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VIA COURIER

November 4, 1991

John T. Baker, Esq.
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Northern Region DOT & PF

Re: State of Alaska v. Lujan, et al.
Our File No. 2556-1

Dear John:

As I discussed with you by telephone on October 31, I am pleased to report a very successful outcome to the hearing before U.S. District Court Judge James Singleton in Fairbanks on the defendant/appellees' motions to dismiss on sovereign immunity and on the merits. In fact, it considerably exceeded my optimistic expectations, and you are aware that from time to time I have in fact been somewhat pessimistic about the State's chances in this case, since several deadlines and opportunities for argument were not exploited in the early administrative stages of this matter. Yet the outcome achieved in Fairbanks will enable the State to reassert and argue most of the significant issues which the United States had claimed were unavailable to the State due to its failure to appeal the 1985 decision of the Interior Board of Land Appeals (IBLA) regarding the validity of the Dinah Albert Native allotment.

As you are aware, briefing on both sides of this appeal has been extensive, in response to the comprehensive federal motion asserting several significant sovereign immunity defenses, as well as attacks on the merits of each of the State's claims in its amended complaint. I had prepared an

oral argument which would have addressed each of the three or four most important issues upon which the State's case appeared to depend, and was earlier told that each party would have 30 minutes within which to present its argument. At the outset of the hearing, the court announced that each side would instead have 20 minutes, but then the court, prior to argument by counsel, proceeded to give its "tentative decision" concerning the dispute.

Judge Singleton's tentative decision tracked my anticipated oral argument almost exactly, and the result is that the State may have a reasonable opportunity to prevail on the merits of this appeal. I have ordered a tape of the complete proceedings, including the tentative decision and the court's later exchange of observations with counsel, so I will not try to recall them or repeat them in any detail here. However, it is sufficient to state that the judge views the State of Alaska as presently entitled to judicial review of both of the IBLA decisions in the Albert case; first the decision of 1985 (which the court observed that the State was not obligated to appeal because it was not an "aggrieved party" by that decision), and the IBLA's later decision of 1989, in which the IBLA applied legal doctrines it had earlier modified, so as to invalidate the State's rights-of-way for the Tanana River highway bridge at Nenana.

The court observed that notwithstanding any claimed residual sovereign immunity under the "Indian trust or restricted lands" exception to the federal Quiet Title Act at 28 U.S.C. §2409a, the State was entitled under the federal Administrative Procedure Act to obtain judicial review of IBLA's administrative adjudications, and that the present action was merely the next proper step in an administrative and judicial continuum which had begun with the State's private contest of the Albert allotment. Thus, statute of limitations issues do not appear to bar judicial review of the 1985 IBLA decision, and it is possible for the State to argue that "legislative approval" of the Albert allotment did not occur under Section 906 of ANILCA by using several arguments which were not raised by any party in 1985.

The court also had some positive observations to make regarding Albert's relinquishment of her allotment, including the fact that this relinquishment may cut off application of the doctrine of "relation back". By this doctrine, Albert's

heirs have claimed that her final allotment application (filed after the federal government issued the highway rights-of-way to the State) "related back" to her original occupancy in 1938, thus defeating the State's rights-of-way. The court did not seem convinced of the propriety of this "relation back", in view of the allotment claimant's earlier relinquishment.

The court also stated that it did not view the holdings by Judge von der Heydt in the Aguilar and Arctic John Etalook cases as "precedent", strictly speaking, since neither of those decisions was appealed, and the present court is of "equal dignity" with Judge von der Heydt. As a result, there will be an opportunity to distinguish Aguilar and Etalook in our briefing. I believe there are clearly distinguishable features between those cases, which involved Alaska Statehood Act land selections and the broad disclaimer in Section 4 of the Statehood Act, and the present case. I will coordinate with you to ensure that any arguments that I might raise to distinguish the Aguilar or Etalook decisions do not conflict with positions you may presently be asserting in other litigation in which you seek to take advantage of the Aguilar or Etalook holdings.

As a result of the court's announced "tentative decision", the opening arguments by the federal and Alaska Legal Services counsel (Dean Dunsmore and Judith Bush, respectively) were fairly ineffectual, and were interrupted or sidetracked several times by colloquy with the court. The court invited me to present the State's opposition, but it became apparent to me, about three or four minutes into my argument, that the court was already persuaded by the State's position and that further argument was unnecessary. The federal counsel declined to use any of his reserved reply time, in view of the court's tentative decision.

From the bench, the court orally denied the federal and ALSC motions to dismiss, and set an appellate briefing schedule which calls for the State's opening brief to be filed on or before December 20, 1991; the defendants' briefs will be filed on January 31, 1992; and the State's reply brief will be filed on February 21, 1992. I will forward to you a copy of the written order which the judge enters, as well as a copy of the transcript of the judge's remarks at the October 30 hearing.

As you indicated by telephone, we need to revise the contract under which I am representing the State to meet legal fees and expenses incurred to date which may have exceeded the original contract amount, as well as to take into account the briefing and argument which will be required to conclude this case in the U.S. District Court. I look forward to working with you on that matter.

Could you please inform Attorney General Cole and Assistant Attorney General John Athens of the present position of this case, for their information? I enjoyed our discussion of this and related public land matters on Thursday, and look forward to hearing from you in the future.

Sincerely yours,

BURR, PEASE & KURTZ

Thomas E. Meacham

TEM/dmd661
cc: Steve Sisk
Alaska DOTPF
Fairbanks