

SB

554



Official Business

Alaska State Legislature

Senate

Committee on Resources

Pouch V
State Capitol
Juneau, Alaska 99811

May 13, 1980

Christian:

Here is a copy of the legal analysis of SB 554. It is quite obvious that there may be problems with this measure should it be decided that it come to the floor of Resources.

If there are any questions that you wish to throw at me, feel free to do so.

Jay

STATE OF ALASKA
THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 13, 1980

SUBJECT: Analysis of legal problems connected with
Senate Bill 554
(Work Order Number 8552)

TO: Senator Bill Sumner
Chairman, Senate Resources Committee

FROM: Tamara Brandt Cook *TBC*
Legislative Counsel

You have asked me to research legal problems which may be involved with Senate Bill 554, "An Act authorizing the commissioner of the Department of Natural Resources to lease state land for industrial development." This bill presents several separate legal issues.

Section 38.05.072(b)(2) requires that a lessee of government land under this act shall agree that at least 75 percent of the persons employed by the lessee shall be state residents. The United States Supreme Court has held that a resident of one state is entitled to travel to another state for purposes of employment free from discriminatory restrictions in favor of state residents. Ward v. Maryland, 20 L.Ed. 449 (1871). More recently, it has held that unless there is a substantial reason for the discrimination, disparity of treatment between residents and nonresidents is precluded by the Privileges and Immunities Clause. A "substantial reason" for discrimination does not exist unless nonresidents constitute a peculiar source of evil and a "reasonable relationship" must exist between the danger posed by nonresidents and the discrimination practiced against them. Toomer v. Witsell, 334 U. S. 385, 192 L.Ed. 1460, 68 S. Ct. 1156 (1948).

In applying this criteria, the Supreme Court overturned the Alaska Hire statute, which provided that residents be given preference over nonresidents for employment in the state oil and gas industry. The purpose of the Alaska Hire statute

was to relieve the uniquely high unemployment rate of the state, but the Court found that nonresidents were not a source of this evil since the record indicated that unemployment was a particular problem of unskilled Alaskans and Alaskans in remote areas, so that the high unemployment rate was not principally due to the influx of nonresidents seeking employment. Furthermore, the Court held that the statute was not reasonably related to the evil sought to be corrected because the preference was granted to all Alaskans regardless of their employment status instead of to only unemployed Alaskans. Hicklin v. Orbeck, 437 U. S. 518, 57 L.Ed.2d 397, 98 S. Ct. 9482 (1978). Arguably, the purpose of this act is to attract new industry to the state in order to stimulate the economy in general, rather than principally to provide jobs. However, even under such a broad interpretation of the purpose, there is little doubt that the section requiring the employment of a percentage of state residents comes squarely under the reasoning enunciated in Hicklin v. Orbeck, supra. It violates the Privileges and Immunities Clause of Article IV, section 2 of the U.S. Constitution and may also run afoul of the Equal Protection Clause of the Fourteenth Amendment; and, if a lessee were an industry which was involved in interstate commerce, the provision could run afoul of the Commerce Clause as well.

The lease of state land for industrial development under terms which would presumably be very attractive and, therefore, favorable to a lessee could run into trouble under Article IX, section 6 of the Alaska Constitution which provides:

No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose. (Emphasis added).

While this act only provides for leases of state land, a lease certainly is a transfer of property rights and would be scrutinized under this section. Section 38.05.072(b) provides that a lessee may be charged no rent or real property taxes, clearly a potential transfer of public property also. While this act could be subject to attack, I feel that it would probably survive a challenge based upon this provision of the constitution. "Public purpose" is a term of great imprecision (DeArmond v. Alaska State Development Corporation, 376 P2d 717 (Alaska 1962)), and the

legislature has broad discretion to choose the means to affect a public purpose, which the courts will not interfere with unless the means chosen are arbitrary and without any reasonable basis in fact. Suber v. Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966). It has been held that legislation directed towards improving the economic climate of the state serves a legitimate purpose (Walker v. Alaska State Mortgage Association, 416 P.2d 245, (1966)) and that efforts to attract local industry also serve a public purpose (Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970)). The purposes behind this act, to attract industry and to stimulate the economy, are similar and would likely be upheld as public purposes.

Lastly, there seems to be a potential constitutional "separation of powers" problem inherent in this act. Just as one branch of government may not infringe upon the power of another branch of government, there are limits imposed upon the extent to which one branch of government may delegate its power to another branch of government. The rule is that so long as a policy is laid down and a standard for the exercise of the power is established by statute, no unconstitutional delegation of legislative power is involved in leaving to selected governmental instrumentalities the making of rules and the determination of facts to which the policy is to apply. Schechter v. United States, 55 S. Ct. 37, 97 A. L. R. 947 (1935). The power to tax is essentially a legislative function and the legislature is authorized to grant tax exemptions. City of Nome v. Block No. H, Lots 5, 6 & 7, 502 P.2d 124 (Alaska 1972). AS 38.05.072(b) provides that the commissioner, evidently at his sole discretion, may agree that no real property taxes will be assessed against a lessee. Since the act contains no standards for the exercise of the power to exempt from taxation, it can be argued that this provision is an unconstitutional delegation of legislative power. Although there are no Alaska cases directly on point, the separation of powers doctrine is recognized in Alaska (Bradner v. Hammond, 553 P.2d 1 (Alaska 1976)), and other states have recognized limits on the delegation of state legislative power under the "separation of powers" doctrine. Cities Service Gas Company v. Witt, 500 P.2d 288 (Okla. 1972); Citizens v. Smith, 396 P.2d 677 (Nev. 1964); Spokane County v. Valu-Mart, Inc., 419 P.2d 993 (Wash. 1966). Article II, section 1 of the Alaska Constitution provides that the legislative power is vested in the

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legislature, so it appears under the Schechter rule that the legislature would have to set standards before it could delegate the power to grant a tax exemption to the executive branch of government. This act does not comply with that requirement.

If you have any further questions, please contact me.

TBC:ljb