April 18, 1996

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

Re: Tribal Sovereignty Questions
A.G. file no: 663-96-0521
1996 Op. Att'y Gen. No. 2

Dear Senator Taylor:

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

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

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

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

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

deny equal protection to persons who are not members of the group if the benefits provided with the funds are made available to the public-at-large in a non-discriminatory manner.

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

State Revenue Sharing for Unincorporated Communities

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

> **State aid to unincorporated communities.** (a) The department shall pay to each unincorporated community an entitlement each fiscal year ***to be used for a public purpose***. The department with advice from the Department of Law shall ***determine whether there is in each unincorporated community an incorporated nonprofit entity or a Native village council that will agree to receive and spend the entitlement.*** If there is more than one qualified entity in an unincorporated community, the department shall pay the money under the entitlement to the entity that the department finds most qualified to receive and spend the money. ***The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law.*** If there is no qualified incorporated nonprofit entity or Native village council in an unincorporated community that is willing to receive money under an entitlement, the entitlement for that unincorporated community may not be paid. ***Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.*** If at least $41,472,000 is appropriated for all entitlements under

> AS 29.60.010 -- 29.60.310 for a fiscal year, the entitlement for each unincorporated community under this subsection for that year equals $40,000. Otherwise, the entitlement equals $25,000.
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> (b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit.

(Emphasis added.)

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

> (1) the applicant must agree to irrevocably dedicate for a public purpose the payment that the applicant receives under AS 29.60.140;
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> (2) the applicant must be providing the residents of the unincorporated community with a public facility or service as of October 1 of the computation year;
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> (3) the applicant must have held a public meeting to give residents the opportunity to express their ideas and preferences for the use of money received under AS 29.60.140 and must have posted notice of the meeting in three public and prominent places in the community for at least 15 days before the meeting; and
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> (4) the applicant must agree to make a service or facility provided with the money received under AS 29.60.140 available to every person in the community regardless of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy, parenthood, or political affiliation.

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

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[2] The former AS 29.89.050 provided that the state was to pay $25,000 annually to a "Native village government for a village which is not incorporated as a city. . . ." The attorney general's

We have been advised by the Department of Community and Regional Affairs (DCRA), the agency that administers this program, that it is not aware of any instance in which a Native village council or tribe refused or failed to execute a resolution waiving immunity from suit for claims arising out of activities of the council related to its entitlement under this program. According to DCRA, since FY81, the first year that unincorporated communities received funding under the revenue sharing program, DCRA is aware of only four instances in which notice was received regarding a problem with the program. The problem was related to Native and non-Native entities submitting competing applications from within the same community for state revenue sharing funding. The unincorporated communities involved were: Cantwell (1983); Circle (1985); Chistochina (1993); and Chitina (1994). It is our understanding that each of these situations was resolved with the encouragement and assistance of DCRA, as appropriate, to help facilitate the parties working together to reach agreement on which entity would be the proper recipient; if necessary in this type of situation, DCRA makes the determination of the most qualified entity. 19 AAC 30.094.

Unincorporated Community Capital Project Matching Grant Program

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

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

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

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

(Emphasis added.)

The terms of the grant agreements for this program are further specified in 19 AAC 55.080, including a requirement that the unincorporated community must submit a resolution approving the capital project and accepting the terms of the grant agreement. 19 AAC 55.080(a)(5). In addition to the required resolution waiving sovereign immunity, the standard provisions of the grant agreement (which also must be approved by resolution of the recipient) provide that the project

must be dedicated to a public purpose and that the "benefits of the project shall be made available without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood." Standard Provisions, article 19. Article 26 of the Standard Provisions addresses sovereign immunity:

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

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

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

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

Similarly, under AS 37.05.316, grants to named recipients, and AS 37.05.317, grants to

Village Safe Water Program

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

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

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

Management Order" on the village safe water program and the grant agreement are attached as Appendix E.

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

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

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

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

As discussed in my January 11, 1996, letter to the Legislature, the Alaska Supreme Court has held that judicial recognition of tribal sovereign immunity turns on whether Congress or the executive branch of the federal government has recognized the particular group in question as

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a complaint or notice of improper action was received relating to a grant.

a tribe. In *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977), the court determined that Metlakatla was entitled to sovereign immunity, holding:

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

The court in *Atkinson* went on to consider whether Metlakatla's sovereign immunity had been waived by the congressional act establishing state civil jurisdiction over action involving Indians (28 U.S.C. § 1360(a), commonly known as Public Law 83-280), by the purchase of liability insurance by the Community, or by the "sue and be sued" clause in the Community's corporate charter. The court concluded that none of these actions constituted or effected a waiver of Metlakatla's sovereign immunity. In the absence of any clear waiver of sovereign immunity in the language of Public Law 83-280 or its legislative history, the court held that it should not imply one. 569 P.2d at 167. With respect to liability insurance, the court held that a waiver of sovereign immunity should not be implied from an act which was intended to protect tribal resources, *i.e.*, the purchase of liability insurance. *Id.* at 169. Finally, the court held that the "sue or be sued" clause in the corporate charter of the Metlakatla Indian Community had no effect on the suit involved because the suit was concerning acts of the Community in its governmental capacity (as organized by constitution and by-laws under section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476), not its corporate capacity (as organized by corporate charter under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, as made applicable to Alaska Native groups by the Act of May 1, 1936, 25 U.S.C. § 473a).

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

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

In *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), the court ruled, in a 3-2 decision, that a contract action against Stevens Village was not barred by sovereign immunity because Stevens Village was not a sovereign and therefore did not possess sovereign immunity. The court, reiterating its conclusion in *Atkinson v. Haldane*, 569 P.2d at 161-63, that "judicial recognition of tribal sovereign immunity turn[s] on whether Congress or the

executive branch of the federal government, ha[s] recognized the particular group in question as a tribe," found that neither the Indian Reorganization Act nor any subsequent Congressional legislation had granted or recognized sovereign status to Alaska Native groups.[4] 757 P.2d at 34-35.

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

The court in *HCA* held that even assuming that HCA would be entitled to sovereign immunity based on its historical tribal status, HCA had waived its immunity by agreeing to arbitrate its dispute with Hydaburg Fisheries. *Id.* The court distinguished the facts in *HCA* from those in a Ninth Circuit decision which concluded that a consent to arbitrate disputes arising out of a management agreement between an Indian tribe and the non-Indian operator of the tribe's bingo enterprise on the reservation did not constitute a waiver of the tribe's sovereign immunity. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989). In *Pan American*, the arbitration clause did not unequivocally and expressly indicate the tribe's consent to waive its

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

sovereign immunity because, among other reasons, the tribe had not subjected itself to the jurisdiction of either the state or federal courts, as was the case in the arbitration clause in the HCA contract. 826 P.2d at 755. In addition, *Pan American* involved a challenge to a tribal ordinance and a direct attack on the tribe's authority to regulate matters on its reservation, not a suit to compel arbitration or enforce an arbitration award as in *HCA*. 826 P.2d at 754.

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

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

It is well-established law that federally recognized Indian tribes possess sovereign immunity from suit. *Pit River Home and Agricultural Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994); *State v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988) (tribe recognized by the federal government or that establishes tribal status based on historical factors possesses sovereign immunity). "Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional

authority to adjudicate claims raised by or against tribal defendants." *Pan American Co.*, 884 F.2d at 418. A tribe's immunity remains intact absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 (1940). A waiver of sovereign immunity cannot be implied, but must be unequivocally stated. *Id.* However, even if the tribe is immune, individual officers of the tribe will not be immune unless they were acting in their representative capacity and within the scope of their authority, nor does tribal immunity extend to individual members of an Indian tribe. *Native Village of Venetie*, 856 F.2d at 1387; *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

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

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

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

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

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

First, when state monies are granted to a qualified recipient in an eligible unincorporated community under the state revenue sharing, capital project matching grant, and village safe water programs, whether that recipient is a Native village council or an incorporated nonprofit, the transaction is not an inter-governmental transfer of money. Rather, the state is *contracting* with an appropriate entity to deliver services in the unincorporated community. These funds are provided to eligible entities across the state, regardless of their racial ancestry or make-up.[5]

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

Third, an express waiver of sovereign immunity is required of any Native tribe or village council as a condition of receipt of the grant monies. Finally, the enabling statutes for both the revenue sharing program and the capital matching grant program specifically provide that neither

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

of the programs, nor any action taken under them, enlarges or diminishes the governmental authority or jurisdiction of a Native village council. AS 29.60.140(a); AS 37.06.030(g).

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

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

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

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

The Supreme Court, both before and after the enactment of 18 U.S.C. § 1151, has consistently phrased the test for a "dependent Indian community" as whether the land at issue has

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

been set aside for the use and occupancy of Indians as such, under the superintendence of the federal government. *United States v. John*, 437 U.S. 634, 648-49 (1978); *United States v. McGowen*, 302 U.S. 535, 539 (1938). As stated by the Ninth Circuit Court of Appeals in *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1391 (9th Cir. 1988), these decisions "turned on the dependent nature of the communities and the federal government's role as regulator and protector of those communities."

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

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

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

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

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

Conclusion

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

Circuit.

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

Very truly yours,

Bruce M. Botelho
Attorney General

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