To: Colorado Interim Legislative Committee on Native American Issues

From: Southern Ute Indian Tribe

Re: Proposed Exclusion Legislation

Date: August 12, 2024

This memo provides background information and an initial draft of proposed "exclusion" legislation for discussion with Colorado's Interim Legislative Committee on Native American issues.

I. Background

Due to Congress's plenary authority over Indian affairs and the fact that federally recognized Indian tribes are sovereigns, the general rule is that state authority is preempted in "Indian Country" as generally defined under federal law (18 U.S.C. § 1152). This is particularly true when a state is seeking to regulate the tribe itself or regulate in an area where the tribe or the federal government have jurisdiction. Within Indian Country, state laws apply in very different ways to Indians and non-Indians and their respective lands. As a result of the provisions of Public Law No. 98-290, a federal law that established the jurisdictional rules within the Southern Ute Indian Reservation, the territorial jurisdiction of the Tribe within the Reservation also varies depending on the Indian/non-Indian status of the actor and the location of the activity.

While the General Assembly is in session each year, the Southern Ute Indian Tribe ("Tribe") actively monitors proposed legislation to identify those bills that either (1) by their express terms apply to the Tribe or the Reservation, or (2) apply generally throughout the State but that if construed to apply to the Tribe or the Reservation, would be an unlawful infringement on the Tribe's sovereignty or would be preempted by federal or tribal authority. The second scenario is more common. Unlike the laws that have applied expressly to narrower subjects involving interaction with the Tribe, such as Colorado's implementation of the Indian Child Welfare Act and funding studies of Indian boarding schools, typically the Tribe has no advance notice that a bill is being proposed that would impact its interests.

Whether or how a bill is intended to apply within the Reservation generally requires a clear statement by the General Assembly. In some cases the Tribe has been able to confirm the intent of the bill sponsor and has been successful in having verbiage inserted into the bill to have the Tribe, Tribally-owned entities, or Reservation land excluded. Other laws, however, have passed without any seeming consideration of their effect within the Reservation, which leads to ambiguity and also increases the likelihood of jurisdictional disputes between the State, the Tribe, or those who are subject to either of their laws.

One recent example of a bill that needed to be amended to exclude the Tribe and the Reservation was HB 24-1346. As introduced, the bill would have conflicted with federal law related to Indian-owned minerals. The bill, which among other things addressed ownership of geothermal resources, reinforced a presumption of ownership that favored the surface owner. In contrast, federal law treats geothermal resources as part of an Indian-owned mineral estate. The Tribe requested exclusionary language, which was incorporated into the final version of the bill that was signed into law. That language stated that except as otherwise specified, nothing in the article authorized the state or its subdivisions to regulate the activities of "federally recognized Indian tribes, their political subdivisions, or tribally controlled affiliates, undertaken or to be undertaken with respect to mineral evaluation, exploration, or development or energy and carbon management operations on lands within the exterior boundaries of an Indian reservation located within the state; or third parties, undertaken or to be undertaken with respect to mineral evaluation, exploration, or development or energy and carbon management operations on Indian trust lands within the exterior boundaries of an Indian reservation located within the state."

There are a number of bills and state statutes that include this exclusionary language at the Tribe's request. Other recent examples include:

- Water Used in Oil & Gas Operations (HB 23-1242)
    - *"On or before December 31, 2024, the Commission shall adopt rules to require a statewide reduction in fresh water usage, and a corresponding increase in usage of recycled or reused produced water, at oil and gas locations. The rules must not apply to activities occurring within the exterior boundaries of an Indian reservation located within the state."*
    - *"The consortium has no role within the exterior boundaries of an Indian reservation located within the state."*

- Dredge and Fill (SB 24-127)
    - "*Nothing in this section is intended to apply to the activities of federally recognized Indian tribes, Indians, their political subdivisions, or tribally controlled affiliates, undertaken or to be undertaken, on lands within the exterior boundaries of an Indian reservation located within the state additionally, nothing in this section is intended to apply to the activities of third-party, non-Indian owners and operators undertaken, or to be undertaken with respect to reservation waters on Indian trust lands within the exterior boundaries of an Indian reservation located within the state. On privately-owned fee lands within the exterior boundaries of an Indian reservation located within the state, this section applies only to the discharge of dredge or fill materials of non-Indian persons.*"

II. Concept for Legislation

The Tribe's proposal is for the General Assembly to enact a law establishing an express rule of construction applicable to future Colorado laws addressing how such laws relate to the Tribe and the Reservation. The new rule of construction would be added to Colorado Revised Statutes (Title 2, Article 4, Parts 1 through 4), which currently contain an extensive set of rules and definitions to be used in interpreting and applying Colorado's laws.

The proposed rule of construction is consistent with well-established canons of construction that already exist on the federal level, where it is reflected in numerous federal court decisions, including in recent U.S. Supreme Court decisions.[1] The proposed rule would establish that in the absence of a clear statement that a law is intended to apply to Indians, the Tribe, Tribally-controlled entities, or real property interests owned by any of them within the Reservation, the new State law would be construed to not apply to such Indian persons, entities, or interests within the Reservation.

Additionally, the legislation could prescribe a procedure whereby the Tribe could consent to the application of a State law within the Reservation (subject to compliance with any federal requirements for issuance of such consent). It could also address the Tribe's eligibility to participate in programs and grant funding when such programs and grant funding are included in laws of general application. Finally, while not addressed in the proposed legislation, consideration should be given to establishing a mechanism for preparing and encouraging the use of cooperative memoranda of agreement to address application of State laws that affect the Tribe's interests, subject to revocation by either the State or the Tribe.

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[1] *See, e.g. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 2023 (To abrogate tribal sovereign immunity, Congress must make its intent unmistakenly clear in the language of the statute.). The complicated analytical nature of the relative powers of states and tribes is reflected in the case of *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), which upheld tribal sovereign immunity from suit by the state seeking to bar tribal gaming activity on land purchased by a tribe within the state boundaries.