April 26, 1996

The Honorable Rick Halford
Alaska State Senate
State Capitol
Juneau, Alaska 99801

The Honorable Bert Sharp
Alaska State Senate
State Capitol
Juneau, Alaska 99801

Re: Supplemental Housing
Development Grants
A.G. file No. 661-96-0688

Dear Senator Halford and Senator Sharp:

You have asked whether the state may provide funds under the Alaska Housing Finance Corporation's (AHFC) supplemental housing development grant program (AS 18.55.998) to regional housing authorities (RHAs) for use in connection with housing projects constructed under the Department of Housing and Urban Development's (HUD) Mutual Help Homeownership Program. We conclude that it is legally permissible for AHFC to make supplemental development grants to RHAs for mutual help projects. Although your letter specifically referenced only state constitutional provisions and statutes, much of this opinion necessarily focuses on federal law which we think would control this issue and upon which the Alaska Supreme Court would heavily rely if it were called upon to render an opinion.

FACTUAL BACKGROUND

Indian Housing Programs

HUD housing programs are authorized by the United States Housing Act of 1937. That act authorizes HUD to make loans to public housing agencies for the development or administration of public or low rent housing. The act originally made no reference to American Indians and it was not until the early 1960's that HUD made specific efforts to meet Indian housing needs. In 1961, HUD recognized Indian tribes as entities which were eligible for public housing assistance. In 1964, HUD joined with the Bureau of Indian Affairs (BIA) in establishing the Mutual Help Homeownership Opportunity Program, the first housing program to promote Indian homeownership.

Congress gave formal statutory recognition to HUD's authority to provide housing assistance to "Indian areas" through the Housing and Urban Development Act of 1968. In 1969, at the direction of President Nixon, HUD substantially expanded the scope of its Indian housing programs. In 1974, Congress passed the Housing and Community Development Act, which specifically included Indian tribes as "units of general local government" eligible to compete for block grant funds for planning and other community development activities. It also specifically authorized new funding for the construction of Indian housing.

In 1988, Congress passed the Indian Housing Act, which established a separate title in the U.S. Housing Act of 1937 for housing assistance for Indians and Alaska Natives. The act was intended to separate Indian housing programs from the general public housing statutes and regulations. Many of those provisions were enacted to address the housing problems of urban areas where most public housing units are located. This sometimes made it difficult to develop housing in rural areas and on reservations where almost all Indian housing is located.

HUD currently operates two major programs under the Indian Housing Act. The low income program provides funding for the development of multi-family rental housing by Indian housing authorities. The mutual help homeownership opportunity program provides financial assistance for the construction of individual homes for purchase by Indians.

Regional Housing Authorities

Following passage of the Housing and Urban Development Act of 1968, HUD undertook to greatly expand the pace of housing construction under its Indian housing programs. In 1970, President Nixon announced a new Indian housing initiative under which the federal government committed to the construction of 30,000 new Indian housing units over five years. Alaska Senator Ted Stevens was influential in having HUD assign 6,000 of the units to meet the housing needs of Alaska Natives.

In April 1971, the Alaska Legislature enacted a bill introduced by Senator Clifford Groh providing for the creation of regional housing authorities. The legislation stated that the authorities were being created for "the specific purpose of implementing the President's National Indian Program for Indian Housing." Sec. 1, ch. 123, SLA 1971. According to Senator Groh, the language of the bill was based on Oklahoma and New Mexico statutes providing for the creation of Indian housing authorities. Testimony before the House Finance Committee indicated that the sponsors of the bill had considered authorizing the Alaska State Housing Authority to participate in the program, but preferred the local control that creation of regional housing authorities would provide. House Finance Committee Minutes, April 29, 1971, pp. 411--414.

AS 18.55.996(a) establishes 15 regional housing authorities and designates various Alaska Native associations to operate them. It is important to note that the housing authorities are not tribal entities. They are statutorily created public corporations of the state which do not possess the various attributes of tribal status such as sovereign immunity. While they are state instrumentalities, they are not state agencies and have a statutory existence independent of state government.

Under AS 18.55.996(b), RHAs have the same powers that AHFC possesses under AS 18.55.100 -- 18.55.290. Pursuant to those statutes, RHAs may participate in any federal housing program for which they qualify. The principal federal programs operated by RHAs are HUD's low-income rental program and the mutual help homeownership opportunity program.

The Mutual Help Program

The Mutual Help Homeownership Opportunity Program was created to increase homeownership among American Indians and Alaska Natives. It was initiated by HUD in 1964 in cooperation with the BIA. The program was codified in statute as part of the Indian Housing Act of 1988. Except for unusual circumstances, participation in the program is limited to American Indians and Alaska Natives.

The program authorizes federal financial assistance to Indian housing authorities for the construction of single-family dwellings. Indians and Alaska Natives are eligible to purchase homes under the program if they agree to contribute land, labor, cash, materials, or

equipment to help build the house. The house is then leased to the individual under what is essentially a lease-purchase agreement. The homebuyer makes monthly payments based on income and the purchase price declines each month by a scheduled amount. Upon completion of the lease period, the homebuyer acquires title to the property. The home may be purchased at any time prior to expiration of the lease by paying the remaining balance.

The Supplemental Grant Program

HUD limits the amount of money that RHAs receive for each residence constructed under the mutual help program. The use of these funds is also restricted and grants may not be used for anything other than on-site improvements. Several factors made these limitations particularly problematic in rural Alaska. Land claims issues often prevented RHAs from obtaining clear title to land close to villages. HUD regulations also require housing to be built above the flood plains in which many villages are located. The result has been that mutual help projects are often built as small subdivisions located outside the village. The HUD funding restrictions, however, prohibited the RHAs from using HUD funds to build access roads from the village or to extend utilities to the subdivision.

During the 1970's, villages tried to meet the need for access roads through the state's local service roads and trails program or special legislative appropriations. Funding for utilities was generally obtained through special appropriations or other state or federal programs. Often the viability of a project depended on the ability of a local legislator to obtain funds for these associated non-housing costs. On several occasions, HUD funding authorizations for projects expired before state appropriations could be obtained.

In 1981 the legislature addressed this problem by creating the supplemental housing development grant program, AS 18.55.998, which funds project costs not covered by HUD funding. The final version of the bill limited use of supplemental grant funds to the "cost of on-site sewer and water facilities, road construction to project sites and extension of electrical distribution systems to individual residences." Establishing a centrally managed grant fund also allowed state funds to be directed to projects on an as-needed basis as they were approved by HUD.

In 1988 the legislature amended AS 18.55.998 to permit supplemental grants to be used for "energy efficient design features in homes." This amendment authorized state funds to be used in housing construction for items such as thermal-efficient windows and additional insulation. Approximately 30 to 40 percent of the state grant is used for these types of improvements in a typical mutual help project.

The state supplemental grant program is not tailored to any specific federal housing program. It is intended to facilitate RHA participation in any HUD program. In fact,

approximately 40 percent of state grants go to a HUD low-income program which primarily funds construction of rental housing units and has no Alaska Native preference requirements.

Although the state supplemental grant is usually set at 20 percent of the federal grant, it is not a "match" for federal funds as that term is generally used. A federal grant must have already been independently approved before an RHA can apply for the state grant. Although the two grants are awarded and administered separately, they are tied together as a practical matter because HUD will not approve the start of construction under its grant unless other funds are available to provide for the associated infrastructure. If supplemental grant funds are not available for a project, construction will probably not start and eventually HUD authorization for the project will expire.

While the state and federal grants fund the development of a specific housing project, state grant funds are largely used for purposes which benefit the community as a whole. Use of an access road is not limited to project residents and its construction will likely open up additional areas for development. The upgrading and extension of existing electrical facilities is a benefit to the entire community. Assuring that houses have safe water and sewer systems is a legitimate public health concern. These types of expenditures develop community infrastructure and generally benefit the entire community.

Projects developed by regional housing authorities under the supplemental grant program demonstrate this point. For example, in Platinum and Golovin, where 20-house mutual help subdivisions were built, grant funds were used to replace the existing electrical transmission lines in both villages. Supplemental grant funds associated with a 10-house subdivision in Beaver were used to purchase new electrical generators for the entire community. In Emmonak, roads developed for the mutual help project have provided access to other land for housing development.

FEDERAL INDIAN LAW

Federal case law recognizes two primary sources of federal authority to deal with Indian tribes. The first is express federal constitutional authority. Article 1, section 8, the commerce clause, provides that Congress has the power to "regulate commerce . . . with the Indian tribes." Article 2, section 2, also grants the President the power to make treaties with Indian tribes subject to ratification by the Senate. Under article 6, the federal supremacy clause, such treaties are the supreme law of the land and supersede the laws of any state. *Antoine v. State of Washington*, 420 U.S. 194 (1975).

The second source of authority is the common law federal trust doctrine which holds that a fiduciary relationship exists between the federal government and Indian tribes. This relationship was first articulated in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and arose as a result of the Indian tribes subordinating their inherent sovereignty to that of the United States

in exchange for the protection and supervision of the federal government. *Alaska Chapter Assoc. Gen. Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982). When the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the government commits itself to a guardian-ward relationship with that tribe. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). That relationship extends not only to Indian tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

Federal courts have frequently relied upon the trust doctrine in rejecting constitutional challenges to laws that provide for the preferential treatment of American Indians. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court rejected a due process clause equal protection challenge to a federal statute providing an exclusive Indian employment preference in the Bureau of Indian Affairs. The Court rejected the traditional constitutional analysis which requires strict scrutiny of racial distinctions and instead applied the rational basis test because of the unique legal status of Indians under federal law:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. . .
>
> Contrary to characterizations made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. . . .
>
> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion . . . .
>
> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards Indians, such legislative judgments will not be disturbed.

As a general rule, the *Mancari* holding does not protect the actions of state government. The trust doctrine applies only to the federal government and not to states or their agencies. *Eric v. Secretary of HUD*, 464 F. Supp. 44 (D. Alaska 1978). This is because the *Mancari* court based its decision not just on the quasi-political nature of tribes but also upon Congress' exclusive constitutional powers to legislate on behalf of Indians. The states do not have such powers and state action providing preferential treatment for Indians would ordinarily be viewed as based on a racial distinction and, therefore, subject to strict scrutiny under a 14th

Amendment equal protection challenge. *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527 (D.N.M. 1990).

There are, however, instances where preferential state action would not be subject to strict scrutiny. Federal courts have upheld preferential state action under two circumstances. The first is when state action is required under the terms of a treaty. The supremacy clause of the federal constitution compels states to recognize federal treaty obligations to Indian tribes. In *Washington et al. v. Washington State Commercial Passenger Fishing Vessel Assoc. et al.*, 443 U.S. 658 (1979), the Supreme Court held that the Washington Department of Game and Fisheries could be ordered to prepare a set of rules recognizing the treaty fishing rights of certain tribes even if state law prohibited it from doing so.

The other circumstance in which federal courts uphold the preferential state treatment of Indians is when the state is acting under a congressional delegation of federal trust authority. The Supreme Court first recognized Congress' authority to delegate the trust power in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). In upholding a Washington statute which assumed partial civil and criminal jurisdiction over tribal lands, the Court, at 439 U.S. 501, made it clear that a state can exercise the federal trust power pursuant to an express congressional authorization:

> It is settled that "the unique legal status of Indian tribes under federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians, but chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians . . . In enacting chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power.

When Congress makes an express delegation of its trust power to a state, the relationship between Indians and the state is based upon the same political classification that formed the basis of the federal trust relationship. *Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F. Supp. 282 (W.D. Tex. 1986). The state essentially steps into the shoes of the federal government for purposes of equal protection analysis. If a state undertakes to implement a federal delegation of trust authority, its actions towards Indians are based on a political relationship, not a racial classification, and are reviewed under the rational basis test.

FEDERAL CONSTITUTIONAL ANALYSIS

In order for an Indian preference program to fall within the trust doctrine and not be racially discriminatory, there must be an expression of legislative intent to benefit Indians. *St.*

Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408 (D. Minn. 1983). The Indian Housing Act, 42 U.S.C. 1437aa-ee, evidences such an intent. That act authorizes the Mutual Help Opportunity Homeownership Program. 42 U.S.C. 1437bb. State action under the mutual help program, therefore, would not be violative of federal equal protection requirements if the act contains an express congressional delegation of trust authority.

42 U.S.C. 1437bb(1) authorizes HUD to enter into contracts with Indian Housing Authorities to provide financial assistance for the development, acquisition, operation, and improvement of housing projects. The term "Indian Housing Authority" is defined to include Alaska regional housing authorities. 42 U.S.C. 1437a9(b)(11). Thus, there is clearly an express authorization under current federal law for Alaska regional housing authorities to participate in Indian housing programs generally and specifically to participate in the mutual help program.

An express congressional delegation of trust authority also existed at the time the RHAs were created. The Housing and Urban Development Act of 1968 gave state housing agencies authority to participate in federal programs designed to alleviate the shortage of housing in Indian areas. It was in the context of this legislation that President Nixon launched his Indian housing initiative in 1970. In 1971, the Alaska legislature responded by creating regional housing authorities for the express purpose of participating in the President's Indian housing program.

As the Nixon five-year plan was drawing to a close, Congress enacted the Housing and Community Development Act of 1974 which provided additional federal support for Indian housing. In 1975, the legislature responded by amending AS 18.55.995 to specifically delete the language which limited RHAs to participation in President Nixon's housing initiative. This change allowed the RHAs to take advantage of the new opportunities available for Indian housing programs.

The legislature's actions evidence a clear intent to authorize state participation in Indian housing programs under the federal trust responsibility. Given an express delegation of trust authority and its acceptance through various legislative enactments, state participation in Indian housing programs falls within the *Mancari* doctrine and is only subject to review under the rational basis test. The issue then is whether the state action can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians. The use of supplemental grants to enable RHAs to participate in the mutual help program satisfies that test.

STATE CONSTITUTIONAL ANALYSIS

Whether the expenditure of state funds for the preferential treatment of Alaska Natives under the mutual help program violates the Alaska Constitution is less clear. The Alaska Supreme Court has never addressed this issue and predicting the approach the court would follow involves a certain degree of speculation. We believe the court would adopt the reasoning of the *Mancari* decision and view the preference as a quasi-political classification, not a racial classification, and find the use of grant funds for the mutual help program constitutionally permissible.

Federal Supremacy Clause

At least one federal court has held that an express delegation of federal trust authority would insulate preferential state action from a challenge under state equal protection provisions. In *Alabama-Coushatta Indian Tribe of Texas v. Matto*, 650 F. Supp. 282, the court indicated that state action under a delegation of federal trust authority is based on a political classification and, therefore, is not racially motivated, stating, at 289:

> The federal government's relationship with the Tribe was not based on an impermissible racial classification. Consequently, when the State assumed the trust duties of the federal government its relationship with the Tribe is *ipso facto* based upon the Tribe's separate and unique political status.

Even if the classification were viewed as racial under state constitutional provisions, the court concluded that the federal supremacy clause requires that a congressional act delegating the trust authority prevails over a state constitutional provision.

The fact that RHAs provide assistance directly to individual Alaska Natives and do not deal with tribes as governmental units does not undermine the existence of a trust relationship. The federal trust responsibility extends to individual tribal members as well as to the tribe. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

We believe that the reasoning of the *Alabama-Coushatta Indian Tribe* decision is generally correct. Congress has the exclusive constitutional power to legislate on matters relating to the federal trust responsibility towards Indians. If Congress decides to delegate that trust authority and a state accepts it, the federal supremacy clause requires state courts to recognize the legitimacy of the congressional delegation. Under such circumstances, the effect of the supremacy clause is to compel state courts to view the relationship between the state and Indians as quasi-political instead of racial. Thus, it is likely that the supremacy clause would compel the Alaska Supreme Court to conclude that the mutual help program is not based on a racial classification and that the use of supplemental grant funds in support of the program is not subject to strict scrutiny.

State Equal Protection Analysis

Even if the federal supremacy clause does not compel acceptance of the state's exercise of federal trust authority, we believe the supplementary housing grants at issue are constitutional under Alaska law. The Alaska Supreme Court's approach to evaluating equal protection challenges involves a sliding scale of review from relaxed to strict scrutiny. The appropriate standard of review is determined by the importance of the individual interests asserted and by the degree of suspicion with which the court views the resulting classification. Once this determination is made, the court examines the governmental purposes served by the challenged statute and the closeness of the means-to-ends fit between the legislation and those purposes. The higher the level of scrutiny applied, the more compelling the governmental purpose and the closer the means-to-end fit must be. At a minimum, the legislation must be based on a legitimate purpose and the classification must be reasonable, not arbitrary, and rest upon some ground of difference having a fair and substantial relation to that purpose. *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 357 (Alaska 1988).

We do not believe that the Alaska Supreme Court would treat the Native preference provision of the mutual help program as a racial preference requiring strict scrutiny. In those instances where state action is taken in furtherance of a congressional delegation of the federal trust responsibility, we think it is more likely that the court would accept federal precedent as the rule of the law most appropriate for Alaska. Under such circumstances, the state's preferential treatment of Alaska Natives would be based on their political status and not on race. It is important to note that our analysis is based on the existence of a congressional delegation of trust authority. Without such a delegation, we believe the court would treat the classification as a racial distinction subject to strict scrutiny, requiring a compelling state interest in the classification.

Although we believe the court would not apply strict scrutiny in reviewing this issue, it is difficult to predict where the court would place this classification on its sliding scale. Generally the court applies its lowest degree of scrutiny to classifications connected with the grant of monetary benefits. *See Williams v. State Dept. of Revenue*, 895 P.2d 99 (Alaska 1995); *State v. Anthony*, 810 P.2d 155 (Alaska 1991); *Sonneman v. Knight*, 790 P.2d 702 (Alaska 1991). Since housing subsidies are economic benefits and tribal membership would not be considered a suspect class, our analysis is based on an assumption that the court would follow its prior holdings regarding economic benefits and review this issue at the lower end of its sliding scale.

The court's review would start with the purpose of the state statutes under which the state is acting. Regional housing authorities were created specifically to participate in Indian housing programs in order to remedy the acute shortage of housing that exists in rural Alaska. Sec. 1, ch. 123, SLA 1971. RHAs may accomplish this purpose through participation in federal housing programs. AS 18.55.110. In fact, qualifying for federal housing funds is considered so

important that the legislature has exempted AHFC and the regional housing authorities from the "limitations, restrictions and requirements" of almost all other state laws which might conflict with the requirements of a federal housing program. AS 18.55.110, AS 18.55.996(b). The purpose of the supplemental development grant program is to make it economically feasible for a regional housing authority to use federal housing programs in rural areas of the state. (Bill review letter from Attorney General Wilson L. Condon to Governor Jay Hammond, July 15, 1981). In short, the purpose of the supplemental grant program is to use state funds to attract as many federal housing dollars as possible into Alaska.

The use of state funds in support of the mutual help program has a fair and substantial relationship to the governmental purpose of the supplemental grant program. The mutual help program is essentially the only program providing for the construction of single-family housing for low-income residents of rural Alaska. Without the availability of state supplemental grants, the scope of the mutual help program would be drastically reduced and the housing needs of village Alaska would continue to go unmet.

Adherence to the federal requirement that mutual help project residents be Alaska Natives enables the RHAs to qualify for a federal housing program which would not otherwise be available. Since mutual help is the primary funding mechanism for rural housing, the use of supplemental grants to ensure the availability of these federal funds is exactly what the legislature intended when it enacted AS 18.55.998. For example, in federal FY 1995, supplemental grants of $5,951,651 enabled RHAs to bring $29,758,282 in federal funds to Alaska for mutual help housing construction. Thus, the use of supplemental grants for the mutual help program bears a fair and substantial relationship to the purpose of AS 18.55.998. State funding of this program, therefore, is constitutionally permissible under the equal protection clause.

State Civil Rights Provision

Article I, section 3 of the Alaska Constitution provides that no person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature has enacted the Alaska Human Rights Act, AS 18.80, to implement this provision. We believe the supreme court would analyze this issue in the same manner that it would an equal protection challenge and conclude that state participation in the mutual help program would not violate the civil rights provision of the state constitution.

Public Purpose Clause

Article IX, section 6 of the Alaska Constitution prohibits the expenditure of public money unless the expenditure is for a public purpose. We have opined several times in the past that the use of public monies for the private benefit of a racially exclusive group would violate this provision of the constitution. *See*, *e.g.*, 1981 Inf. Op. Att'y Gen. (April 27; J-66-335-81). Based on our above analysis, however, supplemental grants are not expended in a racially

exclusive manner, but rather are expended to benefit what the courts would view as a quasi-political grouping of Alaska residents.

The term "public purpose" is an imprecise term the meaning of which changes as changing conditions create changing public needs. Whether a public purpose is being served is determined on a case-by-case review of the entire factual and governmental circumstances. *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970). The public purpose test does not look to the racial or religious character of the recipient, but at the use to which the money will be put. *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963).

Supplemental grant funds are spent for purposes which satisfy the public purpose test. As we have noted, most of these funds are used to fund infrastructure such as roads and utilities which benefit the entire community. Even the use of funds for energy-efficient design features in individual homes is permissible. It is well established that the expenditure of public funds to promote housing is for a public purpose even though there may be substantial private benefit to some individuals. *Suber v. Alaska State Bond Comm.*, 414 P.2d 546 (Alaska 1966).

STATE STATUTORY PROVISIONS

Even if the expenditure of state funds is constitutionally permissible, AHFC may not make a supplemental housing grant for purposes prohibited by statute. You have asked us to consider the effect AS 18.55.998 and AS 18.80 have on the expenditure of supplemental housing development grants in connection with the mutual help program. Our conclusion is that neither statute prohibits the use of supplemental grants for a mutual help project.

AS 18.80

AS 18.80.255 prohibits the state from denying benefits based on race. As indicated above, we do not believe that the classification presented here would be viewed by the courts as a racial classification. For that reason, use of state funds for the mutual help program would not violate AS 18.80.255.

AS 18.55.998

AS 18.55.998(b) provides that AHFC may only make grants for housing projects which "will be made available to the public on a nondiscriminatory basis." Based on our preceding analysis, the courts would not view the classification at issue as racial and, therefore, would not consider it to be discriminatory as that term is used in the statute.

This interpretation is also supported by the legislative history of the statute. We do not believe that the legislature intended for this language to prohibit the use of supplemental grants for federal programs which mandate a Native preference. The language in question was added by the House Finance Committee based on a May 1, 1981, letter from Assistant Attorney

General Rodger Pegues to the bill's sponsor, Representative Jim Duncan. The letter was written in response to then-Representative Duncan's request for language to assure that the grants would be made available on a non-discriminatory basis. In his letter, Pegues notes that RHAs already had a duty under AS 18.80.240 to make housing available on a non-discriminatory basis "unless -- and only unless -- it was constructed under a program for American Indians." Because the RHAs already had a legal duty to provide housing on a non-discriminatory basis, Pegues concluded that "it was not essential to add language" to the bill. Pegues, however, did suggest "clarifying language" to make it clear that housing would generally be made available only on a non-discriminatory basis.

Before passing the bill out of committee, House Finance adopted an amendment adding the language "suggested by the Attorney General." House Finance Committee Minutes, May 4, 1981, p. 929. We believe that by adopting the attorney general•s suggested language, the committee merely intended to adopt his interpretation of a regional housing authority's already-existing obligation to make housing available to all Alaskans except when it was participating in an Indian-preference housing program. AS 18.55.998(b), therefore, should not be interpreted as prohibiting the use of supplemental grants for federal programs that require an American Indian or Alaska Native preference.

This conclusion is also consistent with the general statutory scheme relating to AHFC and regional housing authorities. Their participation in federal housing programs is governed by AS 18.55.110, AS 18.55.240 and AS 18.55.996(b). Under these statutes, AHFC and regional housing authorities are given broad powers to participate in any federal program which provides financial aid for housing projects. With respect to federal housing programs, AHFC and regional housing authorities are not "subject to limitations, restrictions, or requirements of other laws." AS 18.55.110. They may also comply with any conditions that are "necessary, convenient, or desirable in order to obtain financial aid or cooperation from the federal government." AS 18.55.240. When AHFC and the RHAs participate in a federal program, therefore, they are generally not bound by statutory limitations such as AS 18.55.998(b) which would otherwise apply.

CONCLUSION

We do not believe that the use of state supplemental housing grants to supplement the federal mutual help program is prohibited by either the federal or state constitution. It is also our conclusion that AS 18.55.998 does not prohibit the use of supplemental housing grants in connection with federal housing projects which provide a preference for Alaska Natives under HUD's Indian housing programs.

Very truly yours,

Bruce M. Botelho
Attorney General

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