but they shall receive the same travel pay and per diem as provided by law for board members under AS 39.20.180.

*** Sec. 6.** AS 44.83 is amended by adding a new section to article 1 to read:

Sec. 44.83.051. Executive director and staff; administration. (a) The authority shall appoint an executive director as the authority's executive officer. The authority shall delegate supervision of the administration of the authority to the executive director of the authority. The executive director is a member of the exempt service under AS 39.25.110, serves at the pleasure of the authority, and receives compensation fixed by the authority.

(b) The executive director appoints persons to the staff positions authorized by the authority, and staff compensation is fixed by the authority. Employees of the authority are members in the public employees' retirement system (AS 39.35).

(c) The authority may contract for legal and bond counsel, consultants, experts, and financial and technical advisors that the authority considers necessary for the conduct of studies, investigations, hearings, or other proceedings."

Renumber the following bill sections accordingly.

Page 5, line 15:

Delete "sec. 10"

Insert "sec. 12"

Page 5, line 16:

Delete "sec. 10"

Insert "sec. 12"

Page 5, line 19:

Delete "sec. 9"

Insert "sec. 11"

Page 5, line 29:

Delete "sec. 10"

Insert "sec. 12"

Page 5, line 30:

Delete "sec. 10"

Insert "sec. 12"

Page 6, line 1:

Delete "sec. 10"

Insert "sec. 12"

Page 6, following line 2:

Insert a new subsection to read:

"(c) Employees of the Alaska Industrial Development and Export Authority who are responsible for rural energy programs shall be transferred to the Alaska Energy Authority when the Alaska Energy Authority requests the transfer of those employees."

Page 6, line 3:

Delete "Section 5"

Insert "Section 7"

Page 6, line 4:

Delete "Sections 10 and 11"

Insert "Sections 12 and 13"

Page 6, line 8:

Delete "secs. 10 and 11"

Insert "secs. 12 and 13"

Delete "sec. 13"

Insert "sec. 15"

Page 6, lines 8 - 9:

Delete "secs. 10 and 11"

Insert "secs. 12 and 13"

Page 6, line 14:

Delete "secs. 12 - 14"

Insert "secs. 14 - 16"

AMENDMENT TO HB 342

Objective: Create an independent rural energy program under the auspices of the Alaska Energy Authority (AEA), separate from AIDEA's authority.

Powers of the Authority:

- Create separate and clear lines of authority and powers currently established under AS 44.83.020 - .995 and HB 40 (Ch 58, SLA 99, Section 66) and the Rural Energy Programs under AS 42.45 for AEA.

- Establish Executive Director position for AEA, reporting to the AEA Board of Directors. The Executive Director would answer to the Board and may employ staff, legal and bond counsel, consultants, experts, etc., as needed for the operation of the Authority.

- Transfer employees currently housed under AIDEA to positions to be established under AEA for the administration of the programs.

- Delete authority of the AIDEA chair and vice-chair as officers of the Alaska Energy Authority (AS 44.83.040).

HB

387

Representative Eric Croft

HB 387
The Alaska Religious Freedom Protection Act

Sponsor Statement

The Alaska Religious Freedom Protection Act (ARFPA) is a state response to United States Supreme Court decisions that have undermined the religious freedoms of Americans in recent years.

The United States and Alaska Constitutions contain nearly identical provisions stating that governments shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof." For most of the nation's history, the "free exercise" clause of the United States Constitution was interpreted to require that governments make reasonable exceptions to general laws if the implementation of those laws impinged on the religious practice of its citizens.

A good example is the case of Wisconsin v. Yoder, 406 U.S. 205 (1972). Members of the Old Order Amish religion allow their children to attend public school until the eighth grade to learn basic reading, writing, and math skills, but then the Amish religion requires the children begin preparation for adult baptism and life under the religious precepts of their faith. Pennsylvania allows Amish children of high school age to attend special vocational schools for three hours and then go home for religious and other instruction. Wisconsin, however, did not allow any exception to the compulsory school attendance law. Frieda Yoder, a 15-year old member of the Old Order Amish religion refused to attend public high school on religious grounds and her father, Jonas, was convicted of violating the law. The United States Supreme Court ruled that the compulsory attendance law violated the free exercise rights of the Yoder family. The Court ruled that the government may place a substantial burden on the free exercise of religion only if the government can show a compelling state interest and that the government's action is the least restrictive means of accomplishing that interest. This is known as the "compelling state interest" test for religious freedom. The Court noted that because the Amish children attended school until the 8th grade the burden on their education was relatively light and that the burden on the religion was proven to be substantial. The Yoder case and others stood for the proposition that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Yoder, 406 U.S. 221; see also Sherbert v. Verner, 374 U.S. 398 (1963).

The constitutional respect for freedom of religion embodied in the "compelling state interest" test was eliminated in 1990 by the United States Supreme Court in Smith v. Emp. Div., 494 U.S. 872 (1990). Justice Scalia, writing for a court divided 5-4, ruled that government no longer had to provide a religious exemption to general laws. "The Court today . . . interprets the [free exercise clause] to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable." Smith, 494 U.S. at 893 (Justice, O'Conner, dissenting).

The Smith decision met a storm of protest. In 1993, a broad bipartisan majority of both houses of Congress passed The Religious Freedom Restoration Act (federal RFRA) and the bill was signed into law by President Clinton. RFRA attempted to use congressional power to restore the "compelling state interest" test for religious freedom. In 1997, the United States Supreme Court ruled that the federal RFRA statute was an unconstitutional extension of federal power. City of Boerne v. Flores, 521 U.S. 507 (1997). The Flores decision effectively left any protection of religious freedom to the individual states. The Alaska Supreme Court has consistently interpreted the free exercise clause of the Alaska Constitution to require a compelling state interest analysis.
See Frank v. State, 604 P.2d 1068 (Alaska 1979) (allowing a religious exemption for the taking of a moose for an Athabaskan funeral potlatch). There is no present indication that the Alaska Supreme Court intends to follow the direction of the Smith decision in interpreting the Alaska Constitution. However, a change in the composition of the court or judicial philosophy could lead to this change in the future.

HB 387, the Alaska Religious Freedom Protection Act (ARFPA), will provide statutory protection for religious freedom in Alaska by enshrining the compelling state interest test for all state, municipal, and school district actions.

HB 387 is not intended to create an establishment of religion or allow a claim of religious freedom to authorize the infringement of the rights of others. It simply recognizes that Alaskans value their religious liberties and are willing to allow an exception from generally applicable laws for religious freedom unless the government shows a compelling state interest.

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

Advocates for Family & Freedom

To: Members of the Alaska House Community and Regional Affairs Committee

From: Chris Klicka

Date: February 29, 2000

Re: House Bill 387, The Alaska Religious Freedom Protection Act

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By way of introduction, the Home School Legal Defense Association is a national organization which has as its primary purpose the protection of the right of parents to direct the education of their children. We presently have more than 66,000 member families in all 50 states and the District of Columbia, with many member families in Alaska. Because the vast majority of our members choose to home school out of religious convictions, the protection of religious freedom is essential to our cause.

The Alaska Legislature has a tremendous opportunity to restore the protection of religious freedom for all citizens in the state. The U.S. Supreme Court, in 1997, denigrated the right of the free exercise of religious beliefs to a second class right. The Alaska Legislature must act now to protect religious liberty. Below are some commonly asked questions about state Religious Freedom Restoration Acts.

What will HB 387, the Alaska Religious Freedom Restoration Act, do?

The Alaska Religious Freedom Restoration Act (RFRA) reestablishes a test which courts must use to determine whether a person's religious belief should be accommodated when a government action or regulation restricts his or her religious practice. Known as the "compelling interest test," this test requires the government to prove with evidence that its regulation is (1) *essential* to achieve a compelling governmental interest and (2) the *least restrictive means* of achieving the government's compelling interest.

For example, in *People v. DeJonge*, a case argued by the Home School Legal Defense Association (HSLDA), a Michigan couple had the religious belief that they as the parents, although they were not certified teachers, should be teaching their children in their home rather than sending them to school. But the state law requiring all teachers to be certified did not permit

the couple to exercise this religious belief. Using the "compelling interest test," the court required the state to show that (1) teacher certification is *essential* to fulfill the state's compelling interest that children be educated and (2) that teacher certification was the *least restrictive means* to fulfill its interest. The state was able show without much difficulty that it had a compelling interest in seeing that its citizens were educated. But because this couple's children were scoring above the 90th percentile on standardized tests, the state could not prove teacher certification was *essential* for children to be educated and the least restrictive means to achieving that end. Thus, because the state could not satisfy the "compelling interest test," the parents were allowed to continue teaching their children according to their religious beliefs.

Why does Alaska need a RFRA?

Prior to 1990 the U.S. Supreme Court used the above test—the "compelling interest test"—when deciding religious claims. However, in a 1990 decision (*Employment Div. of Oregon v. Smith*) the Court tipped the scales of justice in favor of government regulation. The Court threw out the compelling interest test, which had shielded our religious freedom from onerous government regulation for more than 30 years.

The *Smith* decision reduced the standard of review in religious freedom cases to a "reasonableness standard." In other words, if a state regulation is "reasonable" (which they nearly always are), a religious objector loses. While all other fundamental rights (freedom of speech, press, assembly, etc.) remain protected by the stringent "compelling interest test," the Court singled out religious freedom, reducing its protection to the weak "reasonableness test."

In 1993, Congress attempted to remedy the *Smith* decision by enacting the federal Religious Freedom Restoration Act. This Act simply restored the "compelling interest test" in religious freedom cases. Four years later, the federal RFRA was struck down by the U.S. Supreme Court in the 1997 *City of Boerne* case.

As a practical matter, here are a few real-life examples of government restricting the free exercise of religion that have taken place under the "reasonableness test."

a) the long-standing practice of pastor-laity confidentiality has been repeatedly violated;

b) a Catholic hospital was denied accreditation for refusing to teach abortion techniques;

c) among other zoning ordinance conflicts, a church ministry to the homeless was shut down because it was located on the second floor of a building with no elevator;

d) a church was prohibited by a local city ordinance from feeding more than 50 people per day; and

e) Justice Fellowship reports that a Jewish minimum-security prisoner (CPA in jail for fraud, in 6th year of 8-year term) was denied the right to attend high holy day celebrations.

But Hasn't the U.S. Supreme Court already ruled the RFRA unconstitutional?

The 1993 federal RFRA attempted to use Congress' powers under Section 5 of the 14th Amendment to require both the federal and state governments to use the "compelling interest test" in religious freedom cases.

However, when the Supreme Court struck down the federal RFRA in 1997 (*City of Boerne v. Flores*), the problem wasn't with the "compelling interest test." The test had been used, as mentioned earlier, by the U.S. Supreme Court itself for more than 30 years. Rather, while the Supreme Court recognized the legitimacy of the "compelling interest test," it ruled that Congress could not *require* states to use this test in religious freedom cases.

A widely recognized principle of law is that states are free to protect an individual's right with a much higher standard than the U.S. Constitution itself affords. Under this principle and the *Boerne* decision, states are free to enact their own RFRAs, thereby choosing to apply the higher "compelling interest test" standard in their own religious freedom cases.

Should civil rights laws and ordinances be exempted from application of the Religious Freedom Restoration Act?

No. Religious freedom is one of many civil rights which all Americans should be allowed to enjoy. A civil rights exclusion in the RFRA simply makes religious freedom a "second-class" right, subordinate to all other civil rights. Instead, when a religious freedom right conflicts with another civil right, the two rights should be given the same level playing field by a balancing of interests using the compelling interest test.

In some situations, a civil rights law or ordinance should be upheld even when it conflicts with an individual's religious practice, while in other situations, the religious practice should be accommodated. Using the "compelling interest test" provided by HB 387, a court will be able to properly determine whether the government's interest in enforcing a particular civil rights law is compelling enough to override an individual's religious practice. If, however, civil rights laws are exempted from HB 387, religious freedom will *always* be curtailed when it conflicts with civil rights laws, even if the courts could have made a reasonable accommodation.

Will HB 387 create an increase in litigation?

No. This bill will simply restore the "compelling interest test," which the U.S. Supreme Court established almost 40 years ago as the standard of review for fundamental rights cases.

This "compelling interest test" worked well for over 30 years with no explosion of religious freedom cases. The consistent application of the "compelling interest test" in the courts "evened the playing field," giving people of sincere religious faith a fair chance against state regulations that violated their religious beliefs. Many times, both conservative and liberal religious and civil liberty organizations successfully used the "compelling interest test" to defend individuals' rights to freely exercise their religious beliefs.

As mentioned above, the federal RFRA, which restored the "compelling interest test" in religious freedom cases, was effective from its enactment in 1993 until the U.S. Supreme Court struck it

down in 1997. There is no record of an explosion in religious freedom litigation during this four-year period.

Furthermore, eight states have formally passed RFRAs to specifically restore the application of the "compelling interest test" in religious freedom cases (AL, IL, FL, TX, AZ, CT, RI, and SC). Seven more states, through state court precedents, have established a "compelling interest test" independent of the U.S. Supreme Court's damaging precedence in *Smith* and *Boerne*. (KS, MA, MN, VT, WA, WI, and MI.) None of these 15 states are experiencing an explosion in free exercise litigation.

Based on the lack of examples of excessive litigation during the almost 30 years of experience of using the "compelling interest test" for religious liberty (both before the *Smith* decision and during the federal RFRA years), we believe that restoring this test will generate very little, if any, new litigation. In fact, clarifying the standard for religious liberty under state law may prove to *reduce* the amount of litigation, because a clearly defined legal standard often leads parties to settle disputes before litigation ensues.

Will the passage of HB 387 result in a huge increase in litigation against local governments? Will this also increase the costs for the attorney general's office in defending state officials?

No. The same arguments above apply. The "compelling interest test" is not new. It has been in effect for most of the last 40 years. Local governments and state officials have not been inundated with religious freedom suits.

None of the eight states that have passed state RFRA have experienced any explosion of religious liberty cases, including Rhode Island where the law is seven years old The "compelling interest test" is time-tested.

Furthermore, the "compelling interest test" is simply a "balancing test." It does not give religious claimants an automatic win. It only "evens the playing field" for the little guy.

Is it acceptable to exclude certain people, such as prisoners, from protection under HB 387?

No. As an inalienable right, religious liberty should not be denied to any class of persons. Home School Legal Defense Association urges states not to deny the protections of a state RFRA to anyone (including prison inmates). Religious liberty is diminished for all if it is denied to any. Once the government excludes one politically unpopular group, it is all too easy to exempt others. Of the states that have enacted RFRAs to date, none has found the need to exclude anyone.

But won't HB 387 create an explosion in frivolous cases filed by prisoners?

No. Studies show no sudden surge in religious freedom litigation filed by prisoners during the four years of the federal RFRA demonstrate there was no explosion of cases. Justice Fellowship compiled the following data (provided by the Statistical Division of Administrative Office of the U.S. Courts):

- Prisoner RFRA cases for the years 1995–1996 accounted for about one-tenth of one percent (0.01%) of cases in U.S. courts.

- The National Federal Court statistics show that in 1995, out of 43,158 total U.S. civil cases nationwide (1110 prisoner cases), only 50 of the cases invoking the federal RFRA were filed by prisoners.

- In 1996, out of 48,755 U.S. civil cases, only 51 RFRA cases were filed by prisoners.

A state-by-state breakdown of information was only available for the following three states:

- In New Mexico, out of 407 U.S. civil cases filed in 1995, 0 were filed by prisoners invoking the federal RFRA. In 1996, out of 492 U.S. civil cases filed, 0 were filed by prisoners invoking the federal RFRA.

- According to the Virginia Attorney General's office, out of 1,099 prisoner lawsuits filed against sheriff departments between 1993 and 1997 only 7 were "religious-styled" cases.

- In Florida, only 5 prisoner religious freedom cases invoked the federal RFRA during 1993–1997.

These statistics show that the federal RFRA caused no explosion of cases filed by prisoners—a group considered most likely to take advantage of such a law.

What is HB 387 based on?

The state RFRA model supported by HSLDA is based on other time-tested state Religious Freedom Restoration Acts. It is a combination of the Rhode Island RFRA (the oldest—passed in 1993) and the Illinois RFRA. The substantive provisions of the bill, its heart, are found in all RFRA states. (e.g. Texas, South Carolina, Arizona, Connecticut, Florida, and Alabama). Of course, the "compelling interest test" is patterned directly after the U.S. Supreme Court's description of the test found in dozens of cases over the last 40 years.

Why can't we simply let the Alaska Supreme Court reestablish the "compelling interest test"?

States which have neither an enacted RFRA nor their own body of case law applying the "compelling interest test" have simply followed whatever the current federal standard is. Courts in these states have always relied on the U.S. Supreme Court's religious freedom standard of review and its interpretation and application of the "compelling interest test." The states need to establish their own standard.

Since *Smith* and *Boerne* set the current federal precedent, this means trouble for Christians and other people of sincere religious faith.

Does HB 387 replace all existing remedies to protect religious freedom?

No. It only creates an additional "track" which a religious claimant can use to protect his free exercise of religion. State constitutional and federal constitutional remedies are still available.

Is there a problem with the lack of definition for "religious belief"? For example, what if a group got together (such as a satanic group) and said it was a "religious group" and wanted to meet in a high school gym, but did inappropriate things? Under this law, would the school have to let everyone (including this group) meet in the gym, or let no one do it? Would schools that allow Fellowship of Christian Athletes or Young Life to meet in the gym also be forced to let everyone else in (or no one)?

The first issue is the concern over the absence of a definition of religious belief.

There is a large body of case law relating to the definition of "religion." (For a good summary of the case law see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581, 609-612 (1995)). For example, in *U.S. v. Seeger*, 380 U.S. 163, 176 (1965), the U.S. Supreme Court defined religious belief as "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God."

The drafters of the 1993 federal RFRA considered defining "religion" but decided against it primarily because the U.S. Supreme Court had already done so. Since the U.S. Supreme Court has defined religious belief in dozens of cases with sufficient clarity, it is not necessary to define it in a state RFRA.

Secondly, a response to the school hypothetical:

The hypothetical Satanists who are denied access to a school could make claims under the Free Speech Clause, the Free Exercise Clause, and the Equal Access Act. Their case would likely be considered under the Equal Access Act and the First Amendment's Free Speech Clause—not free exercise law. Under the Equal Access Act (effective since 1984), if a school lets one noncurriculum group meet, it must let all noncurriculum groups meet. When Congress was considering the Equal Access Act, people were concerned that it would lead to an explosion of Satanists, Nazis, and hate groups wanting to meet and organize in schools; however, this "explosion" has not occurred.

Under the Free Speech Clause of the First Amendment, religious expression receives the same level of protection as nonreligious expression. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951) (meeting permit). Free speech rights are essentially a ceiling on free exercise rights. The standard of review for free speech cases is the "compelling interest test" giving individuals who exercise their right to free speech the highest level of protection. See *Heffron v. Int'l Society of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981) (solicitation on state fair grounds).

Thus, once the school lets the Fellowship of Christian Athletes meet after hours, it must let in other groups. This is the case regardless of the standard of free exercise law. The school cannot discriminate among groups except to the extent it needs to regulate disruptive speech. See, e.g., *Tinker v. Des Moines*, 393 U.S. 503 (1969).

In state offices, if a person, because of a religious belief, wanted to have something distasteful on his desk, could his supervisor—under this law—ask for it to be removed?

It depends. If the item was on a teacher's desk, it could probably be removed under the Establishment Clause. If the item was on a desk not open for public view, it may be protected by the employee's free speech rights.

Free speech, the prohibition of establishment of religion, and Title VII considerations all would come into play here. However, like the school example, this scenario is likely going to be considered under the Free Speech Clause. Under U.S. Supreme Court precedent, when government regulates its employees' speech, a different test applies than when government regulates its citizens' speech. It's an easier test for the government to satisfy.

If the dispute over the object on the desk could not be resolved, the state RFRA could be invoked and the courts would have to balance the state's interest with the free exercise claim through application of the "compelling interest test."

CENTER FOR LAW AND RELIGIOUS FREEDOM

4208 Evergreen Lane, Suite 222
Annandale, VA 22003
Phone (703) 642-1070
FAX (703) 642-1075

TRANSMITTAL MEMORANDUM

DATE: February 29, 2000

TO: Representative John Harris

FAX: 907 465 3799

FROM: Betty L. Dunkum

RE: **Alaska Religious Freedom Protection Act**

Total Number of Pages (including this cover sheet): 8

COMMENTS:

Attached are some materials regarding the Alaska Religious Freedom Protection Act, HB 387, which is scheduled for a hearing before the Community and Regional Affairs Committee this Thursday, March 2, 2000. Please have someone insert copies of these materials in each committee member's packet. Please call me if you have any questions.

Sincerely yours,

Betty L. Dunkum

c:\my documents\faxes\faxminzner.doc

Center for Law and Religious Freedom

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Executive Assistant

MEMORANDUM

To: Members of the Alaska House Standing Committee on Community and Regional Affairs

From: Betty L. Dunkum, Esq.

Date: February 29, 2000

Re: **Religious Freedom St ate For Alaska**

For the reasons set out below, religious liberty in many states of the United States lacks adequate legal protection. As the first freedom guaranteed in the First Amendment to the U.S. Constitution, religious liberty should be fully enjoyed by Americans regardless of their state of residence. The Coalition For The Free Exercise Of Religion (presently consisting of over 70 religious faith groups and civil rights organizations) is seeking to enact federal legislation that would provide uniform legal protection in every state. However, because such a federal bill cannot cover as broad a spectrum of religious exercise as state law can, the Coalition is simultaneously assisting with legislation in states, such as Alaska, that appear committed to protecting all their residents and other persons that come within their jurisdiction.

1. Why Alaska Needs Its Own Religious Freedom Restoration Act

Prior to 1990, courts generally found an infringement of the First Amendment's clause protecting the free exercise of religion whenever a law or actions by a government official had the effect (intended or not) of substantially burdening a person's religious belief or practice. For example, pursuant to a state autopsy law, a state medical examiner could order the performance of an autopsy on a person who would have objected to the autopsy because of conflicting religious beliefs. Performance of the autopsy would substantially burden the religious freedom of the individual and his/her family. In another case, a city ordinance designating a church building as an historic landmark meant that the church could not alter its own property (*e.g.*, to expand the sanctuary or social hall or to establish a day-care ministry) without approval by the city landmark preservation board. This substantially burdened the church's collective religious freedom. Whenever courts found such a "free exercise" burden, they generally required that the government (the state medical examiner or the city, in these examples) give the religious person or body (here, the individual or the landmarked church) an exemption from the law.

The only exception to the general rule of free exercise was where the government could prove that denying religious accommodations was the least restrictive means of furthering a compelling government interest. In the historic preservation example above, the city would have

to prove that architectural preservation is a vitally important role for government and that there is no less onerous way to further this interest than to deny religious accommodations. Unlike landmark preservation cases, cities routinely met this "strict scrutiny" when churches sought exemption from fire and safety regulations applicable to their buildings.

But in 1990, the U.S. Supreme Court unexpectedly dropped the "compelling interest" test for most Free Exercise Clause claims. *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court held that the test did not apply to cases where the burden on religion was the result of a law that was generally applicable to all persons and groups. So, using the autopsy example above, the individual's family could not invoke the First Amendment to prevent the autopsy.

This 1990 turnabout by the Court so threatened religious liberty for all faiths that a national coalition of over 65 religious denominations and civil rights groups was formed. They drafted and, in 1993, Congress passed (almost unanimously) the Religious Freedom Restoration Act, which restored the "compelling interest/least restrictive means" test. RFRA required a religious exemption from any government action that substantially burdened the complainant's religious exercise.

However, in 1997, the Supreme Court held that RFRA unconstitutionally exceeded Congress' authority under Section 5 of the Fourteenth Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[1] Consequently, disparate impacts on religious liberty have no meaningful federal statutory protection against state or municipal law, policy, or practice. The First Amendment Free Exercise Clause is triggered only in the rare case where the state action intentionally discriminates against religious practice.

2. What Alaska Can Do To Restore Religious Liberty Protection

Friends of religious freedom should regularly check on the progress of our federal legislation and be ready to rally local support for a federal "RFRA II"--a bill that would uniformly (albeit less broadly) restore meaningful legal protection in every state.[2]

In addition, a state should enact its own RFRA, such as the Alaska Religious Freedom Protection Act, HB 387, because a state RFRA will affirm the state's commitment to protecting religious liberty. Indeed, eight states—Alabama, Arizona, Connecticut, Florida, Illinois, Rhode Island, South Carolina, and Texas—have already passed their own RFRAs, and a number of other states are in the same process.

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[1] While the high court has not addressed the issue, most scholars (and the Clinton Administration) agree that RFRA still applies against federal law or federal action. *See In re Young*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 43 (1998) (mem.).

[2] *See* Religious Liberty Protection Act, H.R. 1691, 106th Cong., 1st Sess. (1999) (utilizing federal Commerce Clause and spending power, rather than Section 5 of the Fourteenth Amendment).

The RFRA Coalition urges any state considering enactment of its own law to include the following essential elements.

a) **The Compelling Interest/Least Restrictive Means Test.** State RFRAs should apply this test to any government action that places a substantial burden on a person's religious exercise.

b) **Broad Definition For The "Exercise Of Religion".** The test should be triggered when government burdens an act, or a refusal to act, that is motivated by religious belief, whether or not the burdened religious exercise is compulsory or central to a larger system of religious belief. Reference to the First Amendment and/or the state constitution's religious liberty clauses should be avoided, so as not to imply that previous case law interpreting "the exercise of religion" under those provisions is being incorporated into the bill.

c) **Universal Protection.** As an inalienable right, religious liberty should not be denied to any class of persons. The Coalition urges states not to deny the protections of a state RFRA to anyone. Religious liberty is diminished for all if it is denied to any. And once a law omits one politically unpopular group it will be all too easy to exempt others. The Coalition opposes efforts to pass a state RFRA unless it is free of exemptions for prison inmates, land use claims, civil rights ordinances, etc. In some cases, suitable language can be framed on specific issues; please contact the Coalition if such language is required.

The Alaska Religious Freedom Protection Act, HB 387, presently includes all of the above elements. Please support this bill and oppose any amendments that would create "carveouts" for any group of people.

Please tell the Center for Law and Religious Freedom (703-642-1070, x3501) how we can assist you.

Examples Demonstrating Why Alaska Needs a Religious Freedom Restoration Act

In this document, several leading authorities on religious freedom in this country provide examples of why state RFRAs are needed.

MARK CHOPKO, General Counsel, U.S. Catholic Conference:

- During the years that the federal RFRA was still valid law, the Ninth Circuit found that RFRA had been violated when prison **personnel deliberately intercepted confessional communication**. *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997). Absent a religious freedom law, it is debatable that a prison regulation dictating that all conversations between prisoners and outsiders will be intercepted would have to excuse religious communications.

- The real power in RFRA "lay in its use in negotiation and persuasion in numerous local and administrative disputes . . . **The ability to have some legal basis on which religious persons and organizations could depend** as a starting point in negotiations was an enormous benefit[.]"

- Many dioceses report conflicts over the **loss of land by eminent domain for such things as creation of bicycle paths** or parking lots. In addition, St. Michael's Abbey in Orange County, California, sued the civil authorities to set aside a plan approving large-scale private development on land adjacent to the Abbey's land which had been, until recently, dedicated to private and quiet religious services.

- Officials in Arapahoe County, Colorado, have placed **numerical limits on the number of students that may be enrolled in religious schools**, and indeed, on the size of congregations of various churches as a way of limiting growth.

- In Douglas County, Colorado, administrative officials initially proposed **limiting the operational hours of a church** the same way they do any "commercial" facility. Limiting its operational hours means that a church could not lawfully engage in any act of service of devotion during those prohibited hours.

- In the Grand Teton area of Wyoming, local officials have proposed **limiting the number of persons who may seek spiritual consolation** and retreat at the Camp St. Malo owned by the Archdiocese of Denver. The camp was used by Pope John Paul II during his visit to the United States in 1993 for a day of quiet reflection.

MARC STERN, Senior Counsel, American Jewish Congress:

- A Muslim child won a judgment for injuries which left him physically and, to some degree, mentally handicapped. The child's lawyer sought to invest the judgment in an interest-bearing account as required by stated law, and as would appear, in the child's best interest. The parents objected that their religious beliefs forbid the taking of interest. **The judge ordered the parties to show cause why the lawyer should not be appointed guardian with the obligation, over the parents' objections, to invest the monies in an interest-bearing account.** While there are many financial arrangements that would provide the same "return" and would not violate Islamic law, the state law did not permit alternative investments of this sort.

- The director of an Immigration and Naturalization Service **detention facility refused to provide detainees--some of whom were seeking asylum for religious persecution—pork-free diets.** Because the President ordered federal officials to comply with the federal RFRA (part of which is no longer available) when threatened with a lawsuit, the manager agreed to provide a pork-free diet.

- A school district in **South Carolina banned the wearing of hats in school. The rule applied to a Jewish boy who wished to wear a yarmulke in school** as Orthodox Jewish practice requires. When threatened with a suit under the federal RFRA (an option now unavailable), the school board accommodated the student.

- A Jewish man was killed in an accident involving a commuter train. **The coroner insisted on an autopsy certifying the cause of death. The family of the deceased objected on religious grounds to the performance of an autopsy.** An MRI or CAT scan was offered in compromise. Once a lawsuit was threatened under the federal RFRA (an option now unavailable), the state attorney general advised the coroner to accommodate such a request.

- The **Illinois Athletic Association requires ball players to play bare-headed. This precluded any Orthodox Jewish boys that would wear yarmulkes.** The league defended its rule on grounds of safety. It argued that if players wore hats, the hats might fall of and other players trip over them. When an Orthodox school sought to play in the league and have its students wear yarmulkes, it was told no. The school offered to make the boys attach the yarmulkes to their hair with clips so that they would not fall off, and the Seventh Circuit held that the alternative had to be explored. Today, such a case would likely be dismissed at the initial motions stage, because it is a "facially neutral" law, and it is reasonable.

VON KEETCH, Church of Jesus Christ of Latter Day Saints:

- One city adopted an entirely new Comprehensive Plan covering development within its city. The Plan was based on the "overwhelmingly residential aspect of the City," and limited any new development within the city to single family unit dwellings. **The City's plan set up an "Educational and Religious Zone (ER) " for schools and churches that already existed within the city.** Although any entity could make a request for such a zone change, the zoning would be changed only if *the applicant* seeking the change *could prove* that (1) "the city made a mistake in zoning the property" in the first place; or (2) "a change in condition has occurred making the property more suitable for ER use than for residential use." *See Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn., Jan. 27, 1998).

- **A religious mission for the homeless operated by the late Mother Teresa's order has been shut down because it was located on the second floor of a building without an elevator.**

- **Adult children with strong religious convictions about serving their feeble parents have been prevented form volunteering to care for their elderly parents** housed in government-regulated nursing homes. *See Greater New York Health Care Facilities v. Axelrod*, 770 F. Supp. 183 (S.D.N.Y. 1991).

- **One district court held that an unnecessary autopsy on a young Hmong man did not constitute a violation of the Free Exercise Clause,** despite the religiously-based belief of his family that the autopsy condemned the spirit of the deceased. The court had originally ruled in favor of the family, but after Smith, felt compelled to reverse its earlier ruling. The judge, when issuing its order against the family, remarked that "I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed." *You Vang Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990); *see also Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt, conservative Jewish beliefs).

- **The strict confidentiality of communications between member and clergy has come under strong attack,** with litigants attempting to gain information or otherwise discover sacred confessional information for use in pursuance of their civil claims. *See, e.g., Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992); *Scott v. Hammock*, 870 P.2d 947 (Utah 1994).

- Local governments have attempted to impair or altogether eliminate proselytizing by Church missionaries by passing "generally applicable" laws that happen to place **severe restrictions on the times and places that missionaries may contact door-to-door.** Local officials have attempted to curtail church proselytizing in such cities as Mundelein, Illinois; Dover, New Jersey; Flemington, New Jersey; Chester, Connecticut; Valencia, California; Media, Pennsylvania; Downers Grove, Illinois; Marin County, California; and Seven Hills, Ohio.

STEVE McFARLAND, former director of the Center for Law and Religious Freedom at the Christian Legal Society:

- **An Orthodox Jewish rabbi was threatened with criminal prosecution for leading morning and evening prayers in a converted garage in one of Miami's single-family residential areas.** The U.S. Court of Appeals for the Eleventh Circuit held that the city's interest in an exception-free zoning plan outweighed the rabbi's interest, because the services "are not integral to [his] faith" and because the burden on the rabbi and his friends of having to relocate "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit [unemployment compensation]."

- **A federal judge in Philadelphia granted judgment for the city against a Seventh-Day Adventist church to which the city had issued a building permit and then revoked it *after construction had commenced*** when the city discovered it had erred in calculating the number of parking spaces its code would require.

- **Religious student groups or clubs are penalized if they require that their student leaders share a particular religious belief.** Many campuses deny official charter status to any group that discriminates in its leadership selection based on religion. This means that the chapter cannot meet on campus, use campus media to announce their activities, or distribute literature to their peers. Legal battles have taken place at: University of Arizona, University of Minnesota, University of Kansas, University of Toledo, Texas Institute of Technology, Johnson State University (VT), California State University - Monterey Bay, and Georgia Institute of Technology.

Without SH

By Lee Boothby

In 1991 the archbishop of San Antonio was denied a permit to enlarge St. Peter's Catholic Church in Boerne, Texas. The archbishop's challenge of the denial led to *City of Boerne v. Flores*,[1] in which the U.S. Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act (RFRA) of 1993. As a result, many religious people are like the homeless—without shelter.

As with many church-state cases, the real issue here isn't the particular; it's the universal behind it. In *Flores* the problem wasn't the denial of the building permit per se, but the rationale the Court used in upholding the denial, which was that RFRA was unconstitutional.

RFRA arose in response to the Supreme Court's decision in *Employment Division v. Smith*,[2] which eradicated what many court observers believed to be bedrock constitutional principle first established in *Sherbert v. Verner*[3] and amplified in *Wisconsin v. Yoder*.[4] Under *Sherbert/Yoder*, when a governmental requirement conflicted with an individual's religious practices, in order for the requirement to prevail over the individual's religious practices the government had to demonstrate a compelling state interest that showed why the practice should not be allowed. Then, even if the government was able to demonstrate that interest, it had to prove further that there was no less restrictive means by which to achieve its secular purpose. In other words, the onus and burden was on the government to show that it had a very good reason to restrict a religious practice; if not, then those seeking an exemption or accommodation to a law that restricted their practice should, ideally, have gotten it.

But in a radical departure from precedent, the *Smith* Court stated that the free exercise clause of the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[5]

According to *Smith*, the only time the *Sherbert/Yoder* test applies is in the hybrid situation in which the free exercise claim is raised (1) "in conjunction with other constitutional protections, such as freedom of speech and of the press"[6] or (2) "where the state has in place a system of individual exemptions," such as in unemployment compensation cases. In the latter situation, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[7]

Thus *Smith* relegated the Free Exercise Clause to only an antidiscrimination provision leaving unprotected individuals whose religious beliefs may be somewhat different from society's mainstream. The *Smith* justices reduced free exercise protection while completely aware that their action might have a disparate effect on those who are members of minority religions. The Court stated:

"It may fairly be said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[8]

This diminished understanding of free exercise protection was not shared by much of the American religious community, the Congress, or the president. The result was RFRA, which mandated that federal, state, and local government be subject to the compelling state interest/least restrictive alternative test

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ILLUSTRATION BY RALPH BUTLER

when free exercise claims were raised by an individual who found his or her religious practices were in conflict with governmental law, regulation, or action.

When Congress enacted the RFRA, it relied primarily on its Fourteenth Amendment enforcement power. The Fourteenth Amendment provides in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

So for now, Americans are withou it comes to free exercis

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The courts have repeatedly held that the religion clauses of the First Amendment are applicable to the states by reason of the Fourteenth Amendment to the United States Constitution. Thus those who argued that under Section 5 of the Fourteenth Amendment Congress had the right to enact RFRA contended that "Congress . . . is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's due process clause, the free exercise of religion, beyond what is necessary under *Smith*."[9]

However, the Court held that in adopting RFRA, Congress went beyond its Fourteenth Amendment authority. Because the *Smith* Court had decided the scope of the Establishment Clause, when Congress enacted RFRA, it went too far:

"Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[10]

Also, the Court concluded that "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."[11] As the Court noted, "in most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."[12]

In summary, the Supreme Court instructed that "when the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles."[13] The Court argued that once interpretation of the Free Exercise Clause was made by the courts, "it is this Court's precedent, not RFRA, which must control."[14]

The *Flores* decision, of course, did not settle the argument or end the problem. On the contrary.

First, it was argued that although RFRA has been held unconstitutional as far as the federal legislation may be applied to state and local governments, it is not unconstitutional with reference to federal agencies. This is because the Fourteenth Amendment, the basis of the *Boerne* decision, does not apply to the federal government. In a recent case, *In re: Young Christians v. Crystal Evangelical Free Church*,[15] the Eighth Circuit Court of Appeals held that the Bankruptcy Act also violated RFRA. (In these cases, bankruptcy trustees recovered from churches the tithes paid by bankruptcy debtors.) The court concluded that RFRA was an appropriate means by which Congress could modify the United States bankruptcy laws.

Second, in *Flores* three of the justices dissenting from the majority argued *Smith* itself should be reexamined. Justice O'Connor, joined by Justice Breyer, concluded that the Court in *Flores* may well have been correct in ruling that Congress did not have the power under the Fourteenth Amendment to enact RFRA in light of the Court's earlier *Smith* deci-

sion. But she observed that the *Flores* decision "is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause."[16] Justice O'Connor then stated that "this is an assumption that I do not accept."[17] She continued, explaining that the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."[18]

In his *Flores* dissent, Justice Souter had "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."[19] He stated he was "not now prepared to join Justice O'Connor in rejecting it [*Smith*] or the majority in assuming it to be correct."[20] But he called for "a full adversarial consideration" of the issue. Justice Souter stated that "this case should be set down for reargument permitting plenary examination of the issue."[21]

shelter when of religion.

The *Flores* case continues to generate much heat. Professors Eisgruber and Sager argued that RFRA was "practically unworkable" and that in *Flores* the Court "was renouncing a congressional vision of religious liberty that was at radical odds with its own."[22] In contrast, Oliver Thomas, special counsel for religious and civil liberties of the National Council of Churches, compared *Flores* with the century-old *Dred Scott* decision, saying the "decision . . . is a blow not only to the sovereignty of the Congress but to the American people as well."[23]

In June of this year federal legislation was introduced to reinstate the compelling state interest/least restrictive alternative test as part of federal law applicable not only to the federal government but also to state and local governments. But the new legislation, called the Religious Liberty Protection Act, is limited to situations that involve or affect interstate commerce, when the burdensome state program is a recipient of federal funds, and when the accommodation is aimed at avoiding religious discrimination. Nor is it without detractors (see pp. 10-14). Besides this law, a broad-based coalition of religious organizations is currently asking state legislatures to pass legislation requiring the application of the *Sherbert/Yoder* test in each state.[24]

The bottom line in this free exercise mess is that though the *Sherbert/Yoder* test was hardly perfect, it did provide some level of judicial protection for the free exercise of religion. After *Smith* and now *Boerne*, that protection, with rare exceptions, is all but gone. Even worse, among many scholars who oppose the jurisprudence behind *Smith*, and who see a need for greater free exercise protection, much disagreement exists on the best way to reinstate these protections.

So for now, Americans are without shelter when it comes to free exercise of religion. A sad state of affairs, especially for a nation that views the free exercise of religion as one of the most basic of all human rights, to be protected.

FOOTNOTES

[1] 117 S. Ct. 2157 (1997).

[2] 494 U.S. 872 (1990).

[3] 374 U.S. 398 (1963).

[4] 406 U.S. 205 (1972).

[5] *Smith*, 494 U.S. 879.

[6] *Ibid.*, p. 881.

[7] *Ibid.*, p. 884.

[8] *Ibid.*, p. 890.

[9] *Flores*, 117 S. Ct. 2163.

[10] *Ibid.*, p. 2164.

[11] *Ibid.*, p. 2171.

[12] *Ibid.*

[13] *Ibid.*, p. 2172.

[14] *Ibid.*

[15] __ F.3d __, No. 93-2267 (8th Cir. 1998).

[16] *Flores*, 117 S. Ct. 2176 (O'Connor, J., dissenting).

[17] *Ibid.*

[18] *Ibid.*, p. 2177.

[19] *Ibid.*, 2186 (Souter, J., dissenting).

[20] *Ibid.*

[21] *Ibid.*

[22] Eisgruber and Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 83.

[23] Clarence Page, "Keeping the Faith: Religious Freedom Act Could Turn Into Worthy Amendment Scheme," Chicago *Tribune*, July 2, 1997, p 19.

[24] See *Liberty*, July/August 1998, p. 8.


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