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Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol
Sacramento, California 95814

Dear Governor Brown:

I write today in respect to California Fish & Game Code §2022, regarding the possession and sale of ivory, as added by Assem. Bill 96, 2015-2016 Reg. Sess., ch. 475, 2015 Cal. Stat. This provision became operative on July 1, 2016.

Several months ago I was contacted by Dr. Dalee Sambo Dorough, Associate Professor of Political Science at the University of Alaska Anchorage and a member of the United Nations Permanent Forum on Indigenous Issues about the significant adverse effect that the new Fish & Game Code §2022 could have on the traditional trade in marine mammal arts and crafts by Alaska's Native people, as well as the use of fossilized mammoth and mastodon ivory in traditional Alaska Native arts and crafts.

The creation and sale of Native arts and crafts involving marine mammal parts, e.g. walrus ivory and whalebone, is a significant part of the local economy in remote Alaska Native villages like those on St. Lawrence Island in the Bering Sea. It is a byproduct of federally regulated subsistence activities in which the animal is first taken for consumption in accordance with federal law. The non-consumptive portions of the animal are used for arts and crafts. This pattern of use is consistent with Native tradition that requires that no portion of the animal go to waste. Alaska Natives also utilize "old ivory", from marine mammals taken prior to the 1972 enactment of the Marine Mammal Protection Act and "fossilized ivory" found on their aboriginal lands.

California Fish & Game Code §2022 defines the term "ivory" to include a tooth or tusk from a species of mammoth, mastodon, walrus, whale or narwhal, whether raw or worked ivory, and includes a product containing or advertised as containing, ivory.

The law, as enacted by the California Legislature, also contains several exemptions. An exemption was included for ivory that is part of a musical instrument. Another was created for ivory that constitutes 5% or less of the volume of a bona fide antique. This exemption was presumably established in response to concerns from antique firearms owners whose gun grips are made of ivory. There was an exemption for sales of ivory by a bona fide educational or scientific institution. However there was no explicit exemption for the traditional arts and crafts of Alaska's Native people or other indigenous peoples.

There is an exemption in the Fish & Game Code for “an activity that is authorized by an exemption or permit under federal law or that is otherwise expressly authorized under federal law.” The Marine Mammal Protection Act does contain an exemption permitting the taking of marine mammals in a non-wasteful manner for the creation of “authentic native articles of handicrafts and clothing.” 16 USC §1371(b). It goes on to state, “Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce.”

However there is considerable uncertainty in Alaska over whether this language is sufficient to exempt traditional Alaska Native arts and crafts which fall within the federal definition from California’s prohibitions. This uncertainty has a chilling effect on customers and creates a hostile environment for the Native artists and artisans who rely on income from their works to support the high cost of living in remote Alaska villages. I respectfully ask that we work together toward definitive guidance to address these uncertainties.

The federal government does not presently regulate transactions in fossilized ivory from sources other than marine mammals, as I understand it, so there is no federal law that would provide the predicate for a California exemption. I appreciate that the California Legislature may have been concerned that it is difficult to distinguish between fossilized ivory derived from species other than elephants and rhinoceros and new ivory derived from those species. However, it is unfortunate, in my judgment, that California has asked indigenous artists and artisans to bear the burden of an over inclusive regulatory regime. I would appreciate your thoughts on whether California law might be specifically amended to exclude authentic Native articles or handicrafts and clothing using the Marine Mammal Protection Act definitions from the ivory prohibitions.

The indigenous community has suggested to me that preemptive federal legislation may be necessary to protect Native artists and artisans from different and at times conflicting state laws regarding the sale and possession of Native handicrafts. Other states have enacted or are considering ivory bans.

The federal plenary power under the Indian Commerce Clause of the United States Constitution affords Congress the authority to consider such legislation. Recognizing however that the states are increasingly sensitive to the historic tensions and traumas that have been inflicted upon America’s first peoples I felt it appropriate to afford you and your fellow Governors the opportunity to consider whether well intentioned legislation to protect global elephant and rhinoceros stocks is causing inappropriate adverse and unintended consequences to indigenous economies.

Nathan Bergerbest, my Deputy Chief of Staff in Washington, is staffing this issue for me. I would encourage your staff to contact him at (202) 224-2839 to pursue this matter further.

Respectfully,



Lisa Murkowski
United States Senator