

# LEGAL SERVICES

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## MEMORANDUM

March 27, 2017

**SUBJECT:** ANCSA language and PILT  
(HB 156; Work Order No. 30-LS0602\A)

**TO:** Representative Cathy Tilton  
Attn: Heath Hilyard

**FROM:** Susie Shutts *Susie Shutts*  
Legislative Counsel

You requested an opinion regarding two questions: (1) What is the necessity or effect of the language in AS 29.45.050(m) related to the Alaska Native Claims Settlement Act (ANCSA)? And (2) Could a payment in lieu of taxation (PILT) arrangement be provided for a municipality and a taxpayer with economic development property?

### (1) What is the necessity or effect of the language in AS 29.45.050(m) related to the Alaska Native Claims Settlement Act?

You asked about this language in the definition of "economic development property" for the purpose of AS 29.45.050(m):

including developed property conveyed under 43 U.S.C. 1601 et seq.  
(Alaska Native Claims Settlement Act)

This phrase was added by a House floor amendment on May 3, 1989, which Representative Gruenberg explained:

This was offered at the request of a number of Native corporations to cure up a possible ambiguity in some language. House Bill 272 will authorize municipalities to grant economic development property up to a five year exemption from local taxation. It would allow municipalities to encourage new economic activity through its tax laws. Under both section 21 of the Alaska Native Claims Settlement Act and AS 43.80.015,<sup>1</sup> property conveyed under ANCSA is exempt from local taxation until it is developed. These laws ensure that Native corporations are not forced to prematurely develop their large landholdings because of the substantial taxes that might otherwise be levied on these lands. The proposed

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<sup>1</sup> In 2002, this section was renumbered as AS 43.98.015.

amendment makes it clear that municipalities can encourage the development of ANCSA properties by continuing the existing exemption for [. . .] five years after development begins. Without the amendment, it could be argued that the specific tax treatment of ANCSA properties under AS 43.80.015 reflects the state policy to discourage development of ANCSA properties, and that therefore the incentives of HB 272 should not apply to ANCSA lands. Obviously, the drafters of 272, myself included, never intended that result. And while Congress intended in section 21 of ANCSA to preserve Native capital until land was actually developed, it was also Congress' intent to meet the real economic and social needs of Natives by encouraging economic development of Native property. Through this amendment, then, the legislature will ensure that the provisions of AS 43.80.015 and the bill will work together to best implement the purposes of ANCSA.

As discussed by Representative Gruenberg, ANCSA exempts undeveloped Native corporation lands from property taxes. Section 21(d) of ANCSA<sup>2</sup> originally provided for a 20-year exemption for all real property interests conveyed under the act that were not developed or leased to third parties.<sup>3</sup> In 1988, this exemption was extended to provide that, "so long as such land and interests are not developed or leased or sold to third parties," all land conveyed under ANCSA to a Native individual or Native corporation is exempt from "real property taxes by any governmental entity."<sup>4</sup> However, property which has been developed *is* taxable.

Therefore, under federal law, undeveloped ANCSA lands still enjoy an exemption from local property taxes. This is also reflected under state law. AS 29.45.030(a)(7) provides for a mandatory tax exemption for

real property or an interest in real property that is  
(A) exempt from taxation under 43 U.S.C. 1620(d), as amended or under 43 U.S.C. 1636(d), as amended; or  
(B) acquired from a municipality in exchange for land that is exempt from taxation under (A) of this paragraph, and is not developed or made subject to a lease;

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<sup>2</sup> Sec. 21, Pub. L. No. 92-203, 85 Stat. 713 (1971).

<sup>3</sup> 43 U.S.C. 1620(d)(1).

<sup>4</sup> Congress did not amend 43 U.S.C. 1620(d)(1) directly. The extension is the product of an amendment to the Alaska National Interest Lands Conservation Act (ANILCA). *See* the Alaska Native Claims Settlement Act Amendments of 1987, sec. 11, Pub. L. No. 100-241, 101 Stat. 1806 (1988); Op. Atty. Gen., March 29, 1989, File No. 663-89-0373, 1989 Alas. AG LEXIS 31.

Once developed and taxable, I do not see why ANCSA lands could not qualify for the municipal property tax exemption under AS 29.45.050(m) even without the language specifying that "economic development property" includes "developed property conveyed under 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act)." I would note that none of the other optional tax exemptions under AS 43.55.050 clarify that ANCSA land qualifies for the exemption.

Note that if this language were removed without the purpose of altering the eligibility of property conveyed under ANCSA for a tax exemption under AS 29.45.050(m), it would be advisable for the legislature to state this intent on the record. This is because amendments to existing law are generally adopted because the legislature intends to change the original bill, although, of course, amendments can also be adopted to better express an idea in the original bill or because an original provision was redundant.<sup>5</sup>

**(2) Could a payment in lieu of taxation (PILT) arrangement be provided for a municipality and a taxpayer with economic development property?**

Amendment of AS 29.45 would be necessary in order to authorize a municipality to enter into a PILT agreement with any taxpayer that has economic development property.

Municipal PILT agreements are currently referenced under AS 29.35.670(c) (port authority), AS 29.35.870(c) (regional solid waste management authority), AS 29.45.030(a)(8) (federal law providing for PILT for certain military housing), AS 29.45.650(j) and AS 29.45.700(f) (sales or use tax on the sale, use, or transfer of refined fuel), AS 29.45.810 (Stranded Gas Development Act), AS 38.05.504 (land), and AS 44.88.140(b) (Alaska Industrial Development and Export Authority).

Although all municipalities have the general power "to enter into an agreement,"<sup>6</sup> a municipality that levies a property tax must assess, levy, and collect a property tax as provided under AS 29.45, which does not authorize a municipality to enter into a PILT agreement with any taxpayer that has economic development property.

Note that even if state law were amended to authorize a municipality to enter into a PILT arrangement with any taxpayer with economic development property, such a contract would raise a constitutional issue under art. IX, sec. 1, Constitution of the State of Alaska, which provides: "The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article." Even if a municipality is authorized by statute to enter into a PILT contract, such a contract may be

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<sup>5</sup> See *2A Sutherland Statutory Construction*, sec. 48:18 (7th ed.) (citations omitted).

<sup>6</sup> AS 29.35.010(13).

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viewed by a court as contracting away the state's, or a municipality's, power of taxation, in contravention of art. IX, sec. 1.<sup>7</sup>

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<sup>7</sup> *See, e.g.*, 2016 Op. Alaska Att'y Gen. (June 23, 2016) (opining that the state cannot enter into a contract that purports to prohibit the legislature from changing tax terms in the future, in disagreement with earlier attorney general opinions that concluded long-term, irrevocable tax exemptions were constitutionally permissible).