MEMORANDUM

State of Alaska
Department of Law

TO: Patrick K. Poland, Director
Municipal and Regional Assistance Division
Dept. of Community & Economic
   Development

DATE: April 26, 2000

FILE NO: 663-00-0144

TEL. NO: 465-3600

SUBJECT: Adak Incorporation Petition;
Prospective Agreement for
Private Entity to Assume
Assets and Liabilities If
City Dissolves

FROM: Marjorie L. Vandor
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Governmental Affairs Section - Juneau

You have asked us to consider whether it is a legally viable option for the Local Boundary Commission (Commission) to condition approval of the petition for incorporation of the City of Adak on the execution of a prospective agreement between the State of Alaska (state) and a private entity, the Aleut Corporation, that essentially will provide for the Aleut Corporation succeeding to the assets and liabilities of the City of Adak in lieu of the state under AS 29.06.520 in the event the city dissolves under AS 29.06.450(b) and no other municipal entity is in the line of succession, or if in succession, refuses to act as successor. In brief, we cannot conclude through our research that such an agreement between the state and the Aleut Corporation is clearly prohibited under Alaska law. Conversely, we cannot assure you of its legal enforceability under general rules of contract law or public policy. Our reasons are discussed below.

Under AS 29.06.520, once dissolution of a city occurs, a municipality (presumably the borough within which the city is located) would normally succeed to all rights, powers, duties, assets, and liabilities of the dissolved city. Otherwise, the state succeeds to those rights, powers, duties, assets, and liabilities. Assuming Adak incorporates as a second class city, it will not be located within a borough. Further, a borough forming in that area of the state in the near future is not anticipated. Therefore, it is highly likely that the state, by operation of law, would be the successor to the city's assets and liabilities in the event Adak dissolves. Under AS 29.06.520, if the state succeeds, it may enter into a contract for the performance of duties or powers in the area of the dissolved municipality.

In the past, the Commission, during the process of dissolving several second class cities in the unorganized borough, conditioned dissolution on the successful execution of an agreement transferring the assets of the dissolving cities to private entities (mainly tribal entities) so that the assets would be operated and maintained for public use. The differences between the Commission's conditioning dissolution on the transfer of assets and liabilities under the former dissolutions and the one anticipated with Adak, are: (1) the state had the legal capacity under AS 29.06.520 to enter into contracts regarding the assets and liabilities of the former cities because the dissolution process was underway; and (2) the assets and liabilities of the dissolved cities were known commodities (i.e., particular lands, buildings, generator plants, land fills, etc.) at the time the agreements between the state and the private entities were entered into by the parties. With Adak, the city has not yet been incorporated and its dissolution process obviously not begun; thus it is arguable that the state does not have the legal capacity to enter into an enforceable contract at this juncture under AS 29.06.520 that concerns dissolution. A contract between the state and the Aleut Corporation that would require the latter to assume all assets and liabilities (environmental or otherwise) of the dissolved City of Adak would not contain known items.[1]

The essential elements of a contract are:

(1) competent parties (i.e. legal capacity);
(2) subject matter;
(3) legal consideration;
(4) mutuality of agreement; and
(5) mutuality of obligation.

Black's Law Dictionary, (5th ed. 1979). It may not be possible to enforce a contract with the Aleut Corporation because essential elements of the contract are arguably missing: namely, the subject matter (the actual assets and liabilities for which the Aleut Corporation would be assuming) and the legal capacity of a party (the state entering into a contract before dissolution is sought under AS 29.06.450 - 29.06.530).

If the City of Adak incorporates and functions as a municipal government for several years, it is simply impossible to determine at this juncture what kinds of debts, assets, or other liabilities it will acquire during that time. Conversely, it is not possible to determine whether the city will keep assets transferred to it at time of incorporation or

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[1]   We appreciate that the incorporation of Adak is unique due to its military base history and its remote location. If a city is incorporated, it will evidently inherit existing assets that are physically present at the former base and for which major liabilities could result over the years due to operation costs as well as environmental liabilities. However, rules of contract law are not altered due to these unique facts.

whether it will sell or transfer those assets prior to dissolution. Again, these unknown elements of an executory contract may result in its enforceability.

We are aware of the Commission's broad powers to amend petitions for incorporation under AS 29.05.100(a). However, in the past, the use of those powers to amend petitions or to condition incorporation (i.e., on passage of a sales tax) was for the purpose of enhancing the viability of the municipal government in order to approve the petition for incorporation, not to enhance its dissolution.

In conclusion, we are not able to find legal or historical evidence of comparable agreements related to municipal incorporation. Therefore, we cannot conclude that the perceived executory contract with the Aleut Corporation is clearly prohibited under law; however, we also cannot provide you with assurance of its legality as a matter of public policy or under rules of contract.

We hope this addresses your concerns.

MLV:jn