

Original sponsors: Martin and
Pettisworth

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 466 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to appropriations to and fiscal
7 procedures of the University of Alaska; and providing
8 for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 37.07.080(e) is amended to read:

11 (e) Transfers or changes between objects of expenditures or
12 between allocations may be made by the head of a state agency upon
13 approval of the division. However, transfers or changes between
14 objects of expenditures or between allocations may be made by the
15 Board of Regents of the University of Alaska in accordance with proce-
16 dures established by the Board of Regents and the Office of Management
17 and Budget. Transfers [NO TRANSFERS] may not be made between
18 appropriations except as provided in an act making the transfers
19 between appropriations.

20 * Sec. 2. AS 37.07.080 is amended by adding a new subsection to read:

21 (i) Notwithstanding (h) of this section, the increase of an
22 appropriation item based on additional federal or other program re-
23 ceipts not specifically appropriated may be expended by the Board of
24 Regents of the University of Alaska in accordance with procedures
25 established by the Board of Regents and the Office of Management and
26 Budget.

27 * Sec. 3. AS 37.25 is amended by adding a new section to read:

28 Sec. 37.25.040. APPROPRIATIONS FOR ORGANIZED RESEARCH. (a) An
29 appropriation to the University of Alaska for organized research is

1 valid for the duration of the project and the unexpended balance for
2 the project shall be carried forward to subsequent fiscal years.

3 (b) Between July 1 and December 30 of each fiscal year the Board
4 of Regents shall file with the Department of Administration a state-
5 ment of the amount of the unexpended and unobligated balance of appro-
6 priations to be carried forward to the next fiscal year under this
7 section.

8 (c) This section applies only to appropriations specifically
9 designated by the legislature to be for organized research and subject
10 to this section.

11 * Sec. 4. This Act takes effect immediately in accordance with AS 01.-
12 10.070(c).
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STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465 3800

MEMORANDUM

November 3, 1983

SUBJECT: Dedication of interest earned on University of
Alaska investments
(Work Order No. 13-1543)

TO: Representative Terry Martin

FROM: Keith B. Levy *KBL*
Legislative Counsel

Enclosed is a revision of Work Order 13-1543, relating to the fiscal procedures of the University of Alaska. At your request, I have included in section two of this draft a provision allowing interest earned on University investments to be deposited directly into the University of Alaska working capital reserve fund (AS 14.40.296) without an appropriation from the legislature. You should be aware that this provision may be in violation of the prohibition against dedicated funds in the Constitution of the State of Alaska.

Article IX, section 7 of the state constitution provides:

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article [the Alaska Permanent Fund] or when required by the federal government for state participation in federal programs. This provision shall not prohibit the

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continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

Thus, the state constitution prohibits the dedication of certain state revenues to any special purpose except for three specific exceptions: the Alaska Permanent Fund, participation in federal programs, and funds grandfathered in at the time the constitution was adopted. It seems clear that the provision in your bill requiring the dedication of interest income does not fall into any of the exceptions expressly provided for in the dedicated funds clause.

Two questions are presented by your bill with respect to the dedicated funds clause. First, is interest income a "state tax or license" within the meaning of article IX, section 7 of the state constitution such that the dedicated funds clause applies at all? Second, does depositing that interest income into the University of Alaska working capital reserve fund so that it may be used without an appropriation by the legislature amount to a dedication to a special purpose?

The meaning of "state tax or license":

In a recent decision, the Supreme Court of Alaska considered whether certain mandatory tax assessments to be paid directly to private aquaculture associations amounted to a "state tax or license" that would invoke the dedicated funds clause. State v. Alex, 646 P.2d 203 (Alaska 1982). Concluding that the assessment did come within the ambit of the dedicated funds provision, the court cited 1975 Alaska Op. Atty. Gen. No. 9 with approval:

...it is our conclusion that the dedication of any source of public revenue: tax, license, rental, sale, bonus-royalty, royalty, or whatever is limited by the state Constitution to those

existing when the Constitution was ratified or required for participation in federal programs. (Emphasis added.)

Alex, supra, at 210. This language indicates that the Supreme Court takes a very broad view of the kinds of revenue that amount to a state tax or license within the meaning of the dedicated funds provision. Accordingly, there is a strong possibility that the Court would consider interest income a state tax or license that may not be dedicated to a special purpose under the state constitution. Since the issue has not been placed squarely before the Court, however, it remains an open question.

The dedication of interest income to a revolving fund:

Last year, the Attorney General released an opinion providing a well reasoned thorough discussion of the dedicated funds clause. 1982 Alaska Op. Atty. Gen. No. 13. That opinion specifically discusses the second question raised by your bill: the applicability of the dedicated funds clause to interest income that is returned to a revolving fund. The opinion acknowledges that an argument could be made that placing interest generated by a fund back into the fund without an appropriation by the legislature does not violate the purpose of the dedicated funds clause: to allow the legislature to retain control of state revenues. However, the Attorney General reached the following conclusion with which I agree:

A difficulty that arises from the view that the dedicated funds prohibition is not applicable to interest or investment income on separate funds is that it permits steadily increasing amounts of money to be received and used by state departments and agencies without legislative control through the annual budget process. This is precisely the problem posed by the dedication of revenue sources

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which the drafters [of the state constitution] sought to avoid. For this reason, while we are not certain about the likely outcome, we doubt that a blanket exception for derivative income would be approved by the courts.

1982 Alaska Op. Atty. Gen., No. 13 at 16. Thus, in light of the significant amounts of interest generated by various state funds and the broad view of the dedicated funds clause taken by the Supreme Court, the dedication of interest income to the University of Alaska working capital reserve fund is at least open to constitutional attack.

Moreover, your bill may present an even greater constitutional problem than that discussed in the Attorney General's opinion. This is because the Attorney General's opinion considered only the dedication of the interest earned from a particular fund to that fund itself. Section 2 of your bill differs, however, in that it would dedicate the interest earned on all investments made by the University of Alaska to the working capital reserve fund. Thus, the relationship between the fund and the interest income which the Attorney General considered significant seems to be lacking.

In conclusion, while the applicability of the dedicated funds clause to interest income remains undecided, there are strong indications that such a dedication of funds may be unconstitutional. As an alternative, the legislature might consider including a provision in the annual budget bill appropriating all interest income earned on funds held by the University of Alaska to the working capital reserve fund. This would not guarantee that the interest would be appropriated to the fund in future years, but it would provide that money to the university on an annual basis and also circumvent the constitutional problem.

KBL:ojb
J1/d014
Enclosure

MEMORANDUM

State of Alaska

TO: Jay Hogan, Associate Director
Division of Budget Review
Office of Management & Budget
Office of the Governor

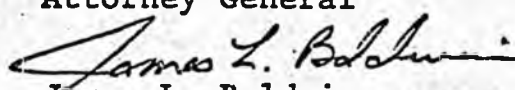
DATE: January 12, 1984

FILE NO: 366-588-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: University of Alaska
investment power re
interest income


By: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

This memorandum responds to a request for opinion made by your predecessor dated April 19, 1983. Our advice was requested concerning the status of receipts earned by the University of Alaska, and the treatment of interest income earned by the University of Alaska through the deposit of those receipts in an interest bearing account. We believe that certain funds held by the university may be invested and the legislature may appropriate interest as a source of funding separate from the state general fund. However, the investment power of the university does not extend to money which represents unrestricted state revenue appropriated to the university.

Specifically, you have asked "what authority is there to treat interest income as a program receipt?" The term "program receipts" is not defined by law. That term has been used to describe a source for certain appropriations included in the executive budget. Generally, the money is paid to a state agency by a third party in trust, for a specific purpose, or as a custodian, or as a consequence of authorized activities of the agency. For most executive branch agencies, receipts are paid monthly into a program receipts account within the state treasury (also referred to as the "general fund"). Each fiscal year the legislature appropriates money based on estimates contained in the governor's budget. If program receipts exceed the estimates, the agency may expend the money only after it submits a revised program for approval by the office of management and budget. AS 37.07.080(h). These appropriations are considered made from a funding source other than the general fund. However, the designation of program receipts as a separate source of funding in the executive budget is not appropriate for all of that revenue. Rather, some of the revenue can properly be considered separate because it is held in trust or as a custodian. The remainder must be considered unrestricted revenue: that is, the money is not held by the state as custodian nor held in trust for a specific purpose but is available for appropriation for any purpose.

Generally, program receipts are accounted for as a separate funding source for either of the following two reasons:

(1) by doing so the amount of general fund expenditures appears to be reduced without reducing spending; and (2) an agency can be encouraged to capture program receipts which it might otherwise lose for lack of a proper incentive. Unrestricted revenue in the form of program receipts should not be considered to be a separate funding source from other unrestricted revenue because to do so creates the same conditions for which the dedicated fund prohibition (Alaska Const. art. IX, § 7) was adopted to prevent.

You next ask whether certain sources of cash payments to the university are "property of the university or under state control." The university apparently retains all receipts from tuition, dormitory fees, rental income earned on university land, and private endowments given to the university. The university deposits these receipts without segregation in an investment account established by the university. The university considers all receipts generated by the operation of its programs to be property which may be segregated from the state treasury.

Generally, the dedication of state revenue is prohibited by article IX, section 7 of the Alaska Constitution. In State v. Alex, 646 P.2d 203 (Alaska 1982), the Alaska Supreme Court interpreted article IX, section 7 so that the dedication of any source of public revenue is prohibited. Certain exceptions to this prohibition are recognized, including pledges of revenue made to secure revenue bond financing. This type of dedication is enforceable because it is made by bond covenants which create a contractual relationship between the parties. For similar reasons, certain receipts from property held in trust may be segregated and expended only in accordance with terms of the trust. All other receipts of the university raised by operation of some general law become state public funds. Navajo Tribe v. Arizona Dept of Administration, 528 P.2d 623 (Ariz. 1974). Unless provided otherwise, these public funds should be promptly remitted to the state treasury where they are in the custody and under the control of the commissioner of revenue. AS 37.10.050; see also Opinion of the Justices, 134 N.E.2d 892 (Mass. 1956) (interpreting a state constitutional provision identical to the provisions of AS 37.10.050(a)).

Interest income earned from investment of university trust property may be appropriated as program receipts from a separate fund. Clearly, the university has the power to "invest ... money ... received from sources other than the state legislature or federal appropriations for the purpose of the University of Alaska, its adornment, or the aid or advantage of students or faculty" AS 14.40.250 (emphasis added). While the wording of the statute is ambiguous, we believe that the words "for the

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Office of Management & Budget
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purpose of the University of Alaska, its adornment, or the aid or advantage of students or faculty" defines and limits the investment authority of the board of regents as to trust property. The exclusion of money received from the state legislature or federal appropriations probably applies to unrestricted revenue sources and is consistent with the provisions of AS 37.07 and AS 37.10. Investment of program receipts which are the source of appropriations made by the legislature is the responsibility of the Department of Revenue. AS 37.10.070.

The university may not deposit program receipts, which represent unrestricted revenues of the state, in interest bearing, federally insured accounts for safekeeping unless a statute is enacted which specifically provides for that power. The power of the university to manage its finances and property is subject to control by the legislature through the enactment of statutes. Alaska Const. art. VII, § 2; see also University of Utah v. Board of Examiners, 295 P.2d 348 (Utah 1956). The public finance laws of the state contemplate centralization of the investment of surplus state money in the Department of Revenue. AS 37.10.070(a). The legislature has specified by law certain institutions or instruments in which state money may be invested. In its defense, the university maintains that it is conservatively investing the cash "float" from various funding sources. However, nothing in law prevents this investment strategy from changing. A further expansion of the power to invest surplus state money without adequate provisions to govern this activity will increase the opportunity for diversion or mismanagement.

Unless AS 14.40.250 is amended to allow the university to retain and invest unrestricted revenues appropriated as program receipts, it must pay all cash earned by operation of general law directly to the Department of Revenue. The university must draw on appropriations of program receipts from the Department of Revenue in the same manner as other executive branch agencies. The request to expend interest income derived from receipts which are attributed to income earned from the investment of appropriated money should be denied. These receipts must be paid into the state treasury.

Finally, you have asked if provisions which set the rules for the lapse of appropriations apply to the university. We believe that AS 37.25.010 and 37.25.020 apply to the university in the same manner as other state agencies with one exception. Appropriations from segregated trust or custodial property of the university expire as provided by law but lapse into the separate funds of the university rather than the state treasury.

JLB/pjg



UNIVERSITY OF ALASKA
Statewide System of Higher Education
Fairbanks, Alaska 99701

January 26, 1984

MEMORANDUM

TO: Jay Barton
President

FROM: Astrid de Parry
General Counsel *Astrid de Parry*

RE: House Bill No. 466

The purpose of this memorandum is to provide a general overview of the laws and customs relating to the fiscal procedures of the University of Alaska. In particular, this memorandum will attempt to address some of the significant legal issues and public policy considerations surrounding House Bill No. 466. Accordingly, this memorandum is divided into five major sections as follows: (1) a description of House Bill No. 466; (2) a statement of the issues presented; (3) an historical overview of pertinent legislation and related matters; (4) a discussion of the issues presented; and, finally, (5) a summary analysis of the foregoing.

I. House Bill No. 466

House Bill No. 466, entitled "An Act relating to appropriations to and fiscal procedures of the University of Alaska; and providing for an effective date," consists of six sections as follows:

Section 1 would amend AS 14.40.250 by deleting the phrases "from sources other than legislature or federal appropriation" and "under this section," and by substituting the phrase "any source" for the phrase "sources other than the state legislature or federal appropriation." The purpose of these amendments is to clarify and underscore the fiduciary responsibility of the Board of Regents to properly administer all funds and other property of the University of Alaska.

Section 2 would amend AS 14.40.296(a) by adding the phrase "interest income from investments made by the Board of Regents under AS 14.40.250 and" The purpose of this amendment is to provide explicit statutory authority for the Board of Regents to supplement the legislatively created working capital reserve fund with the proceeds of excess interest income generated

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pursuant to the Board of Regents' investment programs under AS 14.40.250.

Section 3 would amend AS 37.07.080(e) by adding the following sentence: "However, transfers or changes between objects of expenditure or between allocations may be made by the Board of Regents of the University of Alaska in accordance with procedures established by the Board of Regents and the Office of Management and Budget." The purpose of this amendment is to provide explicit statutory authority for the Office of Management and Budget to review and approve procedures established by the Board of Regents concerning transfers or changes between objects of expenditure or between allocations.

Section 4 would amend AS 37.07.080 by adding a new subsection as follows:

(i) Notwithstanding (h) of this section, the increase of an appropriation item based on additional federal or other program receipts not specifically appropriated may be expended by the Board of Regents of the University of Alaska in accordance with procedures established by the Board of Regents and the Office of Management and Budget. Expenditures under this subsection shall be reported in writing to the Legislative Budget and Audit Committee by the Board of Regents.

The purpose of this amendment is to provide explicit statutory authority for the Board of Regents to expend "additional federal or other program receipts" received by the University in excess of the budgeted amounts reflected in the annual general appropriation bill. In addition, the amendment provides explicit statutory authority for the Office of Management and Budget to review and approve procedures established by the Board of Regents concerning the expenditure of excess program receipts.

Section 5 would amend AS 37.25 by adding a new section as follows:

Section 37.25.040. Appropriations for the University of Alaska.

(a) The unexpended balance of an appropriation to the University of Alaska from program receipts shall be carried forward to subsequent fiscal years.

(b) An appropriation to the University of Alaska specifically designated by the legislature to be for

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organized research and subject to this section is valid for the duration of the project and the unexpended balance for the project shall be carried forward to subsequent fiscal years.

(c) Between July 1 and December 30 of each fiscal year the Board of Regents shall file with the Department of Administration a statement of the amount of the unexpended and unobligated balance of appropriations to be carried forward to the next fiscal year under this section.

(d) In this section and AS 37.07.080(i), 'program receipts' means revenue from all sources including tuition, fees, rents, investment income, sales, overhead recovery, and payments from other sources including boroughs, municipalities, private individuals, corporations and trusts, and the federal government, but not including the general fund.

The purpose of this amendment is to codify, as permanent law, the legislature's recent practice of adopting substantially similar statements of "legislative intent" regarding annual appropriations to the University of Alaska. In addition, this section provides a much needed definition for the term "program receipts," and specifically acknowledges that unexpended program receipts "appropriated" to the University shall be carried forward to the same extent as unexpended program receipts generated in excess of the budgeted amounts.

Section 6 provides an immediate effective date.

II. Issues Presented

There are at least four significant questions of constitutional magnitude implicit in House Bill No. 466 as follows:

1. Does HB 466 violate the constitutional prohibition against dedicating "the proceeds of any state tax or license . . . to any special purpose. . . ."? (Constitution, Article IX, Section 7.)
2. Does HB 466 violate the constitutional prohibition against withdrawing money from the state treasury "except in accordance with appropriations made by law."? (Constitution, Article IX, Section 13.)

3. Does HB 466 impermissibly infringe upon the Board of Regents' constitutional mandate to govern the University of Alaska? (Constitution, Article VII, Section 3.)
4. Does HB 466 unconstitutionally divest the University of Alaska of its "title to all real and personal property now or hereafter set aside for or conveyed to it."? (Constitution, Article VII, Section 2.)

III. Historical Overview

The University of Alaska, as the designated land-grant institution for the State of Alaska, is a unique product of both state and federal law. Most of the 69 existing land-grant colleges and universities were established in the mid-19th century pursuant to the Morrill Act of 1862 (a time when Alaska was still a Russian enclave). Under the Act, Congress granted certain federal lands to each state in the union for the purpose of establishing ". . . at least one college where the leading object shall be . . . to teach such branches of learning as relate to agriculture and the mechanical arts." In 1915, Congress granted certain federal lands to the Territory of Alaska so that it too could establish and support an "Agricultural College and School of Mines" (Act of March 4, 1915, Ch. 181, §2, 38 Stat. 1215). In 1929, the federal government granted additional lands to the Territory of Alaska for the exclusive use and benefit of the Agricultural College and School of Mines (Act of January 21, 1929, Ch. 92, §§1-7, 45 Stat. 1091-1093). Effective July 1, 1935, the territorial legislature reconstituted the Alaska Agricultural College and School of Mines as a body corporate to be known as the "University of Alaska," and to be governed by a Board of Regents who were empowered to ". . . have the care, control and management of all the real and personal property and all monies of the said University. . . ." (§37-10-6 ACLA 1949; now amended and codified at AS 14.40.170; see generally, Chapter 10 of Title 37 of the Alaska Compiled Laws Annotated, 1949.)

For the next twenty years, the University of Alaska enjoyed the curious distinction of being the only territorial agency or instrumentality which operated on the federal fiscal year. (§37-10-4(e) ACLA 1949.) Presumably, this distinction was necessitated by the fact that the University's major source of financial support was the federal government. Even though the Treasurer of the Territory was designated as the initial recipient of any federal land-grant college funds belonging to the University, he was obliged to pay over all such funds to the Treasurer of the Board of Regents upon requisitions duly signed by the President and the Secretary of the Board. (§37-10-4(a)

ACLA 1949.) The Board of Regents was authorized to "requisition" federal funds and territorial appropriations on a quarterly basis. (§37-10-4(f) ACLA 1949.) In addition, the Board of Regents was ". . . authorized and empowered to receive, manage, and/or invest monies or other property, real, personal or mixed which may be given, bequeathed, devised, or in any manner received from sources other than the Legislature of the Territory of Alaska, or any federal appropriation for the purpose of the University, its improvement or adornment, or the aid or advantage of students or faculty, and, in general, to act as trustee on behalf of the University of Alaska for all of said purposes or objects." (§37-10-20 ACLA 1949; now amended and codified at AS 14.40.250.)

In 1955, the territorial legislature enacted the "Fiscal Procedures Act of 1955," which is substantially the same as the present statutory provisions. The declared purpose of the Act was ". . . to provide uniform financial procedures for all Territorial agencies with respect to budgetary, accounting, purchasing, post auditing, and related financial procedures; and to revise financial procedures for the purpose of securing economy, efficiency, and integrity in handling public monies." (§2, Art. I, Ch. 82 SLA 1955.) The definitions section of the Act defined the terms "Territorial Agencies," "Agencies" and "Departments" or "like terms" to mean "all departments, officers, institutions, boards, commissions, bureaus, divisions, or other administrative units forming the Territorial Government of Alaska." (§3, Art. I, Ch. 82 SLA 1955.) The 1955 territorial legislature also changed the University's fiscal year to a July 1 through June 30 basis, rather than the federal fiscal year. Two years later, the 1957 territorial legislature enacted a provision subjecting the University to the competitive bid practices set forth in the Fiscal Procedures Act of 1955. (§1, Ch. 86 SLA 1957.) They also amended the definitions section of the Fiscal Procedures Act to include the Alaska Pioneers Home (but not the University of Alaska) as a covered "Territorial Agency" for purposes of the Act. (§§1, 2, Ch. 186, SLA 1957.) Thus, it appears reasonably clear that the 1955 and 1957 territorial legislatures specifically intended to exempt the University from all provisions of the Fiscal Procedures Act except for those dealing with competitive bid practices.

On November 8, 1955, a constitutional convention was convened on the campus of the University of Alaska in College, Alaska. The delegates' simple and forthright treatment of the University of Alaska is now contained in sections 2 and 3 of Article VII of the Alaska Constitution. Unlike boards or commissions heading up the "executive and administrative offices, departments, and agencies of the state government," the Board of Regents was expressly

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authorized to appoint the President of the University without the prior review or approval of the Governor. (Compare Constitution Art. III, §§22 and 26, with Art. VII, §3.) Indeed, the Alaska Supreme Court later ruled that the University was not an "agency" or "department" of the "state government" within the meaning of Article III, Section 22 of the Constitution and AS 44.15.010. The Court held that the University, as a constitutional corporation, ". . . is an instrumentality of the sovereign which enjoys in some limited respects, a status which is co-equal rather than subordinate to that of the executive or the legislative arms of the government." University of Alaska v. National Aircraft Leasing Limited, 536 P.2d 121, p. 128, May 30, 1975.

For the first eighteen years following statehood, the legislature scarcely changed any of the substantive statutory provisions originally enacted by the territorial legislatures pertaining to the University of Alaska. Thus, for nearly two decades, the University of Alaska continued to enjoy and exercise considerable autonomy from the executive branch of government and remained relatively free from undue interference by the legislative branch. All this changed dramatically in 1977 when the legislature adopted a series of sweeping amendments which gravely challenged the Board of Regents' constitutional governance prerogatives. In particular, the legislature amended both the Fiscal Procedures Act and the Executive Budget Act to extend the scope of those provisions to the University of Alaska. (Ch. 46 SLA 1977.) The following year, the legislature attempted to wholly divest the University of its federal land-grant holdings. Shortly thereafter, the University filed suit against the State of Alaska, challenging those recent enactments which infringed upon the Board of Regents' governance authority and deprived the University of its vested property rights. Later, the University agreed to voluntarily dismiss most of its claims, without prejudice, on the understanding that the legislature would promptly consider appropriate statutory revisions. Regrettably, however, this never came to pass and, instead, the University has attempted to regain some measure of fiscal autonomy by an informal process of "working understandings" with key legislators and commissioners, sometimes reflected in statements of "legislative intent."

In the interim, the University has endeavored to regain the respect and confidence of concerned state officials through a conscientious program of strict fiscal controls, including reasonable and prudent cash management procedures. The University's efforts have been rewarded by certain legislators, such as Representative Martin, who are now seeking to relax some of the more onerous restrictions placed on the University in

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1977. At the same time, however, there appear to be other state officials who would like to completely divest the University of all of its treasury functions. In essence, they are suggesting that the Board of Regents should entrust all funds belonging to the University to the state Departments of Revenue and Administration. The practical effect of this would be to transform the University of Alaska into a mere "agency" or "department" of the executive branch.

IV. Discussion

Some commentators have suggested that HB 466 may be constitutionally suspect as an impermissible dedication of funds or an improper withdrawal of funds from the state treasury. In my opinion, HB 466 does not violate either §7 or §13 of Art. IX of the Alaska Constitution. On the other hand, I believe that HB 466 may impermissibly infringe upon the Board of Regents' constitutional governance authority in violation of Art. VII, §3. Furthermore, there may be some question concerning whether HB 466 impairs the University's vested property rights in violation of Art. VII, §2. On balance, however, I am persuaded that HB 466 passes constitutional muster and should be supported as a reasonable and prudent compromise measure.

With respect to the dedicated funds issue, please be advised that there is no Alaska case law authority directly on point. Some commentators have suggested that the Alaska Supreme Court's opinion in the case of State of Alaska, et al. v. Alex, et al., 646 P.2d 203 (Alaska 1982), is dispositive. I disagree. The Alex decision invalidated a so-called "mandatory assessment" which was unquestionably a barely disguised "tax or license" within the meaning of Art. IX, §7 of the Alaska Constitution. More importantly, I believe that the Supreme Court had to overturn the challenged assessment because the statute, which purported to authorize private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, clearly constituted an invalid delegation of the legislature's taxing power in violation of Art. IX, §§1 and 2 of the Alaska Constitution.

The constitutional prohibition against dedicated funds has been the subject of numerous opinions of the Attorney General. By and large, they are not particularly instructive, except as a guide to the political exigencies of the day. There is one opinion, however, which merits serious attention. That is, a November 30, 1982, opinion written by then-Attorney General Wilson Condon. Among other things, Mr. Condon wrote that: ". . . a very good case can be made that the present language of Art. IX, §7 must be read to include certain implied exceptions, such as those that

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are set out in the January 4 PAS memorandum, i.e., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state/local cooperative programs, and tax receipts which the state might collect on behalf of local government units." (1982 Op. Atty. Gen. No. 13 at 11.) This interpretation appears to have good support in the records of the Alaska Constitutional Convention Proceedings. Mr. Condon also suggested that: "A strong argument can be made that money once appropriated, regardless of the mechanism utilized, loses its character as revenue for the purpose of dedicated funds prohibition because the purpose of the prohibition, i.e., that the legislature retain control over state revenues has been satisfied." (1982 Op. Atty. Gen. No. 13 at 13.)

In my opinion, HB 466 does not violate the constitutional prohibition against dedicated funds for the following reasons:

1. With the possible exception of certain federal land-grant college funds (i.e., "Morrill-Nelson" grants in aid), no "program receipts" generated by the University have ever been treated as "public revenues," or been deposited in the state treasury. (Note that all other federal grant and contract monies are paid directly to the University.) Furthermore, with respect to the "Morrill-Nelson" funds, the state acts as a mere custodian or transfer agent for the University. It does not own these funds. Rather, all federal land-grant college funds and other program receipts are the rightful property of the University of Alaska.
2. The dedicated funds prohibition only extends to "the proceeds of any state tax or license." It is highly unlikely that the constitutional framers intended to include "program receipts," as defined in HB 466, within the scope of the dedicated funds provision. In fact, they specifically rejected an earlier draft which spoke to "all public revenues," in favor of the current language which is limited to "the proceeds of any state tax or license."
3. Assuming, arguendo, that the constitutional framers truly intended to encompass every conceivable source of "public revenues," they clearly did not intend to ". . . prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska." (I.e., April 24, 1956.) Recall that the University of Alaska retained virtual fiscal autonomy until as late as 1977, and that the pre-ratification statutory scheme unequivocally vested absolute title, management, and control of all University property in the Board of Regents.

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In light of the foregoing, it is equally clear that HB 466 does not violate the constitutional prohibition against withdrawing money from the state treasury except through appropriations made by law. Since "program receipts" generated by the University have never been "deposited" in the state treasury, they cannot be "withdrawn" from the state treasury. [Similarly, to the extent that the University has generated and retained program receipts in excess of legislatively "appropriated" amounts, those funds are not subject to lapse under AS 37.25.010, since the excess amounts were never "appropriated" to the University in the first place.] Recall that the pre-1977 statutory provisions expressly authorized the Board of Regents to "requisition" all funds belonging to the University, including both state and federal appropriations, on a quarterly basis. (This is still true for some federal land-grant college funds, but state general funds are now drawn on a monthly basis.) I am reasonably confident that the University never even lapsed any general fund monies to the state before fiscal year 1977-78. At most, the Board of Regents may not have requisitioned every last penny of general fund monies appropriated to the University in any given year.

Not true.
See Front.
S.A.A.

Due to the press of other urgent business, I will not be able to discuss fully my concerns regarding the potential constitutional infirmity of HB 466 from the perspective of the Board of Regents' governance authority and the University's vested property rights. Briefly stated, however, I am more concerned about the former than the latter. To the extent that HB 466 grants explicit statutory authority for the Office of Management and Budget to review and approve fiscal procedures adopted by the Board of Regents, the bill creates the potential for a significant constitutional crisis. So long as the Board and OMB are able to reach a mutually satisfactory accord, the problem may never materialize. If, however, the parties cannot reach agreement, what happens then? In this regard, please be advised that several state supreme courts (eg., California, Minnesota, Mississippi, Montana, Nebraska, New Mexico, etc.) have invalidated similar state laws as unconstitutional intrusions upon the governance authorities of higher education boards. [See, especially, Board of Regents of the University of Nebraska v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1975); and, Board of Regents of Higher Education v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975).]

V. Summary

In conclusion, I believe that the University's present practices in managing its total current funds are entirely consistent with the dictates of common sense and the requirements of law. Inasmuch as HB 466 is designed to codify the University's present

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informal "working understandings" as permanent law, I urge its passage. At the same time, I would not oppose efforts to place reasonable restrictions on the Board of Regents' investment authority, such as listing permissible investment vehicles. To the best of my knowledge and belief, the University has voluntarily limited its current funds investment program to very conservative and secure types of debt instruments. I can think of no particular reason why the Board of Regents would wish to venture into the stock or commodities markets at this time.

Please do not hesitate to call me if you have any questions or comments regarding these matters.

ADEP:MMZ,LSD

cc: Board of Regents
Executive Vice President Sherman Carter
Chancellors

Introduced: 1/9/84
Referred: Health, Education &
Social Services and Finance

1 IN THE HOUSE

BY MARTIN

2

HOUSE BILL NO. 466

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to appropriations to and fiscal
7 procedures of the University of Alaska; and providing
8 for an effective date."

9

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10

* Section 1. AS 14.40.250 is amended to read:

11

Sec. 14.40.250. REGENTS TO ACT AS TRUSTEES AND ADMINISTER MONEY

12

OR PROPERTY [FROM SOURCES OTHER THAN LEGISLATURE OR FEDERAL APPROPRI-

13

ATION]. The Board of Regents may receive, manage, and invest money or

14

other real, personal or mixed property in any manner received from any

15

source [SOURCES OTHER THAN THE STATE LEGISLATURE OR FEDERAL APPROPRI-

16

ATION] for the purpose of the University of Alaska, its improvement or

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adornment, or the aid or advantage of students or faculty, and in

18

general, may act as trustee on behalf of the University of Alaska for

19

any of these purposes. However, the regents shall make a written

20

report to the legislature, in accordance with AS 14.40.190, as to the

21

administration and disposition of funds received [UNDER THIS SECTION].

22

* Sec. 2. AS 14.40.296(a) is amended to read:

23

(a) There is established in the treasury of the University of

24

Alaska the University of Alaska working capital reserve fund. The

25

fund consists of interest income from investments made by the Board of

26

Regents under AS 14.40.250 and money appropriated by the legislature

27

for the purpose of providing nonlapsing current working capital for

28

the University of Alaska and is not available for appropriation by the

29

Board of Regents.

1 * Sec. 3. AS 37.07.080(e) is amended to read:

2 (e) Transfers or changes between objects of expenditures or
3 between allocations may be made by the head of a state agency upon
4 approval of the division. However, transfers or changes between
5 objects of expenditures or between allocations may be made by the
6 Board of Regents of the University of Alaska in accordance with proce-
7 dures established by the Board of Regents and the Office of Management
8 and Budget. No transfers may be made between appropriations except as
9 provided in an act making the transfers between appropriations.

10 * Sec. 4. AS 37.07.080 is amended by adding a new subsection to read:

11 (i) Notwithstanding (h) of this section, the increase of an
12 appropriation item based on additional federal or other program re-
13 cepts not specifically appropriated may be expended by the Board of
14 Regents of the University of Alaska in accordance with procedures
15 established by the Board of Regents and the Office of Management and
16 Budget. Expenditures under this subsection shall be reported in
17 writing to the Legislative Budget and Audit Committee by the Board of
18 Regents.

19 * Sec. 5. AS 37.25 is amended by adding a new section to read:

20 Sec. 37.25.040. APPROPRIATIONS FOR THE UNIVERSITY OF ALASKA.

21 (a) The unexpended balance of an appropriation to the University of
22 Alaska from program receipts shall be carried forward to subsequent
23 fiscal years.

24 (b) An appropriation to the University of Alaska specifically
25 designated by the legislature to be for organized research and subject
26 to this section is valid for the duration of the project and the
27 unexpended balance for the project shall be carried forward to subse-
28 quent fiscal years.

29 (c) Between July 1 and December 30 of each fiscal year the Board

1 of Regents shall file with the Department of Administration a state-
2 ment of the amount of the unexpended and unobligated balance of appro-
3 priations to be carried forward to the next fiscal year under this
4 section.

5 (d) In this section and AS 37.07.080(i) "program receipts" means
6 revenue from all sources including tuition, fees, rents, investment
7 income, sales, overhead recovery, and payments from other sources
8 including boroughs, municipalities, private individuals, corporations
9 and trusts, and the federal government, but not including the general
10 fund.

11 * Sec. 6. This Act takes effect immediately in accordance with AS 01.-
12 10.070(c).