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of ALASKA
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February 24, 2022

The Honorable Mike Shower, Chair
Senate State Affairs Committee
Capitol Room 429
Juneau, Alaska, 99801

Re: Inquiries regarding sovereignty and HB 123

Dear Chair Shower:

Thank you for affording the Alaska Department of Law (LAW) the opportunity to respond to questions raised regarding House Bill 123 (HB 123) in the Senate State Affairs Committee. This communication also addresses specific questions from your staff office on House Bill 123 that was posed to the Department of Natural Resources (DNR), the Department of Fish & Game (DFG), and LAW.

HB 123 purports to, if enacted, formalize the State of Alaska's (State) recognition of Alaska's Federally Recognized Tribes. LAW, at the request of the Office of the Governor, undertook an analysis to confirm the intent of the legislation was reflected in the text of HB 123. LAW's consensus is that HB 123, as written, does reflect the stated intent of the legislation.

LAW was also requested to analyze whether HB 123, as written, in any way changes the obligations, duties, or expectations of the State with Alaska's Federally Recognized Tribes. LAW concludes that HB 123 as written does not expand or contract any obligations, duties, or expectations upon the State. LAW's conclusion is that HB 123 would, if enacted, communicate the State's respect to Federally Recognized Tribes in Alaska and, specifically, the members of the Tribes.

Below is a thematic summary of questions and topics raised in Committee and by the Chair's staff, followed by LAW's response:

HB 123 does not Impact Sovereignty

Sovereignty comprises many attributes and can include sovereign immunity and jurisdictional authority. In Alaska, because of the relative lack of Indian Country¹, the attributes of a tribe's sovereignty are unique and more circumscribed than in other places where tribes have territorial jurisdiction over lands (i.e., where Indian Country exists).² As such, HB 123 as written maintains the status quo by neither expanding nor contracting the attributes of sovereignty.

HB 123, in no way, impacts the State's sovereign authority. Jurisdictional questions in this field of law are extremely complex and depend upon, among other things, congressional acts, the presence or absence of Indian country, the type of issue at stake, and whether the sovereign is asserting jurisdiction over a tribal member or nonmember.³ This bill would in no way change any jurisdictional analyses.

HB 123 would Recognize only Federally Recognized Tribes

HB 123 would recognize as sovereigns the tribes that the federal government recognizes as sovereigns. The federal government publishes a list of tribes that the federal government has determined are sovereigns, 25 U.S.C. § 5131 (List Act). The second sentence of Section 5 of this bill would recognize as sovereigns those tribes and only those tribes within the state that are published on the List Act.

In response to the Chair's particular inquiry about the definition of "federally recognized tribe" in HB 123, the bill would not recognize as sovereigns subsidiaries owned by tribes. It would recognize only the tribes in the List Act: "The state recognizes all tribes in the state that are federally recognized under 25 U.S.C. 5130 and 5131." The State cannot make into sovereigns the subsidiaries of a tribe, nor does the text of HB 123 attempt to do so.

The first and third sentences of Section 5 of the bill cross-reference the definition of "federally recognized tribe" in the Alaska Employment Security Act, which defines

¹ See *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526-27 (1998) (discussing Major Crimes Act's statutory definition of Indian country—reservations, dependent Indian communities, and Indian allotments—that generally applies to questions of civil jurisdiction).

² See *John v. Baker*, 982 P.2d 738, 751, 754-55 (1999).

³ See generally Felix Cohen, *Cohen's Handbook of Federal Indian Law*, § 7 (2012 ed.).

“federally recognized tribe” as including tribes on the List Act and wholly owned subsidiaries of those tribes.

The first sentence of Section 5 acknowledges the federal government’s special relationship with List Act tribes, which can include subsidiaries of those tribes. Of course, the State of Alaska cannot broaden the federal government’s trust relationship to include subsidiaries of tribes that do not have a trust relationship with the federal government. But, to the extent the special trust relationship and special benefits accorded to tribal trustees are afforded not just to the tribe but also to subsidiaries of the tribe, the State already acknowledges that relationship and those special benefits. The third sentence explicitly explains that Section 5 does not create any obligation on behalf of the State to tribes on the List Act or their subsidiaries.

HB 123 would not create a Category of State-Recognized Tribes separate from Federally Recognized Tribes

HB 123 as written would recognize only the tribes that are recognized by the federal government and published on the List Act. That makes HB 123 different than other state recognition laws. A state-recognized tribe is usually thought of as a tribe that is not recognized by the federal government, but that is recognized by an individual state. States may choose to do this for many reasons. For this bill, however, the textual purpose, and the purpose stated on the record in committee, is for the State of Alaska to recognize only the tribes that the federal government already recognizes via the List Act; HB 123 as written does not recognize a broader category of entities.

Responses to Specific Questions Addressed to DNR, DFG, and DOL

The following specific questions from your office were addressed to the DNR, DFG, and LAW. Considering the above analysis, LAW offers the following responses.

Questions Posed to DNR, DFG, and DOL by the Committee Chair's Office

To DNR:

Question: I am attempting to move the enabling statute out of AS 44.10. Why create tribal recognition tension in the same chapter with off-shore water and submerged lands?

Answer: If it is the will of the committee, this bill could be created in a new chapter for Intergovernmental State-tribe relations.

Question: Sec 2 (B) includes tribal recognition of any subdivision, subsidiary, or business enterprise wholly owned by the tribe. Will this morph into a sovereign immunity doctrine in state jurisdiction now that tribally owned businesses are recognized in state jurisdiction?

Answer: As written, the recognition clause in the bill only recognizes List Act tribes. That clause does not recognize "federally recognized tribes" as defined in the Alaska Security Employment Act. (The definition in that act already includes subsidiaries of List Act tribes.) Therefore, the best reading of this bill does not include State recognition of subsidiaries of tribes as sovereigns, entitled to sovereign immunity.

Question: How will this affect Right of Way condemnation of property that is owned by a tribe?

Answer: As written, HB 123 would have no effect. Currently, tribes have sovereign immunity, notwithstanding any passage of HB 123. Whether a condemnation suit can be brought against a tribe is an open question at this time, based on the immovable property doctrine. This bill does not change the legal analysis. To be clear, the State's eminent domain authority is different than the State's ability to bring a condemnation suit against a tribe in court. The State's eminent domain authority exists over tribally owned land, but whether the State can avail itself of the Court system to enforce that authority is an open question, depending on the immovable property doctrine.⁴

Question: What if an allotment is somehow changed into a wholly owned tribe business? Will they [sic Tribe] challenge a condemnation based upon sovereign immunity?

Answer: Anyone can bring a lawsuit. However, HB 123 as written does not change the relevant legal analyses. Whether a tribe's sovereign immunity extends to that tribe's wholly-owned business depends on many factors. HB 123 as written does not change that legal analysis. For discussion on condemnation suits against entities with tribal sovereign immunity, see above discussion.

Question: How about RS 2477's?

⁴ At oral argument in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), all the United States Supreme Court justices seemed either persuaded by or very receptive to the argument that the immovable property doctrine applies in the context of tribal sovereign immunity. But when the Court issued its decision, it decided not to resolve that issue because it was raised for the first time at the Supreme Court in the federal government's amicus brief.

Answer: HB 123 as written would have no effect on the State's assertions of RS 2477 rights of way. This is similar to the condemnation analysis. Whether the State can bring a quiet title claim against a tribe for an RS 2477 depends on the contours of the immovable property doctrine. This bill, if enacted, would not change that analysis.

Question: What if native corps get "bought" or somehow restructured to become a legal wholly owned business by tribes and there is now 44 million acres of tribally owned land out there? Is anyone paying attention to this?

Answer: House Bill 123, as currently written, would have no effect on that scenario. Tribes already have sovereignty. Tribal ownership of land does not create Indian Country. Regardless of whether HB 123 passes, a tribe can own land in fee. That ownership does not create Indian Country.⁵

To DFG:

Question: Asking if our ANILCA team can review HB 123 for any red flags.

Answer: No effect. The passage of HB 123 would not impact relevant legal analyses.

To LAW:

Question: Tax exempt status. Are tribes subject to sales and property taxes? If subdivisions and subsidiaries are recognized in Alaska as tribal businesses, are they tax exempt from property, corporate, and sales taxes?

Answer: This is a question regarding Indian Law generally, which HB 123 would not impact because HB 123 does not create Indian Country.

In non-Indian Country, state or local sales and property taxes apply. However, enforcement of taxation against entities with tribal sovereignty is another matter. A description on pages 10 and 11 of an amicus brief that the State of Alaska submitted in *Ito v. Copper River Nation Association*, a case currently before the AK Supreme Court, may be helpful in understanding tribal sovereign immunity. It is public record, and also attached to this email for ease of reference.

⁵ See, e.g., *Venetie*, 522 U.S. 520 (concluding that former reservation land that was transferred by the federal government to ANCSA corporations in fee, and then transferred from corporations to a tribe in fee, was not "Indian country").

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Sincerely,

A handwritten signature in black ink, appearing to read "Rebecca C. Polizzotto". The signature is fluid and cursive, with a large, stylized initial "R".

Rebecca C. Polizzotto
Chief Assistant Attorney General
Legislation, Regulations,
And Legislative Research Section

cc: Akis Gialopsos, Legislative Director, Governor's Legislative Office