



THE STATE  
*of* **ALASKA**  
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

CIVIL DIVISION

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October 4, 2021

The Honorable Kevin Meyer  
Lieutenant Governor  
P.O. Box 110015  
Juneau, Alaska 99811-0015

Re: *21AKTR Ballot Measure Application Review*  
AGO No. 2021103148

Dear Lieutenant Governor Meyer:

You asked us to review an initiative application for a proposed bill entitled:

An Act providing for State of Alaska recognition of federally recognized tribes. (21AKTR).

We review initiatives to ensure they meet all constitutional and statutory requirements, without considering the merits of any initiative. While the legal effects of 21AKTR may be limited, we recommend that you certify the application because it is in the proper form, and both the proposed bill and the application comply with the constitutional and statutory provisions governing initiatives.

**I. The proposed bill**

The bill proposed by this initiative has six sections, the most significant of which would recognize federally recognized tribes in Alaska:

**Section 1** would add a new section to the uncodified law concerning the history of tribes in Alaska and stating the intent of Alaskans to recognize federally recognized tribes in the state.

**Section 2** would correct a citation to federal law in the statute defining “federally recognized tribe.”

**Section 3** would make technical changes required by the addition of a new section to Title 44, Chapter 3. It would replace references to Chapter 3 with references to the existing sections in Chapter 3. It would also make a grammatical change.

**Section 4** would also make technical changes, replacing references to Title 44, Chapter 3 with references to the existing sections in Chapter 3.

**Section 5** would add a new section to Title 44, Chapter 3. In it, the State would recognize the United States' relationship with federally recognized tribes, and the State itself would recognize federally recognized tribes in the state. This new section specifies that it does not diminish the United States' obligations to federally recognized tribes or create a trust relationship between the State and federally recognized tribes.

**Section 6** is a severability clause.

## II. Analysis

Under AS 15.45.070, the lieutenant governor must review an initiative application within 60 calendar days of receipt and “certify it or notify the initiative committee of the grounds for denial.” The Division of Elections received the application for 19AKTR on August 11, 2021. Sixty calendar days later is Sunday, October 10, 2021.

In evaluating an initiative application, the lieutenant governor must determine whether it is in the “proper form.”<sup>1</sup> Under AS 15.45.080, the lieutenant governor must deny certification if “(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors.” This means the lieutenant governor must decide whether the application complies with “the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot.”<sup>2</sup> This requires consideration of both the form of the proposed bill and the form of the application.

### A. Form of the proposed bill

The form of a proposed bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the bill contain an enacting clause that states, “Be it enacted by the People of the State of

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<sup>1</sup> Alaska Const. art. XI, § 2.

<sup>2</sup> *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

Alaska”; and (4) the bill includes no prohibited subjects. The lieutenant governor may deny certification if a proposed bill does not meet these requirements or if “controlling authority establishes its unconstitutionality.”<sup>3</sup> The bill proposed by 21AKTR meets all four of these requirements and it is not clearly unconstitutional under existing authority.

First, the bill has one substantive section that is confined to one subject: state recognition of federally recognized tribes. Federal recognition has a specific legal meaning. The federal government recognizes tribes by placing them on a list it publishes annually.<sup>4</sup> This acknowledges the sovereignty of the tribal governments and establishes a government-to-government relationship between them and the United States.<sup>5</sup> Federal recognition is a question of federal law, and federal determinations are dispositive.<sup>6</sup> The proposed bill would add state recognition to the recognition the federal government has already provided to certain tribes. Even parsing the substantive section of the bill—Section 5—to the maximum extent possible, all of its parts concern this one subject. Section 5 recognizes the “special and unique relationship” between the United States and all federally recognized tribes, and between the United States and federally recognized tribes in Alaska. It also provides for state recognition of federally recognized tribes in Alaska, and it states that it does not diminish the United States’ obligations to these tribes or create a trust relationship between the State and these tribes. All of these parts “fall under some one general idea,”<sup>7</sup> namely, state recognition of federally recognized tribes, “as a matter of both logic and common sense.”<sup>8</sup> The other sections of the proposed bill make minor and technical changes in service of Section 5 and provide for severability.

Second, the proposed bill includes a title that expresses its single subject: “An Act providing for State of Alaska recognition of federally recognized tribes.”

Third, the proposed bill includes the requisite enacting language.

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<sup>3</sup> *Kohlhaas v. State, Off. of Lieutenant Governor*, 147 P.3d 714, 717 (Alaska 2006) (quoting *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003)); *State v. Vote Yes for Alaska’s Fair Share*, 478 P.3d 679, 690 n.58 (Alaska 2021).

<sup>4</sup> 25 U.S.C. §§ 5130, 5131.

<sup>5</sup> *John v. Baker*, 982 P.2d 738, 750 (Alaska 1999) (citation omitted).

<sup>6</sup> *Id.*; 2017 Op. Alaska Att’y Gen. (Oct. 19), 2017 WL 4803738, at \*1.

<sup>7</sup> *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 484 (Alaska 2020) (quoting *Gellert v. State*, 522 P.2d 1120, 1123 (Alaska 1974)).

<sup>8</sup> *Id.* at 499.

Fourth, the bill does not include any prohibited subjects. Under article XI, section 7 of the Alaska Constitution and AS 15.45.010, a proposed bill may not dedicate revenue; make or repeal appropriations; create courts, define their jurisdiction, or prescribe their rules; or enact local or special legislation. The bill proposed by 21AKTR does not concern state revenue, appropriations,<sup>9</sup> or courts, and it does not constitute local or special legislation. This last determination “requires careful consideration” and a sequential analysis.<sup>10</sup> If a proposed bill is of “general, statewide applicability,” it is not local or special legislation,<sup>11</sup> even if it has uneven effects or a particular group of people stands to benefit.<sup>12</sup> If a proposed bill is not applicable statewide, it may still be permissible if it “bears a fair and substantial relationship to legitimate purposes.”<sup>13</sup>

Here, the proposed bill is applicable statewide because it applies to the State itself, and represents the State’s recognition of federally recognized tribes and their relationship with the United States. Even assuming state recognition would benefit these tribes over other groups, that would not disqualify the proposed bill as special legislation, because “most laws have a greater effect on some groups or some locations than others.”<sup>14</sup> And even if the proposed bill were considered not to be of statewide applicability because it recognizes only federally recognized tribes, it would still be permissible.<sup>15</sup> The State

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<sup>9</sup> The proposed bill does not concern appropriations because it does not “deal with a public asset.” *Pebble P’ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1073 (Alaska 2009). The legislature retains the discretion whether to appropriate any funds related to the State’s recognition of federally recognized tribes. *Cf. id.* at 1075.

<sup>10</sup> *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015); see 2012 Op. Alaska Att’y Gen. (Dec. 17), 2012 WL 6736206.

<sup>11</sup> *Pebble P’ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1078.

<sup>12</sup> *Price v. Kenai Peninsula Borough*, 331 P.3d 356, 361 (Alaska 2014).

<sup>13</sup> *Pebble P’ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1079 (quoting *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977)) (internal quotation marks omitted).

<sup>14</sup> *Price*, 331 P.3d at 361.

<sup>15</sup> See *Pebble P’ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1080 (noting that a law of general applicability also had a sufficient relationship to legitimate state purposes).

likely has a legitimate purpose in recognizing tribes, not unlike its purpose in recognizing Alaska Native languages<sup>16</sup> and art,<sup>17</sup> and the proposed bill achieves this end.

Finally, the proposed bill is not clearly unconstitutional under existing authority. While the lieutenant governor's certification decision does not involve a comprehensive, pre-election review of the constitutionality of a proposed bill, the lieutenant governor may reject a bill if it "proposes a substantive ordinance where controlling authority establishes its unconstitutionality."<sup>18</sup> This is a high bar; examples of clearly unconstitutional bills include a bill that would mandate school segregation based on race and a bill that would call for Alaska's secession from the United States.<sup>19</sup>

State recognition of federally recognized tribes is not clearly unconstitutional. While federal recognition is a question of federal law, no authority prohibits a state from also recognizing tribes. Federal laws and regulations account for the possibility of state recognition,<sup>20</sup> and several states recognize tribes within their borders, including some tribes that are not federally recognized.<sup>21</sup>

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<sup>16</sup> AS 44.33.520(a) (creating an Alaska Native Language Preservation and Advisory Council "to support the preservation, restoration, and revitalization of Alaska Native languages").

<sup>17</sup> AS 45.65.010(a) (providing for identification seals that "may be affixed only to original articles of authentic Alaska Native art created or crafted in the state").

<sup>18</sup> *Kohlhaas*, 147 P.3d at 717 (quoting *Kodiak Island Borough*, 71 P.3d at 900); *Pebble P'ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1077 (permitting "pre-election review of initiatives where the initiative is clearly unconstitutional or clearly unlawful"); *Vote Yes for Alaska's Fair Share*, 478 P.3d at 690–91.

<sup>19</sup> *Kohlhaas*, 147 P.3d at 717 (quoting *Kodiak Island Borough*, 71 P.3d at 900).

<sup>20</sup> *See, e.g.*, 25 U.S.C. § 4103(13)(A) ("The term 'Indian tribe' means a tribe that is a federally recognized tribe or a State recognized tribe."); 25 C.F.R. § 309.2(e) (defining "Indian tribe" to include federally recognized tribes and "[a]ny Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.").

<sup>21</sup> Martha Salazar, State Recognition of American Indian Tribes, National Conference of State Legislatures (October 2016), <https://www.ncsl.org/legislators-staff/legislators/quad-caucus/state-recognition-of-american-indian-tribes.aspx>.

The Alaska legislature has previously attempted to pass legislation recognizing tribes, considering multiple bills that are essentially identical to the bill proposed by 21AKTR.<sup>22</sup> It is not clear whether the state recognition provided by these bills and by 21AKTR would have any legal effect on the relationship between tribes and the State. In a memorandum to one of these bills' sponsors, Legislative Legal Services concluded that the bill would not have any legal effect, because the United States and Alaska Supreme Courts have already held that federally recognized tribes are sovereign entities.<sup>23</sup> This office has similarly concluded that "there are no unresolved legal questions regarding the legal status of Alaska Tribes as federally recognized tribal governments."<sup>24</sup> The proposed bill limits some possible effects of state recognition by explicitly stating that it does not "create a trust relationship between the state and federally recognized tribes." Whether the proposed bill would have other positive or negative effects, as a practical matter, is beyond the scope of this review. In any event, a lack of legal effect does not render a bill clearly unconstitutional.

Because no authority clearly prohibits the State from recognizing federally recognized tribes—particularly when doing so is unlikely to change the legal status of tribes in relation to the State—the proposed bill is not clearly unconstitutional. Accordingly, the bill proposed by 21AKTR meets the constitutional and statutory requirements for certification.

## **B. Form of the application**

The form of an initiative application is prescribed by AS 15.45.030, which requires that an application include the

- (1) proposed bill;
- (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

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<sup>22</sup> H.B. 123 (2021) (identical to 21AKTR, except for an effective date clause in place of the severability clause); S.B. 108 (2021) (same); H.B. 221 (2020) (same).

<sup>23</sup> Legislative Legal Services letter to Representative Tiffany Zulkosky (Mar. 25, 2021), [http://www.akleg.gov/basis/get\\_documents.asp?session=32&docid=13434](http://www.akleg.gov/basis/get_documents.asp?session=32&docid=13434).

<sup>24</sup> 2017 Op. Alaska Att'y Gen. (Oct. 19), 2017 WL 4803738, at \*2.

- (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The 21AKTR application includes the proposed bill and the requisite statement on each signature page. It also designates an initiative committee of three sponsors, who provided their information. With respect to the number of qualified sponsors, we understand the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of 148 qualified voters. Therefore, the application is in the proper form.

### **III. Proposed ballot title and summary**

We have prepared a ballot title and summary to assist you in complying with AS 15.45.090 and AS 15.45.180, as is this office's standard practice. Under AS 15.45.090(a)(2), petitions for a certified initiative must include "an impartial summary of the subject matter of the bill." Under AS 15.45.180(a), the lieutenant governor may also have to prepare a ballot proposition, including a "true and impartial summary of the proposed law," and a ballot title. The ballot title must "indicate the general subject of the proposition" in 25 words or less, and the word count of the summary must be less than 50 times the number of sections in the proposed bill.<sup>25</sup> The proposition must adhere to the readability policy described in AS 15.80.005 and ask whether the proposed bill should become law.<sup>26</sup>

The bill proposed by 21AKTR has six sections, which would allow a summary of up to 300 words. Below is a ballot title with 6 words and a summary with 49 words. Using the readability formula described in AS 15.80.005(c), the summary has a score of 66.6, which exceeds the target score of 60. We submit this ballot title and summary for your consideration:

#### **An Act Recognizing Federally Recognized Tribes**

This act is about tribes in Alaska. The federal government recognizes some tribes as sovereign nations. With this act, the State would recognize the

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<sup>25</sup> AS 15.45.180(a). "Section" here means "a provision of the proposed law that is distinct from other provisions in purpose or subject matter." *Id.*

<sup>26</sup> AS 15.45.180(b).

same tribes. This act will not change the federal government's duty to tribes or create a similar trust relationship between the tribes and the State.

Should this initiative become law?

#### **IV. Conclusion**

This initiative application is in the proper form. Both the proposed bill and the application comply with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative application and notify the initiative committee of your decision. You may then begin to prepare a petition under AS 15.45.090.

Please contact us if we can be of further assistance to you on this matter.

Sincerely,

TREG R. TAYLOR  
ATTORNEY GENERAL

By:

Thomas Flynn  
Assistant Attorney General