SB

212

Meeting of the Alaska Railroad Transfer Advisory Commission
December 15, 1982 - Anchorage, Alaska

Commission members present:
Al Swalling, Chairman
John Bates, representing the Commissioner of Transportation
John Kelsey, Vice Chairman
Senator Jay Kerttula
Jim O'Sullivan

Commission members absent:
Beverly Dunham
Rep. Bette Cato

Also in attendance:
Dr. David Olson, University of Washington
Captain Merle Adlum, Port of Seattle
Yale Lewis and Gerry Johnson of Wickwire, Lewis, Goldmark and Schorr
Steve Soenkson, House Transportations Committee Staff

Other legislators present:
Mike Szymanski
Joe Flood
Walter Furnace
Mitch Abood

Chairman Swalling introduced Dr. David Olson, Professor of Political Science from the University of Washington.

Dr. Olson: I'm pleased to be here today. It was just a short month ago when Captain Adlum and I came up and shared some thoughts and observations and experiences about this kind of an organization called a public authority and I'm pleased to come back again and to share some of those same thoughts and some additional thoughts. I realize that the meat of this session is to turn to Senate Bill 212 and review it in some detail. I will try to be as brief as I can but at the same time try to accomplish the purposes I've come for.

Let me just say a couple words about myself and how I came to the area of research on public authorities. About five years ago I had completed writing my fifth book and all the prior research had dealt with what I considered to be failed institutions of government in this society. Whether it was looking at the atrophy of political parties, the demise of participation through voting or bureaucratic operations at the national level. Each of the books focused on a set of institutions that fundamentally failed to accomplish the kinds of purposes that were mandated to them. I turned and wanted to look at a set of institutions that worked, to understand how they were organized, why they were organized, the way in which they were organized, and how they performed. My immediated focus was on ports as public authorities. All seaports handling general cargo in this country are publicly owned and most of them are organized as public authorities. So what I have to say today. is based upon the empirical record of the performance of ports as public

enterprise, public authorities, but in the recent period, the last year and a half, I've turned to look more broadly at public authorities. So my purpose today is to offer some observations on how public authorities are designed across the country and how they are organized in the lower 48 states and what differences it makes, what kinds of consequences are forthcoming about how they're organized.

I've attended a number of sessions like this including your own a month ago and one of the problems that I've seen in those sessions is that they tend to be either or too narrow or too broad. Too narrow in the sense of focusing exclusively on the kinds of budget systems that are attached to public authorities, the accounting methods, the audit type, the methods of depreciations, and in a sense, losing the forest for the trees, looking at the (indesc) and not appreciating the larger theoretical questions that are involved the organizing of public authorities.

A second kind of problem is of the opposite, which is to say, to get hung up on the very general questions that can stimulate a good deal of emotion and precious little reflection. Most often this turns on the question of public vs. private ownership of commerical firms, commercial activities, and the resolution to that question often turns on the ideological bias the values of those who make the argument about public or private ownership. I want to turn to halfway house between the minitiae and the very vague and general questions and look at the question of organization of institutional design with respect to public authorities. First, let me put public authorities in the context of their place in American society by comparing them to what we are familiar with. One point of comparison is with the traditional private firm that is organized with stockholders as the ultimate decisional body who in turn choose a board of directors who in turn choose chief executive officers who hires management, who hires employees. Public authorities have several things in common with the traditional private firm both organizationally and in a larger sense in what they do. The most decided point of commonality between the two is that they exist in commercial marketplaces so that the public authorities is partly related to commercial marketplaces not unlike the private firm. Second point of comparison is with the traditional, the familiar governmental agency or department, where instead of stockholders are the ultimate decisional body who elect officials who in turn appoint administrators, who hire employees. What public authorities have in common with the traditional governmental agency is their public ownership. So that a public authority is essentially a hybrid between the private firm and the traditional governmental agency. They draw part of their existence from the private firm model to the extent that they are commercial enterprises that operate in competitive marketplaces. They draw a part of their existence from the traditional governmental department in the sense they are publicly owned and controlled. The essence of the public authority is this unique hybrid combination of public ownership and control with market orientation of the public firm.

So, we'll begin with the first order of question. Is a commercial activity going to be privately owned or publicly owned. I take it with respect to the Alaskan railroad, and I suspect we'll get into this later

on in the day, that the decision has largely been taken to organize it as a publicly owned entity not unlike it's current existence that the private firm is basically uninterested in picking up or operating the Alaskan Railroad. And conversations with the Chairman of the Alaskan Railroad Advisory Committee, it appears to me that there simply is not that option available. So the first question is settled between public vs. private ownership which gives rise to a second question.

If public, does one follow the traditional governmental department as a means of organizing this commerical entity or creation of public authority. Senate Bill 212 essentially says that it will be organized as a public authority and there are consequences of that that I want to develop in a moment but let me regress for one moment at this point. I have rarely experienced the kind of emotional reactions to governmental institutions as is provoked by the creation of public authorities. That there is such deeply engrained entrepreneural spirit and private marketplace belief system in this country that the very mention of public authority raises fears about something unamerican, something so totally unique, so totally unheard of in the American experience that it ought not be entertained as an option. My digression is historical in the first instance. Prerevolutionary war, many of our country's transportation institutions were organized as public authorities. The King's highway, the post roads. In 1776, the Declaration of Independence but a remarkable line was written by Adam Smith, the Wealth of Nations, the intellectual godfather of conservatism in America. Smith argued in one portion in that book that public authorities were one of the three functions of the sovereign. To Smith the sovereign had the obligation of national defense, protecting the country from external aggression; had the obligation of internal police force, protecting individuals from their brothers; and the third function was the creation of public authorities and he specifically mentioned transportation and education as the arenas that fit his criteria where profit does not repay the expenses or where it is so marginal that the private firm will not enter to invest or to operate a commercial set of activities. This from the intellectual godfather of conservatism in America. Beginning with the country's history and it's origins, most of the transportation institutions were organized as public authorities whether it was harbors, water ways, the post roads, the highways that penetrated to the west through Appalachian such that if one takes a careful look at the role public authorities in America's history at the early period, I had characterized them as American as apple pie and I think that historical record stands.

What of their evolution and development over time? They have continued to proliferate in number, in size, and in the share of the markets in which they exist over the two hundred years of the country's history. They have been created during historically specific time periods such as the great wars, World War I and II, so a mass of expansion of public authorities at the national level. They have also been expanded dramatically during periods of economic depression. The 1930's saw a proliferation of post public authorities. They also have been created in response to specific political reform movements the great reform movement at the turn of the century held as one of planks in its campaign to

reconstitute the economic order of the society. The creation of public authorities.

Allow me to spend one minute on one such institution on which you will hear more detail about from Captain Adlum who is not only commissioner of the Port of Seattle but has in the last year and a half achieved the status of the most tenured commissioner in the history of the existence of the Port of Seattle and can talk with a degree of detail about that public authority. Seattle wanted the Transcontinental Rail line to locate at its harbor. It meant a great deal to the city building process in the last quarter of the nineteenth century. It literally gave a way to James J. Hill and the great Northern, a monopoly over its waterfront. The Great Northern which eventually did come to Seattle organized and controlled the waterfront. It began to practice not unlike monopolies elsewhere, monopolistic abuse through differential rate structures, to its competitors or outright prohibition of the transport of goods across its lines from competing interests in institutions in the midwest. That gave rise to the great reform movement in Seattle where literally seven to eight thousand people would gather downtown and agitate for passage of a public authority for the organizing of port district in the harbor so as to break monopolistic abuse in this natural monopoly area. The legislature passed in 1911 and the volume of trade that occurred across that waterfront increased significantly in the period of public organization of the harbor through the Port of Seattle. We may want to talk about the current period in more detail as we get into this session. But the first point I want to make here is that it is simply indefensible to say that public authorities are not a central part of the political economy of the United States or that they have not been a central part over the history of the country.

Allow me to turn to what I consider to be core question. In the state that you're at, if you make a decision on public ownership as opposed to private, if you go the route of public authority rather than traditional governmental department. The key issue, I think, is whether or not public authorities can effectively combine the hybrid qualities of public ownership on one hand and commercial orientation on the other. Put it in different terms. Commercial orientation, marketplace orientation, deals with the question of efficiency. Can a publicly owned commerical firm act in an efficient fashion. The conventional wisdom is no. Efficiency is incompatible with governmental ownership and control of commercial organizations. I'm going to argue that it depends on how that entity is organized. The inducements that are offered to management be competitive and efficient and the way in which the organization relates to the marketplace within which it exists. On the other side of the coin is whether or not public authorities can also be held publicly accountable. Now we enter the great debate. Efficiency and accountability are usually posed as antithetical one to the other. You can't have an efficient market oriented entity in a commercial marketplace that at the same time is accountable or controlled by the political system or by the public. They are usually posed as inversed to one another such that if you maximize efficiency you decrease accountability; if you maximize accountability, you decrease efficiency.

The unique quality of public authorities is the attempt to combine those two principles of maximizing efficiency at the same time as maximizing accountability. The way in which that is done is largely related to the nature of the organization that is created within the commercial marketplace within which it exists. The inducements to management, the reward structure to management to operate in an efficiency manner in the first instance that is to say they have to be given a degree of flexibility, a degree of ability to adapt to market forces and to behave in business-like manner without the consistent and direct intervention into management decisions by the political system. At the same time as those entities have to be made accountable by state oversight, by policy direction, that does not intervene in the day to day management decisions that must be taken within the commercial marketplaces that the public authority exists within.

Let me turn to the question of organization. Across the lower 48; one of the curious things is there is a great deal of diversity in the organization of public authorities. That organization, at times, works against either efficiency or accountability. Allow me to get specific with an instance.

The Port of San Francisco was organized as a public authority in 1856. From that point through to the first third of the 20th century, the Port of San Francisco was the dominant port in California. It's organization was not within the city of San Francisco or the San Francisco bay area but the entire state of California. with the development of harbor facilities in San Pedro Bay, Los Angeles, and Long Beach, when the old bond issues were put to public vote, the competitive character of Southern Californians was such as to vote against any GO bond that was floated by the Port of San Francisco because it worked to the disadvantage of Long Beach and Los Angeles so that over time the organizational form came back to haunt the Port of San Francisco and its origins of statewide organization was appropriate. It developed the capital that was needed for the development of the Port of San Francisco, but into the 20th Century when L.A. and Long Beach began to operate harbor facilities, Southern Californians simply voted against any issue that would advantage San Francisco or Southern California. (indesc) the Port of San Francisco to literally be beaten in the competition for cargo by Oakland and by its cousin ports to the south, Long Beach and Los Angeles. It's not until 1978 that the state of California finally relinquishes control of the Port of San Francisco and gives it back to the city of San Francisco and its not just coincidental that at that point the port of San Francisco turns it's first profit in 20 years because there was a disincentive to profitability or to efficiency as long as it was organized on a statewide basis because all excess revenues went to the state of California

Here is a classic example of an organizational design that was not appropriate to the commercial character of that port. The decentralized mode that currently gives expression to its organization is much more appropriate and the results are predictable and are a matter of public record that the port of San Francisco is simply more efficient and more accountable under its current organization.

Let me look at two areas of the internal organization of public authorities. One is the relationship between the commission, the policy board and management. Last time up I characterized that relationship as inherent abrasive. Commissioners have a tendency to dip down into the organization in management decisions on a day to day basis and vice versa. Management has an inherent tendency to not carry out policy but to set policy. The relationship between commission and management is necessarily a war zone and within that war zone battles are waged where commissioners who are suppose to set policy and allow management to carry out tend to want to carry out the policies that they set and where management that is charged with the responsibility to carry out policy tends to attempt to set policy as well. The trick organizationally is to create a designed institution that mandates policy setting to the policy board and constrains the policy boards tendency to wanting to manage the firm and that sets management the charge of administering the policy and not setting those policies. Captain Adlum will discuss one institutional device that the Port of Seattle has developed. It is a statement of that port's purposes and objectives that singles out what the goals of the organization are. The maximization of the (indesc) of commerce, water and air, based on the commerce through the port district. Secondly it sets out the policy board's role of what the board can and can't do within the Port of Seattle. Thirdly, it mandates the managerial function and gives a reward structure for appropriate performance, for efficient performance, and a set of non rewards for inefficient performance. That is one way in which the war zone can be clarified and where at least constraints can be placed on commissioners from not trying to manage the day to day operations of the firms and constraints on executive and management from not trying to set policy. The second area that I would characterize as the twilight zone is the relationship between the public authority and its parental government, its sponsoring government. In the case of the Port of Seattle the parental government is the state legislature. The parental government is simply that agency of the government that gives rise to, that spawns, that creates the public authority. Anything they create they can abolish. Anything they create they can also give policy and direction to. The twilight zone concept is intended to say we know very little of the relationship between the parental government and its creature, the public authority The greatest abuses in the twilight zone is where the public authority does not follow the policy direction that is mandated by the parental government. There is an equal tendency to ere where the parental government attempts to dip directly into the organization and to set its day to day management on a (indesc) basis. This is a very fine line that we are trying to draw in the twilight zone between the giving of policy direction and the holding of accountability from the public authority to its parental government on the one hand and a sufficient degree of flexibility, autonomy, on the part of the public authority to do what it is mandated to do and to be held responsible through periodic checks on its performance. Let me conclude my observations with this comment. The tradeoffs that are traditionally attributed to efficiency as against accountability need not be a necessary, inevitable relationship. Public authorities have proven themselves to be simutaneously accountable and highly efficient. Part of my analysis of those public authorities that do that, that are able

to accomplish that is the way in which they have worked out relationship the management and executive and the policy board in the war zone, and on the other hand, the relationship between the entity, the public authority, and its parental government. I presume that that is part in parcel of what we are all here for today in looking at the bill in some detail and I look forward to joining you in that exercise. Thank you for your attention.

Chairman Swalling thanked Dr. Olson and introduced Captain Merle Adlum.

Last time we were up we did point out and we are kind of doing it in reverse this time but these ports and public ports have had some great successes; however, each and everyone that has the successes some real downfalls. The Port of Seattle when started in 1911 officially rose up to the Great Depression to be the second largest port in the U.S. second only to New York and went downhill and downhill. There was a spurt of business of course during WW II, mostly due to the military and then it went downhill again following WW II and was in one the worst doldrums in its history until the early sixties. During the early sixties it was so bad that one of our leading TV stations did an hour long documentary called "The Lost Cargo". And it showed all of our empty warehouses and the doors falling off of them. The people started to ask why? "The Lost Cargo" did get their attention, they looked to the then port commission and found that they didn't have the leadership that they thought they should have. That commission hadn't hired the managerial personnel that it took to do this work and there were even some investigations as to the propriety of how it was being run. This all led to as I remember (indesc) Alan Hamilton report which was commissioned and a study was done of the whole system. Out of that (indesc) Alan Hamilton report I think was a real turn around point again for the Port of Seattle. Amongst the other things that happened, a commission was expanded from three to five. They were elected by the people of King County and that was even expanded to where they were elected at-large rather than by districts so that they were there to represent all of the port and not some special purpose of the port. They did go out and hire a new management. They let that management hire his department heads and they did everything they possibly they could. Early after the (indesc) Alan Hamilton report they did come up with a document called "Purposes and Objectives." I believe the first one was in 1966 and was done by one of the commissioners and adopted by the rest of them. We lived with that until about 1973 and found out we still some abuses so redid that and then feeling that this had worked so well in 1980 we commissioned a committee very broadly representative, the League of Women Voters, people from the city council, the county council, the state legislature, industry and we really redid that and what I think we have now is an optimum of how a commission should operate a public utility and how they should direct the management of it and leave the management to the people that they hired to do it. This, I am happy to say now at least turning this 19th year I finished, I guess, next week I was appointed 19 years ago to fill a vacancy and has now put me in the longest tenure of anybody there. I think my whole life has been in transportation. I started coming up here to Alaska, and a great deal of it has been with Alaska, about 40 years ago. But the thing that we have seen as being real important had not been just the decision of hiring

management, you've got to go out and find out what your port is capable of doing. And we got a long ways from the waterfront from the Port of Seattle. One of the things we recognized early on is that the Panama Canal was having real troubles. And after WW II the ships are getting bigger and bigger. So we started developing and working with the railroads, what we called the mini land bridge and the land bridge and we just plain by passed the Panama Canal. We installed equipment to meet the newer and faster vessels across the Pacific ocean now as fast as six days. We couldn't even get the material from Yokohama to Seattle in time by courier, so we installed a satellite system. Now all our material comes by satellite right to our computer room where all the bill of lading are done so that when that vessel arrives we know which boxes are going by unit train across the country or going by truck or what ever else goes with it. So it becomes a very highly complex thing, where one port even enters into trucking agreements so that we can stay competitive with other ports on the pacific coast. This is an ongoing thing that we are trying to learn what is the best that your port can accomplish. We now rank number one on the pacific coast and number two in the nation, number five in the world. We enjoyed a triport seminar last month in Rotterdam with our sister city of Rotterdam and Copenhagen, two of the largest container ports in the world. There we shared experience of how we can build better and better mousetraps to beat our competition, Rotterdam has its competitor right next door in Amsterdam and we have a little place called Tacoma to the south of us, that spends all of its time not looking for business but how it might steal ours. So there always problems that have to be met. Some can be met by regionalization. Back on the east coast, the New York Port Authority which is now in existence was previously made up of several small ports both in the State of NY and in New Jersey. They not only combined all of their ports in the state into one but the two states joined together, they have what is known as the 51st state and the New York Port Authority handles just about as much money as any state in the Union and a lot more than some of the others. So there are a lot of problems in this and what we are trying to do is come up here and hope we can share with you how we solved some of our problems as they arose. When I first came on the port commission we didn't have contracts with labor unions. But we resolved satisfactorily and to my knowledge we have never been tied up a minute since we did that, we were tied up several times. If we can be of any help in any way sharing this experience with you and passing it on, because we look at Alaska from our region as our number one customer. You still produce for us about 27% of our business so we are just more than happy to help in any way we can. Thank you.

Chairman Swalling: Thank you Captain Adlum. Early on in one of our very first meetings of the commission we tried to narrow our goals. One of our decisions was that this commission had no business or status in Washington, D.C. in watching the progress of the bill that would turn this entity over to the state. Our commission was narrowed when and if we get it, how will be will run it. However, we are all interested in what's happening there. Steve Soenkson from Rep. Cato's office has just returned from Washington. He has kindly consented to bring us a brief update of the status of the legislation and he might even care to make a prediction.

Steve Soenkson: I've never liked trying to forecast weather and I don't think I'll make a straight prediction on the railroad here either. To give you a little background on myself, I'm staff assistant to the House Transportation Committee and I work for Representative Cato on a variety of transportation issues and I worked with SB 212 when it was in the House Transportation Committee and I've been working with federal legislation also back in Washington. In Washington, I've worked with David Rogers of the Senate Advisory Council, Mark Hickey with state DOT and more recently with Dave Walsh for the Sheffield administration. We have also been assisted by Tom Allison who is seated in the back of the room. He is with the Federal Railroad Administration assisting on the transfer and getting information together on the state level and also in Washington, D.C. Our role has been to help gather information to legislators and to work with the Congressional delegation in Washington on the transfer. In general do research and analysis on the issues relating to the transfer. Were we're at right now, the transfer legislation is on a siding, it's on hold at this time. As many of you have heard and has been printed in the media, Sen. Howard Metzenbaum from Ohio has a hold on the bill at this time preventing floor action. Discussions are preceding with him and with other Senate members at this time on the legislation and its hoped that that legislation can be brought up before the conclusion of the lame duck session. The lame duck session was originally scheduled to be completed by the end of this week, but I've heard that that has been extended at least through next week and there is also the possibility that the session will be continued after the Christmas holidays. Time is very important on this. We are getting close and down to the wire but we should know in the next few weeks how its going to come out. As far as the legislation itself, its in content and the objections to the legislation remain the same through all these discussions. There have been quite a few discussions with the House Interior Committee which has particular interest in the legislation now. The House and Senate Commerce Committee in the Congress that have been working with the bill all the way through and those kind of discussions are proceding also. The legislation is on hold and if time can work with us for a change we will have a federal railroad transfer bill.

Chairman Swalling: Thank you Steve. Tom, I didn't see you come in. Do you have anything you care to add to Mr. Soenkson's remarks?

Tom Allison, FRA: No I really don't have anything additional. I think Steve did a good job. The primary problem that he alluded to which is time. There may not be time in the lame duck session to pass the transfer bill but there is some chance. We won't know the answer to that for at least a week or more. I can tell you from the view of the Federal Railroad Administration if passage in the lame duck session is not successful that certainly our goals of transferring the railroad to the state do not change by the fact that we are getting a new Congress in January. Certainly will be pursued at that time. The problem that we are facing now (indesc) the ability of even one member to hold up the legislation. The time encumbrances will not be present so we will not be present so we will continue working on the transfer of this railroad to (indesc - end of tape).

BREAK

Copies of SB 212 were passed out to each table during the break. Chairman Swalling introduced Yale Lewis of Wickwire, Lewis, Goldmark and Schorr of Seattle.

Yale Lewis: First of all, its a pleasure for Mr. Johnson and I to be here. This is a project that we have extraordinarily interesting. My firm, though it is a Seattle firm, has been involved in legal matters in the State of Alaska for a long and its a pleasure to be able to offer assistance in something that we think is so important to the state. Let me give you a little bit of background on the two of us. Then I'd like to explain how this bill was developed. The procedural processes that led up to this bill and what we were asked to do and how we attempted to do it. First of all, I graduated from college in 1962, in economics and went into the Navy for four years where I was a submarine officer worked for Southern Railroad, then went to law school, came out to the pacific northwest, worked for a federal judge in Oregon for a year then began practice in Seattle. My principle areas of interest have been advising various groups of people, either public or private who wanted to undertake some new project or convert some project offering advice on various ways to structure the new entity. Sometimes our recommendations are that it should be for profit, sometimes it should be a governmental agency and sometimes a public authority. We have had significant involvement in railroad law over the past 3 or 4 years as well as public land law. Gerry Johnson and I were involved in the Milwaukee Railroad Restructuring Act in which we were retained in that case to represent the State of Montana which was interested in trying to preserve the Milwaukee Railroad lines across the western states. We were involved in the Staggers Rail Act and appeared in a number of ICC rate regulatory processes. I am a practitioner before the Interstate Commerce Commission. Mr. Johnson, prior to coming to our firm was first legislative then administrative assistant to former Sen. Magnusson. He also in his further experience worked with private developers in Seattle and worked as a legislative aid to the Seattle City Council. We represent seven or eight public authorities in the State of Washington and we are currently advising the City of Seattle, the City of Olympia and the City of Tacoma in possible tax syndications of a variety public buildings and ways in which the public entities in cooperation with the private sector can get some new capital for their capital projects and at the same time blend with the private sector and pass to the private sector certain tax advantages that public bodies can't take advantage of. Often they end up looking for something like a public authority for the railroad that you are considering here. We were first contacted in late spring of 1981 when the attorney general called and said that 6 firms were being contacted that had railroad expertise and asked if they would be interested in representing the State in this particular process. We said that we were extremely interested. We submitted resumes' and there were interviews and we were ultimately selected by the attorney general to represent the Department of Transportation. So from the beginning there was some ambiguity as to who our particular client would be. We were advised that there were a number of strong interest groups in the state that had very strong interest and feelings about the subject and we were warned of that. Subsequently we worked with a three person policy

committee, the attorney general, Jessie Dodsen of the Governor's office and the Commissioner of Transportation. They had an additional staff with whom we worked, but the three of them made policy through the first year or so. When the legislative session began last year we were sort of loaned or turned over to the legislature and began working with the legislative leadership. So from a traditional lawyer-client perspective our client throughout this has been the Department of Law, the Department of Transportation, the Governor and the Legislature. As you all know, all of those entities don't necessarily see the same way on anything and there was a lot of disagreement among them on particular issues of this bill. We tried to handle this by simply pointing out the questions that had to be answered, trying to advise on the consequences and having somebody else fill in the blank. Often the blank was filled in daily, different ways. We have a stack of drafts of the legislation about like this (hand two feet off table). If one were interested, one could go back and see the alternatives that were rejected along the way along with some notation as to how they ended up being the way they are now. We were asked to advise the State, first of all on the entity, on the issues that had to be answered and assist in the drafting of the state legislation assist in the draft of the federal legislation and attempt to make them consistent. The other thing that would be helpful in a general way is to share with you the policy of that committee, the Governor, the attorney general and the Commissioner of Transportation. There were ten of them:

(1) The State should be insulated from legal and financial liability for the railroad's tort, contractual and debt obligations and liabilities.

(2) The State itself, as distinguished from the railroad, should be insulated from Interstate Commerce Commission jurisdiction and regulation. What that meant is that the railroad entity was to be set up in such way that there would be an independent entity to be regulated by the ICC so that the ICC didn't get an opportunity or be required to review all the State undertakings as it would have if the State itself were the railroad operator.

(3) The railroad entity should have an independent capacity to obtain tax exempt finance.

(4) The State operating subsidies to the railroad should be precluded.

(5) The State should have the ability to enter into service contracts with the railroad. The State should also be able to invest in capital improvements for the railroads facilities and rolling stock, and for track expansion and major rehabilitation. If you notice, the distinction was made between state involvement in operating subsidies and state involvement in major capital expansions, rehabilitation programs.

(6) The railroad should provide the best possible combination of high quality and low cost transportation.

(7) Railroad operation should be insulated from political pressure generated by the railroads competitors, suppliers, shippers, lessees, lessors, and of course from the state legislature itself.

(8) The railroad should be subject to state oversight and intervention only on narrow, specific areas. One, to prevent insolvency. Two, to insure continued service. Three, to require or preclude expansion or substantially changed service levels. Four, to prevent borrowing debt that can endanger the state's borrowing capacity.

(9) Transfer of the railroad should be accomplished in a manner that would cause the least possible disruption to the state employee pay, benefits and retirement system.
(10) The relationship between the state and railroad must conform to the state constitution.

As we began on the first part, the first thing we were asked to do was to advise this policy committee on the substantive issues and decisions that would have to be made by the state as it made a decision on how to set up and operate the railroad. In that context we reviewed first the draft Senate bill that had been introduced the previous session by Senator Kerttula. We were given and reviewed carefully something called the Statewide Rail Systems Study which was commissioned by the State. We referred to it as Bivens I, Mr. Bivens and John Gray of the University of Alaska worked on that for the State. They did a subsequent that we referred to as Bivens II. The third was a document entitled "An Assessment of the Alaska Railroad Ownership and Operational Alternatives" which was published in July of 1981. A study had been arranged for a commission by the state legislature called "Alaska Public Corporations: A Framework for Assessment". Those were the principle documents and we relied upon for our subsequent work. We obviously looked at scores of other articles we have. We have bibliography that I would be happy to share with anyone who is interested in that much detail. The way we then broke up the area that needed to be the subject matter area into five broad subject matter areas. The first one was land and property issues. Obviously the most important thing that was going to be transferred was land with improvements and personal property, typewriters, rolling stock, locomotives. The property would be encumbered by leases there would be options and all of that type of thing and we were asked to advise on how the state could figure out what it was getting from the federal government and how the state should deal with that broad category called property once the state got it. The second broad issue was the regulatory issues. What would be the regulatory framework for the railroad once it was transferred to the state. Would it make a difference what form it was organized under? Would that effect the regulatory issues and climate? There were broad employee issues running from simple things like transfer of personnel, of records, issues involving labor unions, the right to organized, the right to strike, personnel systems, pensions, profit sharing, the whole works. There were tax issues, those state, federal, local issues. How would the form of organization effect the entities tax status under various local, and state and federal tax laws. And last, the simple entity issues. So there were five broad areas. We divided the work product into those five areas and comparing lists of questions that needed to be answered without any regard to what the answer should be and began working with the state staff with the policy committee. We drafted preliminary memoranda that identified the issues and the consequences of various decisions. The draft memoranda were then circulated and reviewed with a variety of state departments, the Attorney General's office, the Governor's office, the Department of Transportation, railroad management, railroad employees where appropriate and various interest groups in the state that we were directed to consult with. During the course of the consultation various people met with and received comments from the State Chamber of Commerce, Fairbanks,

Anchorage Chambers of Commerce, Commonwealth North, Resource Development Council, Railroad management and leadership of various unions that operated on the railroad property. I think that is it in a general way. We are prepared to do now is go through the bill after to responding to questions that might be asked now. Chairman said that there might some people that simply wanted to get answers to specific questions then leave. We will answer these as well as we can now. At the conclusion of that I thought we might go through the bill on a section by section basis. Mr. Johnson and I will alternate going through the bill trying to identify the critical issues and explaining how they came to be. Some of them we as lawyers had opinions on that we thought that there were very significant consequences and we advised the people we were working with in those instances. Most of them we simply identified issues, question marks and did not supply the answers ourselves. We have some recollection of how the answers came to be or the rational for them. There were lots of them that we would be indifferent to in the sense of offering advice. How much should commissioners get? That was simply a blank. How many commissioners should there be? 3? 5? 15? Who should be the composition of the commissioners? There were issues such as the separation of power concern between the governor and the legislature. We were very sensitive to those and basically tried not to take an issue on those. We were representing both the executive and the attorney general and we were cognizant there was a dispute and we made an effort not to characterize answers that would appear to weight that overall struggle that has been going on here ever since statehood. There are some issues such as the appointment power of the governor, the relationship between the governor and the legislature to initiate action that we can simply identify to you as issues and explain why they were solved the way they were. There were other issues involving tax consequences and regulatory consequences that we had more precise legal judgments about.
With that introduction. I'll turn this back over to the Chairman.

Chairman Swalling: Is there anybody in attendance, who has read the bill and who has a specific question that they would like to address to Mr. Lewis?

Jim Harle, Anchorage Chamber of Commerce: Thank you very much for coming to the State of Alaska. I think you comments have very informative and provide some background information that we have not had at least from our viewpoint. My question is: What thoughts or discussions went on with regard to placing the railroad into private ownership, either initially, or midterm or long term?

Lewis: That issue was constantly if not on the center of the table lurking in the background and was reviewed constantly. When we started we were going to do a analysis of all three alternatives, a full blown analysis of all the consequences of all the different consequences of the three different forms of organization, a line agency, private ownership or public authority. However, we were asked, because of the press of time to concentrate first on the public authority alternative, in part because that was the conclusion reached by each of the predecessor studies I mentioned, Statewide Rail Systems Study, Bivens I and II, and the Assessment of the Alaska Railroad Ownership and Operational

Alternatives. It was I think perceived by the people we were advising as an open question but that the most likely conclusion would be a public authority and so we were directed after some initial discussion to focus on that one first with the understanding that if time permitted we might be asked to go back and do the same type of analysis on either of the other two alternatives. My impression from listening to discussions however, was that the concensus of the people we were working with seemed to be that simply in the short period of time was not that the most likely alternative would not be private ownership at least at the outset. The state bill does not in any way preclude private ownership. In fact there is a specific provision for private operation. It is very short in terms of the amount of language devoted to it but it clearly provide without any additional legislation the alternative for private operation. I think that the decision was that if the railroad and all its property were actually going to be divested by the state, that the legislature itself should make that decision. The state bill that's before you gives the commission or the railroad authority the legal power, without going back to the legislature to contract with the private sector for operation and management but it would not permit the railroad authority to commission itself to divest the state that property without going back to the legislature. My impression again was that there was no sentiment either in the legislative or executive branches for giving the railroad authority the right to divest the state of the property without putting that issue back to the legislature. So the distinction was made with this bill between private operation and private ownership. The legislature reserved unto itself the issue of ownership. Mr. Johnson has pointed out the federal bill also conditions the transfer that it be operated by the state and those provisions change. One of the things unfortunately, that has happened, is when somebody in the state says that this railroad could make x-hundred million dollars and be very profitable then congressional people from other states say 'if the railroad is so profitable then the federal government is not going to give it to the state of Alaska but will sell it'. The Congressional debate to some extent goes the opposite direction from comments made here. The bill as of the end of the day yesterday, though had a restriction on ownership and required that the state operate it for at least five years.

Harle: Thank you for your comments. I have one other general type question. In general, some of the discussion of what we refer to as the old Senate Bill 212, the nominal 55 page or so version, much of the justification for its length has been that most of the statements in that legislation are required by law. Would you comment on that statement and maybe explain your feelings on how much of bill is required by law?

Lewis: I'm sure what the statement "required by law" means. I think the state could in fact simply set up a commission, turn the railroad over to it and conclude. And that would be a lawful piece of legislation. Maybe what you're referring to is there are issues that have to be answered. They can be answered either in lawsuits or by the legislature.

Harle: What I'm referring to is that due to the fact that the railroad would be either a public corporation or some subsidiary of the legislature. Due to that fact, that there are certain requirements of law to protect its operation, to manage its affairs.

Lewis: I think I understand what you mean. If it were going to be turned over to the private sector, it could be just sold. There could be a bill that said that we will sell the railroad at public auction. That is all the legislature would have to say. Then the way that the private entity would be operated would be effected by all the other millions of laws that affect the private sector operation. If it is going to be a state owned railroad, state owned property, then as a public agency there are a whole raft of other pieces of legislation that affect it. At that point if this legislation doesn't deal with specific issues then people will turn to the laws that affect the state in general. For example, this bill exempts much of the railroad's operation from the state's Administrative Procedures Act. And in its place, it attempts to draft a less restrictive and shorter provisions. The bill could have simply referred to the Admin. Procedure Act and this bill would have been very short. But then the whole of the Admin. Proc. Act would have replaced that which is here. The same way with conflict of interest, with constitutional provisions. Your constitution is very short. It talks about the number of departments that can exist in the state and the agencies have to be in one or the other and there are a number of state supreme court decisions and a lot of litigation dealing with that. We tried to take all of the things that we knew had to be answered, either by this legislation or by the existing legislation and tried to ask the policy committee how they wanted those questions answered. If they said "we are quite content with the existing state law" on conflict of interest, public disclosure, or open meetings or Administrative Procedure Act, or those kinds of things, then this bill simply adopts those. Where the decision was made that the existing state purchasing, bidding laws were too restrictive for the railroad then we attempted to draft less restrictive provisions and put them here so that there would not be any doubt about when somebody came in said all public agencies have to bid and rather than leave that open for a lawsuit we tried to deal with those particular things here. That's an example. The public open meetings act is where we should air those kind of things. I'm sure we left some out which the local lawyers of this state will be delighted to find out. There will actually be litigation about this but we tried on the basis of our experience to go through and have the legislature specifically answer everything that is normally litigated about. One, we also, and I have a copy here, in the course of preparing this we took the provisions of the Alaska Code that would be applicable if we had not granted a different one in the bill. If you put those on a bar graph and you took all the words in S 12 it would be about that high and if you took the existing legislation that is excluded by those it would be something about like that. So, it is long but the effort was made. The reason it is as long as it is was an effort to draft lesser restrictive provisions to the existing state legislation that would presumably be applicable in lieu if this legislation were not adopted.

Harle: Could you realize then, and it would be very subjective but could you make a general estimate of how much of the old SB 212 related to the required legislation in the nature you just discussed. The 55 page version.

Lewis: The one the legislature was considering at the end of the last session?

Harle: That's right.

Lewis: Your question again?

Harle: In terms of that bill, how much of that bill was required due to the fact that it was a government or public authority? How much of the legislation, in an effort to streamline the legislation that may be required was the total content of that legislation. I'm looking for just raw numbers in terms of 70% of the legislation was required to streamline the existing laws of the state that apply to the railroad.

Kerttula: While you're answering that question, I'd like to point out that there are two or three items in this legislation that pertain to errors or oversights or mistakes that were made in previous port authorities that we wanted to avoid. Of course, that takes a page or two or three. For instance, not only do you not want political input directly involved in deciding what the railroad is going to do out political bodies, you want reverse. You want the railroad to perpetuate itself as has been accused in the New York-New Jersey port authority. You want to perpetuate something that's (indesc) not public interest or just in their particular interest by virtue of law being buying and selling legislators and so on and we wanted to put a strong exclusion from that particular experience. There are things like that that occur in this bill that add to number of pages but if you got into it you would see the reason and you would probably want to keep it.

Harle: No, my comments, Senator, aren't related to the length of the bill. That's probably been an overstatement that has carried on in the past. The concern relates more to how much structure a public corporation requires as opposed to a private operation with limited controls by government.

Lewis: If the provision here were to sell the railroad and simply set up an agency to receive title to the federal property and then sell it to the private sector, it could be very short. I don't think that's what you're asking but I'm not really able to answer.

Harle: We're discussing an issue and a policy and I think your comments are very well taken and I thank you for them.

Lewis: My comments about the federal legislation to which I really intended to defer to him later, Jerry was going to give it after we've taken these early questions. Give a brief comparison between the federal legislation and the state legislation. The provision in the federal legislation that relates to resale by the state at the end of five years is a much more complicated provision. I gave you a condensed

statement that could be construed erroneously. Basically in a more detailed form it talks about whether the state sells it for a profit over it receives more money, a ratio between assets and liabilities, a transfer the state receives from it. It is not a prohibition against transfer and also that was sale having to do with operation. So, what I would like to do is retract what I said earlier deferred to Jerry Johnson to cover that and the part of our presentation we had intended to deal with federal legislation.

Chuck Smith: I'm representing myself as a long time interested Alaskan. I've been interested in the Alaska Railroad program since the late 40's and early 50's when I worked with the railroad. First of all, I would like to thank Senator Kerttula for putting together this very interesting forum. Last month's forum with Captain Adlum and Professor Olson was very interesting and informative and it certainly served a service bringing that to us to tell us a little about public authorities. My area of concern or interest is in the governing body of the Alaska Railroad in the public authority area that Professor Olson spoke about and that you have alluded to also. I preface these remarks to Mr. Lewis and Professor Olson and perhaps even to Senator Kerttula.

Speaking in relation to this commission management concept of governing where we have the policy body which is the commission and the management who are responsible for implementing this policy I would assume under this arrangement that the commission would be appointed by the governor with legislative approval with the commissioners probably serving on staggering terms to assure continuity in the body of commissioners. I would wonder if we could not draw a parallel with some public authorities that we have in operation today in relation to this public authority or Port of Seattle that had been discussed quite extensively in the last meeting we had last month. Is not the public school system today a parallel of what has been discussed here with a school board that is elected by the public operating as a policy body dealing with the management school administration. I had to chuckle when Professor Olson mentioned with this type of arrangement it very often develops into a war zone. This is very. Those of you have followed school operation since statehood that very often there have been war zones because of this. But the question is is this not a parallel of what has been discussed and proposed. Is that not a parallel of what we have as the governing body in our public school system?

Kerttula: I can say that there are some relationships we're discussing here. One thing is, constitutionally and I know I'm interfering in a way, constitutionally I don't believe the legislature has the right of confirmation of the railroad commissioner appointments by the governor. We think we should have and think there's some good public interest having it but we're not at all we do have. That's a question yet to be answered. I presume that the legislature doesn't have the right of confirmation of those particular people. The school board concept that you mentioned and I suppose you both know it's kind of a superficial way, there are some relationships at this level I suspect between the board and the management. Mr. Kelsey asked me would the legislature interfere, and that was our conversation, and I too noted that in the University of Alaska, in our state school boards, we don't interfere

except at times of budget. This case I don't think we have particularly have them with the railroad. It has it's own. It may come to the legislature for an appropriation for new construction or something but by and large it has its own area of hopefully reaching a break even point and not coming to the legislature for funds like other public entities would. I don't think we've tried to interfere with the railroad operation at least at this stage of our development at all.

Lewis: I can elaborate on that. Very briefly, and we'll go into this in much more detail. This particular bill makes it very difficult. It narrowly prescribes the things the legislature can do and it carefully prescribes the form in which the legislative oversight or intervention has to take form. So, there is a pyramid. Three tier approach. This bill vests authority in the board of commissioners and then it deal in some specificity with relationship between the board and management a lot more specifically than one might gather on a first reading and it requires the board to delegate a fair amount of managerial responsibilities to management and it reserves to the board certain things that the board has to approve itself. That's to make the board be accountable and responsible but delegate most things and this bill delegate most managerial decisions to the management as in a normal private corporation with a board of directors has responsibility and delegates to the chief executive officer. It also very specifically describes the relationship between the board and the state legislature. We'll go over that in detail. But there is no way that the state legislature can intervene in the managerial decisions which this bill delegates to the management. Meaning management like chief executive officers and operating officers. They have to go through very formal processes and the state itself can only reach the commission. It can- not reach management.

Chris Gates, Port of Anchorage: I appreciate you being here very much and for the opportunity to convene such a forum. For those of us who have been trying to stay abreast of this particular piece of legislation for the last two years, you've just tripled my knowledge on the way that the legislation was put together and I appreciate you relaying the facts that in fact there was a policy committee and that they were given ten directives to start with. I guess my first question is were you given a specific directive as to land issue, especially native lands, as far as the Alaska Railroad were concerned and how those were to be addressed by the state?

Lewis: Yes and no. Actually, I'm glad for the opportunity. I should make one other thing clear which I should have done earlier. We did not, because my firm has represented the Arctic Slope eskimos since a long time ago, we made it clear that we felt there would be a conflict of interest that would preclude us from advising a representative in the state in the native issues themselves. And, since that time, the state had as land commissioner and other people who were well versed and competent in that area. We did our best to maintain an absolute strict separation between the discrete issues between the railroad and the native corporations or villages that railroad property went through. That was done by the commissioner of Natural Resources, lard. We dealt with all of the other land issues. Now, so with respect to the other

land issues that did not involve the native corporations. We asked what the state was getting. There had never been a survey to this day. We advised the state to hire appraisers and people to go out and survey the property. In fact, the state hired other people to do that and a very extensive survey, not survey in the sense of survey instrument, but a property, document survey has been done in which we assisted and took a major role in going to the various state and federal agencies and looking at the land document. And, basically, the way the railroad property worked originally, if there was a certain recognized right of way and it was presumed that people could more or less tell where that was from the railroad. You looked x number of feet this way and you looked x number that way and where the tree lines where or whatever there was that was the railroad property. So one of the first things that we recommended in a very absolute recommendation, we said you have to determine what it is you're getting. You do that first by document and we can do the document searches for you but you need other experts in document searches who can develop these further and then at some point somebody goes out with surveying equipment and surveys property. Now there are hundreds, thousands of leases, easements, recorded, nonrecorded property that has come and gone, all the homestead laws, all the townsite laws, all of the laws that the state operated under have effected railroad property. You just know if you deal with real property in Alaska that they effect them. There's no where that says these statutes effect them. That survey is still ongoing. We recommended the inventory be computerized and turned over to the state by the Federal Railway Administration ahead of time. We identified at the end of this a number of property issues and areas that would be controversial. There were leases that have been entered into over the past years. Some people think they're good leases, some people think they're bad leases and there are will and property improvements that have not been constructed on land that would appear to have been leased by the people who made them. So, we basically pursued and attempted to pursue a systematic inventory, a physical inventory, a document inventory and a legal inventory of the consequences of these various operations recorded and unrecorded.

Kerttula: If I could touch base just slightly on this issue, too. Remember this is all federal land essentially so you could put the railroad where you wanted to. It went at a 90 degree angle to my piece of property. Everyone of us has experiences here on the edge of Anchorage where expensive housing is overlooking a very narrow right-of-way on a track. We went back to Washington D. C., twelve state senators, and we invited some members of the House. The majority of the state Senate. There were other meetings on the east coast at the time so we could get that number together to go back and talk to the senators on the transfer part of it. Of course this dovetails in, the acceptance of management that would dovetails in with the transfer. We developed the slogan, the bottom line of which was, if we had all the liabilities of the railroad, we wanted all the assets and that the native corporations that had some theoretical claims during the transfer moment under Section 3(e). We wanted them to get their claims settled out of other lands, other federal lands but not the railroad lands, not the gravel, the dense rock, or the staging areas in Anchorage, or other values. The railroad would not be acceptable, I don't think, if we had

to buy and rent, buy gravel and rock, and rent space for staging and the various areas of Seward, Anchorage, and so on and Fairbanks. We have fairly pitched battle and I'm philosophically implying in a different direction in regard to the arguments I had to pose dealing with the native corporations and I got for a little while somewhat heated. I think since then they've recognized that the future of their export it is necessary to keep this railroad viable and I think they've withdrawn a lot some early positions but not entirely. But we did recognize in the transfer legislation the need to be certain that we didn't up front destroy the railroad in its infancy before the state acquires it.

Chris Gates: Thank you very much and I know we'll be getting into detail discussion of the provisions and look forward to that. Professor Olson, do you think that the provisions of SB 212 adequately address the efficiency vs. accountability issue?

Olson: When we get into some of the specific provisions I happen to have several questions that I want to raise. They are more on the certainties at this point than problems and they are at the margins. In terms of the core of the document of the relationship of the parent government, the legislature, the entity, which was one set of my comments, and in terms of the relationship of the board to the executive and to management, I think that this approximates the kinds of conditions that you want to begin with and when we get into the specific provisions I want to make that point but also raise a couple of issues that frankly that are not self evident in the bill. What they mean, they may be in the language of the law which I am not an expert on. The general response of the question is I am impressed with this bill with respect to the two areas that I raised cautions flags about.

Gates: Mr. Lewis, will you be disposing of any documents or bibliographies or any directions from the state to your firm regarding this legislation in the near future?

Lewis: We, I think, would not ever be doing that. I would assume the governor or the legislature might. We had a, even though it was not clear, whether our client was the executive, the legislature, or the attorney general, we had attorney-client relationship and did our best to point both sides of the issues so there were areas were we said if you take this alternative there are consequences which could be harmful and if the state choses, sometimes that was on both sides, we said you have two alternatives and they both had bad consequences and here they are. The state at some point will chose one or the other of those two alternatives. If they chose to release a document which we pointed out the liabilities attached to the form they took then that will be their perogative but we do not have the power to breach the attorney-client privilege that is maintained by the governor and the legislative leaders.

Gates: Thanks for your time.

Kerttula: I think it should be point out to that Ken Sheppard and Al Swalling position of interested of public citizens with a great deal of knowledge of the railroad brought to several of the legislative group,

including myself, brought to their early attention some of the problems we've just discussed and thought it was necessary to resolve them before the state accepted responsibility for the railroad. They've been several years, at least two years, bringing to my attention some of the problems before, they were appointed to an official body to help resolve and make recommendation. They just did it as public spirited individuals.

Jerry Ward, Representative-elect, Alaska House of Representatives: I need to clarify one point here that I have questions on concerning the actual chemical make-up of the public commission as such. I notice that we had a fairly learned gentleman that has been serving on the Port of Seattle and I another person, a friend serving on the Port of Tacoma and I understand there's some conflict there. Nevertheless, those are elected positions, am I correct.

Adlum: Yes.

Ward: And, within our formula here, I do not find and I have to plead that I very quickly read it, I would like to know what consideration taken the top 100 public authorities in the United States that are profitable, how many are public authorities by election, how many public authorities by appointment and does it make any relative difference whatsoever?

Adlum: One of the most argued points that you can come up with whether you get a better commission by election or a better one by appointment. I've been working on this and studying it around the nation. In fact that's why Dave took a year's sabbatical and worked with the port. I don't think there is a real good definite answer. You can get a real good commission by election, you can get a real lousy one by election. You can get, depending upon who makes the appointment, a real good commission by appointment. I'm inclined to believe you can get an even better one, that way. But I think that they should be confirmed by the legislature so that once they were appointed and confirmed they would then be on their own and not answerable to the guy that appointed them. (indesc) you can get into the Los Angeles where you signed your resignation at the time you are appointed so if anytime the mayor wanted to get rid of you all he had to do is pull it out and put a date on it. (indesc) its a hard question to answer.

Ward: Alaska appointments aren't like that, yet. The follow-up thing is the ports and the public authority, I wanted to break away from ports for a second, because I think a lot of this has been based upon the authorities of other public entities. The Port of Seattle has the right to tax, is that correct? Is that incorporated into this in any form or fashion?

Lewis: No. This commission does not have any tax power.
Ward: OK
Lewis: That was one of the things that I said earlier. We presented a list of questions and one of the questions was. Well there were two questions that were related. Will this entity have the right tax? The answer to that we were given is no. The other question was, Will this

entity have to pay state and local taxes? The first answer to that no, then it was no, then yes, no, yes, no, yes, then it ended up being no. But there is a provisions here in lieu of taxes. So basically, the answer to the second question is no, kind of.

Olson: Can I just make an observation about the first question. What Captain Adlum had reported is correct. And he and I did struggle with the question of appointment verses election. The election of commissioners is fairly distinctive to the pacific northwest and reflects the political movement that originally created these entities back in 1910 and 1920. When you try and impose the election of commissioners on the Alaskan Rail, it simply doesn't work, in the sense that port districts are drawn around county lines. You have a bounded territory, a political jurisdiction that is pre-existing. When you at the impact of the Alaskan rail, there is no pre-existing political jurisdiction, whether county, region or otherwise that bounds the economic activities of the entity and in that sense, appointment is almost inevitable by my calculation as a political scientist at least. You have to have congruence between the impact of the entity and pre-existing political boundaries and that does not work with the Alaskan Rail.

Ward: Within the State of Washington also cannot other existing political authorities own property within a port authority. Can they form their own port authority such as a farming community farther out? No?

Adlum: No. The Port Authority of Seattle is really the Port Authority of King County. You can have more than one authority in a county, if it's set up that way and I think that's true in Everett and in some of the smaller counties were they set up a port authority to build a boat marina or something of that nature.

Ward: One last question. I believe that Washington has been doing much longer. Is it now under consideration to form some kind of united public authority for ports within the state of Washington.

Adlum: What we're using is a regional port authority.
Ward: Which is where we're starting out now.
Adlum: There is a lot of merit to a regional port authority at least as David and I have studied, if you have a real regional economy. Such as Puget Sound as on region. I think you could look at the Columbia River as another region. The Bay area as another region. Your competition lies between these regions and not within the region itself. And a regional port authority can stop this. You have one example here that I can't get an answer for in your state. I understand that you have two grain elevators being built and you don't have any grain to go in either one of them.

Lewis: I can give you a slightly more elaborate answer. Section of the bill 42.40.030 provides for the board which includes 6 public members, voting public members, appointed by the governor. One of the provisions is that at least 4 public members must be selected from areas served by the railroad. So of the 6 voting members appointed by the governor, four of those must come from the Railbelt. They could all six come from there but the legislation requires at least four of them. Now obviously

that is something that the legislature could change. It could say they all do or none of them have to. But the way it exists right now the decision was made in this bill, by the legislative leadership that there would be 4 Railbelt representatives. At least four.
Any other specific questions before we go through in more systematic, section by section analysis?
During the lunch break, one thing that we could share with you, if you're interested, we have the side by side comparison of the provisions of SB 212 with the provisions of the normal state statutes that were replaced. So you can thumb through this. This shows the provisions of 212 and this the provisions of state law that were replaced by these provisions. They are done on a section by section basis. In a very short time you get into pages that are blank, that 212 just deleted the existing state law. I don't have enough to distribute but you are welcome to look through them and take notes if you like.
Well, we will go through the eight article. As I mentioned earlier there were 6 lawyers from our office, experts in different areas, employee, tax, property issues that are not here. Gerry Johnson is legislative expert in general and has specific expertise in drafting both state and federal legislation dealing with energy and transportation. My background in more in entity in a general sense, and in transportation in a specific sense. We are going to divide this up arbitrarily. I'll take one article, he'll take the next one. And during the course of this we'll probably confer on to the other and perhaps there will be instances where we wish we could defer to one of our other 4 colleagues who is an expert in a section and who is not here. We'll do the best be can to answer the substantive questions in all of these six area that we mentioned at the outset.

First there are findings. They run for three pages. These are legislative declarations. These really do reflect more than anything else the statements, philosophies, goals and aspirations for the railroad for the legislative leadership. We assisted them in drafting them. They deal with a variety of areas. Some of these are in here to lay the foundation for exemption from federal taxes, to lay the foundation for tax exempt financing, to lay the foundation for an exemption exempting the state from certain regulatory restrictions if it owned the railroad itself. And they are designed to track the federal legislation. Which reminds me, I'll turn the mic over to Gerry to give a 5 or 10 minute synopsis of the federal legislation. This is what we had intended to do at first. He will go through and give you a brief summary of the federal bill as of midnight last night and draw your attention corresponding state legislation. I think it would not be helpful for us to get into a long debate on the merits of the federal legislation, because there is nothing that any of us can now to affect that one way or another. That is not true of the state legislation which this commission will have an active role in. So the point of this exercise will be a brief summary of the federal law to point out the corresponding provisions of state law.

Gerry Johnson: I'll just give you a very quick review of the federal transfer legislation and this represents a later generation of S1500 was which you are basically familiar and I think more than anything, this quick review will serve to refresh your memories. Tom Allison and Steve

who have also been working on this closely should feel free to make additional comments as appropriate. Federal legislation also includes findings some of which are merely recitals of congressional intent regarding that proposed transfer. Others have specific purposes with respect to state objectives and the operation of the railroad. One in particular goes to the issue that has been raised recently by the attorney general regarding the ability of the railroad authority to operate independent of the state appropriations process. As you know, the dedicated revenues questions is one which has been controversial in this state and the federal legislation attempts to suggest that to transfer to the state of the railroad is in fact pursuant to a federal program which is one of the exceptions that are provided in the state constitution for the preclusion of dedicated revenues.. The federal legislation goes on to provide a series of definitions. I would draw your attention to the definition of state which can be either the state or the state owned railroad as the context requires. That's done that way, it's also accompanied by the way, with a specific definition of the state owned railroad which is used when specificity is necessary. But the definition of state is given both ways in effect to preserve the flexibility of the state in terms of how it choses to operate the railroad. This would allow the state owned railroad to actually assume the liabilities of the federal Alaska railroad and allow the federal Secretary of Transportation to still make his certification that the state has assumed the liabilities. That point is being subject to some confusion in the past The legislation then procedes to an article authorizing the transfer itself without compensation to the state of Alaska. It is subject to a lengthy series of certifications of which are threshold determinations that the Secretary of Transportation must make before his power to transfer the railroad to the state ripens. These include his ability to certify that the state will operate the railroad as a regulated carrier under the Interstate Commerce Act, that the state has assumed the liabilities of the federal railroad. A whole series of conditions providing for protection of the existing employees of the railroad during a two year transition period running from the day of transfer. These include assumption by the state of existing collective bargaining agreements subject to renegotiation at the end of that period, retention of the current work force, compensation at the current level, priority for re-employment in the event of layoffs, preservation of accumulated leave, protection of cost of living benefits, and continuation of health and live insurance benefits. It also provides for a similar protection of the officers of the Alaska Railroad, a defined list of particular employees including the general manager, general counsel, and so on, for a period of one year. The legislation then procedes to provide for a six month transition period following the date of enactment of the federal legislation. During that period, a closing report would be prepared which would delineate the assets and liabilities of the Alaska Railroad to the best available descriptions of property and so on. This section has been carefully drawn to be consistent, well SB 212 was carefully drawn to be consistent with this concept as have the triggers for the effectiveness of the state legislation. During the period following the date of enactment prior to the transfer, this six month period, the state is granted in the legislation the right to inspect documents and records on the railroad property. The consent of the state is required for capital expenditures in excess of $300,000

for the sale of real property, for leases in excess of five years. The federal government has also required to bring the accounting system of the Alaska Railroad in conformance with ICC standards which may or may not be the case now. The next section of the bill provides the mechanism for transfer of lands of the Alaska Railroad to the state of Alaska. It essentially is a expedited process where the resolution of claims about existing rights on record as of the date of transfer. Next section deals in more detail with the employees of the Alaska Railroad being transferred to the state. I would note here that the legislation does not contain a mandate that the employees be included in the state civil service system. The article dealing with the employees more than anything else has to do with their retirement system. It preserves their continued eligibility for participation in the federal civil service retirement system but allows the state at the end of the two year period the option of the state owned railroad of incorporating these employees into the state retirement system or establishing an independent Alaska Railroad retirement system substantially equivalent in nature. The legislation requires, in the event the state owned railroad elects that option, the federal government fund that system to the extent of the accumulated benefits that the employees have in the federal system. Basically, the federal government would disgorge the investment in the federal system and start the new system. This article also includes a provision that allows employees notwithstanding the potential election of the state allows employees within five years of retirement of the federal system to stay in the federal system so that they don't have to transfer and can receive their federal benefits although they're working at the state railroad which has established its own system and a fairly lengthy provision is necessary to authorize that. This article also preserves the federal benefits of those employees who do not transfer to the Alaska Railroad or are terminated by it. The next section in the next article or title of the federal bill bears on the state operation of the railroad after transfer. Its in this section that the railroad is made explicitly subject to jurisdiction of the ICC which is something of a change from the current situation is by the consent of the Secretary of Transportation basically subject to the informal regulation by the commission. It is a condition of the transfer that it now becomes a fully regulated carrier with a series of very important statutory exemptions that will free the Alaska Railroad under state ownership from a number of federal statutes that regulate the activities of railroad on the outside including the railway labor act, rail retirement act and so on. It provides a continuation in effect of memorandum non compliance that the federal railroad administration has granted the Alaska Railroad from federal rail safety statutes. The concern of the state here is that once the railroad leave federal ownership that it not immediately be subject to full compliance of the federal rail safety acts of which we are not confident. There is a provision requiring in this section requiring that the revenues generated by the railroad be reserved for and maintained by the state owned railroad and not by the state generally again going to the dedicated revenue issue. There is a clerification of the tax status of the state owned railroad under both public and private circumstances. There is a requirement that the Interstate Commerce Commission develop a proceeding for the issue on granting of a certificate of public convenience and necessity on the date of transfer to the state owned railroad. And

finally, there is a specific provision making the state owned railroad eligible to participate in any federal rail assistance programs. The next major section of the legislation deals with future rights-of-way, it establishes a statutory support for the expansion of the Alaska Railroad and a process for doing that. Next major section deals with potential reversion of the railroad in the event the state converts it to a use that would prevent operation of the state owned railroad or ceases to operate the railroad. It's also in this context that the sale notion has come up. You may know that the House legislation which authorizes this transfer is much less detailed. It however includes an explicit requirement that the state pay 75% of their net liquidated value of the railroad in order to receive it. The House Commerce Committee has proposed in the alternative the requirement that if the state sells the railroad within five years of the transfer at a profit which is defined as anything in excess of the liabilities assumed by the state plus anything the state invests in the railroad then that profit would revert to the government. The final couple sections of the legislation provide for other disposition of the railroad in the event the state elects not to take it. If after the closing report is filed, one year after the closing report is filed, the secretary is not able to make those certifications I spoke of earlier then he is authorized to dispose of the railroad to another party, giving preference to someone who would continue to operate the railroad. And finally, there are administrative provisions regarding the applicability regarding the appeal and amendment of other statutes which formally dealt with the Alaska Railroad as a federal entity.

Chairman Swalling: Did I understand that in the extension of the railroad did they provide a one window over federal lands?

Johnson: The question is does the legislation provide one window for expansion of the railroad through federal lands. I guess I'm not exactly sure what that means. It relates to future rights-of-way section, obviously. The legislation will provide statutory support for expansion of the railroad. Our expectation now that it will be subject to existing law. There will not be a special process provided.

Kerttula: Secretary Watt did make the commitment, however, that if we would push ahead of right-of-way requests and of course it conflict with extreme environmental potential problems why the state would probably would get from his office conveyance, it they exercised it within fifteen years it would have the standing of statute on the subject.

Johnson: That's right. This is one of the matters that Senator Kerttuja and his colleagues took up with the Secretary directly on his trip to Washington.

Harle: Mr. Johnson, I would like to also thank you for coming to Alaska to share your expertise with us. I'd like to ask you what the status of the native claims on railroad lands and how that is handled in the current legislation.

Johnson: Again, that's a subject which we've exempted ourselves from participating. I can tell you this to report as the legislation

provides a process for the expedited adjudication of those claims. That's essentially what the legislation . .

Kerttula: Tom Allison was discussing this with Senator Faiks moments ago. If he is here he would probably be the briefest presentation.

Allison: There's two provisions in the existing federal bills that would promote the resolution of those outstanding native claims that haven't otherwise been settled on railroad property. It provides for a negotiation process upon passage of the federal bill. It would tend to promote a resolution of remaining claims and the ones that are usually focused on or ones that involve railroad gravel holdings and things of that nature. Post that negotiation period the 3(e) process is mandated to complete itself within three years of passage of the federal bill so that would substantially speed up final determination of all native claims of the railroad. I think that a practical matter of the state, assuming that the bill is enacted in that form the more important provision will be the negotiation provision which would occur immediately upon passage because the state would have an opportunity to get together with the claimants to resolve all of the issues in a way which optimizes the railroad's holdings in such a way that it doesn't denude the railroad of needed gravel reserves and other things which we'll need for continued operation. What Gerry said is essentially correct that speeded up 3(e) determination of prior negotiation process in order to resolve, hopefully, the remaining differences that exist.

Kerttula: Major problem is one village corporation is it not Tom?

Allison: I believe that's correct.

Soenkson: Another point that's important is there's been discussion on the Cook Inlet waiver amendment that there are some amendments in S1500 on Cook Inlet selections, is a regional corporation and they have potential claims to the rights to 13,000 acres, I believe, of railroad properties. They've given a waiver of their rights to that property in exchange for the Cook Inlet amendment which basically modifies the terms of conditions agreement that's existing under existing law. I believe it's the native claims settlement act so that portion and that corporation's selections to rail properties are handled differently and are exempt from this legislation at this time. Other effected native corporations, you really have to look at the individual corporation and their selections to rail property to evaluate and to go down through processing to see how those are going to shake out. In echoing Tom Allison and Gerry Johnson's comments, the legislation provides for an expedited review process with the opportunity to settle those claims prior to final adjudication by the Secretary of the Interior. So, it's thought that that process will facilitate an orderly adjudication and settlement to native claims.

Kerttula: Senator Stevens continuously states also that the railroad was never intended as a piece of surplus property under the Native Land Claims no matter how the treaty is interpreted. Further, the Justice Department has twice made a statement that this is exempt, railroad properties are exempt. The Cook Inlet's and I think all native

corporations save maybe one village corporation have been very cooperative after a series of discussion and negotiations. I don't think they, right now, eye a substantial or perhaps any part of the railroad. They are looking for alternatives.

Soenkson: With the Cook Inlet Region's selections aside, it boils down to about 3,800 acres of 38,000 total rail property so that's the portion we're talking about.

Speaker: Will the railroad have to buy its gravel from the Eklutna pits under the way it's framed?

Soenkson: Are you talking about long term or interim kind of thing?

Speaker: Under S1500 is there a mechanism whereby th railroad won't have to pay for its gravel at Eklutna?

Soenkson: No. The Eklutna gravel situation is a unique situation and it's very interesting discussion but what's happening in that case is the regional corporation, Cook Inlet, has selection right to the subsurface which Eklutna Village Corporation has selection rights to the surface. And so if you're going into a gravel pit situation, what's under the ground is what you're after. Surface rights to get that or to enlarge the pit is a whole other discussion. So, with the CIRI waiver to rights to railroad properties, that type of scenario for gravel is not there.

Kerttula: It was key to all our discussions in Washington that specific thing. The dense rock and the gravel there. The railroad would always be in the whole if it had to buy its own gravel, its own basic materials.

Harle: Is this lands issue liable to be a major impediment to passage of S1500 or is it close enough to negotiable terms to allow the passage without interference.

Soenkson: I don't believe the lands question was is the lands issue the impediment to the transfer or to the passage of the transfer legislation. I don't believe so at this time. Discussions have gone on and all parties are in agreement at this time to much of those discussions and final settlement are going to be left to the period after transfer so the parties involved can sit down at the table and discuss and negotiate settlement or adjudication of valid native claims. And there's even some question as to are the claims valid to railroad property. That question aside, the parties presently are in agreement to the process for adjudicating settlement of those native claims so that's not a problem. House Interior Committee has had some question on rail properties in the Denali National Park area and those to a degree have been solved. There's a provision for railroad even through the park at this time. That's the only area that they've isolated and that's, to my knowledge, that's the extent of it. The parties are in agreement so there's no future impediment to the transfer or bill passage.

Break for lunch.

Yale Lewis: First of all, let me say again how very interesting it is to be here and it's a pleasure for a variety of reasons. Everyone looked so interested this morning. Often lawyers are argue to judges, or lawyers or clients and whoever you're arguing to is asleep or board. You all looked at least very interested an intent. I think that is an indication as to how important this issue is to this state. It's a pleasure as a professional to be able to work on things that people thing are important. This is an extraordinarily complex project. We have been involved in a lot of legislation that has affected Alaska over the last 12 years and I think this is clearly the most complex. It is not a single issue as for example as the Native Claims Settlement Act or D-2 have been. The regulatory issues, the tax issues, the labor issues, the securities issues that are so integral to this process make it so interesting professionally. The way they come together. The way this state has not approached it in a simplistic, quick fix way. You are looking at a very complex problem and you are approaching it in a way that will hopefully come up with a solution that provides that good response for a number of years. Before I go into the first section, it might be helpful if I give one other short overview.

Kerttula: You might care to hear a response. I was sitting up next to one of the principles at the head table and he said that it was nice to listen to an attorney who spoke the kings english.

Lewis: Thank you very much. The selection of the entity, in this case the public authority, I think has conotations that maybe are not accurate. Let me address a few things that we picked over the past two years and over the past day or two and the past hour. This legislation, if it were enacted exactly the way it is, without any changes, would not preclude the railroad from leasing equipment from private operators, from either leasing to or from. It is perfectly consistent with an operation where private shippers own their own cars, where private shippers own their own sidings and spurs, their own short lines. As a common carrier the railroad would have to accept whatever anybody tenders for shipment on it. So it could be a combination. And presumably it will be. I guess it's my professional opinion that in fact that some of the cars on the railroad line will be owned by individuals, some will be owned by wealthy doctors who looking for tax write offs, some will be owned by the railroad itself and some will be owned by other railroads. There would be cars that be time share or time share leases. Some cars the railroad would lease to private parties, some cars the railroad from private parties, all kind of ownership issues, all kind of tax appreciation issues. The form of entity does not have anything to do with those issues. There are technical, when one starts talking about investment tax credits, safe harbor leasing, depreciation, accelerated depreciation, those types of things. These are very discrete issues that to a certain extent are affected by the form of the entity but basically this form of entity doesn't preclude the types of private investment in specific equipment, sidings, leasings, spurs, warehouses, all of that type of thing. It

also does not preclude private operation. All this really does is preclude as I said earlier, is sale of the real property to the private sector. The legislature always reserves the right to do that. Another thing that is not inconsistent at all, and which I assume will be true is the selection of this form of entity does not preclude efficiency incentives to management, bonus, incentives tied on productivity, paying the vice president of management an incentive to increase the freight, it doesn't preclude the vice president of operations from getting bonuses for smoother operations. There is only one provision in this bill which relates to that. There is a limitation on the executive salaries. Now that what's I referred to as a marginal type of decision, not marginal in that it's not important, but it's a political decision, it doesn't have anything to do with the entity itself. The commissioners of the New York Port Authority, the executive director of the NY PA makes a lot of money, probably more than anybody here. So does selection of this with the one exception of the limitation that is in the existing bill, there is nothing in the existing bill. There is nothing that would preclude the board of commissioners from paying the CEO $5 million a year, or $5 a year, or having bonuses and incentives that are distributed evenly or unevenly among all the employees. At a certain point in any railroad there are limitations based upon productivity and that type of thing. With that one exception, that salary cap, which can be left in, taken out or modified. The selection of this entity does not effect that particular issue. Separately, the amount of money paid to the commissioners is not effected. This particular bill provides per diem of something like $300 a day. That's a blank line for the legislature to fill in. The legislature could say $3000 a day, $3 million a day or they could have said $30 a day. Marginal decisions, in that they have no legal impact of how the railroad would operate or the way the state relates to the railroad. They're political policy decisions in the first instance up to the legislature and after the legislature takes a broad cut, then it's up to the commissioners themselves to determine the salary and incentives and compensation arrangements with their chief executives. Are there any questions on those two points? I took them out of order simply because I had gotten the impression that those were important to people.

Harle. I have a question relative to if the old bill allows those things to happen how for instance do the laws, that are substantially documented in this bill, how would they pertain say to a private operator?

Lewis: Well I think they wouldn't at all. If this commission under this bill were to enter into a ten year management contract with Railroad Management, Inc., RMI could pay their executives anything they wanted to.

Harle: But in terms of day to day operations or accounting methods, ICC regulations, how would that impact ...

Lewis: I would not impact at all because the ICC prescribes the accounting methodology. The same accounting methodology is going to be required regardless whether the railroad is by the state, is a line agency, whether it's sold to Railroad Management Unlimited or whether is

operated by a public authority. So what these bill do by the way, the federal bill requires the railroad to bring its accounting system in accordance with prescribed ICC methodology. Betterman (?) accounting would still be used just as it would be for any other railroad in the country. There would still be a limitation in this bill, if this bill remains unchanged, the commissioners would still get $300 a day regardless of whether the railroad was privately operated or not, but otherwise it would not have any impact on any of those decisions.

Chris Gates, Port of Anchorage: The entity question was the focus of the questions at least in the Anchorage area between a number of groups when this bill was being discussed. What type of entity, an authority, a line agency, private ownership or contracted to private ownership. The motivation was again to get the best railroad, the best railroad system to keep the cost of living and doing business in Alaska as low as possible. That was the motivation, politically. Above all, in the drafts of 212 that came down, the number two finding was that this time private ownership and operation was not considered to be in the public interest. I think this advisory commission might be helped by having an explanation as to why that finding came down and why it was consistent throughout the entire drafting process that the operation of the Alaska Railroad by private contractor owned by the state but by the private operator was deemed to be in the best interest of the state.

Lewis: That reflected, as far as I know, the considered judgement of the policy committee that I described earlier and the legislative leadership and the earlier studies, the one done by the University of Alaska and the various studies that I referred to. I never heard any debate about the factual foundation for that conclusion. It was a working assumption that the people who were setting policy expressed a preference or a wish that it could be done that way. But there were never any surveys that I saw other than those, which were pretty detailed, which were reflected in the University and the other studies that I mentioned earlier. Something that I believe the Chamber of Commerce referred to that study that was done last July, 1981. One of those "The Assessment of the Operational Alternatives" It was just a working assumption that people shared so I didn't hear any debate about the details of it.

Gates: That is kind of key to everything that follows is that it is based on that finding that it would not be in the public interest to have the railroad contracted out. Maybe Senator Kerttula might be able to shed some light as to why that was handed down to your firm.

Lewis: Maybe it would be better...Tom?

Tom Allison: I can shed a little bit of light on it from the point of view of the federal government. For the purpose of the finding, it doesn't really say anything about public interest per se. The truth of the matter is that it has been sort of for sale by my client for quite a while and we haven't received any offers. I think it's also true that at least initially, and this is yet to be decided, it is not clear that we will be able to transfer the railroad cost free to the state. But it's quite clear at least to me that Congress would not agree to

transfer cost free to a private entity. So that as a practical matter, we have not been able to get any interest (indesc) and we see private acquisition or operation of the railroad as something probably more likely to happen post transfer to the state at least initially. We don't feel it would be feasible, politically to transfer the railroad to a private entrepreneur at no cost.

Lewis: I can respond a little bit more from a national perspective. The trend is not from public ownership to private ownership, the trend is just the opposite. In West Virginia, South Dakota, Minnesota, Wisconsin, North Dakota, all the way the state of Washington, all across the northern tier, I know from intimate involvement that what is happening in all those states is that public authorities are being set up to operate the remnants of former private systems. From Vermont all the way across, the same way that port authorities are generally, I mean that debate goes on in Seattle. Like the port authority could be operated more efficiently by the private sector, that type of thing. The debate goes on constantly, but the practical judgments across the lower 48 are that all the mass transportation facilities are being operated by public authorities now, all the railroads are bailing out and the big fight now is to keep Amtrak running to keep Conrail running and the public authorities in everyone of the states that I have mentioned have been set up in the last 2 of 3 years or they are being set up now to operate railroads that the private sector wouldn't operate because the judgements made by the legislators in those states that operation having the service in the northern tier, largely agricultural, mineral, coal resources was more important than the return on the dollar investment that the railroads had as their single objectives. Basically it is an issue of objectives. The private railroad has only a single objective, which is to maximize return on investment. The legislatures across the states have as a primary objective, continued operation if they can afford it. And the public authorities are being used as a means of trying to combine tax exempt financing to make it more affordable with continued operations. Perhaps, as we go into the sections some of this will become more clear.

Gates: I don't want to belabor this point. You are starting with SB 212 which has that as a basic, fundamental premise, that that is not in the best interest of the people and in all preceding drafts that specific choice of words is in there. Two sessions ago the advisory commission was told by Malcolm Roberts who suggested that we don't start with 212, that we look at that basic fundamental premise, that is it good to contract it out to a private operator or do we really want to accept this point blank without any justification.

Chairman Swalling: I'd like to comment on that just a little bit. I hope
I'm a free enterpriser. I have visited with one of the most successful railroads in the United States twice on this very issue. They have absolutely no interest in it. They wouldn't take it. And I visited with them as late as last Monday. And he said "what can we do for you?" He said we do not want to put any money into it, we have no interest in capital expenditures and he said "If you need equipment, we'll help you find it, help lease it. Presently, if you need help in personnel we'd

be very pleased to help you find such personnel and if we were to operate it for you as an operating entity, there wouldn't be any incentive because there is no money to be made." As far as his entity is concerned in being an operating contractor for the Alaska Railroad. I have personally explored this and I would like to report those conversations. He further said "You have a fine operating entity. I don't know what I would off hand to improve it." So, don't think it hasn't been looked at.

Harle: Chairman Swalling, my comments to that are: When you look at the railroad as a whole your statements are correct. What we would like to see is some innovative thinking along the lines of a private entity of operation of the railroad, a working railroad, with state support for the expansion and capital investment required to develop the railroad. I certainly agree with Tom and yourself and others who say that there are probably no buyers for the railroad in its present form. And that is probably exactly correct. That has a lot to do with the bureaucracy that goes with the railroad. It has a lot to do with the legislation of bringing the railroad from the federal government to the state. But once you get the railroad in a form that a private operator can look at without all the legislative red tape wrapped around the railroad and separate the railroad into logical business elements it might be very advantageous to operate the railroad as a private entity. And I think that where we'd like to suggest that the commission and legislators look at innovative ways to put the railroad together in a package such that it can be operated by a private developer.

Chairman Swalling: I hear you loud and clear. As I read the bill there is nothing that will prevent after should be say a shake out period or something to entertain such proposals and to convert it to that basis.

Harle: I would like to go on record that while that is possibly true and I certainly don't have the capability that Mr. Lewis has in forming the legislation. But the bill does not provide the optimum avenue to go in that direction. What it does is provide the major avenue to go into a bureaucratic type public authority. What we'd like to see is an equal avenue open to go to a profit motive.

Chairman Swalling: I have no answer. I have explored it to the best of my ability. The other thing that they did say, in addition to all the other things, you're jumping into a political morass and they have no interest in that whatsoever.

Harle: That relates directly back to my previous comment. That in the present form the railroad is not salable. We would not certainly not disagree with that.

Chairman Swalling: Russ?

Russ Babcock, Alaska Miners Assoc.: I think that I notice in the findings and in this first section is that there is absolutely no reference to the state ever divesting itself of the railroad in favor of private enterprise concern. I think that the reservations and the decisions of the legislature maybe completely appropriate in the context

of this bill as one of those things that triggers legislative approval. In the findings at least, it would certainly serve us in part of some reference to consideration of eventual consolidation and sale to a

private entity could be allowed. It is not even mentioned, and therefore are we precluding it forever?

Chairman Swalling: I presume what the legislature can create they can change or eliminate.

Babcock: I'm saying in these findings they made a decision that they wouldn't consider it. I say that we should put it in there that they would consider it.

Chairman Swalling: Nothing wrong with that. They are looking for ideas.

Soenkson: What you're getting into has been discussed in some degree and we're kind of getting back to the political morass of whether the state should finance a gas line. There are some similarities that can be drawn there. Just by way of process, this is more of a legislative staff observation that when this commission completes its work and makes its recommendation to the legislature on possibly language as to what the bill should contain on those specific provisions it may be appropriate at that time to incorporate that type of additional finding if you will or some additional history that this should be discussed and looked into in more detail by the authority once they are set up. Because we are in agreement at this time that it is probably not feasible for the railroad to be in private operation; however, as conditions change and there could be an effort towards that point where it may be possible. This could be a kind of ongoing consideration that the authority should look into. The Institute of Public Administration has looked this bill and has looked at public authorities in Alaska in general has recommended that either through this bill or through legislative committee report language which when people testify on bills those are the kind of things that end up in the committee reports. Those kinds of the things give the commission or the authority more direction in general policy matters. The authority make the determination whether or not those are applicable and receives a lot of general policy decisions. Those kinds of things are probably part of the ongoing discussion and deliberation that the authority is going to be involved with as part of the general policy.

John Kelsey: I would like to pose a question to the gentleman. Perhaps you'd like to see us as a commission even though we adopt and recommend 212, that we attach a recommendation to make a better avenue for your proposal. Do I get that from you?

Harle: That's right, John. The concern that I have personally, that I think it would not be advantageous for the commission to merely take Senate Bill 212 back to the legislature and say here, this is the best document that we can find. Our voice in the wilderness has been that there are other potential options and we are trying to those ideas somewhat clear. We're not proposing tremendous turnover or changes in

SB 212. There are some things in there that are perfectly satisfactory. We just would like to see other options addressed. And this isn't done in the present SB 212.
Kelsey: I think it's fair to say that the commission will consider that and perhaps recommend that. I don't want to speak for the chairman but I believe that this will be a consideration that we will take up.

Lewis: One other comment that might be helpful. When one talks about private enterprise, you're talking about two things: return on an individuals time and return on equity. The private people that I represent, which are most of the people I represent, they talk about return on equity. I think right now that the assumption of the policy group, the legislative leadership is that this bill, and they have made it very clear that the state ferry system approach is not appropriate for the railroad. That there has been unnanimity on that. That's not a reflection on the operation of the state ferry system. But trying to apply that model to the railroad, we have been instructed not to do. To do everything that we can to avoid that. The notion of private incentives through financial rewards for risk taking, for efficiency, for initiative, for good management, those are drafted into the bill and are left to the commission. With the exception of the limitation on executive salary, which I mentioned earlier. But for that limitation, everything that you would want in terms of the opportunity for a commission to give financial incentives to its management is present in this bill. What is not present of course is a provision for a return on equity to private investors because at this point the state leadership considers that the private sector has not made an equity investment on the railroad and therefore there isn't one. I think there has been consideration that if private sector wanted to step in for example and expand the railroad, then if the private sector put the capital in to do it, then there would be arrangements made, as there would obviously have to be for the private sector to get a proper return on its equity investment. The same way, if the railroad leases cars from shippers, whoever owns the cars, the rolling stock, the sidings, will get a proper return on their investment. Those things aren't said explicitly in the bill, but if we get time maybe I can show you that they really are in here and it was the intention of those of us who worked on it both policy makers and us the drafters that the commission have all of those possibilities and the assumption that they would use them. The assumption has been that it will take good efficient management to make the railroad work, much less expand. The other point on that, as long as the railroad is operated by the commission with its existing capital, the state legislature doesn't have anything to say really about how it operates. The assumption is that if it tries to cut back service, it has to account to the legislature. If it gets involved in a major capital expansion, then the legislature has an oversight. So long as the railroad is operated without either expanding or contracting service, maintaining its rolling stock in its existing roadbed, it's strictly between the commission, its executives and its employees. And the legislature doesn't really have very much to say about it, so long as it continues to operate as it is operated on the day that the transfer takes place.
The Findings, which I started on about four hours ago. I think we basically discussed, and given that we are running out of time, we've

talked about the philosophy. I think they are here, I gave you ten policy directions that were implicit from the beginning, based upon all the other studies that were done, the executive policy committee made and the legislative leadership accepted those ten principles that I mentioned earlier today. Those, if you made notes of them, or I can give them to you later, are reflected basically through these findings. The basic assumption through these findings is that the legislature wants the railroad to be continued to be operated. Regardless of whether it gets a return on investment, regardless of these other things, it is a legislative intent and that is the most important...One of these findings.. The legislature says we intend for this railroad to be operated until further notice. And that is the dominant theme that runs through these findings. We've talked about other assumptions, but the basic message is that operation of the railroad comes number one. The legislature hopes that it will be done effectively and efficiently and won't take money from the general fund and people will be happy with the service and all that. But he basic principle is continued operation.

The reasons for it are given in the second one. It is the policy of the state to, the same type things, the legislative declarations. Number two on page two, it is in the best interest of the people of the state that the public authority created by this act, operate and manage in a prudent manner, the Alaska Railroad. Then it goes through and lists a bunch of things which are a restatement of those ten principles. The only one that is not mentioned is to be consistent with the constitution, because the legislature assumed that whatever it did would be consistent with the constitution. All the others. . to be exclusively responsible for the management of the financial and legal obligations of the Alaska Railroad. That was the first principle, to insulate the state from legal and financial liability. If you go through them you can pair them with those ten. They run a-i and are restatements of those ten policies. When you look to number 4, it is a general statement which is really designed the Internal Revenue Service and other federal agencies that the legislature intends for this entity to be able to engage in tax exempt financing and that type of thing.

Chapter 40, Article 1, we get into the first meat of the bill. I'm going to go through article one, Gerry Johnson will go through article two that after that we'll start rotating.

Article one first deals with the establishment of the authority. There is a statutory reference here that I think has created some confusion. It reads as follows: The authority is a public corporation and for purposes of article three, section 22, Constitution of the State of Alaska, it is an instrumentality of the state within the department of transportation and public facilities. I think that this makes people think that, oh my god, here comes the ferry system. I've heard that over, and over and over again. This does not mean that. Your state Constitution requires that things be placed somewhere. Think of pigeon holes, think of a mailbox. Your constitution limits the number of separate departments. A policy decision was made not to create a new department for the railroad. Therefore, it must be placed somewhere, it can't just be left dangling. That's all it does. The second part of that sentence makes that clear: but, the authority has a legal existence independent and separate from the state. From a lawyer looking at its operational significance, the second part is the operational

significance. The first part is boiler plate, designed to conform with the state constitution. The operative language is that the authority has a legal existence independent of and separate from the state. That's all you can say. You can't say anything more to make it separate and independent. We've used all the magic words there. Legal existence independent of and separate.. and that is the significant part of that.

Kelsey: It says a public corporation. Does that mean that it is going to be an incorporated entity, the same as a private corporation?

Lewis: No. That word, as a term of art(?). There are three kinds of corporations, there are laws, there are corporations incorporated under your business for a profit, which is what most people work for. I think that is Title X here in Alaska. There is another section which deals with non-profit organizations, churches, boy scouts, those kinds of charitable organizations. Everything else, if it is not under the business or profit or the non-profit, then it is public. So this means that it is owned, that its shareholders are the public at large, rather than the non-profit board of directors or for profit partnership or corporation. Public corporations are used loosely in two ways: sometimes it means publicly held corporations, a lot of people have stock in. That is not what it means here. It means that it is synonymous with public authority.

Olson: I presume on the date of effectiveness that there would be nothing to prohibit passage and creation of the authority even before the federal legislation passed that reverted the entity back to the state. Isn't it possible under this section that the Alaska Railroad Authority would come into being before the passage of S. 1500.

Lewis: Yes. There is another provision the way your legislative draft is worked here which I think is a good way to do it, the bill in an earlier form had sections in it that deal with the initial creation of it, and those become redundant or dated the day after they begin it so there is in the back part of this bill under article eight there are sections that deal with the initial incorporation and what happens and which come first in the order of things. Cause once they've all happened they'll no longer be effective so they were stuck in the back. They were put in the back by the legislative codifiers(?) rather than be left in the operative provisions.

Adlum: What different connotations do you put on public corporations rather than municipal corporations?

Lewis: I hate to get into that. That's the kind of thing that lawyers fight about.

Adlum: The only reason I asked was most of the port authorities are often called municipal corporations.

Lewis: No. We'll we fight about them in Washington, too. The public is a broader word than municipal. Municipal normally means an entity that has the delegation of sovereign powers of taxation and lease power. So, a public corporation is generally a municipal entity, port

authority, has tax power. And will have both tax and police power. So those have significance. Bond lawyers fight about them. Public attorneys fight about them so we've tried to avoid those.

Gates: Does the constitution of the State of Alaska allow a separate form of government equity established as an authority with the power of taxation and eminent domain to government property?

Lewis: Well, I'm not sure. Let me answer it a different way. This entity could have been condemnation and tax power, I think, but nobody wanted to do that. Now, I'm not certain about that since a decision was made earlier that the entity would not have police power. Now there is some condemnation power, I think port authorities here have condemnation power.

Adlum: No. They do in Washington.

Lewis: I guess I really don't know the answer to that.

Harle: I can offer a comment there . I would certainly wish someone could convince me that if the railroad was put into the Department of Transportation and Public Facilities that it would not become a ferry system. What would be a possibility of considering something in the establishment of the authority to create a private corporation of which the state owns 100% of the outstanding stock. I suppose getting away from the constitutional requirement of having all the pigeon holes to place this thing in.

Lewis: I think probably the state could do what you suggested first but I don't think that will avoid, I really don't know the answer, but I suspect it would not avoid the second problem even though it could be done, I think.

Harle: That would be along the lines of the idea we would like to throw out later. This is one of the Anchorage Chamber of Commerce's great concerns is this section right here where the railroad is placed in DOT/PF. Because that opens up all the horrors of red tape bureaucracy and a ferry system and we can't see our way clear how it will not become a ferry system if this is indeed where it is placed within state government.

Lewis: Well, another alternative it could be placed in a brand new department called the Railroad Department and that's perfectly available to the state. I think the decision there was made just the assumption that (indesc) another one of the few remaining numbers.

Harle: That is certainly preferable , I think, to put it in a DOT/PF. At least it wouldn't have to deal with all the procedures of that department.

Lewis: From a legal standpoint, the state could do that as easily as it could do this but the second point I think which may be more relevant and that's what I hope will become a little bit more clear. The reason that there's so much specificity in this bill was to avoid the

regulations the Department of Transportation operates under. Again, we would not, we meaning the bill could have been, if it were simply decisional made to make it subject to everything to which the Department of Transportation is subject, the bill could end it at this point. The reason it goes on in such gory detail is to carve out exceptions and make it clear that to keep the Department of Transportation from getting control in that sense. That's what some people said. I would say it was a clarity.

Harle: That is a very laudable effort, however, the railroad would still have to deal through the DOT/PF commissioner and be subjugated his direction.

Lewis: If this law is followed, maybe what your decision is and the way things work the law can be just a matter of course. The law won't be followed. I can tell you categorically that if this bill is inacted the Commissioner of the Department of Transportation is one vote on the commission and that's it. Now whatever powers of persuasion he or she might have is a different proposition. But everything we could think of that needed to be dealt with was done to preclude it.

Harle: Organizationally, doesn't your wording here place the railroad under, I'm not talking about the Board of Commissioners. Organizationally, it places the railroad within the Department of Transportation and as such the railroad must report up to the governor through the commissioner of DOT.

Soenkson: Probably John Bates can help us out on this but in order for the Department to have operative control over the railroad there would have to be a specific provision in their statute. How do you log it. The Department of Transportation gives them specific powers to deal with the railroad and to my knowledge their existing statutes doesn't have anything to do with operating on the railroad. Also, the reason the commissioner was placed on the board was for the purpose of being able to work to help intergrate the entire state infrastructure and the rail of course, being an important part of that. Maybe John can respond to that.

Harle: Steve, I'd like to comment on that. What that tends to do though is to subjugate the railroad to the commissioner's whims in terms of how he views them relative them to other transportation features. If you separate the railroad and let them speak for themselves as a separate department or at our suggestion, as a private corporation, they can lobby in their own behalf. Instead of being on the level with all the other modes of transportation.

Lewis: That's a perfectly reasonable decision. I think what you're suggesting, the commission could consider taking the commissioner of transportation off the board. That was one of the things that I can tell you that has been debated and that can be changed. I'm not suggesting that that should be changed or that's it right the way it is now but that's another flag, the composition. The decision to put the chief operating officer of the railroad on the board was another blank, to put a representative of the labor unions on the board. Those three people

are all political choices which this commission can address but there's certainly no reason for them to be on in that sense. There is maybe a reason to keep the Commissioner of the Department of Transportation on because there are Supreme Court decisions in this state which say that in order which has relied upon the existence of the Commissioner on a board as addition that the public agency is really within the department. So I'm not really offering a ultimate legal conclusion on that particular part but it could be put in a different department in which case it would be the Department of Railroad and there would not be a commissioner of transportation on it. At that point it would become a political decision and not a legal judgement.

O'Sullivan: Mr. Harle, would it help your thoughts if he were a non voting member?

Harle: I think that would be more acceptable than the way it is now.

Lewis: Those are both, as I say, they are legal which in a public forum like this I'm reluctant to comment on that part because there is a problem under state constitution. But aside from that state constitutional problem, whether the commissioner is on it, whether he has voting power or whether he is not on it at all are all political judgement.

Gates: Those are the nature of our comments. They are political rather than judgements of law. Would it behoove the commission to look at the establishment of a separate department so that in case you didn't address the right issues it wouldn't fall back to DOT practice?

Lewis: I wouldn't advise the commission on what they ought to do but that's certainly something that is the realm of possibility.

Who promulgates regulations under this act?

Lewis: Well when we get to that section they're dealt with very specifically here. It's not the commissioner of the Department of Transportation. It's the board itself.

They have the effect of law?

Lewis: Yes they do. I'm beginning to get nervous that we're going to give out a time and the most philosophical questions might take up all the more detailed time. That specific question is dealt with in great length. There was a lot of debate within the attorney general's office. Some of the attorneys there thought this was a sellout to the private sector. Some of these thought it wasn't so this was hotly debated not so much by us but by other people who worked on the bill and dealt with it in great specificity. One other point I'd missed earlier. This railroad does have condemnation power or expansion power. The authority would have it. That was another one of the things that was debated a lot. That is obviously a political decision. It doesn't need condemnation power. There has been huge debate for as long as we've been working on this about expansion and it's been almost as significant as private/public, the notion of expansion and who pays for it and who decides and what people don't like it. That again will be dealt with. That's

dealt with in great length in the property section and one of the other sections we'll come to today. (indesc) Now, the next section is section 42.040.030, Board of Commissioners. I think we have already addressed this. I'm not sure there is really anything new to say about it. I think this section is clear.

Mr. Moore, Resource Development Council: I'd like to know with regard to the board why there are two members (indesc) and a quorum of four (indesc).

Lewis: Well the first one I think the truthful answer is to compromise between having the chief executive officer on the board and not. It's an issue that's debated in all the private corporations we represent as well as the public ones. The notion on the one hand is that the board, the power that's given to the board, and the board tells the chief executive officer, the board sets the policy, and the chief executive officer carries it out. And the chief executive officer's role should be kept distinct. He or she should not be in a situation where they are voting on policy. For example, in losing in the vote on the commission and then being in a position of carrying it out. It's a practical judgement not to have the chief executive officer on the board. It's not peculiar to this, as I say. Some very large private corporations have chief executive officers on the board and some don't. I don't know what the experience of the people here is. So on the other hand there were people and I think that the bill was reviewed by railroad management and the existing management thought it was very important that the chief operating officer be on the board and be able to speak to argue but not so a decision was made by the policy board and by the legislative leadership to have the chief executive officer on the board in a non voting capacity so he or she could participate in the debate, have access to all the information but not be able to vote.

Moore: Do you expect them to be responsible?

Lewis: Well, I assume he'll be responsible and I assume the board does also.

Moore: Then you better have the authority (indesc).

Wright: Earlier on there was some discussion that members of the board and not have to be confirmed by the legislature and there was some concern by the legislature but I see here in this draft they are to be confirmed by the legislature.

Lewis: Yes. I said there was a debate about that. This reflects the resolution of that debate. They'll be appointed by the governor and subject to confirmation by the legislature. What you asked, the second question about the quorum, why is the quorum four. I guess I really can't answer that. There's six voting members and the quorum requirements are that there be four present. That's one more than half and I think often a quorum is half or whatever the next number of persons up over half or is the next number up over the half of six, I think that was the rationale.

Moore: I would just like to voice an opinion that I feel the chief executive officer should be a voting member of the commission (indesc).

(Speaker unidentified) Question on the certification. You're talking about labor organizations that are concerned by the representative of the authority. Is certification some kind of special labor representation or is that a general sense?

Lewis: That certification is the act where whatever the regulatory body certifies that a group of employees are the recognized bargaining agent for those employees on that particular property. They might change. The existing unions might be the unions twenty years from now but they will always be certified as such.

Mike Olson, United Transportation Union: Why can't they have union representatives be a voting member?

Lewis: Same debate as the other. You heard the debate here. One person thought management should have a vote, one person thought management should not have a vote. The same debate was done. Should the labor representative, first of all should there be a labor representative on the board. Some people thought they should, some people they shouldn't. And the second question was should they have vote. Some thought should. There was a parity done to treat the labor representative the same way as the management representative as I recall.

Buki Wright, Fairbanks Chamber of Commerce: I want to refer to the second to the last sentence in that paragraph. The four public members selected from areas served by the railroad. I think that's good. I think though that it needs to go a bit further in that the two major areas served by the railroad are Southcentral and Interior Alaska. The political power base is clearly in Southcentral Alaska. So I think that the possibility exists that a mass majority of those members could quite possible end up being from Southcentral Alaska and then Interior Alaska not being represented adequately. I would like to see if we would like to see that subject addressed and that if you specified that half of those or two be from south of the Alaska Range and two be from north of the Alaska Range. In dealing with that I think there's another area that needs to be considered and I would appreciate it if you would have whether it has been and that is in dealing with this from areas served by the railroad. Barrow is served indirectly by the railroad. Prudhoe Bay is served by the railroad. Ft. Yukon is , St. Michael is. Would it be those persons living in those areas be eligible to be one of those four or are we talking about people who live along the railbelt. In others words somewhere from Seward to Eielson to the other end of the railroad.

Lewis: Well, I can give you a little bit of the debate. Earlier there were notions by locality. One commissioner from one locale. As you went through, there was a huge uproar and they got to the legislative leadership and it ended up four without specification. It ws an intense debate all along the way and I think the decision on that was made basically to defer that to the future and trust the legislative leadership and the governor would work out something that was there. That was

a situation which earlier drafts we had addressed to great specificity. A political judgement was made that that was not politically a good thing to do. Second question you raise is how do you define an area served by the railroad and that's were you get into specificity again. We could have had another section and I don't say this /. There could have been a description, a definition, and that was considered about what is an area served by the railroad. The points you made were debated and there was some confusion and disagreement about it and a decision was made to leave it this way. In answering questions like that I'm not meaning that this is a proper solution. I think all of these kind of questions you're really directing your responses to the commissioners who are here thinking about these and make recommendations. All I'm trying to give is a historical perspective on how it ended up this way.

Wright: I would imagine the argument that would be put forth arguing that a certain number of individuals should come from the area served by the railroad would be the same argument put forth that half of them should be north of the Alaska Range and half south. As you mentioned earlier, there has been substantial debate about the expansion of the railroad and that's certainly something we're interested in in the Interior because if the railroad is to expand and a lot of the expansion, or the majority of it, will happen with the Interior being a hub of that. I think the Interior is very important to the survival of the railroad and what happens there. So, I think that same argument applies. In order to keep it away from political infighting and in order to keeping it away from having to trust the legislature and the governor who may be from a certain geographical area and therefore may be have a tendency to want to support his local constituents. Then we wouldn't have to deal with that. Then it would be specified. In response to the second part of my question, possibly rather than just from areas served by using the word residing somehow other than from might be a bit more specific without getting so specific that everybody would get upset.

Lewis: I think that is a very reasonable suggestion. This is actually probably useful on a particular point as example of whether you want specificity or lengthiness. It's kind of a microscopic look of one of two hundred debates that was entered into on this. Specificity versus generality. Legal or practical considerations.

Speaker: Can I ask one question, what's your definition of a connecting carrier of the Alaska Railroad. Those aren't railroads and we're talking about railroads here. I just want to make sure that it doesn't mean another railroad or putting rail cars on the Alaska Railroad system.

Lewis: It doesn't mean the latter. Gerry, do you remember?

Johnson: Yes, this is another area which the bill could have been much more specific. Virtually any railroad in the nation could be said to be a connected carrier indirectly or very indirectly. The intent here was to railroads, probably in the State of Washington, maybe British Columbia, that have a more or less direct with the intermediary of one, water carrier relationship with the Alaska Railroad and that again could

be more specific but that would add to the complexity and length of the bill and I think that's something that could be left to legislative history.

Lewis: That's a good example of something that maybe has not been adequately addressed in a definitional sense. Are there any other questions about subsection a. That's what we just got through talking about. Now subsection b is a confirmation. We looked carefully at all the other public authorities in the state and the legislation that set them up. Sometime there is disagreement. When the governor doesn't want to confirm someone there is disagreement about what their status is. This provision says that once the governor has appointed someone, unless and until they are rejected by the legislature so that if the legislature never gets around to acting on the confirmation they have full voting and participatory rights. I'm not going to comment on c or d. They're, I understand, more a place of business. Subsection e describes the conditions forewhich the governor may remove someone. This is an important section. I think it is, hopefully, relatively clear. It's a political issue and it's an issue to be debated about how much control the governor should have and it's like the notion of judges should be. Should they have life tenure or shouldn't they. This says that once they are appointed, unless they are rejected by the legislature they serve to the end of the term unless they are removed by the governor for certain specific causes.

Speaker unidentified: What does it mean, conduct intended to harm the authority? Does that mean take any violent policy disagreement with someone else on the board and someone else thinks that you're suggestion would have harmed the railroad?

Lewis: The key word there, this gets into criminal law, the key word there is intent. Two people could violently disagree about something. Violently disagree about whether the chief executive officer should have a vote and on the board. Their intention would be what was the good of the board. So they could be criminally violent in that situation. That's designed to get in a situation where someone intends, knows what they want to do would be harmful and intends to do it anyhow. The next section, Section .040 deals with term of office, public members of the board serve for staggered terms of five years each, could be four, could be six or any other number. I don't remember who made that decision. Those were basically blanks. I won't go through the rest of that, they're fairly self explanatory. Compensation and expenses in .050. That's the one that has the limitation of $300 a day and that type of thing. As I said earlier, that's a blank and it could be removed. The legislation could not put any limitation leaving it up to the commission to set their own salary. Some people would think that the legislature should set the salary for the commissioners and the commissioners set the salaries for their employees. Otherwise there would be no one to whom the commissioners would be accountable. Strictly political issues. Policy decisions to be made by the legislature and who receive advice from this commission. Quorum and meetings. I'm not going to go into those. Again, I think it's self explanatory. Dropping down to .080 on page 6, this is a very important section. It's one that the people invent, I guess I kind of alluded to earlier in the day referring to

other sections. Now, Subsection (a) says, "unless the board provides for management of the authority by a third party contract under Section (b)" so this recognizes right off the beginning in the first statement on that issue is that the board can provide for management of the authority by a third party contract. Then it goes on and says the board shall appoint fixed compensation for the chief executive officer and legal counsel of the authority. There was some discussion which we did not participate in whether or not the governor should also appoint the chief legal officer feeling that it was important that the chief attorney for the commission, that that person should give advice that would be consistent to the advice the board would get if they went to the attorney general. There were other fights that the board's lawyer should be loyal to the board, independent and all that. This was a compromise to say that the governor got to review the appointment of legal counsel for competence. Whatever that means. So that the board appoints the chief executive officer, not the governor, but the board appoints the chief executive officer. The only person the governor even gets to consider is the competence of the legal officer. The decision was made not to give the governor the confirmation powers of the chief executive officer. That's strictly by the board. There's no question about that and I don't think there's any room for there to be question about that. That was a very important policy decision that was hashed out basically over the whole year. People had their strong feelings about that. Then, the chief executive officer shall appoint and fix compensation for the other executive officials just like any private corporation. The chief executive officer has everybody else fix his salary. In this case, the appointments of compensation are subject to board approval. There was debate about whether or not that should be limited so that the only ones the board had approval power over things like treasurer or vice president, chief operating officer. Those were rejected. This was the resolution after long debate on that subject. The officials appointed under Sections 1 and 2, that means the executive officials who are defined later in the act can be fired by the board any time the board wants to. Other people presumably will have contracts and this doesn't effect people other than the chief executive officers. This again is like a private corporation rather than public one. Public officials are elected for a discreet term. In the private sector, the board can fire the chief executive officer whenever the board wants to. Subject, of course, to whatever the contract terms are. If the chief executive officer had a contract that said he was entitled to one year and couldn't be fired before a year and if he or she would be fired sooner they would get two years severance pay. Of course, that would override this. But this basic decision again was that the board would function here with all the efficiency just like a private authority and the board could fire the chief executive officer, the chief executive officer wants to do what the board wanted.

Why is that extended to other officials other than the chief executive officer. It appears to me that you weaken the chain of command when you do that. It says the board can fire the second level. It's no good.

Lewis: You look to the definition of executive officials. Again, basically it's a blank. That's what people decide. Our advice was be specific. Don't leave it up to the people who wonder about the future.

Who got the power to appoint, approve and fire. Do it specifically so everybody knows going in. This was a particular resolution there are infinite numbers of others that maybe would be as good or better.

Chris Gates: These people then serve both the general manager and the board.

Lewis: Yes

Gates: Ok, isn't that traditionally a nonproductive arrangement were you don't have a clear boss you've got two bosses, and you've got to please both of them.

Lewis: They're debated constantly, they're lots of kinds of corporations I know where the chief financial officer and the chief executive officer or the chief legal officer all serve for the pleasure of the board. There are others where nobody but the committee do. There are just lots of ways to do it. And here is a section, section five then is the one that... the provision that no executive official may be compensated at a rate in excess of that established for the heads of principal executive department of the state. Policy called, there's no legal basis for that.

Unknown speaker: Did you read that before to permit incentive bonus to such a person or are those precluded?

Lewis: My interpretation would be mean that that would be the limit, if the limit perceived department heads at 60 thousand dollars, for example, that the total compensation for one of these executives could not exceed that.

Unknown speaker: Doesn't that leave you up in grey area, how are you going to get a competent executive officer for that amount of money ? I doubt it for the Alaska railroad. You'll never get it. That's a poor provision.

Lewis: That's a policy provision that you can change your recommendation could be to change, if the legislature could change it it's not. I think that's , it's something I guess I'm not going to I express an opinion because it's not a legal not a legal issue it's a policy decision for other people to make.

Lewis: Oh there's absolutely nothing that prohibits it. That is your judgement about what is the best way to operate.

Unidentified speaker: Excuse me Mr. Lewis, if I may make a reference back to number three, officials appointed under 1 and 2 that the gentle man from the port authority just made reference to here, back on page 44 there's a definition of what executive officials is and it's incredible, manager of marketing and sales, chief engineer, chief mechanical officer, officer of industrial development, real estate manager of budget

and accounting, manager of planning, chief of security. That seems to be quite a can of worms.

Lewis: It's a big list.

Same speaker: All those people are answering to the board or the what ever we're calling this. As well as the chief executive officer, your example makes sense that the chief financial officer or chief legal council or what have you might answer directly to the board, but with an operating structure where there is one chief executive officer with other people subordinate, to that working within that operational structure needing to be abordinated through one entity and one voice.

Lewis: I know what you're saying, I don't disagree with you, this could easily have been changed and I suspect in some earlier draft it probably said that. I know that a earlier draft there was a very narrow definition of executive officials. And it got lengthened for reasons that I don't really recall now. But it could say that this does provide that the CEO appoints and sets salary for all these people. There is no question about that, but it also says that all these at level two can be fired by the board. There was a practical judgement as I recall, something that somebody said "well look, if the board tells the CEO to fire somebody and he or she doesn't then they'll fire him or her." Then that does the same thing and I think what you're expressing here is that the list is too big and there's probably a better way to do it and I sure don't disagree with the observation.

Speaker: It would seem me that it would be the function of the board to tell the CEO to run the railroad and to run it efficiently. If he does that terrific and doesn't then deal with the executive officer .

Lewis: That is a perfectly good way to approach it.
Looking under section B, page seven. The board may provide for in a manner consistent with the purposes of the chapter, and subject to the approval of the state has provided in section of the state code, the management and operation of the railroad by a third party contractor. The purposes of the chapter are the ones set out in the beginning. Obviously, if the board decides that it could be done by private operator then it would nullify the finding that it is not presently appropriate for private operation. But so long as the board decides that the private operation will provide good efficient, safe, economical, continued service then the board may contract with a private operator. I don't remember the reference to the state code. Legislative approval of course. That's one of the provisions that we'll get to later, where the commission puts something in motion and then the legislature can come in and stop it if they choose to.

Speaker: That need not be the entire railroad, it could be segments of its operation.

Lewis: Yes sir. It could be for different times or different parts of the railroad. That is left up to the board.
We come now to section 090, delegation, which responds to a question that somebody asked earlier. Subsection a, the board shall by rule,

delegate powers and duties appropriate and necessary for managing the daily affairs and operations of the authority to the CEO subject to any requirement of board concurrence or authorization imposed by the rules. That says board just sets is own rules and regulations and for turning the railroad over for operation to the CEO but what recognizes what's obvious, that the board itself can limit what it gives to the CEO. B and this is very important. This is something that I think was a result of input by the Chamber of Commerce or Commonwealth. Within 180 days of its establishment, the board shall delegate the following activity of the authority to the CEO or other executive officials designated by the board subject to board review of any activities that may be specified in the rules. Now if you look at these things, this is the nuts and bolts of the operation of the railroad. And what the legislature is saying to the board is: within 180 days you will delegate these things to the CEO recognizing that the board will have review power, and they can't get out of their own responsibility by delegating to a CEO. But saying nevertheless, the management of all these things must within 180 days be delegated to the CEO. Look at them. They are complicated. I suggest that we not linger or them but I would be happy to respond to questions.

Speaker: I have one question. Why was not an operating budget included in there? That the CEO should provide an operating budget to the board

Lewis: The debate on that I recall, that the commission itself would require the CEO to submit a budget. It was an assumed responsibility of the chief executive officer. You'll note that another section says that the board shall cause to be, you know the plans the annual plans,the five year plans, I think this specific language to accompany shortly reads like the board shall direct that a budget be prepared that the board will submit to the legislature. It doesn't have to be done, it could be added. One of the dangers in adding things, if you start adding too much then people will argue that what you didn't have you didn't intend to delegate. The assumptions were that the CEO would prepare a budget.

Harle: This seems to be in conflict with some of the other procedures. Legislatively, why should the board be told what to delegate.

Lewis: My recollection is that this was requested by if not your group, I think one of the Chambers of Commerce, Commonwealth North, I really don't remember the history of that. Gerry. Oh, I beg your pardon. It concerned the management of the railroad.

Harle: It just doesn't seem appropriate in legislation to tell the commission what they ought to be doing in terms operation. Lewis: I don't disagree with that at all. I think your suggestion is a good one. Last spring, there was a lot of concern by people here that it was set up, that it was to bureaucratic and the manager of the railroad didn't have enough authority. This was a political response to a perceived local concern generated by the management and supported people that the board would keep to much power to itself and ought to be ordered by the legislature to delegate. It's not a provision that needs to be in here. The other side of that is there were certain things that people thought that the board itself really had to be responsible for. Not that they

would do it originally, but that they would vote on it, they could be cognizant of it, they couldn't simply delegate without further thought. And those are the ones that are set out in sub-section "c" on page 8: General or particular board authorization or concurrence is required for a number of other things. The list is based upon various people's experience, things to be added to it, things can be deleted. It could be deleted altogether. It's a policy decision that certain things were so important that the legislature thought the board itself really ought to vote on it, to not resolve it say arbitrary (??). So if its $5 million, or $ million or say $50 million.
And that brings us to the conclusion of Article One and Gerry Johnson will take Article Two.

Russ Babcock: Perhaps I could address a question to Capt. Adlum and Dr. Olson. We've now structured a board and given its duties and constraints. Are doing a good job? Are we going to get a good board out of this process? In your experience, are they going to be able to function under this set up? What's your comment on what we've done so far?

Adlum: Well as a commissioner, a couple of things that strike me, the even numbers. I can see too many deadlocked votes, 3 to 3, 2 to 2 and not much of a way to resolve that. I do agree that the executive director should not be a voting member. If you are going to keep this division between the commission and the management.

Lewis: I apparently made a mistake. There are six public voting members. There are a total of seven voting members. Right now, the Commissioner of Transportation is a voting member though not public. There are six public members. If the decision were made to take the commissioner of Transportation off, then I think the recommendation to go along with that would be to add another public member to you end up with an uneven number.

Adlum: Then you have one more than half as a quorum. We have a five man commission. Even though there are only three of us there, and that's a quorum, we have to have three votes to pass something. You can't come there with a minimum quorum of three, and pass on a 2 to 1 vote.

Lewis: We have drafted that for other public authorities that we represent to require a super majority. There are lots of things like that could also be drafted so that certain decisions required more than a majority.

Adlum: Maybe you could put that in some bylaws of the commission, though and cover them in that manner. Lewis: That is intended to be done by the Commission in their own regulations. Everything that is not dealt with specifically, will be left to the board to promulgate their own regulations.

Adlum: My feeling on that. Just because somebody happens to be traveling, out of town working for the commission, a small group can get together and get something passed without the whole majority.

Babcock: What about representation, getting people who really represent the interests of the authority in this case, to serve on the board. Should there be geographic reflections in that, or not.

Adlum: Well, we talked on that, David and I both, when we were talking the issue of whether they should be elected or appointed. We felt the area that you had to cover with the railroad it would be very difficult to have an election that would be representative. We did feel strongly that they should be appointed. I personally have strong feelings for at large. What can happen on commissions, and has happened on the Seattle Port Commission, you get one guy that is for the waterfront and one guy that is for the airport. We have it today on our county commission. In King County where they're elected by districts. They're fighting for their own districts and to hell with the rest of the county. I don't think that's good either. If you're going to run a successful railroad, you got to have representation (?) over the entire area.

Wright: But suppose the governor is from the waterfront and he's doing the appointing.

Adlum: You happen to have one from the hotel industry and he's got hotel everywhere.

Olson: Let me just make one response to Russ's question. My own reading of this section of the bill is that closely approximates the kind of organizing structures that worked best with respect to public authorities, generally. I strongly agree the comment that Mr. Ebert made earlier on, that this section at the top of page seven, that gives appointment and compensation powers at a second level of the organization and particularly as these are spelled out in the list on page 44. That really violates some very fundamental properties of inducements toward efficiency, flexibility, managerial expertise and dipping that far down into the managements staffing side of the organization is probably not a well founded principle.

Adlum: It takes a big risk toward patronage.

Olson: Correct. Other than that, I find most of the provisions here closely approximating some of the best public authority structures. But that one, I just strongly agree with the comment.

Johnson: To have any hope of getting through this we are going to have to start moving more quickly. And I think it's more important that we try and explain things at this point. The next article has to do with the administrative provisions provided for the railroad authority. As I go through these I'm going to try and compare them to some extent to the Alaska Code that affects other public entities. As we've noted consistently throughout. An effort was made to review the statutory provisions that effect other public entities to determine they can be improved upon in the sense of providing more independence and flexibility, workability to the railroad, making it less like a conventional public agency and more like a private entity. The first provision you see there has to do with conflicts of interest. This is a little understood provision. I think people on first reading considered it a

restriction. Actually, it is permissive in the sense that its major function is to be very detailed in defining what conflicts of interest are. Secondly, to allow the authority to operate in the face of existence of conflicts of interest, to deal with them in order to allow it to function. The state code is basicly two parts, a financial disclosure aspect and a fare prohibition against acting in cases where there are conflicts of interest. It does not define conflicts of interest to this extent. Incidently, I would pause in the explanation to note that this provision is basically consistent with a rapid developing area of the law concerning private boards of directors and feduciary duties owned by those directors to their colleagues or their companies.

Harle: Mr. Johnson, what is the need for this article in total. Why couldn't the board of commissioners establish these procedures, instead of through legislation?

Johnson: Because the state statute is so explicit and doesn't reach this, it was our opinion that simply delegating broad, rule making power in this area to the board would not be sufficient to allow them to save a decision in the face of a conflict of interest. The meat of this provision is to first narrowly define what an inhibiting conflict of interest is, and secondly provide a procedure through which the disclosure of other minor conflicts of interest and then the board proving participation of the member following disclosure, that the board can actually make a decision. That we feel is very important.

Harle: So this article is required by law because it's a public authority-

Johnson: It's not required by law and you could do without it. It just gives this body more flexibility it makes it better (end of tape) circumstances from judicial attack. Which is very important.

Gates: Article two or the second part of this article, deals with public board meetings. This is the very first instance where we approach a subject of competition. And I'd like to take just one minute if I could to say get a real consideration here that this is a tough, thorny issue that must be considered. And that is the long term effects of this bill on all transportation competition into southcentral and the railbelt. You're dealing with exemption from taxes, tax exempt financing, railroad operating modes of transportation other than a railroad, rate making by legislative fiat as opposed to fully allocated costs, exemption from state anti-trust provisions, the ability to form contract rates as opposed to other carriers not having that ability, entering water transportation with direct competition with some existing carriers. How far do we want to make the Alaska Railroad a profitable beast? Do we want to eliminate SeaLand and TOTE? Do we want to eliminate present competition on the long term and do you only want the ARR serving the railbelt? It's a tough, thorny issue, but how much subsidy, how much help do you give the railroad when it in fact when it competes for general cargo and could drive out competition that is normally considered beneficial.

Johnson: You're raising a policy question regarding the ability of the ARR as a quasi public entity to function like a private carrier. If the board of TOTE or SeaLand would agree to set their rates in public hearings then I think the state of Alaska should consider comity. Since they don't do that and since the ICC doesn't require any other carrier to do that I think that the Alaska Railroad should probably enjoy the same protection from the inappropriate disclosure of proprietary information.

Gates: This is just the tip of the iceberg. When they can do all these things and have access to capital subsidies from the legislature. It's a real issue.

Johnson: To some extent you're mixing apples and oranges. The legislature doesn't have to give them capital subsidies. If it does give them a capital subsidy, then the ICC in regulation of the railroad's rates will take that into account.

Gates: Contract rates?

Johnson: Contract rates are subject to regulation.

Gates: SeaLand can't enter into contract rates as a public common carrier, the railroad is entitled to do that without any disclosure at all. Without any filing of tariffs.

Johnson: I think we're into something other than an explanation of this provision. I would just point out to you that the purpose of this public board meeting section as well as the disclosure of public information later on is to give the railroad entity access to the same exemptions that exist under state law for other public entities plus additional ones that are peculier to the railroad business, that would be necessary for it to operate. I would simply point out that the concerns that have been raised are largely ones that are subject to the regulation of the railroad by the federal government. Minutes of meeting: that provision is there simply to go the creation issue some of your Supreme Court decisions invalidating the creation of independent public corporations outside of the 22 department limit have looked to provisions in those statutes requiring the submission of minutes in this manner to support the creation of entities outside the 22 agency limit. The administrative procedure section, the gentlemen who asked the question, unfortunately is gone, but this is a section which is basically a provision exempting the authority from the state Admin. Proc. Act and giving it an independent streamlined rule making power. There is one provision here that requires the submission of certain types of rules and regulations to the attorney general for review. The inclusion of that is not required by law and it was made basically as a policy decision and one may or may not feel that that is appropriate for an independent authority. With the exception of that provision, the administrative procedure section represents substantially the provision to the authority of substantially greater flexibility than any other public entity would have. All this does is say that with respect certain types of regulations that effect the public in major ways, the

railroad has to comply the bare minimum of due process, which, I noticed is an opportunity to be heard.
Public disclosure information we discussed. Again, the Alaska Code requires the disclosure of everything that's public.

Speaker: Could I go back to Administrative procedure? At the bottom of page 11, it says the legislature can annul or temporarily suspend any regulation it likes. To me that seems to give the legislature an infinite capability of doing anything it wants.

Johnson: That, unfortunately, is a requirement of you law at the moment.

Speaker: Is it a requirement of a law that is higher than this law?

Johnson: Yes, it's a generic requirement. I'm trying to recall the history of this a bit and maybe what I should do is to refresh my memory and get back in touch with you on this. There have been Supreme Court decisions on this question and I think I care to go right now.

Gates: Would this have any effect if this were operated by a private entity? Would those regs that are internally generated have to be approved by the legislature?

Johnson: If it were operated by a private entity under a public authority, the public authority would still be subject to this. The ability for it to delegate out from under requirements like this to a contract management is not clear. It's something that would require a lot of work to determine in order for it to be done right. If the railroad was simply transferred to the private sector, taken by the state and sold or given away, then these requirements would not follow.

Speaker: If you could give us some help on that one, it kind of sticks in our craw a bit. A lot of our people question that.

Johnson: Sure, we'd be happy to do that.

Speaker: That would apparently cover operating rules..then it would have to go before the legislature.

Johnson: There's a bifurcation here. Regs affect things relating to the outside world. Rules affect the internal governance of the authority. This goes only to regs so it's not as broad as it at first appears to be. We'd be happy to reflect on that and provide more information to the commission.

Lewis: Article 3, page 14: The first 4 pages specify 32 specific powers plus one general power that is expressly delegated by the legislature to the railroad authority. I'm not going to go into the details and again they are self explanatory. They're in there for a variety of reasons. Often when people challenge actions of public authorities, one of the challenges is that the public authority doesn't has not been delegated the legal authority by the state legislature to do something. So this was intended as a long shopping list to take all the issues that

have been controversial that we know about (indesc) and to specifically challenges that have been made in this state to the authority of your other public authorities in making clear that the authority has those. 33 is a catch all which says that if something that has been left out in the first 32 items, the public authority has the power to do all things necessary, convenient and desirable to carry out the powers and duties expressly granted or that necessarily apply to this chapter or any of the other laws of the state, etc. It's also designed, in looking ahead, one of the other things that we've given a great deal of attention to are the bonding provisions. Some of these specific powers are in here to satisfy some of the bond council. When the railroad floats a bond to do something, and the bond council asks for an opinion that the railroad has the power to do that. This would be the reference that the bond council would look to. So it's designed in a prospective w. co deal with bonding provisions that we'll come to later.

Wright: Could you elaborate briefly on 27? I assume there has been discussion about the latter half of that and the railroad's ability to acquire the modes of transportation and for example compete with private trucking industry.

Lewis: It's a policy question. There has been tons of discussion about that.

Wright: It is the intent of this legislation that the railroad could compete with private industry and other things, other forms of transportation other than the railroad, such as the barge lines or trucking firm, a wholly owned subsidiary of the railroad which could be a trucking firm that would compete as a feeder service for some railroad terminal to say Valdez, or Delta or Tok. Is that a specific intent of this or is it an accidental happening that it's there.

Lewis: I'm trying to recall and I'm also trying to be careful.
Johnson: You are looking at the May 4 draft, that draft was subsequently amended in the house committee. Power number 27, to provide for extension of the ARR rail system with negotiation of thru tariffs with providers of inter and intra state transportation. That was done, in the rational of the sponsors of you amendment, to go to your point. In spite of the fact of the way that the bill was drawn previously, diversification of other modes was one of those things which was subject to the legislative review provisions.

Wright: So as you're describing it, my concern is no longer valid.

Johnson: Your concern to this particular power on the day that the legislature adjourned is no longer valid.

Speaker: When we go back to this issue that we talked about in the findings where some of us consider that this authority should be in power to consider transfer of the railroad to private enterprise. Again, mention of that ability to consider that should be in these subsequent articles where the activities of the board are allowed or condoned or set in a framework of approvals or what not. It's an issue that should

show up in a couple of places as we go along. I'm just saying this to the board and not to you.

Lewis: There is nothing to preclude that from being added here.

Speaker: Well if you had it one place, I think it's important that we had it the others too.

Lewis: If you get into that, you get into the notion that the legislature still has veto power over those kinds of things. You'd have to decide whether to take out or put it in.
Any other questions?

Bill Zyback: Gerry just referred to the piece of legislation that was passed at the end of the session. The question that I have is whether this advisory commission is going to be dealing with the May 5 version, as I understood it was, or some subsequent version with changes that we are not aware of?

Lewis: Gerry was referring to a House bill. My understanding is that the commission is looking at the senate bill where the house bill was different from the senate bill, this commission would presumably decide whether they think the different provisions of the house bill should be considered with the senate bill or not.

Zyback: We were not aware of that and this is why Buki brought that point to your and the commissions attention.

Lewis: I'm sure the commission will look carefully at any differences between the house and senate versions. Annual reports. This also responds, as I alluded to earlier, Sec. 42.40.310, Annual reports. The board shall direct preparation of, certify and distribute to the governor and each member of the legislature a report generally describing the operations and financial conditions, etc. In the next section 42.40.320, says the board shall have the financial records audited etc. Then we go on into, the next section, 325, the authority shall prepare and the board shall adopt a long range program. All of these are assuming that the board will its CEO prepare these things for its review and that the board will vote on them, approve them or disapprove them or change them, and the board will submit them to its seniors, the legislature the governor.

Johnson: One additional point on that. This collection of provisions also assumes or in lieu of annual appropriation of the authority's revenues.

Lewis: This bill does not contemplate any annual appropriations by the by the legislature. It is quite explicit that all the revenue generated by the railroad will be retained by the railroad and will not go into the general fund, one. Two, the railroad will not look to the general fund for appropriations. The legislature is simply saying to the authority: We want to know what's going on, what your plans are, and we want to make sure that you plan. That you plan in one and five year intervals or other provisions early on for 18 month intervals. But it's

basically the legislature responding to some of these outside studies done and some of the studies of the other public authorities and through these various provisions required the board to plan both policy, program and financial planning and to do it on a regular basis and to require them by law to submit those things to the legislature and to the governor. So that the gov. and the leg. will know: one, that the railroad authority is planning to do something, and that two they'll know how they plan to carry it out.
There is an annual audit that I referred to in sec. 320. There are other sections in the back of this bill, I'll refer to briefly on page 47, sections 10 and 11, talk about the first reports and audits, right after the initial start up. Sections 10 and 11 have little asterisks, because after the first the first time they are complied with, they'll fade into history and they'll be superseded by the annual requirements that we just talked about in the main body of the legislation. It's an interesting fertile area and the commission will look very carefully into this because this is really the part of the bill that deals with planning and that sets out the requirements that the authority plan and disclose its information to the state policy makers.

Mr. Ebert: If audit by an independent public accountant is provided why is there also audit by the governor and the legislature whenever they consider necessary, which I guess if they disagree with railroad policy could be arranged to be during the evening hours of every day.

Lewis: That's a very good question. One answer is that it's not necessary, if there's an audit, there's an audit. And that's all that one needs. There was concern, and I don't remember the details, both by the governor's office and by the legislative leadership that apparently somebody had had some difficulty with some of the existing public authorities and the wanted a provision to get information from them.

Johnson: And only during normal business hours.

Lewis: That's right. See the whole debate is playing out again. The authority shall, at all times during normal business hours, etc. That's one part. The other part, and as often governor's auditor or the legislative audit division considers necessary make available.

Johnson: One other point, deserves passing, is that although the auditors can examine the authority's records, the information cannot not be disclosed unless its consistent with the protection of information that we've seen in other aspects of the bill.

Lewis: Page 19, sec 42.40.330, use of authority assets. This is really is the only part that really differs in some ways from a private entity the authority shall apply all money, property, other assets accredited to the authority towards activities authorized by this chapter. Now first of all this is limitation they can't use their money for something that's not authorized in this legislation, presumably they could not go into raising ox or wheat or something, they couldn't manufacture blivits.

Ebert: Except one of their expressed powers and authorities is to invest in the stock of other corporations who might be raising wheat, manufacturing blivits.

Lewis: Which number are you referring to?

Ebert: It's in the litany (Lewis: Back in on of those 32 powers?) yes.

Lewis: well you're talking about section 13, (yes).

Ebert: Acquire, hold and dispose of stocks, memberships, contracts, bonds general limited partnership interests or other interests in another corporation, association, partnership, joint venture or other legal entity.

Lewis: That is still subject to the substantial limitations, that's a technical provision to say that if a purpose, I suppose some of you mentioned grain, somehow you grain elevator and that's not a bad example. If there was a decision that somebody didn't have enough capitol to build their own grain elevator or spur or siding or that type of thing and the purpose of the railroad required them in carrying out their other purposes to participate in a silo then this gives them explicit authority to engage in that specific legal arrangement where it's necessary to carry out one of the substantive powers that's been authorized by this chapter.

Ebert: I thought this was the purposes in substantive powers.

Lewis: Well it is, I think the normal parlance divides between things that are necessary to do something and the purpose. The purpose of the authority would not be to borrow money. The purpose is to provide transportation.

Ebert: Is that stated in here somewhere?

Speaker unidentified: That's in the findings.

Lewis: I think that's the way statutes are normally construed. Again, this is for bonding issues and those kinds of things. You look at explicit provisions. The purpose of entity is not to sign contracts but it is given the power to sign contracts where it necessary to do something else. But the purpose of the entity is not to sign contracts. The purpose is to provide transportation.

Speaker unidentified: I have one concern. Isn't this section subject to litigation? Assuming that maybe the Alaska Railroad were to make money, isn't there a provision in our constitution that all monies shall go back into the general treasury. I'd like for you to address that.

Lewis: That's a very important question that received a lot of debate. You looked at two things. That what you are referring to derived from the state constitution. There is an exception in the state constitution that says that where required authorized by federal programs, the money does not have to go into the general treasury. The federal legislation

that Gerry described earlier had an explicit provision that says that all revenues generated by the Alaska Railroad shall be retained by the authority for purpose authorized under this chapter and shall not go into the general fund.

Speaker unidentified: We don't know if that provision is going to survive, do we?

Lewis: That's right and if it doesn't the bill will be a significant problem. The next part that says notwithstanding provisions that set those limitations we just talked about, this is a traditional section that says that the board may nevertheless pay the board members fees, dues, or service charges, etc., and defendant identified. Presuming the board will be sued anytime the railroad runs over somebody or somebody thinks that they default on a contract or something, people will typically sue everybody in sight including the individual board members. This simply says that the board can use board revenue to protect and defend and indemnify its employees, counsel members, and commissioners. Buy insurance and that type of thing. That brings us to Article 4 which Gerry will talk about.

Johnson: Rail properties. This section is, I think, largely self explanatory. The first Subsection of .400 deals with the receipt by the railroad of the property from the federal government under the transfer legislation in its own name. So that it doesn't have to first pass through the state and then to the authority. Authorizing direct receipt. The one issue that I would mention here that was a policy decision that has caused some controversy is the so called bifurcation of the properties. The requirement the authority reconvey subsurface to the state for management by the Commissioner of Natural Resources. That is a policy decision. It is not required by state law. Authority yes.

Ebert: Why did you hitch it to the term subsurfaces state which we are all going to be learning what it means over the course of the years as the district court tells us what villages own and what regions own? Why not use the Section 6(i) in the statehood act language.

Johnson: This language was proposed by assistant attorneys general in the Department of Natural Resources. It is their policy, their idea.

Gates: Between the last draft and this draft you added on line 7, page 21, and in accordance with AS 42.410(g), Coal. What does that refer to? Does that allow the railroad to mine its own coal, for example?

Johnson: If you'll look on page 24 you'll see for .410(g). This is a coal amendment, basically, which allows the authority to use coal. That provision is to protect the railroad authority to use its own coal and notwithstanding the reconveyance back to the subsurface. If the policy decision is made to keep the title unified, then the coal provision, obviously, would not be necessary. It's merely a cross reference to the internal provision. The rest of these subsections speak to basically the ability of the railroad to settle claims and apply for federal land in its own name. The next section in classification acquisition of use and state land for railroad purpose, again, is self explanatory. Allows

the railroad expansion, for instance, or for other purposes to seek the allocation to bid on state lands and provides an expedited process for doing that requiring certain findings by the Department of Natural Resources and so on. Whether or not that is adequate is something I think you should review. Development of oil, gas, minerals, geothermal, resources, this again, is required as a result of bifurcation of title. In the event this provision is essential to tax the operation of the railroad in the event the Department, in its ownership and management of the subsurface decides that it wants to export minerals therein requires that notification be given and that findings be made the railroad has to certify and so on. It's not going to impair the operation of the railroad. Furthermore it establish funds in the treasury into which revenues are deposited that the railroad would benefit from. .420, land use regulation. Straight forward provision allowing the railroad to promulgate regulations concerning the land. .430 is the eminent domain provision. It grants the railroad the power of condemnation for railroad purposes. That brings us to the financial provisions.

Speaker unidentified: If we consider that the railroad might one day be sold to a private entity and would like to keep in a bundle, the land, the railroad, and its operations, for consideration of that purpose there's no constitutional reason why the lands and the subsurface or the 6(i) definition if you want to use that one, don't state in the authority as a package and could subsequently be passed off. That's a policy decision.

Johnson: That's right although I think when the time comes that should be looked at carefully. I haven't given that much thought and it would have to be considered. I don't believe that's impediment.

Speaker: If that was the case then you wouldn't need all this other language about geothermal and coal and things. The land would be the authority's.

Johnson: That's there strictly because of bifurcation that is envisioned here at the outset. That conveyance back of the subsurface. If you don't do that then you don't need any of this stuff.

Easley: Do you know what the decision was on the bifurcation of the (indesc).

Johnson: It was strictly the preferance of the Department of Natural Resources and the previous administration. I'm not even sure the policy survives. I think its strictly up to them to think about and of course it's within the perview of this group to make a recommendation. We believe it is technically (indesc) done.

Lewis: Article 5, financial provisions. Bonds and notes. Any questions?

Gates: As long as the commission is aware that we don't create a monster. Go to far. Saying that we want efficient railroad, which we do and everybody does, but we don't get it to the point where private enterprise, which competes against it and 13% of its revenues, general

cargo, that we don't create a monster that just kicks that out through these special provisions that private enterprise does not have access to. Such as tax support, exemption from taxes in total, such as acquiring other modes which I'm glad to hear did not survive in the House version. Such as exemption from antitrust provisions which private operators must abide by. Such as the ability to go with contract rates private carriers can operate with. On and on. There's just the ability here to change the competitive aspect and its up to eliminate competition and I think its a public purpose to have good competition. Head to head competition and not create a distinct advantage on one hand over and above the other hand. It's just that we don't go too far and it's not something that's obstructive.

Lewis: Any other questions about the bond provisions? I would be very happy to go into them. We've given a lot of thought to them. There was some earlier suggestion that the bond provision didn't do something. I had hoped that whoever it was would be here. We've had it reviewed carefully by bond underwriters as well as bond counsel and based upon the fair amount of experience we've had representing public authorities in these areas. I think I'll defer that until some questions. Lets skip those to page 33, Section 42.45.40. There is again making it clear that the credit of the state is not pledged to this authority. That the authority stands on its own. The section we talked about before and I'll mention it one other time is .550, revenues. Revenues generated by the authority did not become part of the general fund of the state's but is kept and managed by the authority for purposes authorized by this chapter. The validity of this, there has been a debate conflicting attorney general opinions by your previous attorney general about the dedication of funds issue. That's what this refers to. Sometimes your attorney general thinks that dedication of funds would not apply to revenue generated by something like this railroad since it was generated by property that was acquired by the federal government rather than property that was acquired funds which had been raised by taxes. Big debate upon that issue. There is a provision in the federal legislation, though, that is consistent with the federal exceptions of the state constitution and if that provision survives in the federal legislation then presumably this is an effected provision in this legislation.

Babcock: Is there any chance a good attorney could do something with that word "do" as opposed to "may?" Revenues generated by the authority "do" not become part of the general fund as opposed to "may" not.

Lewis: I would say "do" is a better word there than may or will not or should not. I think the intent is clear here. Maybe there should be some clarification. Should take a look at that.

Wright: Same section there. Purposes authorized by this chapter. I'm assuming the authority is authorized to operate the railroad, repair, maintenance, etc. Not just retire bonds.

Lewis: Yes. We all know that certain things are part of running a railroad. Well, that's it on that section. The next section, Article

6, is one of the most important articles in the legislation. I talked earlier in detail about the relationship between the commission and its management. This talks in detail about the relationship between the commission and the state and Gerry will handle this.

Johnson: This section attempts to establish the relationship between the state and its creature, the authority.. To establish is on a mutually understood clearly defined and formal basis so that each actor knows when accountability is expected and the relationship can function in a formal and hopefully ultimately routine way. It is designed to make the relationship as structured as possible in the sense that it limits state oversight and interference by defining the manner in which the state relates to the authority. There are four basic mechanisms. The first of them is state review which for those things set out on page 34 on the authority prior to undertaking them must first notify the governor. He, at that point, has the option, notification, incidentally, means to specify those things on the top of page 35, the governor then has three choices. He may approve it in which case the authority can go ahead. He can send it to wait for the legislature to come into session or he can disapprove it. The provision in (e) explains what the legislature's options then are and that continues on through (f). In (g) there are somethings delineated which require the approval of the legislature, the governor's aide keeping function notwithstanding. In other words they're considered so significant that the legislature must approve them. They're not things that the governor could simply brew and allow the authority to go ahead on their own. The items which are subject to these various levels of approval are again policy types of decisions. They were considered the types of activities overwhich the state, for a variety of reasons, ought to have some control because they were either on different activities than what the railroad is eventually doing or they were financial undertakings so substantial as to either potentially impair the viability of the entity itself or perhaps the credibility of the state. The coverage of these items, the treatment of the items within the mechanism were again policy decision. I think we could debate whether or not its appropriate or whether more things or fewer things should be subject to review. The point I would stress here today is examination of the mechanism is built. The mechanism is something which we were responsible for.

Bates: Under Article 6, Subsection (a) 1, "significant or prominent change must be approved." Is there any possibility of further defining that beast so that it does not rear its ugly head.

Johnson: That's a very good point and its something a lot of people thought long and hard about. It still worries me. We stopped short of more detail because we were already concerned about the level of specificity, complexity of the legislation. I think it's entirely appropriate to consider some further elaboration on that point.

Speaker: Could you refer that back to .300 which gives them general powers? There's some conflict there. One place it says its their power to do and the other says you can't do without approval.

Johnson: I think that's not an entirely different thought.

Speaker: Because what's significant one day might not be the next and vice versa.

Bates: I think they've got wires down that are killing moose now. The fact of getting those wires up if that's significant to the news media would it be significant to the governor?

Harle: We would encourage the commission to look at this particular Article 6 very carefully with regards to seeing if they couldn't somehow consider depoliticizing this section of the article.

Johnson: Let me just say one thing about that. The whole purpose of this article is to depoliticize the relationship. It may not be apparent but I think the politization of the relationship between the state and the authority is something that worried everyone that's been working on this. The decision was made that there ought to be a mechanism through which the two can relate so that instead of it being informal and subject to abuse on an adhoc basis that the relationship woud be defined. This is an effort to do it. Whether it achieves that result I don't know.

Harle: In our view it does not accomplish that. What it does is require the commission to come back for specific activities and still remains to leave open the other issues that are unwritten to be directed by various political entities. We view this as somewhat as an interference. You should set up a commission, give it directives, and let it do its day to day work.

Johnson: The other objective in this section was to strike a balance between accountability and independence. I suppose on the one hand you could say that it makes the railroad overly accountable and results in interference. It wasn't intended to do that.

Harle: . . . approval prior to proceding and that is a definite hinderance on certain things major things.

Johnson: What we were told was that the operation of the railroad and the functions that it currently has and hopefully willing to undertake in the future is so important to the state that there had to be a formal mechanism for insuring that it was accountable and not reckless.

Harle: Isn't that mechanism inherent in organization as you have developed this?

Johnson: I think that whether it is or not is a judgement call and whether this (indesc) the objectives I mentioned to you is again is subject to personal judgement.

Speaker : It seems that you've got three different points in Article 6 where you have an interface between the legislature and the authority. You've got 600 and 610 and 615 and they all act separately. Couldn't you say just leave it with 615 which says the governor shall intervene and excersize some control over the authority if necessary and specify the areas that are a real concern.

Johnson: They do different things. Maybe we should move through the rest of them quickly and talk about them as a subset. The last two are escalating. The first two are companions. The first one requires authority to seek approval for certain activities. The second one allows the governor or the legislature to request the authority to do certain things. It's the converse. They have that relationship as well but also for anything basically the governor or the legislature can ask that the railroad take action. Instead of having a whole bunch of things coming from a whole bunch of different sources to which the railroad make varying responsive replies what this attempts to do is to structure the relationship so that the governor or the legislature may officially ask the railroad to do something or not to do something. The railroad is then obligated to respond in writing with some specificity and then that sets up, it poses the policy issue in an informed way for the subsequent action of the state government. Make a decision on way or the other. Intervention and trusteeship are more regulatory in nature. They deal with situations in which the railroad has gone awry, in a sense. The first one allows the governor when authorized by the legislature to intervene and temporarily control the affairs of the authority in a case of those five things listed on page 37. Trusteeship has something of a conotation of bankruptcy of almost where the affairs of the railroad are still troubled that the management of it has to be totally taken over and things set right.

Ebert: You've got intervention triggered by an insufficient membership to constitute a quorum which itself would be a condition brought about by the governor failing to appoint. So the governor would be in a position to create the condition of his own intervention.

Johnson: No. He can only intervene when the legislature authorizes him to it.

Ebert: In which case all of this is academic. The circumstances underwhich the legislature would chose to authorize intervention would presumably be addressed when they authorize the intervention.

Johnson: This sets up a set of circumstances underwhich the governor could seek it or the authority could seek it or the legislature could initiate it. It creates a new entity. If, for instance, the authority in number 2 is represented to the public or the creditors that they have access to the credit of the state in their dealings, then this poses the opportunity for the legislature to step in.

Ebert: Doesn't the legislature have that option at anytime anyway?

Johnson: Well, the legislature can abolish the authority. There is no question about that . This is an interim mechanism that saves it. It provides a way in which a cure can be imposed at short of simply abolishing it or taking it within the Department of Transportation.

Ebert: Even though it would be a situation procured by the gentleman proposing to intervene?

Johnson: Well, in that case I think that if the governor were setting up that circumstance by not appointing people then assuming the legislature wouldn't authorize him to intervene. Do you see that that is not a circular situation.

Ebert: Actually I do not see that that is not circular. If this section has any life without future legislation it's circular. If it has not life without future legislation then why is it here.

Johnson: Well, I guess I don't agree with your characterization. These mechanisms, I know, are new to you. There's nothing like them currently in Alaska law. They were developed as a result of the concern of the policy group to achieve that balance of independence and accountability and also to respond to the criticisms of the many existing public corporations that you have in this state that have come out in legislative audits and in the review by the Institute of Public Affairs. We drew heavily on those materials in working with the policy people who developed these mechanisms.

Bill Zybach, Fairbanks North Star Borough: Is there an inconsistency in (g) of this section where it says there needs to be approval for the provision of management and operation of the railroad by a third party contractor and on page 6 when we were talking about management of the authority it seemed to indicate that the board could provide for management by a third party?

Johnson: Yes, the legislation provides for the possibility of contracting out to management. What this is additive in a sense that it requires the legislature to approve it if they elect to do that.

Babcock: I might pose the same question as before to Captain Adlum and Dr. Olson in their experience how they see this Section 6 operating. Is it workable, is it not, are there any pitfalls.

Dr. Olson: Let me respond to that. I spent a good deal of time going through this section first time up and again before coming up this time. I recall this morning I characterized the set of relationships you are dealing with here as the twilight zone and what is characterized as the twilight zone is that not many people know very much about how it operates or who acts on whom are the rest. I think that its a very imaginative way of trying to do as Mr. Johnson says, maximize the kind of independence and autonomy for this quasi public entity at the same time as having checkpoints that assure a measure of public control. On the first two of these, the state review and the action forcing mechanism, the first one is requiring a set of reports, accountability, and responsiveness to the parental government while the second is allowing for policy direction. I think you come down in the end on this second one by saying that the parental government of the entity ought to or ought not to have the ability to set broad policy issues for the entity and if you come down on the affirmative on that question, the action forcing mechanism is about as controlled a set of policy interventions as I have seen in other public authorities. I don't have problems with either the review or the action forcing mechanisms. On intervention and trusteeship, trusteeship is tied to a fairly specific set of

contingencies. Intervention seems to be the one that gives people the greatest degree of pause and it is attempting to anticipate a set of events that would require intervention and I think Mr. Johnson is quite in correct in saying that experience and working through this intervention mode is about all one can rely upon at this point. I don't see any necessary problems nor do I think its necessarily a circular set of requirements that are being set out here. So within that general area of the twilight zone, this is at least as good as most of the other sets of relationships that I have seen. We're in a very difficult area because you're trying to say that we want the degree of autonomy, flexibility for the entity in order for it to be an efficient business like organization but you're also saying that you want a set of structures that insure public accountability and policy direction. Combining those two is a very difficult enterprise and I think that's where most of the concern comes from.

Babcock: I recognize the balancing effort there and agree with you . It's nice to have the structure instead of not structure. The problem is that like any balance you can put as many on either side as you want and what maybe we should focus us is restrict it to the significant ones. And again that's the definition of significant (that's right) do we invite too much balance, too much balancing so there's no operation you might say. Is there any protective mechanisms that might be.

Adlum: The fact that it's here I think might cause the commission to keep pretty much on the straight and narrow and not get themselves in a position where they could be exercise (indesc) up against them. They know it was there and could be used. I think right now in the state of Washington, why I don't think our law says this, but the legislature could move in with an investigating committee and did once about 21 or 2 years ago.

Olson: Let me just take an example of public agency, public authority, that's gone awry for the lack of this type of attention. Washington Public Power Supply System lacked both the requirements of state review in the first instance, so that superior governmental levels knew what was going on, let alone could agree with what was going on, and, secondly, the state legislature failed to have the tools of intervention until the most recent period, the last couple of years. So that even when they found out how far things had gone awry, on the contracting system on the financing of the ntities, it took some doing for them to intervene. And I take it what has been attempted here is to try to anticipate worse case scenarios with respect to trusteeship and intervention, at the same time as allowing for policy influence, policy direction on the action forcing mechanism and more regularized review through the review stage. I think your comment is probably best taken: It's better to have this kind of anticipation of the wayward agency than not to have it at all.

Speaker: I noticed at the federal level that there is a great deal of politication with regard to legislative (indesc). This piece of legislation is review (?) in that regard. I'm referring to the FTC legislation in Congress with all the proposed regulations (indesc)

Johnson: First of all, the legislative veto situation, had you point out something that is a developing question in the law. It's also a problem that is founded on the constitution of any particular entity, the separation of powers, delegation and that sort of thing. I think that particularly with respect in this case where we have a state creature that has operative responsibilities rather than regulatory ones. That should not be a problem, even if any precedents could be applied from the federal litigation to the state system.

Speaker: Doesn't it call for the propagation of regulations?

Johnson: No. You have a legislative annulment scheme now, which is more directly on point than this system. I think that would be in trouble long before these provisions would be. I would point out again that these are substantive rather than regulatory. And its not a veto situation in the strict sense either. It's a good, valid concern.

Gates: Wouldn't the defaulting on any revenue bonds by the authority impair the credit worthiness of the state? Just hurt the credit rating of the state?

Johnson: Not necessarily. I think everyone is more skiddish about that these days than they used to be. No. It depends upon the relationship, particularly in the constitutional document which is what this is. If an effort has been made to segregate the liabilities as here, that's something that the rating houses would look to in answering your questions.

Gates: I would really disagree with that.

Olson: There have been a number of studies on the flirtation with default and actual default in the past that shows that there is contamination effect. But it shows that it is not blanket. It really depends on what that geographically proximate agency is, does, and how it operates so that it is disaggregated by the nature of the agency. I would predict for example: if default occurs on the WPPSS bonded indebtedness, the Port of Seattle would continue to hold its AA rate.

Adlum: I was just going to use that example. At that time, that WPPSS was up to 15%, the state itself was at 12% or 13%, not in good shape at all. The Port was still selling bonds as 7% and 8%. Its AA or AAA rating was not affected because of the WPPSS within the same state or the state itself which couldn't balance its budget.

Johnson: Another good example of that also relates to WPPSS and the City of Seattle, which is a participant in three of the five plants but not all five of them. The City's bond rate has been preserved in the face of a declining bond valuation of other public utilities in the state. The bond has to be pretty sophisticated in that if the case is made to them appropriately. It's no guarantee of course.

Olson: It's not denying your point, there is a contamination effect if the other agency. Like if the state of Alaska's budgetary system were itself in jeopardy, then the contamination effect would probably occur.

But if it's not, there is no evidence that that relationship would hold.
Johnson: Maybe these days, the state's condition would impair the authority's. Anything else on this section?
The next article is Miscellaneous Provisions. I'll just breeze through this quickly. The first section regarding personnel is a treatment of a couple of issues posed by the transfer of the railroad to the state. I know this is of great concern to the unions on the property and I'm aware that it does not treat a number of these issues to their satisfaction, nor does it reach all of the issues of concern to them, or all the issues that the state will have to address concerning retirement. I think this is something that is policy in nature and not something that we need to spend a lot of time on now. Unless you all want to express....

Leonard Black, Brotherhood of Railway Carmen: It is my opinion, that the first three section of 42.40.700, are anti-labor. Though I can't speak for the management people, I can say that being placed in a restrictive category AS 23.40.200, a, 1, which allows us to take no job actions, and when these provisions provide us with no benefits, the bill appears to us to be anti-labor.

Johnson: I think you should present your concerns to the commission.

Black: Because it would be better if these two sections were completely deleted.

Tony Bashelier, International Assoc. of Machinis. d Aerospace Workers: My question would be if you can shed any light on how and why they reached the decisions, number one to exempt us from AS 39 but yet put us in 23.40.200, a (1), the most restrictive category?

Johnson: I really can't, it was simply a decision at the time to do that. Exempting you from the state civil service and at the same time classifying you under that subsection for purposes of job actions. Again, the ball game is not over on this one. It's not my decision to make.

Mike Olson, United Transportation Union: It says here that the provisions of AS 39 do not apply. Would that mean that as general chairman of the UTU, that I could not negotiate into state retirement?

Johnson: No. That has to do with the state civil service. The ability of the authority to provide for a retirement to the state civil service retirement system is something that would have to be separately authorized. An any case. This doesn't preclude it. The legislature would have to allow the authority to elect that option, under the federal transfer legislation. You remember earlier, after two years the state has the option of incorporating you into the state system or setting up a substantially equivalent one that is independent. If they elect the first course, obviously the legislature would have to approve it. That was one decision last year that the policy people decided not to make and really to leave it to the authority to make a recommendation on.

Black: I have one other problem. This bill allows us to deal with management but yet we are dealing with nobody, since the authority has to approve. And then again the legislature has to approve. We are dealing with the bottom step of the ladder and I feel that it puts us in a very disadvantageous position.

Ebert: This does not provide that the legislature must approve a labor contract?

Johnson: No.

(Black and Johnson talking at the same time, indesc.)

Johnson: Political activities is self explanatory. It's protection from politification of the authority or an attempt to severly constricts the ability of board of commissioners from behaving in political activities or using authority funds for that purpose. Licenses and permits from other governmental entities to the same extent would. Claims against the authority. This is basically a more detailed treatment of the principle that the authority's debts are its own and not a debt to the state. It also exempts the authority from any possible suggestion that the authority would be subject to state claims process, in effect the authority will settle its own claims outside of the state system. Exemption from taxation merely clarifying the

Gates: Whoa. Exemption from taxation again. As long as the commission is sensitive to the fact that you are going to be competing against your established system of bringing goods, general cargo, food, clothing, into the state, by allowing special circumstances to exist for one carrier verses others is detrimental to the long term competition. That competition has been a very productive thing. It's allowed the reduction of rates with the head to head competition.

Johnson: Does the Port of Anchorage pay taxes?

Ebert: The railroad does not presently pay taxes. If these other modes survive without the railroad paying taxes I don't suppose they are going to be damaged cause the railroad doesn't pay taxes.

Gates: This is just one of many. As long as the commission is sensitive that we don't go too far. Yes, we want an efficient railroad, but let's watch the other end of the extreme too.

Ebert: If the commission does really want to get into the whole structure of public subsidies to various modes of transportation, the commission will not complete its work for several years to come.

Johnson: Payments in lieu of local property taxes and impact aid. This is a totally discretionary provision through which the authority may make payments in lieu or provide impact aid for its activities.

Lewis: Last article. Article 8, page 43, general provisions. Some of these might be controversial; however, I think most are not. The first section involves criminal laws, it's one of the interesting aspects of

this. The decision made to give the security officers for the authority the authority of other state law enforcement officials to enforce state and authority laws and regulations. With respect to violations of the laws or regulations that occur on or to the property owned, managed or transported by the authority. People can think that's a good idea or a bad idea. But are there any questions about what the effects of that would be.
The next section .880, it's clear I think, again you can think its good or bad.
The next section, .900. A series of definitions. We've probably talked about most of them as we went through. I'd be happy to answer any questions anybody might have about any of these definitions.

Ebert: I'm curious why you tie rail properties to the closing report as opposed to tying it to the property that you ultimately in fact receive.

Lewis: Those are the same thing. The closing report will describe the properties.

Ebert: Under the federal legislation, as it's presently written, the closing report is not intended to be a judicial declaration of what properties go in what direction. It's only a planning document. There's a provision for adjudication of valid existing rights with court appeal. It would seem more appropriate to give the rail authority jurisdiction over properties they in fact receive which might be greater or lessor than the closing report predicted they would receive.

Johnson: Which section?

Ebert: On page 45, item 10. If you're giving someone administrative jurisdiction you should give them jurisdiction over something they in fact get, not someone predicted they would or would not get.

Johnson: Actually, I think the identification of the closing report is not a useful concept in this concept. I think we should say transferred to the authority under the legislation.

Speaker: Could I suggest that maybe we just ask if there's any comments on this last article and deal with those specifically.

Lewis: I think that's an excellent suggestion. Are there any questions on this last article?

Gates: When does the definition for the leadership of the legislature come into play. The definition is really extensive: Speaker of the House, President of the Senate, minority leaders for each house, chairman of the senate and house transportation and finance committees and chairman of the legislative budget and audit committees. I forget when that becomes important. But that is going to be a real battle.

Lewis: I think that is not important and was deleted.

Johnson: For purposes of giving notices under the act, when the authority was required to inform the legislature of certain things the thought

was it was better to have it go to certain people rather than to all of them or one of them or something. That concept was removed.

Ebert: With this discussion of collective bargaining agreements, the discussion on page 47 and over to 48, that the state will continue in existence the existing contracts, until they expire by their terms or as required under the federal legislation, they are renegotiated. It seems to me the federal legislation contains a two year limit on this which is not expressed here. Are they really parallel?

Johnson: Yes. The federal legislation requires them to be renegotiated at the end of the period (indesc) basically within that period of time. Some of them expire sooner than that by their own terms. Others have no explanation date at all.

Speaker: I have a couple of general questions directed toward Adlum and Olson. The first one is regarding Article 4, Lands and it's a question of flexibility or the interrelationship of agencies and their impact on the authority. The Dept. of Natural Resources will have control over the subsurface rights on railroad land. Do you see that as a problem with the authority. Is that going to create a difficultly in its flexibility to carry out its operations?

Adlum: I don't see that its going to be a problem because any right of eminent domain there are still (indesc) in the courts in one manner or another. We have the right of eminent domain in the Port of Seattle but if we can't reach a price between their appraisers and our appraisers we end up going to court. What's decided there is whether have the right to take it and then deciding the fight (indesc)

Olson: I presume that this policy choice toward DNR will have control over the subsurface rights to place in parallel, the mandate of self sufficiency on the part of the rail line such that revenue generation comes from its mode of operation of the rail as opposed to its extractive capacity. To that extent you ought to build in, inducements to efficiency on the rail line itself. I happen to personally agree with that policy declaration if I understand it correctly that they're saying that the resources that lie in the subsurface rights will go to the DNR and the state general treasury and the railroad will attempt to achieve self sufficiency of its own operation. That is a powerful inducement to efficiency.

Adlum: If the government had done this when they alloted all those spaces to the railroad that came across the nation at the turn of the century, they might be in a lot better shape right now.

Speaker: One other question. On the article that deals with the make up of the board. What are the implications of having a union member on the board? Is that something that's common in other authorities?

Adlum: I'm the first union official to serve on the pacific coast that I know of.,
Olson: The port commission currently has two of its members whose backgrounds are in organized labor. Informally, which 's what's

happening, that by elections, two of those members have come from organized labor. In other ports across the country, there is a formal slotting of positions. The Port of Milwaukee, for example, mandates that one of its members be drawn from organized labor. It also mandates one of its members from the south side if Milwaukee, one from the north side of Milwaukee, one from the Chamber of Commerce. MASSPORT, Boston's port has a similar slating of membership. My own analysis says that the greater the degree of formal slotting of positions to occupational groups, and this is not a criticism of organized labor because the slotting is going on the business side as well, or the residential basis, the more precise the slotting, the greater the attention to particularistic issues as opposed to universalistic issues. Let me get away from the academic jargon. What that means is: particularistic issues are those that are specific to the group or to the constituency that is being represented; universalistic issues are those that deal with larger questions of the operation of the entity. What you get is a function of how you orient yourself toward that question, of slotting or not slotting. As I read what this bill does there is a half way house that is struck. It does not, as the gentleman from Fairbanks suggested, draw a line for geographic representation. It does not give the vote to organized labor's representation on the board. So that it is once again a delicate compromise that is reflective of interests withing the state and within the legislature and I suspect that set of compromises will continue forward as this bill is enacted. My point is that the kind of representation, the kind of policy orientation you get on the board, is partly a function of how you draw the criteria for membership on the board and you get very different things.

Adlum: I get the jeweler and the other guy's vote a helluva lot quicker than I get the other labor guys' votes.

Lewis: Are there any other questions about Article 8?

Gates: AS 23.10. 055. The Alaska Railroad Authority is considered a political subdivision for the state for the purposes of the section. I thought I had the rest of them figured out, but that one escaped me. Can you explain that for me? Why is the ARR Authority considered a political subdivision-

Lewis: I'll call you tomorrow. I don't remember which one that is.

Ebert: Workman's compensation, I think.

Gates: Cause you get into troubles of establishing a new form of government which is...

Lewis: I don't think we'll be able to help much cause I can't remember what that section is.

Chairman Swalling: If there are no more questions, these men have to catch an airplane. We're very grateful that they were able to come up. Now, I'd like to say that if any of you have a position paper or anything that you'd like to submit either today or at some future time we solicit your input. It will help us if it is in writing. Now we will

have a very short meeting to decide a little about our future. You're all welcome to stay. I'll tell you what we're going to discuss, is where do we go from here, because we are not in a position yet to prepare a report. Our request for funding for a word merchant has been frozen. So we don't know when our next meeting will be. We're going to take a few minutes and discuss where we go from here.

Harle: Mr. Chairman, I have a concept that is written and I would like to them to the commission for your consideration.

Chairman Swalling: We appreciate that very much.

Wright: Chairman Swalling, I have not a concept, but a position paper that I'd like to submit also from the Greater Fairbanks Chamber of Commerce. And I'd also like to formally request and invite the commission to at some point hold some of your meetings in Fairbanks so you can get more input from the people in the interior.

Chairman Swalling: It is doubtful that we are going to have another public meeting such as this for input. I thank you all for being very cooperative and very attentive as to presenting your views and we're gonna try to go from here and put a report together.

Speaker: The State Chamber has already submitted their position but we would also like to go on record in support of the Fairbanks Chamber position which they have submitted to you.

Chairman Swalling: Anyone is perfectly welcome to stay. We've got to stay and decide what we've got to do now.

FEBRUARY 1983

ALASKA RAILROAD TRANSFER PROJECT

WORK PLAN OUTLINE

The Alaska Railroad Transfer Act of 1982 was signed into law by President Reagan on January 14, 1983. This legislation establishes a detailed process for assembling the specific information necessary to a thorough consideration by the state of the transfer proposal, while also specifying the time framework for effecting an eventual transfer. Date of enactment serves as a trigger for several key provisions which involve a great deal of work activity in order to accomplish a thorough addressing of the transfer question. The following discussion highlights the major work tasks confronting the state, along with some explanation of the state's response to satisfy these requirements.

TASK #1 - TRANSFER TEAM ORGANIZATION.

A detailed organization is in the process of being established to direct all state activities pertaining to the railroad transfer. Because of the diverse nature of tasks involved and limited time available for work performance, an interdisciplinary team of state officials and outside expertise is necessary to accomplish the mission. Governor Sheffield has designated the Department of Transportation and Public Facilities to serve as the lead agency for all matters regarding the railroad transfer. As a result, Commissioner Dan Casey will serve as the state official responsible for the conduct of this project.

Commissioner Casey has appointed a transfer team of three individuals to direct all work activity regarding the proposed transfer. Mr. Mark Hickey of DOT/PF will serve as the staff coordinator and contact point for transfer team activities. Mr. Dave Walsh and Mr. Jack Day, who are in the process of being placed under contract to the state, will be working with Mr. Hickey to direct these efforts and will provide special outside expertise on certain specific aspects of the project. Mr. Jack McGee of the Attorney General's Office will also be working with this group, directing the legal research portions of the work. In this regard, the special services of the law firm of Wickwire, Lewis, Goldmark & Schorr will remain available to the state as needed. Additional state personnel from various agencies will be involved with specific aspects of individual tasks.

TASK #2 - FRA COOPERATIVE PROCEDURES/INFORMATION ACCESS.

Section 605(b) of the transfer legislation specifies the means by which the state can monitor railroad operations and inventory and evaluate rail properties prior to a decision to accept transfer. As part of this effort, the state will have to ascertain the position of the Federal Railroad Administration (FRA) regarding confidentiality limitations as also noted in Section 605(b). Additionally, there needs to be established a general framework for coordination of transfer duties and information access. Important in this area will be clear delineation of FRA liasion and contact personnel, along with explicit definition of current railroad management's role relative to

transfer proceedings. It is anticipated that FRA will respond to this project through some overview arrangement which includes an equivalent transfer team of federal personnel primarily dedicated to transfer activities. Assistance from other federal agencies, particularly the Department of the Interior, will also be important to the successful performance of transfer work.

Several steps have already been taken to address aspects of this task. FRA has appointed Mr. F. Colin Pease, Special Assistant to the Administrator, to serve as the responsible federal official for transfer matters. Mr. Pease is in process of appointing Mr. John Cikota of FRA to serve as the liasion contact on temporary duty at the railroad in Anchorage. Railroad personnel will serve as technical support staff for various transfer duties, but will not be directly involved in any of the policy aspects of the transfer. The Alaska State Office of the Bureau of Land Management has been designated as the lead DOI agency for transfer matters and has already established an Alaska Railroad Project Staff under the direction of Mr. Gary Bauer. Preliminary meetings have also occurred between the key state and federal personnel regarding coordination of transfer duties and information access procedures.

TASK #3 - STATE CONSENT FOR ARR ACTIONS.

During the period between date of enactment of the federal transfer legislation and the date of actual transfer, or an official negative response by the state to the transfer offer, certain specific types of actions and decisions by the Alaska Railroad (ARR) will require state consent. Section 605(b) specifies that the following actions fall into this category: (1) make or incur any individual capital expenditure in excess of $300,000; (2) sell, exchange, give or otherwise transfer any real property; and (3) lease any rail property for a term in excess of five years.

Governor Sheffield has formally designated Commissioner Dan Casey to serve as the state official responsible for dealing with this matter. The transfer team is responsible for reviewing these items and forwarding recommendations to the commissioner for action. Mr. Hickey has been designated the responsible official for coordinating this activity. Information about specific items involving state consent is available through Mr. Hickey's office.

TASK #4 - CLOSING REPORT.

Section 605(a) requires the Secretary of Transportation and the Governor to prepare and deliver a report, commonly referred to as "the closing report", within six months from the date of enactment. It is envisioned that the Alaska State Legislature will have to review this report prior to authorizing final acceptance of the transfer. This document, which is intended to provide the state greater specificity regarding transfer particulars prior to final action on the offer, will describe all rail properties of the Alaska Railroad and the liabilities and obligations to be assumed by the state under the proposed transfer. Although the legislation contemplates that the federal and state governments will jointly prepare the closing report, the state has a greater

interest in its accuracy and completeness since since it will be the basis for subsequent transfer documents.

The following categories represent the major components which will be addressed within the closing report: (1) real property; (2) personnel obligations; (3) personal property; and (4) commercial/contractual/legal obligations. Each of these components will involve a process of identification and detailed description for inclusion within the closing report document. In the case of real and personal property, the parties will have to review systematically ARR records and conduct physical inventories where such records are considered inadequate or unreliable. There will also be a need to identify which of the real properties of the ARR are subject to claims of valid, existing rights and which are not. Finally, it will be necessary to offer some sense of personal property condition and the value of the railroad as going concern operation.

The state and the FRA have already discussed a procedure for agreeing jointly to the appropriate form and content of the closing report, as well as the actual process for drafting the various portions of the report. It is clearly understood that the FRA has the lead responsibility for the federal agencies involved with the transfer. Agencies of the DOI will support the FRA as a technical resource for matters pertaining to real properties, but they will not make any final decisions regarding policy questions. It is currently envisioned that a final draft of the closing report will be available for agency circulation by early June.

The following lists depict the specific resources being used by the state to address properly each component of this task. It should be added that these activities represent a line share of transition activities for the first six months following passage of the federal legislation.

ARR Real Property Team

Mark Hickey, Staff Coordinator
Dave Walsh, ARR Transfer Team Leader
Jack Day, ARR Transfer Team Leader
Jack McGee, Attorney General's Office
Sarah Kavasharov, Attorney General's Office
Tom Koester, Attorney General's Office
Jim Sandberg, DOT/PF - Right-of-Way
Ted Richards, DOT/PF - Right-of-Way
Bud May, DNR - Technical Services
Clyde Duren, DNR - DTS (Cadastral)
Carol Shobe, DNR - DTS
Tony Braden, DNR - DTS
John Hanley, Wickwire/Lewis
Greg O'Leary, Wickwire/Lewis

ARR Personnel Team

Mark Hickey, Staff Coordinator
Jack McGee, AG's Office
Tom Brewer, Wickwire/Lewis
DOA - Division of Personnel*
DOA - Div. of Ret. & Benefits*
DOA - Div. of Labor Relations*

ARR Personal Property Team

Mark Hickey, Staff Coordinator
Jack Day, ARR Transfer Team Leader
Jack McGee, AG's Office
Dave Zugsberger, OMB (Management)
Dick Wiggins, DOT/PF - Planning
Gary Cox, DOT/PF - Facilities
Dick Meyer, DOT/PF - Facilities
John Alderson, DOT/PF - Facilities
John Hanley, Wickwire/Lewis

(* resource yet to be identified)

ARR Commercial/Contractual/Legal Obligations Team

Mark Hickey, Staff Coordinator
Dave Walsh, ARR Transfer Team Leader
Dick Wiggins, DOT/PF - Planning
Yale Lewis, Wickwire/Lewis
Tom Brewer, Wickwire/Lewis
Jack Day, ARR Transfer Team Leader
Jack McGee, AG's Office
Dave Zugsberger, OMB (Management)
Gerry Johnson, Wickwire/Lewis
DOA - Div. of Risk Management*

(* resource yet to be identified)

TASK #5 - USRA FAIR MARKET VALUE DETERMINATION.

Section 605(d) requires the United States Railway Association to determine the fair market value of the Alaska Railroad within nine months from the date of enactment. This value, if any, will then become the amount which the state would have to compensate the United States to receive the railroad under the transfer offer in Section 604. In performing this work, the USRA is instructed to perform an appraisal of all real and personal property with consideration for the current fair market value and potential future value if used in whole or in part for other purposes. The USRA is also to take into account all obligations imposed by the transfer legislation and other applicable law (e.g., Alaska Native Claims Settlement Act) upon the operation and ownership of the state-owned railroad. Finally, the USRA is directed to use all relevant data and information from the closing report document in making the fair market value determination.

Preliminary meetings between the transfer team and USRA officials have already occurred regarding project schedules and appraisal methodologies. The USRA intends to perform three types of assessment to reach their determination of the railroad's fair market value: (1) real estate appraisal; (2) facilities and equipment; and (3) continued operations valuation. A preliminary report on this activity is currently scheduled to be available in June. The USRA has agreed to keep the state apprised of ongoing activity and allow review of all draft products. Members of the state transfer team will also be available to research any information requests. Mr. Jack Day of the transfer team has been designated to serve as the point individual for staff activity under this task.

TASK #6 - NATIVE VILLAGE CLAIMS NEGOTIATION.

During the ten months following the date of enactment, there is a requirement for the state, the Department of the Interior, and all affected Native village corporations to enter into a good faith effort to negotiate settlements for as many outstanding claims as possible. Some 3,800 non-right-of-way acres of the ARR's total 38,000 acres are affected by village corporation filings under Section 3(e) of the Alaska Native Claims Settlement Act. Additionally, as many as 3,300 acres of right-of-way land may also be subject to similar filings. In the latter case, however, the transfer legislation structures a different procedure for this issue whereby the state will ultimately receive the railroad's right-of-way free and clear of any such encumbrances. With respect to the 3,800 acres of non-right-of-way land, the first step will be identification of the specific parcels involved, along with obtaining appropriate legal descriptions.

The state is in the process of organizing a negotiating team, while also determining an appropriate policy stance for each specific parcel. Information and recommendations is being collected from knowledgeable ARR officials regarding the railroad importance of each parcel. There is also the need to conduct some discussion and investigation with personnel from DNR and DOI regarding the availability of other state or federal land which might facilitate achievement of settlements. Mr. Dave Walsh has been assigned the role as point individual for staff activity for these negotiations. Mr. Walsh will have direct support from Mr. Hickey and members of the Attorney General's office.

TASK #7 - TRANSFER DOCUMENTS.

Section 604(b) details a series of legal documents which will effect the actual transfer assuming state acceptance. Specifically, the following four documents are required: (1) a bill of sale conveying title to all rail properties except real property; (2) an interim conveyance of real property of the Alaska Railroad not subject to unresolved claims of valid existing rights; (3) an exclusive license granting the state the right to use all real property not conveyed pending resolution in accordance with the review and settlement process or final administrative adjudication of claims of valid existing rights; and (4) an exclusive-use railroad easement for that portion of the railroad's right-of-way within Denali National Park and Preserve.

The content of these documents will require lengthy discussion and careful drafting by the state and FRA. Direct and extensive legal assistance will be needed to achieve this task. Mr. Hickey will direct these efforts with assistance from the Attorney General's Office and the state's special counsel, Wickwire, Lewis, Goldmark & Schorr. Actual completion of this work is contingent on state acceptance of the transfer offer. Preliminary work on this task should begin following completion of the closing report. The final documents do not have to be finished until after the Alaska State Legislature ratifies the transfer proposal and the Secretary of Transportation certifies the state has agreed to all of the required terms and conditions as specified in the transfer bill.

TASK #8 - ICC REQUIREMENTS.

Section 605(c) requires that prior to transfer the ARR's accounting practices and systems shall be capable of reporting data to the Interstate Commerce Commission in formats required of comparable rail carriers subject to ICC jurisdiction. It will also be necessary to obtain an ICC certificate of public convenience and necessity to ensure continued operation of the railroad following transfer. As a result, it will be necessary to petition the ICC to promulgate proceedings to respond within the anticipated time period, along with preparing the necessary filings to provide for the operation of the state-owned railroad. A final ICC-related task involves rate-making authority for the new state entity. Although the transfer legislation provides a two-year hiatus, staff should probably engage in discussions with ICC officials regarding this matter, prepare preliminary filings, and direct background valuation work which will serve as the basis for future rate-making filings.

Efforts have already been initiated to accomplish some of these tasks. Work is in progress to review current accounting practices and systems in light of ICC requirements. Additionally, efforts are underway to petition the ICC for a promulgated proceeding for obtaining a certificate of public convenience and necessity. The remaining tasks, which are more substantive in nature, should be initiated within the next few months and will carry into the time period following transfer. Mr. Hickey will direct these efforts with assistance from the state's special counsel. Additional outside assistance will be needed from individuals knowlwdgeable with ICC procedures and railroad valuations.

TASK #9 - PRE-TRANSFER PREPARATIONS.

This task covers a range of duties related to ensuring an orderly and timely transfer. Much of this activity will be integrally tied to the creation and implementation of an appropriate entity to own and operate the railroad. The following list details the major task of this nature that can be identified: (1) legal research regarding appropriate state response to comply with the federal certification requirements under Section 604; (2) necessary state activity to allow assumption of current ARR collective bargaining agreements for the mandated two-year protection period; (3) further assessment of implications of anti-trust liabilities following transfer; (4) various planning activities related to required waivers of compliance with railroad safety laws and OSHA compliance requirements; (5) investigation of need for full-scale inventory and condition survey of ARR assets; (6) initiation of long-range capital planning effort for future railroad needs; and (7) anticipating and satisfying all other critical labor, administrative, regulatory, insurance and fiscal requirements prior to actual transfer.

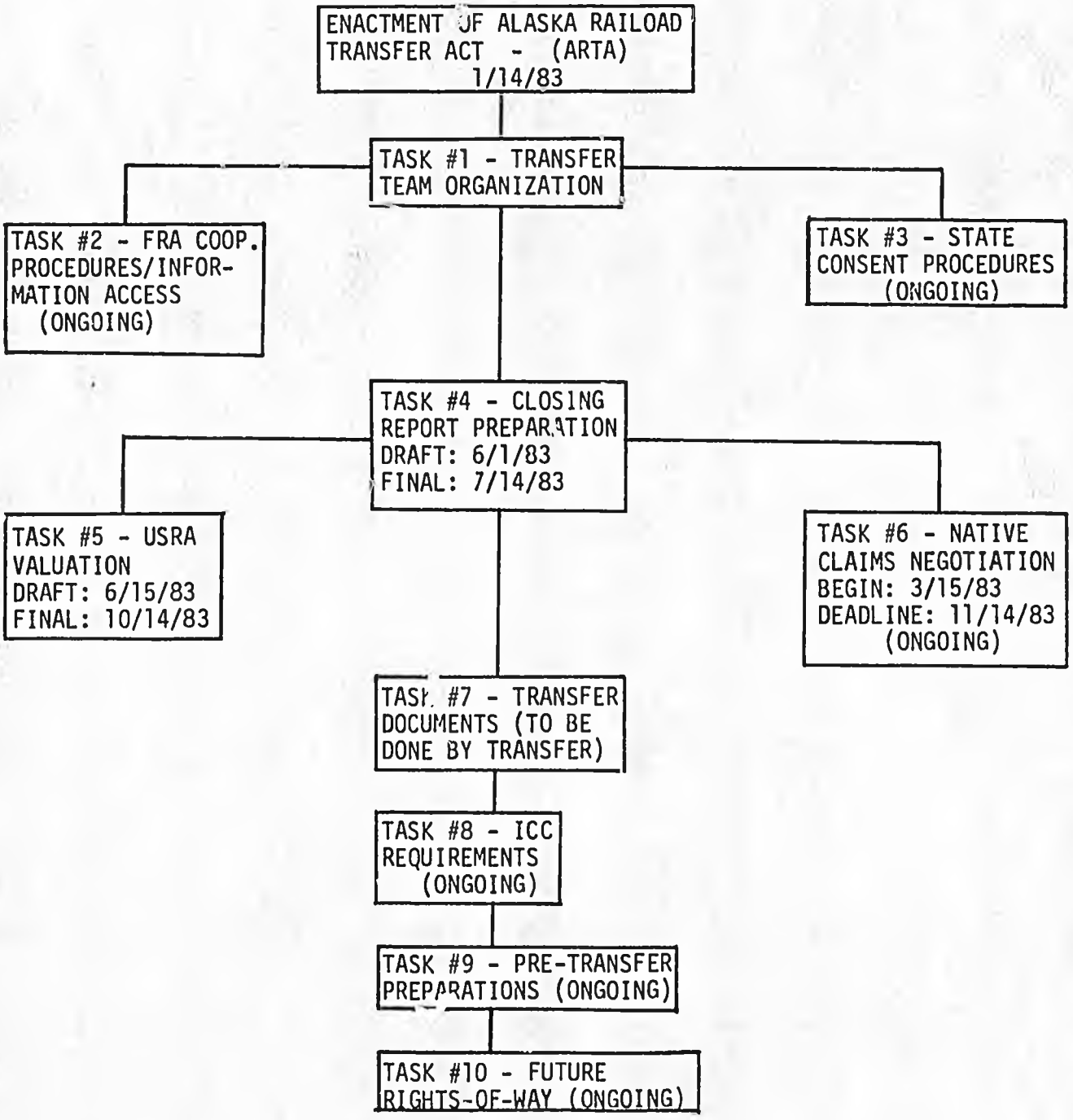
The time frame for the performance of these activities will span the entire period between enactment of the federal bill and formal completion of the transfer. Certain elements will be important in relation to the creation of a state entity to own and operate the railroad, which will be governed by the framework for action within the Alaska State Legislature. The state transfer team will be responsible for the performance of these tasks.

TASK #10 - FUTURE RIGHTS-OF-WAY.

Section 609 sets out the appropriate process whereby the state-owned railroad will be able to secure future rights-of-way across federal lands. In response to this provision, the state has initiated a process to develop an acceptable policy position for obtaining needed reservations in an intelligent and orderly manner. Once this activity is completed, work efforts will be undertaken to survey the selected routes and to prepare necessary application submittals for the federal and state portions. Additional funding will be needed to perform this effort.

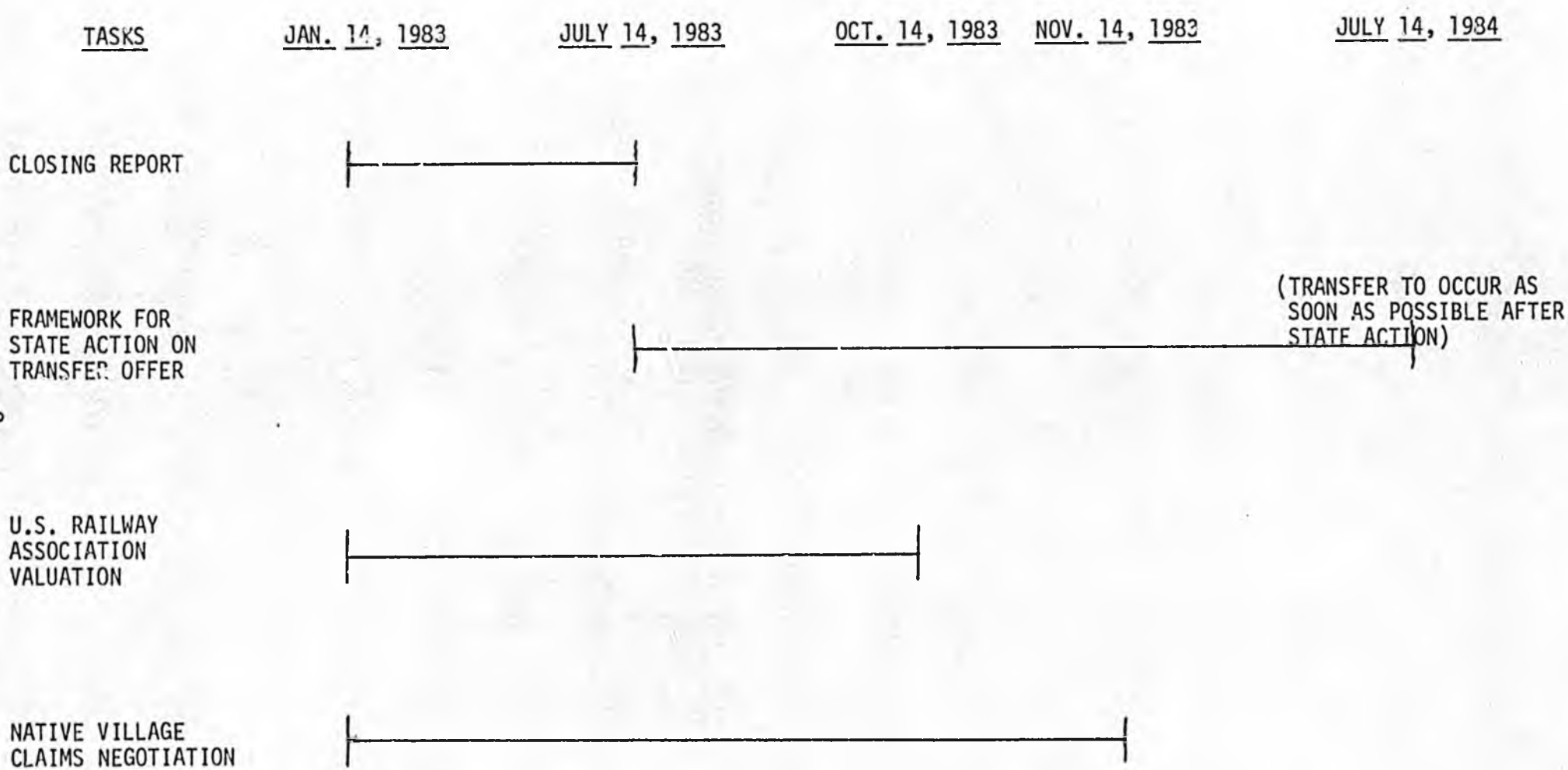
ALASKA RAILROAD TRANSFER PROJECT

FLOW CHART



ALASKA RAILROAD TRANSFER PROJECT

SCHEDULE



DRAFT

CONFIDENTIAL

STATE ORGANIZATIONAL ISSUES INVOLVED IN THE PROPOSED TRANSFER OF THE ALASKA RAILROAD FROM THE UNITED STATES TO THE STATE OF ALASKA

January 15, 1982

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This memorandum addresses some of the issues involved in creating an entity to own and operate the Alaska Railroad after transfer from the federal government to the State of Alaska. The issues involved in determining the most appropriate organizational structure were treated preliminarily in two studies performed jointly by the State and an outside consultant (referred to hereafter as Bivens 1 and Bivens 2).[1] As stressed in Bivens 2, the issue is important because the railroad's organizational structure will directly affect the State's ability to meet its policy objectives for the railroad, see Bivens 2 at 81.

Bivens 2 predicated its analysis of different organizational structures on a set of specified assumptions, (See Appendix 2 enclosed). This memorandum adopts the same assumptions about the State's basic policy guidelines; most of which seem fully warranted by the State's actions and expressed policies to date. This memorandum further agrees with Bivens 2 that the twelve criteria it sets forth are extremely useful tools for evaluating the effectiveness of alternative structures for the railroad. However, as a result of decisions made by the Governor's Railroad Policy Committee in the fall of 1981, this memorandum is organized around a different set of ten goals that are, in substance,

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[1] Statewide Rail Systems Study for the State of Alaska, Department of Transportation and Public Facilities Planning and Programming Division, December 1980, prepared by Bivens & Associates, Inc., et al. (Bivens 1); Assessment of the Alaska Railroad: Ownership and Operational Alternatives, July, 1981, prepared by John T. Gray II and Bivens & Associates, et al. (Bivens 2).

largely identical to the Bivens 2 criteria, but incorporate additional legal constraints that must be considered in setting up a railroad structure. As outlined in the following sections, the railroad entity should be organized in such a way as to:

1. Insulate the State from legal and financial liability for the railroad's tort, contractual, and debt liability;

2. Insulate the State from I.C.C. jurisdiction;

3. Have an independent capacity to obtain tax-exempt financing;

4. Preclude a State operating subsidy;

5. Permit both service contracts with the State and State investment in the railroad's capital improvements in facilities, rolling stock and track expansion, and rehabilitation;

6. Provide the best possible combination of high quality and low cost transportation;

7. Insulate railroad operations from political pressures generated by the railroad's competitors, suppliers, shippers, lessees, and lessors;

8. Be subject to State oversight and intervention power to:

(a) prevent insolvency;

(b) ensure continued service;

(c) require or preclude expansion or increased service; and

(d) disapprove borrowing that could endanger the State's borrowing capacity;

9. Cause the least possible disruption to the State's employee pay, benefits, and retirement systems; and

10. Conform to the State constitution.

The initial Bivens report (December 1980) considered four very broad approaches to organizing the Alaska Railroad, including continued federal ownership and totally private ownership. By the time the second Bivens study was completed in July 1981, the range of options had been considerably narrowed, and Bivens 2 presents three alternatives: (1) a state line agency, (2) a state public corporation or authority, or (3) a state-owned railroad operated by a private lessee. Bivens 2 at 85. Bivens 2 makes clear, however, that one option -- a public authority or corporation -- best satisfies all of the relevant criteria, whereas each of the other alternatives has serious, indeed potentially fatal, drawbacks or impracticalities. Although the criteria analyzed in this memorandum are somewhat different, and perhaps more legalistic, than those applied in Bivens 2, the conclusion reached is the same: a public corporation or authority provides the greatest opportunity to maximize the State's goals. Leasing to a private operator, for example, would probably preclude tax-exempt financing. Using a State line agency would subject the State itself to tort and contractual liability for railroad activities and probably to

I.C.C. supervision. It also would probably not afford the desired degree of management independence and flexibility.

As a result of the Bivens studies and of preliminary discussions regarding some of the legal concerns addressed below, the Governor's Railroad Policy Committee has tentatively decided to pursue only the possibility of creating a public authority or corporation[2] to operate the railroad. Accordingly, this memorandum, except as noted, focuses only on this one possibility, and considers whether and how a public authority can achieve each of the State's expressed goals, as outlined above.

As a caveat, it should be noted that the State's fundamental objectives -- to run the railroad both as a public service and as a sound business enterprise -- may conflict to some degree. It will therefore be necessary to create an organizational structure that strikes a balance between these goals, and between the means of achieving those goals discussed below. See Bivens 2 at 79, 89. Fundamental decisions must be made, in particular, on how best to balance autonomy and flexibility on the one hand with accountability and State oversight on the other.

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2 The terms "public corporation" and "public authority" are used interchangeably in this memorandum. The ramifications of any technical differences between these two structures can be resolved at a later date.

I. STATE LIABILITY.

An independent public authority can effectively insulate the State from legal and financial responsibility for the railroad's tort, contractual, and debt liabilities and can bear sole responsibility for railroad obligations. Public authorities are, in fact, often used for this purpose in other states and in Alaska. The State constitution contemplates and impliedly allows creation of public authorities with the power to issue bonds that are not supported by the full faith and credit of the State. See Alas. Const. Art. IX, Sec. 11 (exempting bonds of public authorities whose debts are not State debts from the credit limitations of Article IX, Section 8). See Section VIII below for further discussion of State constitutional restrictions on public authorities. Numerous other Alaska public authorities have been granted the power to issue bonds without pledging the credit of the State.[3] The enabling legislations for these other authorities offers a model for appropriate language in the railroad's enabling legislation.

The acts creating the existing independent public authorities in Alaska appear silent on the issue of State contract and debt

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[3] See, e.g., A.S. 44.81.010 et seq. (Alaska Commercial Fishing and Agriculture Bank); A.S. 44.82.010 et seq. (Alaska Gas Pipeline Financing Authority); A.S. 44.83.010 et seq. (Alaska Power Authority); A.S. 44.88.010 et seq. (Alaska Industrial Development Authority).

liability. The State has the power to provide that an independent public authority will bear exclusive liability for the railroad's contractual obligations and tort liabilities, and can, in fact, limit that liability if it chooses.[4] To ensure State immunity, the enabling legislation should address the issue specifically.

II. I.C.C. JURISIDICTION.

If the Interstate Commerce Commission (I.C.C.) considers the State, rather than a railroad entity, to be the "common carrier," the State itself would be subject to I.C.C. supervision. Such supervision would require the State to conform its accounting practices to I.C.C. requirements and to obtain I.C.C. approval for the issuance of all State securities. The obvious burdens imposed by such requirements appear to preclude direct State operation of the railroad.

Creation of a public authority will avoid such far-reaching I.C.C. jurisdiction. As indicated in Memorandum, Regulatory and Related Issues Involved in the Proposed Transfer of the Alaska

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[4] If the State owned and operated the railroad itself, it might technically have the power to limit its liability for the railroad's tort and contractual obligations. It is unclear whether a court would allow total immunity, however, or whether the railroad would be able to contract effectively with third parties if it denied all liability. Establishing a public authority is the clearest and most definite method of insulating the State itself from liability, while continuing effective and responsible railroad operations.

Railroad from the United States to the State of Alaska, October 3, 1981, prepared by Wickwire, Lewis, Goldmark & Schorr (hereafter "Regulatory Issues Memorandum"), the I.C.C. generally considers a state authority or corporation chartered to operate a railroad to be the "common carrier." See State of Vermont and Vermont Railway Inc., 320 I.C.C. 330, 334-35 (1963); Port Authority Trans-Hudson Corp., 317 I.C.C. 357, 362 (1962). The I.C.C. does not seem to have laid forth any standards, however, either through rule making or adjudication, as to how independent a state authority must be in order to be considered the common carrier.

III. TAX-EXEMPT FINANCING.

As discussed in Bivens 2, at 77-78, 80, one of the major problems with federal administration of the railroad has been inadequate capitalization. In the past, federal appropriations have been the sole source of capital. For reasons set out in the Bivens studies, as well as changes in federal policy, access to other public and private sources will be necessary in the future. Such investment might be easier to obtain if the railroad can issue federally tax-exempt bonds, and an entity to operate the railroad can probably be created that would qualify for tax-exempt financing.

For interest to be exempt from federal income tax, the obligation must be issued either (1) by a "political subdivision" of

a state, or (2) by an instrumentality of a political subdivision that issues obligations "on behalf of" a political subdivision. Internal Revenue Code (I.R.C.) § 103(a)(1), Regs. § 1.103-1(b). Even if the railroad authority qualifies as a political subdivision or an instrumentality thereof, any obligation it issues will nonetheless be taxable if it is considered an "industrial development bond."[5]

1. Political Subdivision.

For purposes of the Internal Revenue Code, a political subdivison is:

> any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit. As thus defined, a political subdivision of any State or local governmental unit may or may not, for purposes of this section, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement and similar districts and divisions of any such unit.

Regs. §§ 1.103-1(b) (emphasis added).

For a political subdivision to exercise "the sovereign power" of the state, it must have more than an insubstantial amount of the state's sovereign powers: the power to tax, the power of

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[5] There are a number of exceptions to the general rule that industrial development bonds are taxable. Although these exceptions are exceedingly useful in some circumstances and are often relied on for tax-free financing of municipal development, none of these exceptions appears to apply to the entire railroad operation.

eminent domain, or the police power. Estate of Shamberg v. Commissioner, 3 T.C. 131, aff'd, 144 F.2d 998 (2nd Cir.), cert. denied, 323 U.S. 792 (1944). It is not altogether clear whether one of these powers is enough, but all three are not required. If only one power is conferred, it may need to be an unrestricted power. In determining whether an entity has sufficient sovereign powers, the Internal Revenue Service ("the Service") considers "all the facts and circumstances . . ., including the public purpose of the entity and its control by a government." Rev. Rul. 77-165, 1977-1 C.B. 21.

The power of taxation is probably not a realistic alternative for the railroad entity. The State must therefore confer some eminent domain or police powers on the railroad entity if it is to qualify as a political subdivision. The Internal Revenue Service has ruled that an authority's ability to request a political subdivision to condemn property on the entity's behalf is not a substantial possession of unrestricted sovereign power and was not alone enough to make an entity a political subdivision. Rev. Rul. 77-164, 1977-1 C.B. 20. It is unclear whether power to condemn subject to state veto would be sufficient, but it might well not be considered an unrestricted exercise of the sovereign power.

Conferring police power upon the railroad entity may also be feasible, alone or in conjunction with eminent domain power. The law regarding police power is still developing, however, and it

is difficult to say how much police power is required. On the one hand, the Service has ruled that a state university possessed insubstantial police power where its police force was authorized only to enforce traffic regulations on campus and to arrest violators and detain them until city police arrive. Rev. Rul. 77-165, 1977-1 C.B. On the other hand, a regional urban transit authority has been deemed a political subdivision on the basis of its police powers, which included the power to set rates (after public hearings), determine routes, and enforce its regulations by maintaining a security force. The authority exercised these powers free from any regulation by the State Public Service Commission. Rev. Rul. 73-563, 1973-2 C.B. 24. If the State seeks a political subdivision exemption based on police power, it would be advisable to give the railroad entity as much regulatory and enforcement power as possible, perhaps including an independent security force with the ability to make arrests and issue summonses.

In short, the most promising avenue of achieving political subdivision status would be to grant the railroad the power of eminent domain to condemn property directly for railroad purposes, if the State considers this acceptable. A second, and less certain, alternative would be to confer substantial police power upon the railroad entity. A combination of both of these powers increases the likelihood that the railroad entity would be considered a political subdivision.

2. "On Behalf of" Issues.

If the railroad authority is not granted enough sovereign power to qualify as a "political subdivision," it may still be eligible for tax-exempt financing if it issues obligations "on behalf of a political subdivision." It appears that such obligations need not be backed by the full faith and credit or the taxing power of the state. Such an exemption is less certain, however, and subjects the railroad to greater restrictions.

Internal Revenue Service rulings indicate that certain tests must be met for an obligation to be issued "on behalf of" a political subdivision. These are:

(a) The issuer must engage in activities that are essentially public in nature;

(b) The issuer, except to the extent of retiring indebtedness must not be one which is organized for profit;

(c) Income must not inure directly or indirectly, or appear to be available to, any private person;

(d) The state or political subdivision must have a beneficial interest in the organization while the indebtedness remains outstanding and must obtain full legal title to the property when indebtedness is retired;

(e) The corporation must be approved by the state or a political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.

The first three requirements will probably not be difficult for the railroad entity to meet, especially if the enabling legislation takes account of these requirements and states that the railroad serves important public purposes, requires supervision of railroad books, and so on. The more significant difficulties for the railroad in achieving "on behalf of" status will be the requirement that property revert to the State after the indebtedness is retired and the necessity for State approval of each railroad obligation. On occasion the Service departs from its own established guidelines, and it is conceivable that the entity established to manage the railroad could obtain a favorable "on behalf of" ruling even if it does not comply with these two requirements. In similar situations, local public authorities have obtained "on behalf of" rulings where the property would continue to be held by the authority after the retirement of the indebtedness, but in those cases the political subdivision (a city) possessed substantial control over the issuer's governing body, and upon liquidation of the issuer the property would pass either to another entity of the same nature or revert to the political subdivision. It is impossible to assess the likelihood that the Service would confer "on behalf of" status to a railroad entity that does not comply with these two requirements.

In 1976, the Service published proposed regulations to significantly tighten the requirements for obligations issued "on

behalf of" political subdivisions. Although these regulations have not yet been adopted, the Service may in fact rely on them in making private rulings. Although a number of these requirements are the same as those enunciated above, they go further and require even tighter organizational and supervisory control by the governing unit (the State) over the issuer. For example, the proposed regulations require state approval of the issuer's obligations not more than sixty days before issuance, as well as substantial control over membership on an issuing authority's governing board.

The restrictions and potential restrictions over a public entity entitled to "on behalf of" tax-exempt status generally make an "on behalf of" exemption less desirable than a direct "political subdivision" exemption, as discussed above. If the State decides to rely on an "on behalf of" exemption, qualification of the railroad entity will necessarily impose certain restrictions, which must be analyzed in greater detail to make sure that the enabling legislation complies.

3. Industrial Development Bond Prohibition.

Even if the railroad entity achieves tax-exempt status as a "political subdivision" or as acting "on behalf of" a political subdivision, its bonds will nevertheless be taxable if the proceeds of the bonds benefit private persons in their trade or business. In such event, the bonds are considered taxable "industrial development bonds." Cf. footnote 5. A bond is

classified as an industrial development bond if (1) more than 25% of the proceeds of the obligation are used directly or indirectly in any trade or business carried on by non-exempt persons, and (2) the payment of principal or interest on the obligation is secured, in whole or major part, by any interest in property or payments made in respect of property used or to be used in a trade or business or derived from payments in respect to property, or borrowed money, used in a trade or business.

The industrial development bond regulations are not intended to preclude a state or political subdivision from operating a business. The regulations specifically state:

> When publicly-owned facilities which are intended for general public use, such as toll roads or bridges, are constructed with the proceeds of a bond issue and used by non-exempt persons in their trades or businesses on the same basis as other members of the public, such use does not constitute a use in the trade or business of a non-exempt person for purposes of the trade or business test.

Regs. §§ 1.103-7(b)(3).

Based on the examples in the regulations and on public and private rulings issued by the I.R.S., a strong argument can be made that the mere fact that the railroad hauls the property of private (non-exempt) parties does not mean that the railroad would be using bond proceeds for the trade or business of "private persons," as defined by I.R.S. regulations. It would be necessary, however, to obtain an advance ruling on this issue.

On the other hand, if any part of the operation or the facilities of the railroad were leased to a private party for use in its trade or business, unless amounting to less than 25% of the obligation, the project would constitute an industrial development bond with the commensurate loss of tax exemption of its interest payments. The Service has indicated, in private rulings, that it will closely scrutinize any direct or indirect benefits to non-exempt persons. It seems likely that if the railroad were to contract with a private company for the management or operation of the railroad or various of its facilities, the Service would consider such a contract as a benefit to a non-exempt person which would render railroad obligations industrial development bonds. Thus if the railroad entity is to be eligible for tax-exempt financing, leasing operations to a private operator is not a realistic option, and even hiring a private operator could preclude tax-exempt financing. For this reason, it will be important to continue to monitor railroad operations to ensure that future actions do not cause the Railroad to lose its tax-exempt status.

This discussion of the industrial development bond prohibition is not intended to preclude further in-depth consideration of other sophisticated avenues of generating private investment. As pointed out in Bivens 2, several ways of using federal tax advantages to raise private investment funds may exist, including

limited partnerships, Bivens 2 at 90-91, and perhaps joint ventures or syndications. Use of the public authority structure to operate the railroad should leave these possibilities open, and may even give the State greater flexibility. Once some of the fundamental issues discussed in this memorandum have been resolved, more specific proposals for tax-exempt and other advantageous financing can be explored, and may well prove fruitful.

IV. STATE SUBSIDY, STATE CONTRACTS FOR RAILROAD SERVICE, AND STATE INVESTMENT IN RAILROAD CAPITAL IMPROVEMENTS.

Although the railroad currently is profitable, it is saddled with years of deferred maintenance attributable to inadequate federal appropriations. It is generally believed that the railroad's operating revenues will be insufficient to cover its full operating costs for all services and to finance overdue and future capital improvements, see Bivens 2 at 77-80, 98-99. Accordingly, it will be necessary to find other means of meeting capital requirements and such operating expenses as passenger service. The State wishes to avoid a direct general subsidy, but nevertheless recognizes the need to participate in certain operations that serve clear public purposes, such as passenger service or track expansion. The State can reconcile these competing interests by establishing an entity that is precluded from asking for general operating subsidies but is permitted to request State funds for purposes specified in the legislation establishing the entity.

Contracting. Contracting with the railroad authority for the provision of specific services would ensure that State funds are spent only for those purposes that the State has decided are important. Contracting appears legally permissible,[6] so long as the expenditure of State funds is for a "public purpose." The Alaska constitution requires that State funds be spent only for "public purposes," Alas. Const., Art. IX, Sec. 6, but does not appear to otherwise prohibit or significantly restrict the State's ability to contract for desired railroad services. See discussion in Section VIII below. The public purpose requirement has been broadly construed, at least so far, by the Alaska Supreme Court. The court has, for example, upheld a State mor[illegible]e adjustment plan in which public monies were used to pay private mortgage obligations for dwellings that had been damaged by earthquake. Suber v. Alaska State Bond Committee, 414 P.2d 516 (Alas. 1966). It has also upheld the validity of municipal bonds issued to finance the construction of a manufacturing facility to be leased to a private business. Wright v. City of Palmer, 468 P.2d 326 (Alas. 1970).

The public purpose requirement of Article IX undoubtedly imposes some outside limitation on the nature of the contracts

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[6] A.S. 37.10.085 prohibits the State from subscribing to corporate stock, or lending credit to or borrowing money on behalf of a corporation. It is not clear whether this provision would affect the financial dealings between the State and the railroad, but in the interest of caution, the enabling legislation might specifically provide that the railroad is exempt from this restriction. Cf. 18.26.150 (Medical Facilities Authority).

the State may make with the railroad, but contracts for the provision of services that benefit the public, such as passenger service, appear unexceptionable. To help ensure that such contracts would survive judicial review, the enabling legislation for the railroad authority should set forth specific legislative findings regarding the public purposes served by State-railroad contracts and could provide a non-exclusive list of permissible contracts. To make it more likely that the State would be exempt from potential antitrust liability, the enabling legislation should specifically address the State purpose to be served by any contracts that might be subject to antitrust challenge, and should indicate an affirmative intention to displace free competition. Direct oversight of these contracts by the governor or the executive department would also strengthen the State's claim that such contracts are exempt from the antitrust laws. It is impossible to predict, however, whether these efforts would be sufficient to exempt the State from antitrust coverage. See Regulatory Issues Memorandum, at 15-27.

The enabling legislation can adopt any degree of specificity as to the type of contracts authorized and the amounts, but as the legislation becomes more specific, the executive is less able to respond to new needs and changing circumstances. On the other hand, if significant discretion is vested in the executive branch, it is important to make sure that the department or

agency does not inadvertently become an additional tier of railroad management.

Capital Improvements. State expenditures for capital improvements are also subject to the broad public purpose limitation of the State constitution. Such investment is quite probably for a public purpose, especially if the enabling act contains convincing language to that effect. The technical question of who should hold title to railroad property that is acquired or constructed need not be addressed at this time. The question involves tax, financing, liability, and other issues that should be considered after other, more basic, decisions have been made.

Procedures. To regulate requests for appropriations for railroad projects, the State may wish to establish guidelines for the railroad to follow in requesting State funds. Requests for funds could be made directly to the Legislature (or to the relevant committee), cf. A.S. 144.83.080(16) (Alaska Power Authority), or the railroad could be required to appeal to the Governor or other member of the executive branch who could in turn request legislative appropriations. If desired, the legislation could also provide standards by which requests for appropriations are to be judged, which could range in severity from "appropriate to further railroad purposes" to "essential for the continued operation of the railroad." The legislation can set up as many, or as few, levels of review as the State feels is appropriate, so long as it does not become unduly burdensome,

expensive, or time-consuming. The trade-off, of course, is between the perceived need for State oversight of the railroad and the business advantages of independence and efficiency.

Instead of allowing the railroad to request appropriations as necessary, the legislation could require the railroad to include its appropriation request as part of an annual budget. Alternatively, the Legislature could establish a railroad fund from which monies could be disbursed when the appropriate official found that the requisite standard had been met.

V. INDEPENDENT AND EFFECTIVE RAILROAD MANAGEMENT.

A management structure for the railroad that will foster the optimal combination of high quality and low cost transportation demands that railroad operations be insulated from the political pressures generated by the railroad's competitors, suppliers, shippers, lessees, and lessors. The Bivens 2 criteria, at 83-84, make clear that management freedom and authority (see criteria 2, 4, 5, 8, 9) and freedom from cumbersome bureaucratic restraints (see criteria 5, 7) are critical if the new railroad entity is to operate effectively. To meet these goals, the entity managing the railroad will probably need significant control of day-to-day railroad operations. Giving the railroad entity sufficient control of day-to-day operations to meet the State's goal of effective business management conflicts, however, with the

State's interest in retaining control over major financial and policy decisions for the railroad.

The railroad will be able to make managerial decisions more quickly, flexibly, and efficiently if it is free from most of the restrictions that normally encumber the action of governmental bodies. The railroad entity should be specifically exempted from most such restrictions, such as the State Administrative Procedure Act, A.S. 44.62 et seq., state public bidding and procurement requirements, state personnel requirements, and other restrictions to be identified by the Attorney General's office. If the railroad is to be free to set its own rates and make its own rules, an explicit exemption from regulation by the Alaska Transportation Commission would avoid any possible jurisdictional disputes over intrastate transportation.

It is also important to note that freedom from some of the restrictions that normally apply to line agencies will help give the railroad entity a sufficient degree of independence to justify insulation of the State from liability for the authority's debts.

The State can also use appointment and membership requirements for the entity's governing board to reduce political influence over the railroad board. The most common means of doing so include confirmation of appointments by the Legislature, requiring a bipartisan board, staggering terms so that no one governor appoints the entire board, setting qualifications for

board members (e.g., one member each who represents or has expertise in finance, law, railroads, labor, etc.), or allocating appointment power among different State officials.

VI. STATE OVERSIGHT OF MAJOR FINANCIAL TRANSACTIONS AND POLICY DECISIONS.

Although the day-to-day operations of the railroad can be left to the railroad entity, the State can retain oversight power to prevent the railroad from making major policy changes or taking actions that would threaten the railroad's financial stability. Conversely, the State may also wish to establish a mechanism for ensuring that the railroad's operator will seriously consider the State's ideas regarding railroad projects. In particular, the State is concerned with (a) preventing railroad insolvency, (b) ensuring continued railroad service, (c) having a major policy role in proposed changes in service levels and track expansion, and (d) preventing borrowing that could indirectly endanger the State's own borrowing capacity.[7]

In dealing with these concerns, the State must balance its desire for oversight against the railroad's legal and practical need for independence. If the railroad entity is to make most

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[7] Although the State of Washington is facing serious financial problems, the precarious position of the Washington Public Power Supply System, a creature of the State, is acknowledged to have contributed to the recent lowering of the State's own bond rating.

business decisions and be responsible for the railroad's performance, it will need significant control over its budget and over policy decisions, especially in relation to service changes and expansion. See Bivens 2 at 83, 85-89. It is therefore important to ensure that the State carefully consider the effect of forcing the railroad authority to take a particular action, perhaps by providing that the executive or the Legislature make detailed findings regarding the impact, financial and otherwise, of amending or overruling a decision made or recommended by the railroad. Requiring the State to fund projects it determines the railroad entity must undertake is another possible way to ensure that the State share in the consequences of its decisions.

The enabling legislation can provide generally that the State will retain power to oversee the railroad entity's activities. The State has a wide range of options as to who will be responsible for monitoring railroad performance. An existing body could be given this responsibility, or a new body could be created. Appropriate choices among existing bodies include the Department of Transportation, the Transportation Commission, the Governor's office, or the House and/or Senate committees with substantive jurisdiction over railroad affairs. It is possible to erect several layers of supervisory control and overlapping responsibilities, as has apparently been done in South Dakota, where state railroad activities involve the legislature, the governor, the department of transportation's division of

railroads, the director of railroads, the state railroad board, the railroad advisory commission, and the railroad authority. It is not clear that such a complex structure is necessary or desirable, and it might very well make it difficult for the railroad to operate efficiently and apolitically.

In establishing procedures for State oversight of major financial and policy decisions, the enabling legislation must (1) identify the class of actions or situations that will trigger State review, (2) establish procedures for determining when those situations have materialized, and (3) set forth the method for State review. The State has already identified several primary concerns, regarding both policy (cutbacks and expansion of service and undertaking non-railroad activities), and finance (railroad insolvency and indirect effect on State credit rating).

Policy Decisions. For the two policy concerns, the State needs to determine how large a change must be proposed before the State will step in and review it. For service cuts and expansions, this level could be defined either as a percentage of existing service or as a dollar amount. It is important to set the level high enough that routine changes in timetables and service do not require State approval. Changes of less than 5% or 10% are probably de minimis; changes of 33% are quite probably significant. Picking a figure between those two points may be relatively arbitrary. Since expansion and cutbacks will be conscious decisions for the railroad entity, requiring it to

notify the State within a specified period of time before acting will probably provide sufficient notice; there should be no thorny questions as to whether the "triggering event" has actually occurred. Similarly, the State can require that the railroad authority give notice before engaging in non-railroad activities, as defined in the legislation, and can require State approval for such activities.

Once the class and magnitude of decisions that the State wishes to oversee have been identified, the State should devise an oversight process to give it an effective voice, without making it impossible for the railroad entity to act. To facilitate State review, the railroad can be required to present written reasons for its proposed action. It would probably be most efficient for the report to be submitted to the appropriate legislative committees, but it is also possible for the report to be first submitted to the Governor. The Legislature could either be required to approve it (by resolution or by regular vote of one or both houses); alternatively, the Legislature could be given veto power, to be exercised within a specified time, and possibly requiring a supermajority. The latter approach ensures that a decision will be made promptly.

Financial Concerns. The financial concerns present more difficult issues of assessment and notice to make sure that the State does not step in prematurely. The traditional indicia of insolvency used in contracts between private parties tend to come

too late to be useful to the State (e.g., appointment of a receiver or filing a bankruptcy petition). Other alternatives need to be investigated, perhaps with the assistance of a financial analyst. Possible events to trigger State intervention to prevent insolvency might include an actual or projected budget deficit of a specified percentage or dollar amount, a serious drop in the railroad entity's bond rating, railroad inability to meet bills as they fall due, and so on. If the State retains significant discretion to decide when the railroad is "approaching insolvency," it will be important to ensure that the railroad entity has an opportunity to respond to the State's concerns and to demonstrate that the railroad's financial condition is acceptable. It may also be desirable to provide for review of the State's decision to intervene, either by the judiciary or by a specially constituted advisory board.

If the State determines that the railroad is in danger of becoming insolvent, it could provide for State management of the railroad, perhaps with the governor or other executive officers serving as trustee. A less intrusive alternative would be to replace the executive officers or board of directors of the railroad.

As in the case of impending insolvency, it will be important to establish a fair procedure to guide the State in deciding that the railroad's credit rating is indirectly injuring the State's own borrowing ability. A specific fact-finding process by the

governor or other government officer or body could be required. In making this determination, the State should also be required to consider the impact on the railroad if it is not permitted to continue borrowing. Railroad borrowing is perhaps simpler to oversee than insolvency. Once it has been determined that the State's credit rating, or the authority's credit rating, is in jeopardy, the railroad can be required to obtain State approval (by the Governor or the Legislature) before issuing further bonds. Again, this approval can be active or can be exercised through a veto power.

Other Forms of Oversight. As a general matter, most public authorities in Alaska are subject to annual legislative audit, are required to submit an annual report to the Governor and/or the Legislature, and are required to give the legislative auditor access to their books at all times. See, e.g., A.S. 44.82.180, 44.83.190, 44.85.100. Similar requirements can be imposed on the railroad entity. The State may also want to give the legislative auditor the power to prescribe the form and content of the authority's financial records, as is the case with some of the other public authorities, see, e.g., 44.82.180, 44.83.190, but this requirement could limit the railroad's flexibility or conflict with federal I.C.C. accounting regulations. Alternatively, an independent outside audit could be required, which has the advantage of being immune from the political considerations that sometimes impinge on legislative audits.

with some sensitivity to proprietary concerns.

The procedures for appointing and removing members of the railroad's governing board are another source of State control over railroad activities. The power to remove board members without cause would give the State an effective check on the board's actions. If overused, however, this power could undermine the railroad's independence and make it more vulnerable to political pressures. Another effective tool for State control over the railroad is to require the railroad's governing board -- and not just its executive officers -- to retain actual control over specified important decisions. The legislation could accomplish this by specifying that the board must concur in specified decisions, such as expansion or reduction of service, contracting of debts or issuance of bonds or notes, sale of railroad property, all large expenditures or transactions (specified by dollar amount), filing of annual reports required by the State, adopting an annual budget, contracting with the State, requesting State appropriations, and so on.

An even more effective, although more intrusive, check on railroad decision-making would be to require the railroad to follow specific administrative procedures in making important decisions. The enabling legislation would need to identify what actions would be subject to such requirements, and would need to set forth specific procedures. The formal administrative procedures could allocate responsibility between railroad management

and the governing board, establish specific fact-finding processes (possibly including notice to specified parties and public hearings), and require the railroad to make adequately documented written findings. The State could participate at the decision-making level by contributing at hearings, submitting statements, or reviewing the railroad's files. It can also retain power to review the railroad authority's decisions, as discussed above. Alternatively, procedures for judicial review could be established. Such administrative requirements would, of course, undercut the railroad management's flexibility and independence, which Bivens 2 concluded were necessary, see Bivens 2 at 77-80, 82-83. The effects on railroad management should thus be carefully considered before such requirements are imposed. Cf. Section V above.

Action-Forcing Mechanism. The State may also wish to consider providing a mechanism that will guarantee that the entity in charge of the railroad considers actions proposed by the State, but that does not impose so much control over the railroad that the advantages of independent management are lost. One way to balance these competing interests would be to set up procedures for railroad review of legislative proposals. For example, the legislative committees with substantive jurisdiction over railroad matters, or the Governor, could be permitted to request the railroad to consider State proposals for railroad actions. Such consideration could require that the railroad entity hold

public hearings, conduct appropriate studies, and issue a written report of its findings and decision. The legislation can specify how much time the railroad entity has to reach its decision. After a decision is returned, the State can adopt, modify, or override it. A decision by the State to overrule or significantly modify a railroad decision will, of course, affect the railroad entity's plans and finances, and it may be necessary to require the State to fund any project that the railroad entity has rejected or to otherwise take responsibility for overriding the railroad entity's decision.

VII. EMPLOYEE ISSUES.

Concern has been expressed that State acquisition of the Alaska Railroad may disrupt the State's present employee pay, benefits, and retirement systems. In particular, there has been fear that if railroad employees continue to receive certain benefits comparable to those they receive as federal employees (treatment which may be necessary to induce them to continue working for the railroad), other State employees will feel unfairly treated. See generally, Memorandum, Employee-Related Issues Raised by the Proposed Transfer of the Alaska Railroad from the United States to the State of Alaska, September 25, 1981, prepared by Wickwire, Lewis, Goldmark & Schorr, at 16-17. It would be desirable to prevent such reverberations and dissatisfaction, if possible. Establishing an independent public

authority should largely resolve this problem, since the more independent the railroad entity is, the more it should be perceived as legally separate from the State, justifying differential treatment of railroad employees.

The federal transfer legislation may require that railroad employees be treated somewhat differently from other State employees. If so, the railroad authority will need some degree of independence and flexibility in deciding employee issues. It would therefore be advisable (1) for the State to review present State law to make sure that the railroad will have all of the necessary authority to permit it to comply with the requirements of the transition plan, and (2) that the railroad entity be freed from the restraints of State civil service requirements and that it not be required to conform to or participate in State employee benefit programs. See Section VIII(3) below. Freedom from state civil service system requirements will also make it possible for the railroad entity to adopt a performance-based personnel management system, with direct railroad responsibility for personnel decisions and with the ability to provide adequate performance incentives, as recommended in Bivens 2. The State will also need to decide whether the State itself or the railroad entity will be responsible for the obligations created by the federal transfer legislation.

VIII. CONSTITUTIONAL LIMITATIONS

A number of State constitutional provisions will have a bearing on the structure and powers of the railroad entity, but none appears to present insuperable obstacles to establishing an authority to meet the objectives discussed above.

1. Organizational Limitations - Article III: The Executive

Section 22. Section 22 of Article III of the Alaska Constitution provides that "[a]ll executive and administrative offices, departments, and agencies . . . shall be allocated by law among and within not more than twenty principal departments," with the exception of "regulatory, quasi-judicial, and temporary agencies." Unless the legislature has made recent changes, there are currently 17 principal departments, plus the University of Alaska, a constitutional corporation that is not allocated among any of the principal departments. See University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121 (Alas. 1975).

It is not altogether clear whether an entity established to operate a proprietary enterprise such as a railroad is considered an executive or administrative office, department or agency. There appears to be no State case law on this point, perhaps because most other State proprietary ventures are administered by State line agencies. If "executive and administrative" is used in Article III merely to distinguish between the three branches of government, then the railroad entity would quite clearly be within the province of the executive branch.

Assuming in the interest of prudence that the entity established to operate the railroad is an executive or administrative body, it must constitute a new executive department, be allocated among one of the existing departments, or fall within the exception for regulatory, quasi-judicial, or temporary agencies. The three exceptions seem inapplicable. The railroad authority would quite clearly not be quasi-judicial or temporary. It is debatable whether it could be classified as a "regulatory" agency. Unfortunately, there is very little helpful Alaska case law interpreting this provision. The Alaska Supreme Court has upheld, without explanation, a superior court finding that the Alaska State Mortgage Association, a public corporation established to provide housing financing, is not a regulatory, quasi-judicial, or temporary agency. Walker v. Alaska State Mortgage Association, 416 P.2d 245, 249 N.11 (Alas. 1966). The State supreme court has also indicated that the Alaska State-Operated School System (a state-wide school system comprised of schools outside of organized boroughs and cities and operated by a State-appointed board) is not a regulatory, quasi-judicial, or temporary agency, a point not disputed by either of the parties. Alaska State-Operated School System v. Mueller, 536 P.2d 99 (Alas. 1975). Unless the history of the State constitution sheds light on the proper meaning of "regulatory" as used in this section, it would be wise to assume that the railroad entity would not be a regulatory agency, since it would have direct

responsibility for operating the railroad, and not merely for setting rates, rules, etc.

If the railroad does not fall within one of the exceptions, it must be established as a State department or allocated among one of the existing departments. Virtually every statutory independent public authority in Alaska has been placed within one of the principal departments (usually the Department of Revenue or the Department of Commerce and Economic Development). The only apparent exception is the Alaska State-Operated School System, which the Alaska Supreme Court has implied, without holding, is "functionally if not nominally within the Department of Education." Id. at 104.

While such an allocation may seem a purely formal matter, the issue can become important. Other independent public corporations have been challenged as unconstitutional on the theory that they were not actually "within" one of the executive departments as required by Section 22. The Alaska Supreme Court analyzed the enabling legislation of two of these authorities and concluded that there was sufficient executive department control to bring the authorities "within" the designated executive departments. In reaching its decision, the court relied on the facts that the head of the executive department sat on the board of the public authority, that all members of the authority's board were appointed by the Governor and subject to removal at his pleasure, that the authority was required to submit an annual

report to the Governor and the Legislature, that the authority was subject to a legislative audit, and, in one case, that the corporation submitted certified copies of all its meetings to the Governor. DeArmond v. Alaska State Development Corporation, 376 P.2d 717 (Alas. 1962); Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alas. 1966). In DeArmond the court also pointed out that the corporation was only temporary and could be dissolved by its members, and that the Legislature had set qualifications for board membership with the clear intent of keeping the board free from outside control. The court concluded:

> The fact that the statute declares that the corporation shall have a legal existence independent of and separate from the state does not add weight to appellant's argument [that the corporation is unconstitutional]. This is nothing more than a declaration of the legal relationship that most corporations have with respect to their creators.

376 P.2d at 724.

The DeArmond and Walker cases tell us only what controls will be sufficient to keep a quasi-independent authority "within" a State department; they do not indicate which features are actually necessary. Most of the other Alaska public authorities are subject to similar controls, however, and it would be prudent to impose the same requirements on the railroad entity. Most of these provisions will not significantly limit the State's flexibility in establishing an entity to operate the railroad, with the possible exception of the board membership provisions.

It should be noted that the same features that saved the constitutionality of the mortgage association and the development corporation would have been the basis for finding that quasi-independent public bodies were State agencies for the purposes of other State statutes. In Alaska State-Operated School System v. Mueller, 536 P.2d 99 (Alas. 1975), the court compared the features that made the school system autonomous with those provisions, subjecting it to legislative and executive control, and concluded that for the purpose of procedural rules governing service upon and answers by State defendants, the school system was an instrumentality or agency of the State. In Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alas. 1972), the court cited DeArmond and Walker for the proposition that the Alaska State Housing Authority was an instrumentality of the State within the Department of Commerce, and held that it was therefore a "state agency" as defined by the State Administrative Procedure Act. The authority was thus required to comply with the provisions of the Administrative Procedure Act. In drafting legislation, the State should thus carefully consider all of the rules and statutes that govern or protect State "agencies," "departments," "instrumentalities," etc., and decide whether to exempt the railroad from any such regulations. See Section VI above. The cases are silent as to whether coverage as a State agency for these other purposes is constitutionally required by

Article III, Section 22, or was merely required by the enabling statutes under review.

Section 26. Section 26 of Article III provides:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. . . .

According to Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alas. 1966), this provision does not apply to nonregulatory, nonjudicial agencies that are not the heads of principal departments. Thus, Section 26 will govern railroad appointments only if the railroad is considered a regulatory agency or is established as a new principal department.

The Alaska Supreme Court has held that Section 26 and Section 25 (governing the appointment of heads of principal departments) delimit the full extent of the Legislature's constitutional power over appointments. Bradner v. Hammond, 553 P.2d 1 (Alas. 1976). Accordingly, if the railroad authority is not a regulatory agency or a principal department, there appear to be no explicit constitutional restrictions on appointments.

Section 23. Section 23 of Article III provides that where the Governor makes changes in the organization of the executive branch and "these changes require the force of law," they shall be set forth in executive orders, subject to legislative veto. It is not at all clear what types of changes "require the force

of law." The case law is scanty and unhelpful, and the Attorney General's office should pursue the issue further if significant organizational changes are to be made by the executive.

2. Financial Limitations - Article IX: Finance & Taxation

Section 4. Section 4 of Article IX of the Alaska Constitution governs exemption from state taxation. It provides:

> The real and personal property of the State or its political subdivisions shall be exempt from taxation under conditions and exceptions which may be provided by law. All, or any portion of, property used exclusively for non-profit, religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law. All valid existing exemptions shall be retained unless otherwise provided by law.

It is possible that a public authority is not a "political subdivision" automatically entitled to an exemption from state property tax. See City of Nome v. Block No. H, Lots 5, 6, & 7, 502 P.2d 124 (Alas. 1972) (Alaska State Development Corporation, a public corporation within the Department of Commerce, is not identical to the State and is not entitled to tax exemption as a "political subdivision").

The Legislature can, however, specifically grant tax-exempt status to a public corporation. The Alaska Supreme Court has upheld the power of the Legislature to grant tax exemptions beyond those specifically enumerated in Section 4. DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alas. 1962); see City of Nome, supra. This power to legislate tax-exempt status

may be subject to an implicit requirement that only property used for public purposes be treated as tax-exempt. See City of Nome, supra, citing Evangelical Covenant Church v. City of Nome, 394 P.2d 882 (Alas. 1964).

The Legislature therefore seems to have the power to grant a state tax exemption to the authority operating the railroad. Most of the other public authorities in Alaska have been specifically granted such a tax exemption in their enabling legislation. See, e.g., A.S. 44.81.170; A.S. 44.82.150; A.S. 44.83.150; A.S. 44.85.160; A.S. 44.88.140. To avoid litigation or dispute over state tax issues, it would be advisable for the enabling legislation to specifically address the railroad's tax liability for all forms of State taxation.

Section 6. Section 6 of Article IX of the Alaska Constitution provides that:

> 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.

"Public purpose" has been interpreted very broadly in Alaska, at least so far. The State supreme court has indicated that it will defer to legislative findings regarding public purpose unless "it clearly appears that such findings are arbitrary and without any reasonable basis in fact." DeArmond v. Alaska State Development Corp., 376 P.2d 717, 721 (Alas. 1962). The court has also stated that the concept of "public purpose" is "not capable of precise definition," but will change with changing times. Id.

See Wright v. City of Palmer, 468 P.2d 326 (Alas. 1970); Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alas. 1966); Suber v. Alaska State Bond Commission, 414 P.2d 546 (Alas. 1966). The court's analysis in some of these cases indicates that explicit legislative findings regarding the public purpose to be served provide a basis for a court to uphold the challenged spending. See Walker, supra.

A more difficult question is whether Section 6 even applies to the expenditures and borrowing of a public authority. Most of the cases assume, without specific analysis, that it does. DeArmond seems to imply, however, that the borrowing of an independent corporation is not the use of "public credit." The Attorney General's office may wish to pursue this point, since the cases are not illuminating. In all probability, however, railroad spending is governed by the public purpose requirement, and the State should certainly proceed on this assumption.

Section 7. Section 7 of Article IX 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 or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

The section has been broadly interpreted by the Attorney General's office in a series of opinions stating that the section applies not only to taxes and licenses, but to all sources of

revenue, including, for example, natural resources revenues. See May 2, 1975, Opp. A.G. It is not at all clear whether revenues of an independent public authority would be covered by Article IX, Section 7, or whether application of railroad revenues to railroad expenses would constitute a prohibited dedication. It seems doubtful that this constitutional provision would apply to railroad revenues, but it is an issue that is worthy of further investigation by the Attorney General's office. The railroad might also be able to fall within the "federal program" exception if the transfer legislation is drafted so as to require the use of railroad revenues for railroad expenses.

Sections 8 - 11. Section 8 of Article IX allows State debt to be incurred only for the purpose of capital improvement and only with voter approval. Section 11, however, exempts the bonds of public authorities whose debts are not State debts from the requirements of Section 8. If the railroad's debts are, by law, not the debts of the State, the railroad would not be subject to the requirements of Section 8.

3. Other Limitations.

Article XII, § 6. Article XII, Section 6 directs the Legislature to establish a merit system for State employees. It is not clear whether the constitution requires that the merit system cover employees of independent public authorities. The present merit system, A.S. 39.25.010 et seq., contains a number of exemptions (including employees of the Gas Pipeline Financing

Authority and unionized members of ferry crews); presumably railroad employees could be similarly exempted.

AMENDMENTS TO HB 12

page 1
line 17 - Delete ", the commissioner of revenue, and the commissioner of commerce and economic development." and insert in its place "and four members of the public who represent the petroleum, mining, agriculture, or tourism industries or other railroad user groups. The four public members shall be appointed by the governor and shall serve staggered four-year terms."
line 20 - before "member" insert "public".
line 21 and 24 - change "two" to "three".
line 27 - Delete entire section and insert in its place new section "Qualifications, powers, and duties of officers and directors." (See attachment A.)

page 2
line 6 - Delete entire section and insert in its place "PURPOSE OF THE AUTHORITY. The purpose of the authority is to plan, acquire, construct, operate, and maintain, or sell railroad facilities in the state, as provided for by law."

page 3
after line 13 - insert
"(15) recommend to the legislature
(A) methods of expanding and improving railroad facilities in the state, and
(B) financing proposals if the authority finds that a project cannot be financed by revenue bonds of the authority.
(16) develop a long-range state rail transportation plan to assist development of the state's resources and provide for transportation between communities."

Include new sections:
Annual audit
Limitations on issuance of bonds by the authority
Annual report
Appropriations and reports
Public records; open meetings
(See attachment B.)

Include new section:
"Section 2. (a) A task force, consisting of the directors of the Alaska Railroad Authority, representatives of the Departments of Transportation, Commerce and Economic Development, Natural Resources, Community and Regional Affairs, Law, and Labor, the Division of Planning and the Development of Policy, and the University of Alaska, shall consider all the options for transfer of the Alaska Railroad to non-federal control. The task force shall present its recommendations to the legislature on or before April 1, 1982.
(b) The Alaska Railroad Authority shall construct railroad facilities between Fairbanks and Delta and shall plan railroad facilities between Delta and the Alaska border.

(c) The authority shall initiate discussions with the principals of the Whitepass and Yukon Railroad concerning state participation in the ownership and control of that railroad.
(d) The authority shall consider additional railroad extensions within the state and shall report its findings and recommendations to the legislature.
(e) The authority may purchase rolling stock, terminals, and any associated storage and transportation facilities, including but not limited to grain and coal handling facilities, as are needed to fulfill its purposes.
(f) The authority shall initiate dedication of corridor rights-of-way over federal, state, and private lands.

Sec. 44.83.040. Officers and quorum. The director shall elect one of the directors at large as chairman and other officers they determine desirable. The powers of the authority are vested in the directors, and three directors of the authority constitute a quorum. Action may be taken and motions and resolutions adopted by the authority at a meeting by the affirmative vote of at least three directors. The directors of the authority serve without compensation, but they shall receive the same travel pay and per diem as provided by law for board members. (§ 1 ch 278 SLA 1976; am § 3 ch 156 SLA 1978)

Effect of amendment. — The 1978 amendment substituted "directors at large" for "public members" in the first sentence.

Sec. 44.83.045. Qualifications, powers, and duties of officers and directors. (a) The directors at large must be residents and qualified voters of Alaska and shall comply with the requirements of AS 39.50 (conflict of interests). The directors at large shall serve four-year terms. The four original directors at large have terms of one, two, three, and four years, respectively.

(b) A vacancy in a directorship occurring other than by expiration of a term shall be filled in the same manner as the original appointment but for the unexpired portion of the term only.

(c) The authority shall employ an executive director who may, with the approval of the authority, employ additional staff as necessary. In addition to its staff of regular employees, the authority may contract for and engage the services of legal and bond counsel, consultants, experts, and financial and technical advisors the authority considers necessary for the purpose of conducting studies, investigations, hearings, or other proceedings. The board of directors shall establish the compensation of the executive director. The executive director of the authority is subject to the provisions of AS 39.25. (§ 4 ch 156 SLA 1978)

Sec. 44.83.050. Staff.
Repealed by § 23 ch 156 SLA 1978.

Editor's note. — The repealed section derived from § 1, ch. 278, SLA 1976.

Article 2. Purpose and Powers.

Section
70. Purpose of the authority
80. Powers of the authority
90. Power contracts and the Alaska Public Utilities Commission

constructing, acquiring, financing and operating power pr facilities limited to fossil fuel, wind power, tidal, geo hydroelectric, or solar energy production and waste conservation facilities. (§ 1 ch 278 SLA 1976; am § 5 ch 156 SL

Effect of amendment. — The 1978 amendment substituted the language beginning "power production facilities" for "hydroelectric and fossil fuel projects" at the end of the sect

Sec. 44.83.080. Powers of the authority. In furtheranc corporate purposes, the authority has the following powers in to its other powers:

(1) to sue and be sued;

(2) to have a seal and alter it at pleasure;

(3) to make and alter bylaws for its organization and management;

(4) to make rules and regulations governing the exercis corporate powers;

(5) to acquire, whether by construction, purchase, gift or le to improve, equip, operate, and maintain power projects;

(6) to issue bonds to carry out any of its corporate purpo powers, including the acquisition or construction of a projec owned or leased, as lessor or lessee, by the authority, or by a person, or the acquisition of any interest in a project or any r capacity of a project, the establishment or increase of reserves to or to pay the bonds or interest on them, and the payment of all costs or expenses of the authority incident to and necessa convenient to carry out its corporate purposes and powers;

(7) to sell, lease as lessor or lessee, exchange, donate, conv encumber in any manner by mortgage or by creation of any security interest, real or personal property owned by it, or in wh has an interest, when, in the judgment of the authority, the acti in furtherance of its corporate purposes;

(8) to accept gifts, grants or loans from, and enter into contrac other transactions regarding them, with any person;

(9) to deposit or invest its funds, subject to agreements with bondholders;

(10) to enter into contracts with the United States or any person subject to the laws of the United States and subject to concurrenc the legislature, with a foreign country or its agencies, for the financ construction, acquisition, operation and maintenance of all or any of a power project, either inside or outside the state, and for the sal transmission of power from a project or any right to the capacity

(2) repair or reconstruction of a project; or

(3) design, acquisition or construction necessary to complete a project for which bonds have been issued. (§ 24 ch 83 SLA 1980)

Sec. 44.83.190. Annual audit. The authority shall have its financial records audited annually by a certified public accountant. The legislative auditor may prescribe the form and content of the financial records of the authority and shall have access to these records at any time. (§ 1 ch 278 SLA 1976)

Sec. 44.83.191. Limitations on issuance of bonds by the authority. The authority may not issue bonds except after 60 days notification of its intent to issue bonds is given to the governor and to the legislature, if the legislature is in session, or to the Legislative Budget and Audit Committee, if the legislature is not in session. (§ 24 ch 83 SLA 1980)

Sec. 44.83.195. Operation of projects. (a) When a project is operated by the authority, the authority shall enter into one or more contracts for the sale of electrical power from the project. A contract entered into under this section shall meet all requirements of AS 44.83.090.

(b) If, at the expiration of a contract entered into by the authority under (a) of this section, revenues earned by the authority under the contract exceed expenses of the authority for the project, an amount equal to the excess shall be used by the authority to reduce rates or improve services to consumers served by the power project. (§ 24 ch 83 SLA 1980)

Sec. 44.83.200. Annual report. Before March 1 of each year, the authority shall submit to the governor and the legislature a comprehensive report describing operations, income and expenditures for the preceding 12-month period. (§ 1 ch 278 SLA 1976)

Sec. 44.83.210. Appropriations and reports. (a) Notwithstanding any other provision in this chapter, the authority is subject to the provisions of the Executive Budget Act (AS 37.07).

(b) The authority shall, by the 15th day of each regular legislative session, present to the legislature a report detailing project status, original costs and projected costs, particularly highlighting any costs in excess of the original cost estimates submitted for each project when that project was originally approved by the legislature. (§ 1 ch 278 SLA 1976; am § 19 ch 156 SLA 1978)

Effect of amendment. — The 1978 amendment rewrote this section.

Sec. 44.83.220. Public records; open meetings. The provisions of AS 09.25.110 — 09.25.120 and AS 44.62.310 — 44.62.312 apply to the authority. The authority shall publish a proposed agenda of its meetings and afford the public an opportunity to be heard in accordance with AS 44.62.312. (§ 1 ch 278 SLA 1976)

authority. The authority shall meetings and afford the public an ance with AS 44.62.312. (§ 1 ch 2

Sec. 44.83.224. Long-term en Commerce and Economic Develo shall, after public hearings, prepa energy plan. The plan and its ann the commissioners of the departm government for review and to th approval, the plan shall be submit February 1 of each year. The pl include

(1) an "end-use" study examini amount of energy used and the p

(2) an energy development thermal, electrical and transporta lowest reasonable cost, includin consistent with acceptable stand consideration as practicable to all base on nuclear fuels) which are promote the efficient use of facilit conservation goals, and the consid

(3) an energy conservation com

(A) conservation goals for identifying the region for which energy to which the goals are ap

(B) specific methods and means paragraph;

(4) a component for emergen applicable during times of emerg

(5) a report on areas or subjec demonstration projects involving energy sources, and energy conse § 25 ch 83 SLA 1980)

Effect of amendment. — The 1980 amendment rewrote the section.

Editor's note. — As 44.83.180, referred

Sec. 44.83.230. Definitions. requires otherwise,

(1) "authority" means the Ala this chapter;

(2) "bonds" means bonds, notes issued under this chapter;

February 24, 1981

Representative Bette M. Cato
House of Representatives -
Transportation Committee
Pouch V
Juneau, Alaska 99811

Dear Ms. Cato:

House Bill Number 12 appears to represent an initial attempt to address the issue of changing the status of the Alaska Railroad from that of a federal agency to a state controlled entity. As such, it is an applaudable effort to recognize the need for change and to take some type of action prior to having that change imposed from outside. However, in its present form the bill does not directly address the issue that is before the state. In particular, the following defects appear to be present:

- It tries to do too much in a single piece of legislation. It establishes a body which has the authority to acquire, operate, and expand the Alaska Railroad and, through its rate setting power, becomes an economic regulation body;
- It is premature in that it forecloses on a number of options for dealing with the railroad which may be more attractive for the state in terms of long-term operational considerations;
- It does not address many of the problems of the railroad transfer which can be dealt with only on a legislative basis.

Each of these points deserves a bit more detailed comment.

In establishing an authority with the rather broad power to acquire, operate, expand, and regulate railroad operations in the state the bill combines within a single entity responsibilities which will probably be in conflict. Acquisition of the present railroad is a function which requires both a good deal of planning and a sensitivity to the long-range economic and political goals which may be held for the railroad. The body which plans and negotiates this transfer should at the same time be designing the organization which will operate the railroad to the best advantage of the state. It cannot do this if its form is already set by legislative mandate. Likewise, an organization which is required to operate the railroad in the manner of a private business (as is implied by the bonding provisions of the bill) will inevitably find itself in conflict with the political policy aspects of both its own operational and regulatory mandates and with the political control implied by the board membership. All of these areas offer serious opportunity for potential conflict both within the rail authority and with external organizations.

In an earlier review of this issue I identified at least fifteen major policy considerations which must be addressed in any change in rail status within the state. These are as follows:

- The status of rail-related lands both in relationship to ANCSA conveyances and to the railroad's operational and industrial development requirements;
- The status of public employee unions, existing labor agreements, employee benefits and retirement programs, and employee protection conditions;
- Design of an ownership/operational structure which permits the railroad to seek investment capital;
- Design of an ownership/operational structure which avoids the public/private conflicts now inherent in the marketing of the railroad's services;
- Design of an ownership/operational structure which give management the flexibility to make entrepreneurial decisions and to be accountable for the outcomes of these decisions;
- A determination of whether passenger service is necessary and, if so, whether it is required to continue its operation;
- A determination of whether the railroad represents an appropriate mechanism for implementing state development policy and, if so, under what types of financial, operational, political, and economic conditions;
- A determination of the present and historic financial status of the railroad particularly as this information relates to the prospect of attracting private capital, both equity and debt;
- The desirability or usefulness of establishing a state rail regulatory capability;
- The determination of tax status (federal, state, local) of revenues and for real and operating property after conveyance;
- An assessment of traffic potential for the railroad and how an institutional realignment might affect various traffic possibilities;
- A determination of responsibility and operational mechanisms for subsidies should operating revenues not be sufficient to cover operation costs and capital renewal;

The bill in its present form has selected a means for organizing any future rail activity in the state without investigating alternative operational forms which may be much more attractive options. There are at least six major alternative ways in which the Alaska Railroad (and any extensions or other acquisitions) may be organized in the future. None of these is clearly superior to any of the others at this time. They are as follows:

- Maintain the status quo. That is, continue to function as a federal agency.
- Reorganize as a federal corporation. In form this might be somewhat similar to Canadian National Railway.
- Reorganize as a state agency. This would give the railroad somewhat the same status as the Marine Highway System.
- Reorganize as a state corporation. Such an operation might be similar to either the British Columbia Railway, the Ontario Northland Railway, or to any number of small operations developed in the eastern and mid-western U.S. during the past five years.
- Reorganize with a combination of state ownership and private operation. This would give the state ownership of some combination of the railroad's real and operating assets while a private entrepreneur would either enter into a long-term lease agreement or contract to operate the property in a manner similar to the arrangement between the Southern Railway and the city of Cincinnati for operation of several hundred miles of line owned by that city.
- Sell the railroad to a private firm who would then function in a manner similar to comparable operations elsewhere in the country.

Clearly, these options can differ substantially in the range and size of their impacts upon the state. They also would provide considerable variation in the amount of state investment required although none of them would entirely eliminate state involvement. Finally, the organizational form which evolves will determine almost entirely the degree to which rail decision making in the state will be political rather than commercial. The important point is that it is not yet necessary or in the state's best interest to foreclose on any of these options.

- An analysis of the different possible impacts of various institutional arrangements on potential rail extensions;
- An analysis of the impact on rail competitors of various insitutional arrangements for the railroad; and
- Determination of which federal funding programs would or would not be available under different ownership/operational structures.

Many of these are not addressed in the present bill and given the lack of information on most of the areas, it would be impossible to do so at this time.

In addition to the areas mentioned above it is important to remember that any future rail activity in the state will be largely shaped by the federal legislation which transfers control of the Alaska Railroad to the state. Given this reality, I would suggest that the most important direction that could be taken at this point in time would be to establish an organization which can negotiate transference of the railroad, can participate in the shaping of the federal legislation, can investigate the state's options in this matter, and can assist the legislature in preparing suitable legislation to address the organizational form of future state participation as well as other institutional and policy matters. I would suggest that this organization be set apart from present state agencies due to the fact that its concerns would necessarily span many of their individual interests. For example: the Departments of Transportation, Commerce and Economic Development, Natural Resources, Community and Regional Affairs, Attorney General and Labor all have concerns within their jurisdictions which would also be involved in rail transfer questions. An independent group would be better able to coordinate these concerns while still utilizing existing programs. The most important of these existing programs is the rail planning work presently being done within the Department of Transportation.

Most importantly, by taking this approach, the state would preserve all of its options. While it is clearly time to take action on this matter, it is not yet appropriate to commit the state to a particular and final course of action. House Bill 12 makes this commitment at a time when there is insufficient information to determine whether it is in the correct direction and at a time when the federal consideration is unclear. In view of this I would urge the members of the legislature to adopt a course of action which permits the state to play a major role in shaping future rail matters while postponing the details of rail operation, expansion, and regulation until an appropriate time and until the necessary information has been assembled.

The transfer of the Alaska Railroad to state control represents a major change in the transport system and its institutions. Undoubtedly the most important change since statehood placed the highway and airport system within state jurisdiction. It is important that this change proceed in an orderly manner with clear understanding of the opportunities and liabilities of various courses of action. I hope these comments have helped to further this understanding.

Sincerely,

John T. Gray
Assistant Professor of
Transportation

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CS for House Bill 12 (2d Finance)
Title An Act Relating to the Alaska Railroad
Requested by Rep. Rogers Date 5-28-81

II. FISCAL DETAIL
Agency Affected DOTPF
Program Category Affected Transportation and Public Facilities
BRU, Program, or Subprogram(s) Affected Transportation
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL		SEE ATTACHED				
400	COMMODITIES						
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)	SEE ATTACHED					

POSITIONS

FULL TIME						
PART TIME	SEE ATTACHED					
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The attached fiscal note for HB 519 is applicable in terms of cost to the present Committee Substitute for HB 12, although there do exist procedural difference between the two measures.

IV. DATE 5-28-81 PREPARED BY Warren Sparks
AGENCY DOTPF
PHONE 465-2470

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 519
Title Establishing the Alaska Railroad Negotiating Commission
Requested by (Rep. Fanning) Date 4/24/81

II. FISCAL DETAIL
Agency Affected Department of Transportation and Public Facilities
Program Category Affected Commissioner's Office
BRU, Program, or Subprogram(s) Affected Transportation
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL		25.3	15.0			
300 CONTRACTUAL		159.0	79.5			
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		184.3	94.5			

FUNDING (Thousands of Dollars)

GENERAL FUND		184.3	94.5			
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		-0-	-0-			
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

ASSUMPTIONS/EXPENDITURE BREAKDOWNS:

A) Please note that this Fiscal Note presents the total anticipated costs of HB 519 rather than just the impact on DOT/PF.

B) This estimate does not include the cost of support assistance from existing staff.

C) All cost estimates are in FY 81 dollars.

D) Expenditures will not commence prior to FY 82 and cover an eighteen month time span of activity. (The Act carries an immediate effective date.)

IV. DATE May 4, 1981 PREPARED BY Warren Sparks
AGENCY DOT/PF - S.E. Planning & Programming
PHONE 465-2470

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/80

E) 200 Travel: FY 82

Bimonthly meeting of the commission with an attendance of five members per meeting:

Round-trip air fare @ $300 x 5 = $1,500
Two days per diem @ $67 per day x 5 = $670
Incidental meeting expenses = $50
Total per meeting = $2,220 x 6 = $13,320

Additional travel requirements of commission (including D.C. trips for negotiations):

10 trips per year @ $1,200 air fare and per diem = $12,000

FY 82 TOTAL = $25,320

FY 83 travel budget reflects six months of activity, with adjustments for higher air fares: $15,000

F) 300 Contractual: FY 82

Legal and investment counsel: $150,000
Office Space Rental: 500 net square feet @ $18 annual nsf cost = $9,000

TOTAL: $159,000

FY 83

Legal and investment counsel: $75,000
Office Space Rental: Six months of 500 net square feet @ $18 annual nsf cost: $4,500

TOTAL: $79,500

(Note: While HB 519 does not specifically provide authority for this type of professional assistance, these cost estimates have been included on the assumption that this assistance will be necessary for the commission to competently perform its mission.)