

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

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March 21, 2011

Representative Carl Gatto
State Capitol
Room 118
Juneau, AK 99801-1182

Re: HB 88

Representative Gatto:

You have asked the Department of Law (“Department”) for an opinion on HB 88 and its impact on Alaska natives and tribal law, international conventions, litigation with foreign corporations, and contracts with foreign entities. One premise applicable to all of the questions posed is that HB 88 would have no effect to the extent it conflicts with a federal law or treaty. Pursuant to the Supremacy Clause of the US Constitution (Article VI, clause 2), the US Supreme Court has recognized for many years that State laws that conflict with federal law are “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

HB 88 defines “foreign law” as a law, rule or legal code or system used or applied outside of the United States and the territories of the United States. With regard to family matters, tribes operate within the United States. Accordingly, HB 88 should not affect family matters involving tribes. Tribal members are citizens of Alaska as well as citizens of their tribes. Therefore, in limited circumstances, tribal members may be subject to the concurrent jurisdiction of the tribal courts and the state courts. One example of this concurrent jurisdiction is domestic relations among members. Tribes have the concurrent authority to initiate cases regarding children’s proceedings or custody proceedings involving native children. As to the final question regarding American Indian tribal law and Alaska Indian tribal law, there is no difference between the two.

With regard to conventions on the Law of the Sea, the International Pacific Halibut Convention, and the Pacific Salmon Treaty, to name a few, Alaska is not a party to these conventions. Instead, it is the United States who is a party to some of these conventions and/or treaties. For example, the United States has not yet signed the latest Law of the Sea Convention, though there is a resolution currently pending before the Alaska legislature urging the United States to ratify the convention. The laws that directly affect Alaska are the federal statutes and regulations that implement the treaties,

such as the Northern Pacific Halibut Act. These federal laws, to the extent they apply to Alaska, will preempt inconsistent state law, including HB 88.

In general, Alaska courts and enforcement entities can only apply Alaska law and federal law. Sometimes they will apply applicable law from another state, but only after determining that that law is applicable to the matter before the tribunal. But Alaska courts will not apply a foreign law if application of the law would violate an individual's constitutional rights. Generally, "foreign law" does not apply in Alaska. Judges take an oath to uphold the laws of the state and of the United States. If a foreign choice of law provision in a contract deprives the party to the contract of a fundamental constitutional right, the offending provision would be void as against public policy. In some instances a court might confront the application of foreign law, but these instances likely involve foreign treaties and compacts (such as the Hague Convention on the Civil Aspects of International Parental Child Abduction), in which case the foreign law would not be impacted by a state statute such as HB 88.

All courts have the ability to reform or modify a contract provision if enforcement of the provisions would be contrary to public policy. This would apply to both a choice of law provision and choice of venue or choice of forum provision. If the contract has a choice of venue or forum provision and a party (whether an individual or a corporation or other type of business entity) complies with the provision by filing a dispute in the foreign venue, then HB 88 would have no effect for Alaska law would not be applicable in the foreign venue. The provisions of HB 88 would apply if the party filed a lawsuit in Alaska and was opposing a motion to change venue to the foreign venue because of the clause in the contract. If the fundamental constitutional rights of the party opposing the change of venue motion would be impaired by the foreign venue, the Alaska court could void the venue provision as against public policy.

HB 88 might affect a foreign entity's willingness to do business with individuals or businesses in Alaska if it knows that provisions of the contract may be void by law should HB 88 become law. If a contract is entered into with a foreign entity to provide goods or services to the foreign entity in that entity's country, it would not be unusual for the contract to contain choice of law and/or choice of venue provisions. The foreign entity might be hesitant to enter into such a contract if there is the possibility that in the future the terms of the contract might be changed by an Alaskan court because the other party to the contract claims that his or its constitutional rights are being violated if the choice of law or choice of venue provisions are enforced. Finally, what is unclear from HB 88 is how an Alaska state court could interpret a choice of venue or forum provision so as to preserve constitutional rights other than by determining the provision to be void and to allow a lawsuit to proceed in Alaska rather than in the country chosen in the contract.

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As part of the common law doctrine of forum non conveniens, consideration is given to the laws applicable in the foreign jurisdiction and their impact on the parties to a lawsuit. A party will not be sent to a jurisdiction that does not have equal protection and due process. For example, in a divorce case between two Kenyan citizens, a judge denied a forum non conveniens motion to move the case to Kenya because the wife would have had diminished property rights under the laws of Kenya.

In conclusion, the general concern the Department has with HB 88 is whether the legislation is necessary considering the current ability of the courts to reform or modify contracts if enforcement of provisions of the contract would be contrary to public policy and the general premise that Alaska courts and enforcement entities apply only Alaska and federal law, not foreign law of a foreign country.

The Department is available to answer any question you have about these comments.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

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