HB
139

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 139

Title: An Act Relating to the Administration of Certain Grants

Sponsor: Governor

Requestor:

Date of Request:

FISCAL DETAIL

Agency Affected: Administration

Program Category Affected: General Government

BRU, Program or Subprogram(s) Affected: General Services & Supply

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL	0	0	0	0	0	0
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0
POSITIONS:	0	0	0	0	0	0
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) This Bill recognizes that a grant is more often akin to a unilateral contract (in that there is no specific performance on the State's part other then the provision of funding) than it is to a bilateral contract (where there is an exchange of promises with specific performance on the part of both parties). This bill further recognizes that the difference warrants a separate set of procedures under which the grant will be expended.

Prepared By: Robert J. Link Phone: 465-2250

Division: General Services & Supply Date: December 27, 1984

Approved by Commissioner: Lisa Rudd Date: 1/11/85

Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Alaska State Legislature

House of Representatives

Committee on
Community & Regional Affairs

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4833

LETTER OF INTENT
for
CSHB 139 (CR&A)

The House Committee on Community and Regional Affairs has considered House Bill 139 at length.

During committee discussion the following areas were considered appropriate for the focus of regulation.

1. Establishment of adequate accounting procedures to ensure proper documentation of financial activity;

2. Provision of an annual status report on ongoing projects;

3. Project completion within 7 years, with funds lapsing after that time subject to reappropriation;

4. Compliance with local and state laws required;

5. Prohibition of discrimination in hiring by contractors including all constitutional protections plus prohibition of discrimination based upon political affiliation or opinions;

6. Funds to be deposited in a federally insured interest bearing account or federally insured instrument;

7. Audit requirements; and

8. Encouragement of local hire.

_____
Peter Goll
Chairman

Alaska MUNICIPAL League

TELEPHONES
(907) 586-1325
(907) 586-6526

105 MUNICIPAL WAY, SUITE 301
JUNEAU, ALASKA 99801

TO: Representative Peter Goll, Chair
Members of the House Community & Regional Affairs Committee

FROM: Scott A. Burgess
Executive Director

DATE: April 8, 1985

SUBJECT: HB 139 - Administration of Certain Grants

As you know, the Alaska Municipal League is concerned about HB 139 and the "carte blanche" authority that would be given to the Department of Administration (DOA) to adopt regulations for AS 37.05.315-317 grants under AS 37.05.318. The concern is that excessive, complex and burdensome regulations may be developed that would tie the hands of municipal officials, preventing efficient administration of grant funds and projects, and result in further project delay and increased project cost. The concern was increased last week when the Committee agreed in concept to several proposed amendments to add specific requirements. Many of the suggested amendments do not address the Administration's stated intent of the bill (Governor's Letter of Transmittal, January 28, 1985) of insuring that the projects are completed "expeditiously".

You asked me for comment at the meeting the suggestions were made and I was unprepared to comment. I will comment below on some of the concepts and hope that other municipal officials, more knowledgeable of specific day-to-day problems faced by administering "315" or "316" grant funds and projects will have the opportunity to do so as well.

1. Federally-insured, interest-bearing account. I do not know if this concern was raised because of the topical Ohio situation but I am sure municipalities do not have to be told to invest the money to gain maximum interest with the least risk. The language implies a hypothetical $500,000 advance payment on a $2.5 million grant invested in five (5) pass-book savings bank accounts each insured to the maximum of $100,000 and each gaining 5½% interest. This is unreasonable and unnecessary, and certainly does not address expeditious completion of a project.

In talking to a couple of individuals involved with municipal grants administration, they indicate it is good money management to have a centralized treasury where the funds are co-mingled for investment and the interest is allocated by overall increase to each project where necessary. For funds in excess of the institution's ability to insure (e.g.

$100,000), municipalities may require the institution to pledge collateral for the additional amount with another institution.

2. Interest earned. How the interest money earned is used is a policy question. Municipalities would probably agree more with the position stated by Representative Marrou that as long as the original grant amount is spent to complete the project the Legislature should not remove the incentive for a local government to invest and manage the funds well. However, the maximum restriction should include the option to apply the interest earned toward the project.

3. AICPA procedures. The American Institute of Certified Public Accountants does not set accounting procedures but relies on the National Council on Government Accounting and others. The language, if necessary at all beyond that the funds be auditable, should be, "Establish and use recognized accounting procedures." This language may even conflict with Title 29 that requires only that a municipal treasurer keep an itemized account of money received and disbursed. (AS 29.33.390)

4. Require audits as an expense of the grant. DOA can require an audit currently under statute. If the municipality is required to audit the grant, then it should be an allowable expense <u>over and above</u> the amount necessary to do the project.

5. Anti-discrimination language. A concern here is for smaller communities where there is only <u>one</u> contractor and it is viewed as discriminatory to hire or not hire that individual.

6. Status report - I would concur in the clarification of "brief" discussed by the Committee to minimize any additional or unreasonable burden of such a requirement.

7. 20% limitation. To include architectural and engineering services with contract administration seems to be mixing apples and oranges. What if the project is for design? No such limit should be included, or a limit should not be included without additional inquiry as to what is customary and reasonable.

Again, while the League does not oppose the concept of insuring that a sound project for which grant funds are appropriated is completed expeditiously as possible, the League is opposed to excessive and burdensome regulations. By the same token, the League does support the adoption of policies for pass-through funds to non-profit corporations that do not cause any present or future liabilities to municipalities.

It would appear that statutory safeguards exist in AS 37.05.315 and the problem may be an internal and financial one to the Department of Administration. If legislation is necessary to implement the legislative

intent contained in AS 37.05.315, or to require necessary protection to municipalities for pass-through grants, then I would suggest amending the original bill by:

1. changing "shall" to "may" on line 6; and,

2. adding a letter of intent to require that the subsequent regulations be adopted only after reasonable attempts and opportunities are made by the Department of Administration to get input from municipal officials including managers, finance officers, attorneys and clerks. The purpose of the intent statement is not to give municipal officials veto power but, instead, to encourage the Department and municipalities to share concerns and information to avoid unnecessary regulation.

Thank you.

ANCHORAGE
SCHOOL DISTRICT
4600 DeBarr Avenue
P.O. Box 6-614
Anchorage, Alaska 99502-0614
[907] 333-9561

March 29, 1985

The Honorable Max Gruenberg, Jr.
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Gruenberg:

The Anchorage School District has reviewed House Bill No. 139 which is a bill entitled: "An Act Relating to the Administration of Certain Grants Passed by the Legislature; and Providing for an Effective Date".

Our School District is in support of this legislation which was introduced at the request of the Governor. We believe that regulations should be adopted to include provisions that establish procedures for safekeeping and investment of grant money, management and disposition of property acquired by grant money, and that a post audit of grant transactions should be undertaken upon project completion. We would also request for your consideration, that the cost of post audits be an allowable cost under the terms and conditions of any grant award.

The above-mentioned provisions relating to grants under AS 37.05 are sound financial management policies and should be required of agencies that receive state funding.

Thank you for reviewing the Anchorage School District's position with regards to this proposed legislation.

Sincerely,

E. E. Davis

E. E. (Gene) Davis, Ed.D.
SUPERINTENDENT

cl

cc L. T. Freeman, Assistant Superintendent
for Business Management
B. Miles, School District Lobbyist

Sec. 37.05.250. Delegation of duties. The department may delegate the duties imposed by this chapter to an employee of the state normally stationed in a town or location distant from the state capital. Agents so designated shall perform the duties as the department requires and in accordance with regulations established by the department. (§ 5 art IV ch 82 SLA 1955)

Sec. 37.05.260. Preference for Alaska products. This chapter does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding preference for Alaska forest products, or AS 36.20.010 regarding preference to producers or dealers in Alaska except as provided in AS 37.05.230(1). (§ 6 art IV ch 82 SLA 1955)

Sec. 37.05.270. Purchases through General Services Administration. This chapter does not prevent the department from purchasing through the General Services Administration as provided by law. (§ 7 art IV ch 82 SLA 1955; added by § 11 ch 186 SLA 1957)

Sec. 37.05.280. Leases. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency of the state, wherever it is necessary and feasible, subject to compliance with the requirements of AS 37.05.220 — 37.05.280. No lease or contract for a lease may provide for a period of occupancy greater than 40 years. An agency of the state requiring office, warehouse or other space shall lease the space through the department. No contract or lease executed after January 1, 1966, which provides for a payment or payments by the state in excess of $12,000 annually is valid unless the use of the space to be provided for by such contract or lease has been expressly approved by the legislature by concurrent resolution. (§ 8 art IV ch 82 SLA 1955; added by § 1 ch 81 SLA 1959; am § 1 ch 94 SLA 1961; am § 16 ch 99 SLA 1965)

Article 4. General Provisions.

Sec. 37.05.290. Purpose. The purpose of this chapter is to provide uniform financial procedures for all state agencies with respect to accounting, purchasing, post auditing, and related financial procedures; and to revise financial procedures to obtain economy, efficiency, and integrity in handling public money. (§ 2 art I ch 32 SLA 1955; am § 2 ch 188 SLA 1970)

Sec. 37.05.300. Interpretation of chapter. This chapter shall be construed as supplemental to all other state laws not in conflict with it. If a section or part of a section of this chapter is in conflict with federal requirements for a program for which federal grant-in-aid funds are available, the section or part to the extent of the conflict is inoperative. (§ 1 art VIII ch 82 SLA 1955; am § 18 ch 186 SLA 1957)

Editor's notes. — For applicability of the chapter to the University of Alaska, see notes following chapter heading.

Sec. 37.05.305. Applicability to University of Alaska. The commissioner of administration may delegate the performance of the functions under this chapter as they relate to the university to the Board of Regents of the University of Alaska and set out the criteria and guidelines which shall be followed. The commissioner shall direct necessary stipulations and exercise monitoring responsibility for conformance through the Board of Regents of the University of Alaska. (§ 5 ch 46 SLA 1977)

Legislative history reports. — For letter of intent on ch. 46, SLA 1977 (HCSSB 261), see 1977 House Journal, p. 1019.

Sec. 37.05.310. Fiscal year. The fiscal year of the state begins on July 1 of each year and ends at midnight on the following June 30. The accounts of the Department of Administration, the Department of Revenue, and all other state officers whose accounts are in any way connected with the treasury shall be kept, and all duties performed with reference to the beginning and ending of the fiscal year. (§ 12-4-1 ACLA 1949; am § 2 art VI ch 82 SLA 1955)

Revisor's notes. — Section 12-4-1 ACLA 1949 was repealed and re-enacted by § 30, ch. 133, SLA 1951. Section 1, ch. 24, SLA 1953 repealed ch. 133, SLA 1951 and § 2, ch. 24, SLA 1953 re-enacted § 12-4-1 ACLA 1949 as it appeared in ACLA 1949.

Sec. 37.05.315. Grants to municipalities. (a) When an amount is appropriated or allocated as a grant to a municipality, the Department of Administration shall promptly notify the municipality of the availability of the grant. When the Department of Administration receives an agreement executed by the municipality which provides that the municipality (1) will spend the grant for the purposes specified in the appropriation or allocation; (2) will allow, on request, an audit by the state of the uses made of the grant; and (3) assures that, to the extent consistent with the purpose of the appropriation or allocation, the facilities and services provided with the grant will be available for the use of the general public, the Department of Administration shall pay the grant directly to the municipality. The agreement executed by a

municipality under this section shall be on a form furnished by the Department of Administration and shall be executed within 60 days after the effective date of the appropriation or allocation.

(b) An appropriation or allocation for a grant to a municipality for construction of a public facility lapses if substantial, ongoing work on the project has not begun within five years after the effective date of the appropriation or allocation.

(c) In accepting a grant of money for construction of a public facility, a municipality covenants with the state that it will operate and maintain the facility for the practical life of the facility and that the municipality will not look to the state to operate or maintain the facility or pay for its operation or maintenance. This requirement does not apply to a grant of money for repair or improvement of an existing facility operated or maintained by the state at the time the grant is accepted if the repair or improvement for which the grant is made will not substantially increase the operating or maintenance costs to the state.

(d) Not less than 20 percent of a grant shall be paid to a municipality within 10 days of the effective date of the agreement under (a) of this section. The remainder of the grant shall be paid either in monthly installments equal to the amount of grant money the municipality expended in the previous month or in a lump sum as determined by the Department of Administration. (§ 1 ch 156 SLA 1980; am § 1 ch 4 SLA 1982)

Effect of amendments. — The 1982 amendment in subsection (a), substituted "amount is appropriated or allocated" for "appropriation is made" in the first sentence, inserted "or allocation" in items (1) and (3) in the second sentence, and added "and shall be executed within 60 days after the effective date of the appropriation or allocation" to the end of the third sentence; redesignated the former fourth and fifth sentences of subsection (a) as subsection (d); inserted "or allocation" in two places in subsection (b); substituted "a" for "each" preceding "municipality covenants" and "the practical life of the facility and that the municipality" for "its practical life and that it" in subsection (c); added the second sentence of subsection (c); deleted the provisions of former subsections (d), (f), and (g), which may now be found in AS 37.05.316, 37.05.317, and 37.05.318, respectively; and in present subsection (d), added "under (a) of this section" to the end of the first sentence. The substance of the provisions of former subsection (e) may now be found at the end of the third sentence of subsection (c).

Sec. 37.05.316. Grants to named recipients. When an amount is appropriated or allocated to a department as a grant for a named recipient which is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act, or both, for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services, or both, in the same area. The department shall contract with

the named recipient unless the Office of the Governor, with due regard for any local expertise or experience among those making proposals, determines that an award of the contract to a different party would better serve the public interest. If the contract is awarded to another party than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A contract shall be executed within 60 days after the effective date of the appropriation or allocation. The purchase of the goods or services, or both, shall be in accordance with AS 37.05.230(1)(C). (§ 2 ch 4 SLA 1982)

Sec. 37.05.317. Grants to unincorporated communities. When an amount is appropriated or allocated as a grant under this section to an unincorporated community, it shall be disbursed as follows:

(1) Within 45 days after the effective date of the appropriation or allocation, the Department of Community and Regional Affairs shall notify the governing body of the unincorporated community, if any, that a grant is available.

(2) The Department of Community and Regional Affairs shall determine if there is a qualified incorporated entity in the community area that will agree to receive the grant and administer it, subject to terms generally applicable to private grantees. If there is more than one such entity, the Department of Community and Regional Affairs shall select the most qualified and the grant shall be awarded to that incorporated entity for the purposes specified in the appropriation act. However, the Department of Community and Regional Affairs shall give preference to a nonprofit corporation organized by a community for receipt of the grant.

(3) If there is no incorporated entity qualified to receive the grant, the Department of Community and Regional Affairs shall administer the program as specified in the appropriation act directly or through agents or contractors with whom it may contract in the community area. (§ 2 ch 4 SLA 1982)

Sec. 37.05.318. Further regulations prohibited. Notwithstanding the Administrative Procedure Act (AS 44.62), the Fiscal Procedures Act (AS 37.05), and the Executive Budget Act (AS 37.07), a state agency may not adopt regulations or impose additional requirements or procedures to implement, interpret, make specific, or otherwise carry out the provisions of AS 37.05.315 — 37.05.317 unless required by the federal government for participation in federal programs. (§ 2 ch 4 SLA 1982)

Sec. 37.05.325. Definitions for AS 37.05.315 — 37.05.317. In AS 37.05.315 — 37.05.317, "allocation" and "appropriation" have the meanings given in AS 37.07.120(2) and (3). (§ 2 ch 4 SLA 1982)

Revisor's notes. — Formerly AS 37.05.319. Renumbered in 1983.

Sec. 37.05.400. Definitions for chapter. In this chapter

(1) "fiscal year," "budget year," "accounting year," or similar term means a year beginning on July 1 of one calendar year and ending on June 30 of the following calendar year;

(2) "handicapped individual" means an individual under a physical or mental disability which constitutes a substantial handicap to employment;

(3) "sheltered workshop" means a place where manufacture or handiwork is carried on, and which is operated for the primary purpose of providing remunerative employment to handicapped individuals.

(4) "state agency," "agency," "department," or similar term means a department, office, institution, board, commission, bureau, division, or other administrative unit forming the state government, and includes the Alaska Pioneers' Home and the University of Alaska. (§ 3 art I ch 82 SLA 1955; am § 1 ch 186 SLA 1957; am § 2 ch 92 SLA 1975; am § 6 ch 46 SLA 1977)

Revisor's notes. — Formerly AS 37.05.320. Renumbered in 1983 and reorganized to alphabetize the defined terms.

NOTES TO DECISIONS

Cited in Carter v. Alaska Pub. Employees Ass'n, Sup. Ct. Op. No. 2657 (File No. 6586), P.2d (1983).

Sec. 37.05.410. Short title. This chapter may be cited as the Fiscal Procedures Act. (§ 1 art I ch 82 SLA 1955)

Revisor's notes. — Formerly AS 37.05.330. Renumbered in 1983.

Chapter 07. Executive Budget Act.

Bannister
4/9/85

Original sponsor: Rules/Governor

IN THE HOUSE

BY THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 139 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the administration of certain grants passed by the legislature; and providing for an effective date."

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

* Section 1. AS 37.05.316 is amended to read:

Sec. 37.05.316. GRANTS TO NAMED RECIPIENTS. When an amount is appropriated or allocated to a department as a grant for a named recipient that [WHICH] is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act [, OR BOTH,] for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services [, OR BOTH,] in the same area. The department shall award the grant to [CONTRACT WITH] the named recipient unless the Office of the Governor, with due regard for the [ANY] local expertise or experience of [AMONG] those making proposals, determines that an award [OF THE CONTRACT] to a different party would better serve the public interest. If the grant [CONTRACT] is awarded to a [ANOTHER] party other than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A grant agreement must [CONTRACT SHALL]

be executed within 60 days after the effective date of the appropriation or allocation. [THE PURCHASE OF THE GOODS OR SERVICES, OR BOTH, SHALL BE IN ACCORDANCE WITH AS 37.05.230(1)(B).]

* Sec. 2. AS 37.05.318 is repealed and reenacted to read:

Sec. 37.05.318. REGULATIONS. The commissioner of administration shall adopt regulations to implement the provisions of AS 37.05.315 - 37.05.316. The commissioner of community and regional affairs shall adopt regulations to implement the provisions of AS 37.05.317. These regulations must include provisions that establish procedures for the safekeeping and investment of grant money, the management and disposition of property acquired by grant money, and the post audit of grant transactions. An audit required by these regulations is a cost of the grant. The regulations adopted under this section may not interfere with the implementation of the grant, but shall be designed to prevent the mismanagement of the grant and the misuse of grant funds.

* Sec. 3. This Act takes effect July 1, 1985.

Fairbanks
North
Star
Borough

Mayor: B.B. Allen

April 3, 1985

Representative Niilo Koponen
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Representative Koponen:

Attached is a Position Paper on House Bill No. 139, "An Act relating to the administration of certain grants passed by the Legislature; and providing for an effective date." Section 2 of this act has the potential to increase the Borough's administrative cost thereby reducing program dollars. As stated in the Position Paper, we have already established procedures which are consistant with statutes, Borough ordinances, and accepted accounting principles. We believe that this is the most effective method to regulate these grants in terms of both cost and programs.

While we realize the need to regulate grants, we hope the Legislature realizes that many communities such as Anchorage, Mat-Su and ourselves have effective local regulations already in place. These regulations provide all of the safeguards for grant funds that are provided to every other public dollar which we are entrusted to handle. We would, therefore, urge you to give consideration to our efforts in your quest to protect against abuses in the use of grant funds.

Sincerely,

Bill

B. B. Allen,
Borough Mayor

BBA/rek
Enclosures

P.O. Box 1267 Fairbanks, Alaska 99707 (907) 452-4761

POSITION PAPER - HOUSE BILL NO. 139

Section 1 of this bill does not apply to the Fairbanks North Star Borough.

Section 2 of House Bill No. 139 would amend A.S.37.05.318 to require the commissioner of administration to adopt regulations pertaining to grants awarded by the Legislature through the Department of Administration. This requirement is a total reversal of the existing A.S.37.05.318 which prohibits the commissioner from regulating these grants. While we can support the fact that grant monies need to be controlled, we do have some concerns.

Responsible local governments in various parts of the state have long recognized that the grant funds need to have rules and safeguards. As a result, we have created our own administrative regulations to ensure that grant funds - like all public dollars - are handled in accordance with existing statutes, regulations and accepted principles of government accounting. During the time that these local safeguards have been in place, they have served to ensure that grant funds receive the same scrutiny as other Borough funds. Therefore, where those safeguards are in effect and have proven to work, we feel that the local standard should prevail over any regulations developed by the commissioner of administration.

If the alternative is to be pursued, Section 2 of House Bill No. 139 should be changed by adding a sentence to the end as follows:

> "When procedures established by the municipality provide for the aforementioned safeguards and are consistant with state statute, the provisions of the municipal codes shall prevail over regulations promulgated under the authority of this section.

If this solution is not acceptable, then we would like to see some language built into the statute that would protect political subdivisions from wasteful redundancy and artificial requirements that serve only administrative convenience at the expense of the various programs. To this end, we would propose that the audit of grant funds be made as a part of the annual external audit of municipal funds required by A.S.29.48.220. Under this solution, all grant funds would be audited at the end of each fiscal year. This is currently done in the Fairbanks North Star Borough. There are multiple benefits to this approach. First, it would provide a mechanism to systematically have grants examined each fiscal year. Second, it would prevent the loss of staff time occasioned by multiple audits per year. Third, it would prevent an increase in costs to the state by not requiring the hiring of auditors by the Department of Administration.

We would further propose that the right of municipalities to maintain a central treasury be protected. The costs of establishing separate accounts and tracking the investments for each grant fund would greatly outweigh any benefit to be derived. Further, the position that municipalities are gaining great amounts of interest from grant dollars at the expense of projects just is not true in the Fairbanks North Star Borough. The majority of our grants provide only 20% in front money. This means that during our short construction season, we are often using the Borough's General Fund to pay contractors prior to obtaining reimbursement.

Therefore, any system requiring interest tracing would have to be a by day system calculating not only how much interest a grant was earning but also how much grant interest is due to the Borough for revenues lost between the time we spend Borough money and the state reimburses it. A system of this type would be extremely expensive and would erode program dollars by driving up indirect costs.

If this alternative is chosen, then Section 2 of House Bill No. 139 should be changed by adding two sentences at the end as follows:

> "An audit conducted in accordance with A.S.29.48.220 may be used to satisfy any post audit requirement imposed by regulations of the commissioner. Nothing prescribed by this section or regulations promulgated hereunder may be construed to interfere with the right of a municipality to establish and maintain a central treasury."

COMMITTEE REPORT

HOUSE

4/11

(7)

FURTHER: FINANCE

1/28/85

Date: _____

The Committee on COMMUNITY & REGIONAL AFFAIRS has had HB 139

"An Act relating to the administration of certain grants passed by the legislature; and providing for an effective date."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[✓] replace with CS for Hr. 139 (C+RA) [✓] same title [ ] new title

and recommends _____

[✓] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Note Attached

[✓] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

Peter Joe

MEMBERS HAVING
OTHER RECOMMENDATIONS:

F. Kerkvliet Do Not Pass

Bill Kernan no rec.

Peter Joe

CHAIRMAN

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

March 19, 1985

MEMORANDUM

TO: Representative Peter Goll

ATTN: Bob Berry

FROM: Jonathan Sherwood
Legislative Analyst

RE: Oversight of State Grants in Other States
Research Request 85-245

You requested that we provide information on the statutory or regulatory requirements of other states regarding the oversight of state grants to local governments and nonprofit agencies. We were also requested to contact the Division of Management in the Alaska Office of Management and Budget to determine what ideas for oversight of Alaska grants have been developed.

We contacted five states--California, Louisiana, Minnesota, New Mexico, and Texas--to determine the methods of grant oversight used in other states. In addition, we discussed procedures in other states with Linda Delaney of the Division of Management, who has also researched grant oversight in other states. Before presenting our findings regarding individual states; it is useful to discuss some of our general findings.

None of the states we contacted reported any major grant programs similar to AS 37.05.315-.317, in which the legislature designates the recipient of the grant. Grant programs in other states generally involve an appropriation to a program administered by an executive branch agency, which then designates the grant recipients and establishes the grant compliance and oversight requirements specific to that program.

Many state grant programs involve the appropriation of funds received from the federal government. These federal pass-through programs are subject to federal grant oversight requirements. One of the most significant federal provisions is the requirement mandating the single audit for state, local, and tribal governments receiving federal assistance. This audit requirement, established by Attachment P of OMB Circular A-102, unifies the auditing done on governments receiving funds from various federal programs, thus reducing duplication of audit

efforts by the federal government. Attachment P also outlines the recipient's responsibility for monitoring the expenditures of subrecipients (agencies or local governments receiving pass-through funds). We have included Attachment P with this memorandum along with an article explaining Attachment P audit procedures.

An Attachment P audit considers not only whether the recipient's financial statements are in order, but also whether laws and regulations pertaining to the expenditure of federal funds have been complied with, and whether internal procedures have been established to meet the objectives of the grant program. Although the Attachment P audit requirement does not apply to state-funded grant programs, it appears that some states have altered their audit requirements to coordinate with the Attachment P process.

Oversight in Other States

California. According to Kurt Sjoberg, Chief Deputy Auditor General with the California Joint Legislative Audit Committee, state grants in California are administered by many different agencies, but all grants relating to a particular function are administered by the same state agency. Mr. Sjoberg stated that the California Legislature generally does not identify grant recipients in the appropriation process; instead, it funds programs which have a specified class of recipient agencies.

In some instances, the legislation authorizing a grant program specifies the grant compliance procedures; in others, the executive branch agency responsible for administering the program develops the compliance procedures. Mr. Sjoberg stated that for most grant programs, recipients are required to submit monthly cost reports, obtain an audit by an independent auditor, and make themselves available to state audit.

The California legislature can direct the Auditor General's office to review any state expenditure, including grants. In addition, other audit functions exist within the executive branch of government. However, Mr. Sjoberg noted that while provisions for grant compliance are in place, the state may not always have sufficient staff available to ensure that compliance is obtained.

Minnesota. According to Elaine Hansen, with the Minnesota State Auditor's Office, Minnesota appropriates relatively more grant moneys to local governments than do most states. Most local units of government have annual audits; it is the responsibility of the state auditor to audit local units of government (the Legislative Audit Committee audits executive branch expenditures). Minnesota has tied its audit program

into the federally mandated single audit program; local units of government have a state audit in conjunction with the federal Attachment P audit. In practice, the grant recipient has one total audit, which accounts for all funds received. The audit considers both the financial statements and the program compliance of the grant recipient.

The State of Minnesota has developed a compliance manual for local government units. This manual outlines proper procedures or standards for functions such as minutes of meetings, bidding, subcontracting, claims payment, and indebtedness. In addition, the state has developed charts of accounts for counties, cities, and school districts. In theory, use of these charts will result in local government units keeping their accounts in the same format, although Ms. Hansen acknowledges that this result is not always achieved.

Grants to nonprofit agencies are distributed through programs administered by executive branch agencies. Although different programs may be administered by different agencies, all grant funds are paid out by the Department of Finance, which requires all state agencies to include audit requirements in every grant agreement.

According to Ms. Hansen, if a lack of compliance is found during any audit, the state will stop giving money to the grant recipient. It will also attempt to collect any misspent monies. While she acknowledged that collection was sometimes difficult in the case of nonprofits and small cities without substantial revenue sources, Ms. Hansen noted that the state is particularly aggressive in collecting from county governments.

Louisiana. In Louisiana, the Legislative Auditor is responsible for auditing all state and local governmental units, except for municipalities, which are required to arrange for an audit by an independent accounting firm through the Legislative Auditor's office. Local governments are audited according to Attachment P procedures.

According to Charles Collier, with the Louisiana Legislative Auditor's Office, no overall grant compliance measures have been established. Each state department develops its own guidelines for the programs it administers. Virtually all grant programs are either federally funded, and thus must comply with Attachment P audit procedures, or are distributed by formula, such as the school foundation formula.

All state expenditures are audited by the Louisiana Legislative Auditor at some level. The State of Louisiana as a whole is audited--special reports are compiled on each department--and audits are performed on local governments. school districts, and independent taxing authorities. However, no provisions are made for a state audit of grant recipients

that do not fall into one of these categories, such as nonprofits receiving state funds. In such cases, the expenditure is audited at the state government level.

New Mexico. According to Jim Macias, with the State Auditor's Office in New Mexico, the State of New Mexico is constitutionally prohibited from giving grants to nonprofit agencies. However, the state does give grants to local governments. Each municipality is audited annually; grant funds are included in this audit. Each year, the State Auditor's Office audits a small percentage of the local governments itself; other municipalities are audited by independent public accountants.

The state agencies administering the grant programs are responsible for oversight provisions. According to Jeanne Zoltai, with the New Mexico Department of Finance and Administration, different programs have different oversight requirements. However, Ms. Zoltai noted that there is ongoing monitoring of grant expenditures. Grant recipients are required to submit regular statements showing expenditures billed to the program.

Texas. Jerry Nieff, with the Texas Legislative Audit Committee, stated that Texas has very few state grants. Agencies that do receive grants from the state are either required to have an "Attachment P" audit or are audited by the state agency responsible for administering the grant program. The individual state agencies are responsible for incorporating performance measures in the grant agreements. Where audits turn up expenditures not in compliance with the grant, the recipient agency usually receives a cut in funding for the following fiscal year.

Grant Oversight in Alaska

According to Linda Delaney, with the Alaska Office of Management and Budget's Division of Management, the State of Alaska plans to implement a single audit process beginning in FY 86. The plan has recently been submitted to the Governor's Office for final approval.

Under the proposed guidelines for the program, every grant recipient that receives more than $300,000 in State funds in a fiscal year will automatically recieve a single audit; recipients of $100,000 per year will automatically be audited biennially. Recipients of smaller amounts will still be subject to audits at the discretion of the State.

The State single audit process as proposed is very similar to the federal Attachment P audit process and is designed to be merged with the federal audit requirement so that agencies receiving both State and federal funds will be able to have one audit satisfy both State and federal audit requirements. The single audits will not only review

financial statements, but also consider compliance with fiscal requirements of grant programs and internal controls to ensure such compliance. Individual State agencies responsible for grant administration will still be responsible for performance evaluation of the grant recipients.

Attached are the appropriate sections of the draft Grants Management Handbook which describe the single audit process in more detail. According to Ms. Delaney, the only major change between the draft and current plans is that the dollar limit used to trigger the mandatory audit provisions will be the amount awarded to a grant recipient, not the amount actually received by the grant recipient by the end of the fiscal year.

Also in FY 86, the Office of Management and Budget plans to begin operating a computerized grants information system which will enable the State to track all State grant awards and expenditures.

* * *

If you have any questions, or if we can be of further assistance to you, please do not hesitate to contact us.

JS

Attachments

AUDIT REQUIREMENTS

1. This Attachment establishes audit requirements for State and local governments, and Indian tribal governments that receive Federal assistance. It provides for independent audits of financial operations, including compliance with certain provisions of Federal law and regulation. The requirements are established to ensure that audits are made on an organization-wide basis, rather than on a grant-by-grant basis. Such audits are to determine whether (a) financial operations are conducted properly, (b) the financial statements are presented fairly, (c) the organization has complied with laws and regulations affecting the expenditure of Federal funds, (d) internal procedures have been established to meet the objectives of federally assisted programs, and (e) financial reports to the Federal Government contain accurate and reliable information. Except where specifically required by law, no additional requirements for audit will be imposed unless approved by the Office of Management and Budget.

2. Definitions.

"Cognizant agency" means the Federal agency that is assigned audit responsibility for a particular recipient organization by the Office of Management and Budget.

"Recipient organization" means a State department, a local government, an Indian tribal government, or a subdivision of such entities, that receives Federal assistance. It does not include State and local institutions of higher education or hospitals, which are covered by Circular A-110.

3. State and local governments and Indian tribal governments shall use their own procedures to arrange for independent audits, and to prescribe the scope of audits, provided that the audits comply with the requirements set forth below. Where contracts are awarded for audit services, the contracts shall include a reference to this Attachment.

4. The provisions of this Attachment do not limit the authority of Federal agencies to make audits of recipient organizations.

However, if independent audits arranged for by recipients meet the requirements prescribed below, all Federal agencies shall rely on them, and any additional audit work shall build upon the work already done.

5. Audits shall be made in accordance with the General Accounting Office Standards for Audit of Governmental Organizations, Programs, Activities and Functions, the Guidelines for Financial and Compliance Audits of Federally Assisted Programs, any compliance supplements approved by OMB, and generally accepted auditing standards established by the American Institute of Certified Public Accountants.

6. Audits will include, at a minimum, an examination of the systems of internal control, systems established to ensure compliance with laws and regulations affecting the expenditure of Federal funds, financial transactions and accounts, and financial statements and reports of recipient organizations. These examinations are to determine whether:

a. There is effective control over and proper accounting for revenues, expenditures, assets, and liabilities.

b. The financial statements are presented fairly in accordance with generally accepted accounting principles.

c. The Federal financial reports (including Financial Status Reports, Cash Reports, and claims for advances and reimbursements) contain accurate and reliable financial data, and are presented in accordance with the terms of applicable agreements, and in accordance with Attachment H of this Circular.

d. Federal funds are being expended in accordance with the terms of applicable agreements and those provisions of Federal law or regulations that could have a material effect on the financial statements or on the awards tested.

7. In order to accomplish the purposes set forth above, a representative number of charges to Federal awards shall be tested. The test shall be representative of (1) the universe of Federal awards received, and (2) all costs categories that materially affect the award. The test is to determine whether the charges:

a. Are necessary and reasonable for the proper administration of the program.

b. Conform to any limitations or exclusions in the award.

c. Were given consistent accounting treatment and applied uniformly to both federally assisted and other activities of the recipient.

d. Were net of applicable credits.

e. Did not include costs properly chargeable to other federally assisted programs.

f. Were properly recorded (i.e., correct amount, date) and supported by source documentation.

g. Were approved in advance, if subject to prior approval in accordance with Circular 74-4.

h. Were incurred in accordance with competitive purchasing procedures if covered by Attachment O of this Circular.

i. Were allocated equitably to benefiting activities, including non-Federal activities.

8. Audits usually will be made annually, but not less frequently than every two years.

9. If the auditor becomes aware of irregularities in the recipient organization, the auditor shall promptly notify the cognizant agency and recipient management officials above the level of involvement. Irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriation of funds or other assets.

10. The audit report shall include:

a. Financial statements, including footnotes, of the recipient organization.

b. The auditors' comments on the financial statements which should:

(1) Identify the statements examined, and the period covered.

(2) Identify the various programs under which the organization received Federal funds, and the amount of the awards received.

(3) State that the audit was done in accordance with the standards in paragraph 5.

(4) Express an opinion as to whether the financial statements are fairly presented in accordance with generally accepted accounting principles. If an unqualified opinion cannot be expressed, state the nature of the qualification.

c. The auditors' comments on compliance and internal control should:

(1) Include comments on weaknesses in and noncompliance with the systems of internal control, separately identifying material weaknesses.

(2) Identify the nature and impact of any noted instances of noncompliance with the terms of agreements and those provisions of Federal law or regulations that could have a material effect on the financial statements and reports.

(3) Contain an expression of positive assurance with respect to compliance with requirements for tested items, and negative assurance for untested items.

d. Comments on the accuracy and completeness of financial reports and claims for advances or reimbursement to Federal agencies.

e. Comments on corrective action taken or planned by the recipient.

11. Work papers and reports shall be retained for a minimum of three years from the date of the audit report unless the auditor is notified in writing by the cognizant agency of the need to extend the retention period. The audit workpapers shall be made available upon request to the cognizant agency or its designees and the General Accounting Office or its designees.

12. The Office of Management and Budget will work with Federal agencies and State and local governments to assure that recipient audits are made in accordance with the standards set forth in paragraph 5.

13. The Office of Management and Budget will designate cognizant agencies for major recipient organizations.

14. The cognizant agency shall have the following responsibilities:

a. Obtain or make quality assessment reviews of the work of non-Federal audit organizations, and provide the results to other interested audit agencies. (If a non-Federal audit organization is responsible for audits of recipients that have different cognizant audit agencies, a single quality assessment review should be arranged.)

b. Assure that all audit reports of recipients that affect federally assisted programs are received, reviewed, and distributed to appropriate Federal audit officials. These officials will be responsible for distributing audit reports to their program officials.

c. Whenever significant inadequacies in an audit are disclosed, the recipient organization will be advised and the auditor will be called upon to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient organization and Federal awarding agencies of the facts and its recommendation. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies.

d. Assure that satisfactory audit coverage is provided in a timely manner and in accordance with the provisions of this Attachment.

e. Provide technical advice and act as a liaison between Federal agencies, independent auditors, and recipient organizations.

f. Maintain a followup system on audit findings and investigative matters to assure that audit findings are resolved.

g. Inform other affected audit agencies of irregularities uncovered. The audit agencies, in turn, shall inform all appropriate officials in their agencies. State or local government law enforcement and prosecuting authorities shall also be informed of irregularities within their jurisdiction.

15. Recipients shall require subrecipients that are State and local governments or Indian tribal governments to adopt the requirements in paragraph 1 through 11 above. The recipient shall ensure that the subrecipient audit reports are received as required, and shall submit the reports to the cognizant agency. The cognizant agency will have the responsibility for these reports described in paragraph 14.

16. Small business concerns and business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts awarded with Federal funds. Grantees of Federal funds shall take the following affirmative action to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals as defined in P.L. 95-507 are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available, and arrange time frames for the audit so as to encourage and facilitate participation by small or disadvantaged audit firms.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small or disadvantaged firms.

d. Encourage contracting with small or disadvantaged audit firms which have traditionally audited government programs, and in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small or disadvantaged audit firms as described in paragraph a when a contract is too large for an individual small or disadvantaged audit firm.

f. Use the services and assistance, as appropriate, of the Small Business Administration, the Minority Business Development Agency of the Department of Commerce, and the Community Services Administration in the solicitation and utilization of small or disadvantaged audit firms.

the Government Printing Office. Information on the subscription service and current prices may be obtained by writing to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Publication Sales Manager.

(5 U.S.C. 552(a))

Dated at Silver Spring, Maryland this 1st day of August 1983.

For the Nuclear Regulatory Commission.

Robert B. Minogue,

Director, Office of Nuclear Regulatory Research.

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OFFICE OF MANAGEMENT AND BUDGET

Audit Requirements for State and Local Governments

August 2, 1983.

AGENCY: Office of Management and Budget.

ACTION: Notice for comment.

SUMMARY: This notice offers interested parties an opportunity to comment on a proposed revision to Attachment P "Audit Requirements" to Circular A-102 "Uniform Requirements for grants to State and local governments". The revision would clarify and improve the rules governing entity-wide audits of federally assisted programs and exclude smaller recipients of Federal assistance from these audit requirements.

The revised attachment is shown below in its entirety. The major changes are as follows:

Paragraph 2 establishes a floor of $100,000 beneath which state and local government units that provide reliable financial data and have no weaknesses in internal control would need only entity-wide financial audits. Recipients that receive less than $25,000 per year would not be required to have an audit.

Paragraph 4 adds a definition of Federal assistance. It makes it clear that entity-wide audits should include audits of grants, cooperative agreements, loans, loan guarantees, interest subsidies, insurance, direct appropriations and cost type contracts.

Paragraph 4 also defines a major Federal assistance program as one for which the total expenditures for all awards made for the program exceeded either $300,000 or 3% of the entity's total expenditure of Federal assistance funds, whichever is greater, or any Federal assistance program for which $30 million or more was expended during the period.

Paragraph 8 further defines what should be included in the study and evaluation of systems of internal control and systems established to ensure compliance with laws and regulations affecting the receipt and expenditure of Federal assistance funds.

Paragraph 9 further defines what is required for the evaluation of systems established to ensure compliance with applicable laws and regulation.

Paragraph 11 clarifies the responsibilities of recipient entities that transfer Federal funds to subrecipient entities.

Paragraph 13(i) changes the rules for transmitting audit reports to the cognizant agency. Recipient agencies that have not been assigned a cognizant agency by name are not required to transmit audit reports to a Federal agency unless specifically requested to do so.

Paragraph 18 was added to make it clear that the portion of a single audit attributable to the Federal assistance awards may be charged as a direct cost or allocated as an indirect cost to the Federal assistance awards.

Paragraph 19 provides that Federal agencies may not require additional audit work unless warranted, and if they do, they must arrange for funding the cost of such work.

Comments should be submitted in duplicate to the Project Management Branch, Management Reform Division, Office of Management and Budget, Washington, D.C. 20503, Room 10202. All comments should be received within 60 days of the date of this publication. Contact person: Palmer A. Marcantonio, (202) 395-3857.

Harold I. Steinberg,

Associate Director for Management, Office of Management and Budget.

Circular A-102; Attachment P; Audit Requirements for State and Local Governments

1. This Attachment establishes audit requirements for state and local governments and Indian Tribal governments that receive Federal assistance. Specifically, it requires that financial and compliance audits of Federal assistance be made by independent auditors on an entity-wide basis rather than on an individual award basis, as part of the audits of the recipients' general purpose financial statements. Except where specifically required by law, no additional requirements for the recipient to arrange for or obtain audits may be imposed by the Federal Government, unless approved by the Office of Management and Budget.

2. The audit requirements of this Attachment need not be followed by any recipient entity that receives total Federal assistance, including Federal Revenue Sharing funds, of less than $100,000 per year, provided the recipient has an independent financial audit of its financial statements at least every two years. OMB or a Federal Agency may remove this exemption for a specific entity if it becomes aware, through a review of the audit report or by other means, that the entity has not provided reliable financial statements or has material weaknesses in internal control. The requirement for independent financial audits of financial statements is waived for recipient entities that receive total Federal assistance, including Federal Revenue Sharing, of less than $25,000 per year, although the Director of OMB may withdraw that waiver for a specific recipient.

3. The objective of the entity-wide financial and compliance audit is to provide Federal agencies with reasonable assurance that a recipient of Federal assistance has: (a) Provided financial data that can be relied upon, (b) maintained systems for controlling the receipt and expenditure of funds, and (c) complied with the terms and conditions of Federal awards, and thus its claims for funds were proper and supportable.

4. *Definitions.* "Federal Assistance," for the purpose of this attachment, means the transfer of money, property, services, or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, through grants, cooperative agreements, loans, loan guarantees, interest subsidies, insurance, direct appropriations and work study programs; cost type contracts which are entered into under Federal procurement regulations for purchase, lease or barter of property or services for the direct benefit or use of the Federal Government, whether received directly or indirectly through another level of government. Federal assistance is provided through different federal assistance programs which are generally listed in the "Catalogue of Federal Domestic Assistance."

"Major Federal Assistance Program" is a Federal assistance program for which the total expenditures for all awards made for that program during the period exceeded either $300,000 or 3% of the entity's total expenditure of Federal assistance funds, whichever is greater, or any Federal assistance program for which $30,000,000 of Federal assistance funds or more was expended during the period.

"Recipient Entity" includes the following types of entities that are receiving Federal assistance directly or indirectly from a Federal agency:

(a) States and territories or a subdivision of such entities. State institutions of higher education and state hospitals are not covered by this attachment.

(b) Local governments, such as counties, boroughs, municipalities, cities, towns, townships, parishes, special districts, school districts, intrastate districts, council of governments, interstate government entities, and other local governmental entities. Local hospitals are not covered by this Attachment.

(c) Indian Tribal government means the governing body or governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the

Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

"Independent Auditor" means an independent certified public accountant; an independent licensed public accountant who is licensed by a regulatory body of a state or political subdivision thereof and was licensed on or before December 31, 1970; or an auditor from an independent state or local government audit organization which meets the independence requirements specified in the General Accounting Office's *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.*

"Cognizant Audit Agency" means the Federal department or agency assigned responsibility by the Office of Management and Budget for monitoring audits of a particular recipient entity.

"Basic Financial Statements" are the entity's general purpose financial statements or similar statements that are prepared in order to report the financial position and results of operations of the entity.

"Entity-wide Audit" means an audit of the organizational entity that receives and administers Federal awards. It shall be the entire recipient entity, or in the instance of state and territories, the entire entity or a subdivision of the entity (e.g., Department of Health). The decision as to what constitutes the entity shall be made by the recipient entity, consistent with the objective expressed in Paragraph 1 for entity-wide audits.

5. Federal assistance agreements with recipient entities shall include a requirement for entity-wide audits that conform to the provisions of this attachment.

5. Audits are encouraged to be made annually, but are required not less frequently than every two years. If an audit is performed every two years, it shall cover the two-year period.

7. Audits shall be made in accordance with the general standards and the standards for financial and compliance audits of the U.S. General Accounting Office *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions,* generally accepted auditing standards, the provisions of this attachment, and *The Compliance Supplement for Single Audits of State and Local Governments* and its addendums, published by OMB.

8. Each financial and compliance audit shall include a study and evaluation of the entity's systems of internal control and the systems established to ensure compliance with laws and regulations affecting the receipt and expenditure of Federal assistance funds, as part of the examination of the entity's financial statements. The study and evaluation shall include the selection and testing of a representative number of charges to Federal assistance programs. The representative number of charges shall include charges for each major Federal assistance program operated by the entity. The specific number of charges for each major Federal assistance program shall be determined by the auditor, exercising professional judgement, after considering such factors as the amount of expenditures for the program and the individual awards, in relation to the entity's financial position and operations; the newness of/or changes in conditions of the program; prior experiences with the program, particularly as revealed in audits and other evaluations, e.g., inspections, program reviews; the extent to which the program is provided through subrecipients; the extent to which the program contracts out for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations for the grant program; and the potential impact of adverse findings for the grant program. The representative number of charges shall also include a sample, based on the auditor's judgment, of charges to other than the major Federal assistance programs.

9. The evaluation of the systems established to ensure compliance with applicable laws and regulations and the test of a representative number of charges shall consider, where applicable, whether the amounts claimed were for allowable services; the recipients of the services were tested for eligibility; matching requirements, levels of effort, and earmarking limitations were fulfilled in accordance with the applicable laws and regulations; the Federal financial reports and claims for advances and reimbursements contain reliable information; and other special requirements, pertaining to the applicable Federal assistance programs specifically, and to all state and local governmental recipients of Federal assistance generally, were fulfilled. The evaluation and tests shall also consider whether the amounts claimed or used for matching requirements were in accordance with OMB Circular No. A-87, "Cost Principles for State and Local Governments," and Attachment P of this Circular.

10. A document entitled, "Compliance Supplement for Single Audits of State and Local Governments," available from the Government Printing Office, lists the major compliance requirements pertaining to all state and local governmental recipients of Federal assistance and the major compliance requirements for the larger Federal assistance programs. Addendums will be issued periodically by OMB, providing major compliance requirements for new or significantly revised Federal assistance programs. For those assistance programs contained in this document and its addendums, the evaluation of systems established to ensure compliance and the tests of representative charges need consider only those compliance requirements listed.

The major compliance requirements for Federal assistance programs not included in the Compliance Supplement can be obtained from the administering department or agency, directly or through the cognizant audit agency, or determined from an examination of the applicable laws, regulations, and award agreements.

11. The transfer of Federal funds by the recipient entity to sub-recipient entities will result in certain additional responsibilities:

(a) The recipient entity is responsible for determining that the expenditures of Federal funds by the sub-recipients are also in accordance with applicable laws and regulations. This may be accomplished by the recipient relying upon independent audits performed for the sub-recipients, relying upon appropriate procedures performed by the recipient's internal audit or program management personnel, expanding the scope of the independent financial and compliance audit of the recipient to encompass testing of sub-recipients' charges, or a combination of these procedures. The provisions of this subparagraph do not effect the responsibilities of sub-recipients to comply with the requirements of paragraph 2, where applicable.

(b) The recipient entity is responsible for reviewing audit and other reports submitted by and for sub-recipients, identifying questioned costs and other findings, deciding whether to sustain the questioned costs, and accounting for sustained questioned costs as a receivable and pursuing recovery or taking other appropriate follow-up action.

(c) The recipient's independent auditor is responsible for reviewing to recipient's system for: (1) Monitoring and disbursing funds to sub-recipients, and (2) obtaining and acting on sub-recipient audit reports; testing to determine whether the system is functioning in accordance with prescribed procedures; commenting on the recipient's monitoring and disbursing procedures with respect to sub-recipients, if warranted by the circumstances, and considering whether reported sub-recipient questioned costs require adjustment of the recipient's financial statements, footnote disclosure, or a modification of the auditor's report on compliance.

(d) The recipient entity is responsible for providing technical advice to sub-recipients and their independent auditors, particularly if a Federal cognizant agency is not assigned to the sub-recipient.

12. If the auditor becomes aware of irregularities in the audit, he shall promptly notify the recipient management officials above the level of involvement. The auditor's written notification, together with proposed actions taken by the recipient entity, if any, shall be promptly forwarded to the cognizant audit agency. Irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriation of funds or other assets.

13. The audit report shall be prepared at the completion of the audit stating that the audit was performed in accordance with the provisions of Paragraph 7.

a. The audit report shall include:

1. An auditor's report on financial statements stating the period examined, the scope of the examination, and the degree of responsibility, if any, taken on the entity's basic financial statements and on a schedule of Federal assistance; the entity's basic financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program.

2. An auditor's report on the study and evaluation of internal control performed as part of the financial and compliance audit, including a description of material

weaknesses in internal control, if any; and specific recommendations for corrective actions.

3. An auditor's report containing an expression of positive assurance with respect to compliance with the applicable laws and regulations, including the laws and regulations pertaining to financial reports and claims to Federal agencies for advances or reimbursements for tested items and negative assurance for untested items; the instances of noncompliance with the terms of Federal awards and the amounts of the awards questioned, if any, by specific Federal assistance program where appropriate, regardless of amount of materiality, whether the condition giving rise to the questioned cost has been corrected, and/or the recipient entity does or does not agree with the finding or questioned cost; and specific recommendations for corrective actions.

b. The three parts may be bound into a single audit report or presented as three separate documents.

c. Recipient entities for whom a cognizant audit agency has been assigned by name shall transmit the audit report(s) to the cognizant audit agency. Other recipient entities need not transmit the audit report(s) to a Federal agency, unless specifically requested to do so.

14. Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant audit agency to extend the retention period. The audit workpapers shall be made available upon request to the cognizant audit agency or its designee or to the General Accounting Office at the completion of the audit.

15. The Office of Management and Budget will assign cognizant audit agencies for the larger recipient entities. Where a cognizant audit agency for a given recipient is not specifically assigned by OMB, a Federal Agency or the recipient may request OMB to assign a cognizant audit agency.

16. The cognizant audit agency shall have the following responsibilities:

a. Establish contact with the recipient entities that the Office of Management and Budget has assigned by name, and determine the status or plans for an entity-wide financial and compliance audit.

b. Provide the liaison between the Federal audit establishment and the recipient entities and independent auditors.

c. Provide technical advice to recipient entities and independent auditors.

d. Assure that audit reports or recipient entities that the Office of Management and Budget has assigned by name are received in a timely manner, and that they, along with other audit reports received, are reviewed and distributed to audit officials of other departments and agencies providing Federal assistance. The audit officials will be responsible for distributing the audit reports to program officials.

e. Obtain or make quality control reviews of audits made by non-Federal audit organizations, or use other quality assurance techniques, and provide the results to other interested audit organizations.

f. Inform other affected Federal organizations of any reported irregularities. The Federal organizations, in turn, shall inform appropriate Federal law enforcement officials. State or local government law enforcement and prosecuting authorities, if not advised by the recipient entity, may also be informed of any violation of law within their jurisdiction by the cognizant audit agency.

g. Advise the recipient entity of audits ascertained by review to be inadequate. In such instances, the recipient entity will request the auditor to take corrective action. If corrective action is not taken, the cognizant audit agency shall notify the recipient entity and Federal awarding agencies, through their respective audit agencies, of the facts and make recommendations, if appropriate. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies.

h. The reasons an audit may be ascertained to be inadequate include failure to conduct the audit in accordance with the general standards and the financial and compliance standards of *Audits of Governmental Organizations, Programs, Activities, and Functions;* failure to include tests of all major Federal assistance programs; failure to include a test of a sample of the other than major Federal assistance programs; failure to include the required audit reports; or other specific instances of not performing the audit in accordance with the provisions of this Attachment.

17. The cognizant audit agency will be responsible for tracking the resolution of audit findings which affect the programs of more than one Federal agency (referred to as "crosscutting findings"). Resolution of findings which relate solely to the programs of a single agency will be the responsibility of the recipient entity and that agency. Alternate arrangements may be made on a case-by-case basis by agreement between the agencies concerned.

18. The portion of the cost of a single audit attributable to the Federal assistance awards may be charged as a direct or allocated as an indirect cost to the Federal assistance awards, in accordance with the provisions of OMB Circular A-87, "Cost Principles for State and Local Governments."

19. The provisions of this Attachment do not limit the authority of Federal agencies to perform audits or other reviews of recipient entities. If, however, audits arranged for by recipients meet the requirements of this Attachment, all Federal agencies shall rely on them, and no additional financial and compliance audit work shall be required, obtained, or conducted, unless warranted. If, on the other hand, additional audit work is performed, it shall build upon the work already done. The Federal agency requiring additional audit work shall arrange for funding the cost of such additional audit work.

20. Small business concerns and business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts awarded to fulfill the audit requirements of this chapter. Entities receiving Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals as defined in Pub. L. 95-507 are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small or disadvantaged audit firms.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small or disadvantaged firms.

d. Encourage contracting with small or disadvantaged audit firms which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small or disadvantaged audit firms as described in paragraph (s) above when a contract is too large for an individual small or disadvantaged audit firm.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small or disadvantaged audit firms.

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550.0 AUDIT REQUIREMENTS

Introduction

All grants are subject to audit. In the past, the decision to audit a grant program has been made by either the grantor or the grantee and many audits have been done by State agency staff. For grantees operating multiple grants, this has resulted in duplicative effort and a great deal of overlap in audit requirements.

Beginning in Fiscal Year 86 (July 1, 1985), the State's audit requirements will change for grantees. Those grantees with multiple State grants or grants totaling a specific dollar amount will be subject to a "Single Audit;" one audit that looks at all funds. Grantees not covered by the single audit may be subject to an audit if required by the grantor agency and should be familiar with general audit requirements before beginning operation of a grant.

Changes In Audit Approach

The grant process is not complete until the grant is closed out or the final audit and resolution of audit problems, if any, are finished. Prior to the Single Audit, this final step has been unnecessarily prolonged by various requirements for audits on each individual grant or program to ensure accountability and compliance. The Single Audit, by contrast, attempts to consolidate audits and cover all grants and funds in one Single Audit. By doing so, a more efficient audit process and less inconvenience to the grantees are possible.

An Overview of the Single Audit

The Single Audit will, by necessity, require changes in the way audits are approached by the grantee, grantor, and the auditor.

First, the grantee will be the entity primarily responsible for arranging for the audit. Funds will have to be set aside to pay for the audit and an auditor will have to be selected that can best meet the requirements of the Single Audit as established.

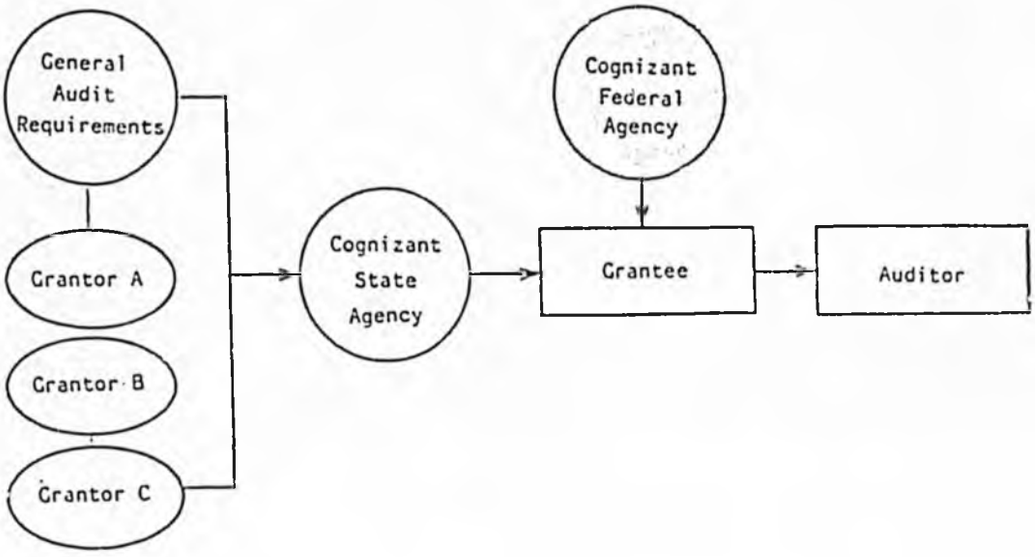
Next, the grantor will have to begin thinking of the grantee as an entity, not a recipient of various grants to be audited individually. As such, each grant or program may not be material or significant when compared to the entire entity. For audits, this means that the auditor may not spend as much time on these areas as may have been spent when each grant was audited separately.

Grantors will also have to work closely with each other so that Single Audits can meet their needs through a centralized agency, i.e., Cognizant Agency (COG).

Finally, the auditors will have to design the scope of the audit to include sufficient tests and audit procedures to enable reporting on compliance, as well as financial accountability, for the various grants and programs.

Ideally, the Single Audit should meet all of the needs in one audit, for example, the federal Office of Management and Budget Circular(102-P) (if applicable), the State requirements, and the management needs of the grantee. (see figure 1)

Single Audit Process (Part I)
(Figure 23)



The need for other audits and reviews may still exist after implementation of the Single Audit. These other audits will be either different in scope or be directed toward areas of problems that may not have been sufficiently covered in the Single Audit. The responsibility for these

audits will be with the grantor after coordination with the cognizant State agency and should build on, rather than repeat, the work of the Single Audit.

Cognizant State Agency

One of the terms associated with the Single Audit is "Cognizant State Agency" (COG). The COG is the State agency that will serve as the focal point for grantor, grantee, and auditor in the Single Audit process.

The COG will be appointed by the State Office of Management and Budget (OMB) and will be responsible for:

- Coordinating with the various grantor agencies to ensure the audit needs of each are addressed in the scope of work.
- Ensuring grantees are notified of the audit requirement.
- Providing technical assistance to auditors.
- Providing quality control reviews of completed audits and auditors.
- Distributing copies of completed audits to relevant grantee agencies.
- Ensuring audit problems are resolved by the grantee and grantor agencies in a timely manner.

OMB will serve as the COG, initially, for all grantees. Later, other State agencies may be appointed.

Audit Selection Criteria -- Grant/Fund Data Base

The State keeps a centralized data base on grant awards in order to track the amount of State funds, the source of the funds and the recipient of the funds. This data base serves as the trigger to notify OMB that State funds have been issued to a grantee and, therefore, an audit may be required. OMB will make this information available to the appointed COG so that the COG can coordinate with the various grantors and begin the Single Audit process. The exact dollar amount that triggers this process will vary from year to year depending on amounts granted.

Because there are other requirements for audits, such as the federal OMB Circular A102 Attachment P, the State's Single Audit will complement the federal requirements. For example, when a grantee has both State and federal dollars and a federal requirement for the "Attachment P" audit, both State and federal audit requirements can be met at one time.

Other criteria used to select grantees for audit will be based on random selection of those not falling within the other groups or if problems become known by grantor. The majority of State Single Audits, however, will fall under the first (Data Base) selection criteria.

Grantee Responsibilities

The grantee will be responsible for engaging an auditor to perform the Single Audit. The grantee is also responsible

for assuring that the Single Audit will be made of the entire organization in accordance with the following:

- GAO Standards (1981 Yellow Book)
- AICPA Generally Accepted Auditing Standards (GAAS)
- State Single Audit Guide
- Alaska Grant Regulations and Compliance Procedures

These standards include requirements for examining the system of internal controls, both financial and program, and the financial statements and reports published by the grantee.

As indicated above, internal controls and financial statements and reports are the responsibility of the grantee. The auditor's responsibility is to examine these and express an opinion on them, if possible.

The audits should be done annually, however, biennial audits may suffice if the audit scope covers both years. Testing conducted throughout the period covered will enhance the year end or biennial audits.

Grantees should also require subgrantees to have an independent audit following the same standards and criteria outlined for the grantee. In some cases this could be accomplished by accepting audit work done by federal, State and other independent auditors.

Costs for the Single Audit are allowable as either a direct or an indirect cost. Since grantees will be responsible for engaging the auditors and paying for the audit, funds will have to be budgeted for this cost normally, an audit is already a part of the grantee's operations.

The Single Audit, because of its expanded scope to cover compliance features, will generally cost from 10 to 20 percent more than an audit of the financial statements alone. This can be partially offset by biennial audits or multiyear audit engagement contracts. In addition, following good internal control principles and keeping accurate records simplifies the audit process which can reduce the cost. The advantage to the grantee is less audit duplication and a more thorough audit.

Initiating The Audit

The grantee will be informed by OMB of three things at the start of the Single Audit process. They are:

- The need for the Single Audit.
- The Cognizant Audit Agency.
- The types(s) of grants, dollar amount, and audit requirements for each grant.

Selecting The Auditor

Once notified, the grantee will select an auditor using criteria normally used for such purposes.

Once the auditor is selected, the grantee and auditor should jointly notify the COG of the selection decision and request the pertinent information (i.e., grant regulations and compliance procedures, and a list of all State grants or funds provided to the grantee).

Grantee - Grantor - Auditor Relationship

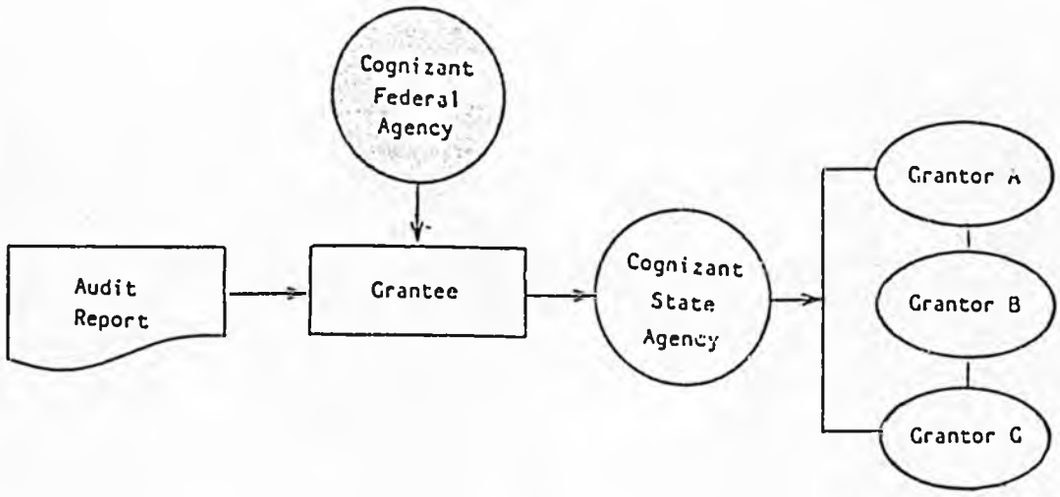
During the audit, the normal client-auditor relationship will exist between the grantee and auditor; however, the COG will have a significant role because of its responsibilities to review the final audit and coordinate the needs of each grantor agency in the Single Audit. Also, during the course of the audit, technical questions may arise and need to be resolved. The COG will have the responsibility to resolve these.

Post Audit Responsibilities

After the audit is complete, sufficient copies will be provided to the COG for distribution to the relevant grantor agencies. This should take place no later than 180 days after the end of the grantee's fiscal year. Resolution of audit findings are the responsibility of the grantee and grantor with the COG involved only to ensure that resolution is reached on each audit finding.

Single Audit Process (Part II)

(Figure 24)



General Requirements of an Audit

Audits should include, at a minimum, an examination of the systems of internal control, systems established to ensure compliance with laws and regulations affecting the expenditure of State funds, financial transactions and accounts, and financial statements and reports of the grantee. These examinations are to determine whether:

1. There is effective control over, and proper accounting for, revenues, expenditures, assets, and liabilities;

2. The financial statements are presented fairly in accordance with generally accepted accounting principles; and

3. The State financial reports (including Financial Status Reports, Cash Reports, and claims for advances and reimbursements) contain accurate and reliable financial data, and are presented in accordance with the terms of applicable agreements.

To accomplish the purposes outlined above, a representative number of charges to State awards will be tested. The test should be representative of the universe of State awards received, and all cost categories that materially affect the award. The test is to determine whether the charges:

1. Are necessary and reasonable for the proper administration of the program;

2. Conform to any limitations or exclusions in the award;

3. Were given consistent accounting treatment and applied uniformly to both State-assisted and other activities of the recipient;

4. Did not include cost properly chargeable to other State-assisted programs;

5. Were properly recorded (i.e., correct amount, date) and supported by source documentation,

6. Were approved in advance, if subject to prior approval;

7. Were incurred in accordance with competitive purchasing procedures; and

8. Were allocated equitably to benefiting activities, including non-State activities.

If the auditor becomes aware of irregularities in the recipient organization, the auditor will notify the grantor agency and grantee management officials above the level of involvement. Irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriation of funds or other assets.

The report issued by the auditor should include

1. Financial statements, including footnotes, of the grantee organization;

2. The auditors' comments on the financial statements which should;

   A. Identify the statements examined, and the period covered;

   B. Identify the various programs under which the organization received State funds, and the amount of the awards received;

   C. State that the audit was done in accordance with the audit requirement of the State;

   D. Express an opinion as to whether the financial statements are fairly presented in accordance with generally accepted accounting principles. If an unqualified opinion cannot be expressed, state the nature of the qualification.

3. The auditors' comments on compliance and internal control which;

A. Include comments on weaknesses in, and noncompliance with, the systems of internal control, separately identifying material weaknesses;

B. Identify the nature and impact of any noted instances of noncompliance with the terms of agreements and those provisions of State law or regulations that could have a material effect on the financial statements and reports; and

C. Contain an expression of positive assurance with respect to compliance with requirements for tested items, and negative assurance for untested items.

4. Comments on the accuracy and completeness of financial reports and claims for advances or reimbursement to State agencies; and

5. Comments on corrective action taken or planned by the recipient.

The Attachment P Audit: Understanding the Audit Roles

John L. Dethman, Charles Graham and Richard E. Nygaard

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Attachment P of OMB Circular A-102 was issued in 1979 for the purpose of establishing the "Single Audit" process for state and local governments and Indian tribal governments that receive Federal assistance. The Attachment provides for independent audits of financial operations including compliance with certain provisions of Federal laws and regulations of an entity's Federal assistance programs.

Although Attachment P has been in existence for approximately four years, implementation of the single audit approach is still in its infancy. Through 1983, only about 750 single audits had been conducted, or were in process, nationwide. Since Attachment P's issuance, several problems in bringing about timely implementation of the single audit process have surfaced. These problems, which are currently being addressed by the Congress, the Federal Office of Management and Budget (OMB) and other Federal departments and agencies, include the following:

- The single audit process has required significant adjustments to the existing approach to Federal assistance program audits by Federal departments and agencies and state and local governments.
- Specific guidance to Federal agencies on how to fulfill their roles has been slow in developing. State and local governments have also experienced delays in their own implementation process even when Federal guidance was available.
- Federal and state and local government program staff have often been the last to be included in the single audit implementation process.

Because the single audit process is all encompassing in its coverage of Federal assistance programs nationwide, Congress has become concerned about the pace of implementation and has voiced its intention to pass legislation requiring mandatory single audits for most Federal grants and grantees. At this writing, Senate Bill 1510 has been unanimously passed in the Senate, and H.R. 4821 has been introduced on the floor of the House of Representatives.

There is no question that Congressional interest and concern has sparked new interest on the part of the OMB. OMB has recently revised Attachment P and has been working with the Federal agencies and Congress, as well as state and local governments, in trying to provide instructions designed to meet the needs of most

participants in the single audit process. Revised Attachment P is not expected to materially differ from the legislation. Through revisions to the Attachment and with new legislation, it is expected that previous barriers to full implementation of the single audit will be eliminated or substantially reduced.

This article is intended for those who have not implemented the single audit process and for those who have implemented it but have some questions about their role in that process. The article discusses the duties and responsibilities of the cognizant audit agency, the auditor and the grantee during the single audit process and is based upon the successful implementation of the single audit process at the City of Portland, Oregon for the years ended June 30, 1982 and 1983.

The Cognizant Audit Agency's Role

Through March 1982, OMB assigned cognizant Federal agencies to the largest 1,000 state and local governments in the United States. After the initial assignments, OMB specified that the Federal agency providing the most Federal assistance dollars to previously unassigned local governments would become the cognizant Federal agency for those governments. Although it is expected that OMB will make more specific cognizant Federal agency assignments, those governments without a specific assignment can obtain one by either requesting an OMB assignment or contacting the Federal agency providing the most Federal assistance to the local government.

The Office of the Inspector General for Audit (OIG) of the cognizant Federal agency becomes the cognizant audit agency during the single audit process. The OIG serves as the catalyst for the successful completion of the single audit.

Once the cognizant audit agency has been determined, and an auditor selected, it is important that open lines of communication be established between the cognizant audit agency, the auditor and the grantee. The grantee should arrange a meeting of all parties to the audit to discuss the various aspects of the single audit. A sense of mutual respect and cooperation should be developed at this initial meeting.

The initial meeting for the City of Portland single audit stressed the following important points:

- How interaction between the City and its various Federal grantor agencies would be coordinated by the cognizant audit agency for future audit related issues.
- The extent of technical assistance which could be sought from the cognizant audit agency by the auditor and the grantee.
- The procedures to be used in determining the scope of Federal programs to be audited.
- The extent of auditor testing necessary to fulfill the Attachment P requirements.
- The sampling plan and sampling methods to be used in the audit.
- The setting of tentative checkpoints for all phases of the audit and establishing the expected report issuance date.
- The required financial information to be included in the audit report.
- Further emphasizing and clarifying the roles of the cognizant audit agency, the auditor and the grantee.

The cognizant audit agency's specific responsibilities are defined in paragraph 16 of revised Attachment P. Paragraph 16 identifies seven areas

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of responsibility; however, this article will address what we believe are the four key responsibilities of the cognizant audit agency in assuring that the single audit is effectively carried out, namely:

- Acting as a liaison between grantor agencies and the grantee and auditor.
- Providing technical advice and assistance to the grantee and auditor.
- Reviewing submitted audit reports and distributing such reports to grantor agencies.
- Performing quality control reviews of non-Federal audit organizations.

Acting as a Liaison Between Grantor Agencies and the Grantee and Auditor

The cognizant audit agency serves as the representative of the appropriate grantor agencies and the grantors' own respective Federal audit agencies during the single audit process. Prior to implementation of the single audit concept, numerous individual Federal and private auditors performed individual grant audits of the various Federal assistance programs. Under the single audit, the cognizant audit agency functions as a liaison between the various Federal agencies and the grantee and the auditor. During the single audit of the City of Portland, the cognizant audit agency communicated with each of the Federal audit offices of the major grantor agencies for any special concerns the agencies had about the City's Federal assistance programs. These concerns were then communicated to the grantee and auditor. The cognizant audit agency also interceded on behalf of the grantee when a Federal audit agency wanted to conduct an individual audit of one of its own programs. The agency was informed that a single audit was in process at the City and the Federal audit agency discontinued its work until the single audit was completed and the results published.

Although the single audit process and the cognizant audit agency's liaison efforts will substantially reduce the likelihood of separate audits being performed, Federal agencies may still perform individual audits of the Federal programs. As stated in paragraph 20 of revised Attachment P:

> *"The provisions of this Attachment do not limit the authority of Federal agencies to perform audits or other reviews of recipient entities. If, however, audits arranged for by recipients meet the requirements of this Attachment, all Federal agencies shall rely on them, and no additional financial and compliance audit work shall be required, obtained, or conducted, unless warranted. If a Federal agency requires additional audit work be performed, it shall build upon the work already done. The Federal agency requiring additional audit work shall arrange for funding the cost of such additional audit work."*

Providing Technical Advice and Assistance to the Grantee and Auditor

Technical advice and assistance by the cognizant audit agency helps the grantee and auditor understand the breadth and scope of the work to be performed. Technical advice and assistance by the cognizant audit agency is not dictated or imposed but offered on an "as needed" basis. Technical questions can arise during the single audit process which can only be addressed by the cognizant audit agency. Additionally, the cognizant audit agency can provide updates of any recent changes to Attachment P and related publications. Cognizant audit agencies can also assist in determining the level of financial information to be included in the audit report as well as providing direction as to the level of audit scope to be performed and clarification regarding compliance requirements of the Federal assistance programs.

Instances have arisen where the auditor might want the cognizant audit agency to "approve" the audit plan. While it is important that the cognizant audit agency concur on the scope of Federal programs to be audited, it should be stressed that cognizant audit agencies will not approve the audit plan of procedures to be performed. The auditor is solely responsible for developing an adequate means of conducting an audit both in accordance with the terms of the audit contract and in accordance with generally accepted auditing standards. This means that the auditor will use professional judgment in determining which and how many tests of transactions are to be made.

Reviewing Submitted Audit Reports and Distributing Such Reports to Grantor Agencies

After the audit report is submitted, the cognizant audit agency will perform a desk review to determine whether the report contains all of the required elements. Specifically, the cognizant audit agency and Federal grantor agencies want to know whether:

- The audit was performed in accordance with the *Standards for Audit of Governmental, Organizations, Programs, Activities and Functions* (Yellow Book) promulgated by the Comptroller General as they pertain to financial and compliance audits, and whether the audit report contains the auditor's opinion with appropriate comments if an unqualified opinion cannot be expressed.
- The audit report contains appropriate financial statements covering Federal funds, the period under audit, the programs audited, and the amounts of funds audited.
- The audit report contains auditors' comments on Federal program compliance, the compliance areas tested, identification of audit findings and any expenditures questioned.
- The audit report includes the auditor's opinion on internal control.
- The report contains comments on the accuracy and completeness of financial reports and claims for advances and reimbursement and whether corrective action of auditors' findings was taken or is planned.

After performing a desk review, the cognizant audit agency will distribute the report to the Federal audit offices responsible for each respective program. The report will include a transmittal letter which identifies the report, any discrepancies noted during the desk review and whether the report contains findings which require action by the Federal audit offices.

Each Federal audit office will then distribute the report to responsible program officials for action within their respective departments. They, in turn, will be responsible for requiring grantees to take actions to correct deficiencies in accordance with recommendations contained in the audit report.

For those findings known as cross-cutting issues (findings affecting more than one Federal agency or program), the cognizant audit agency will coordinate and track resolution of the findings to satisfactory completion.

Performing Quality Control Reviews of Nonfederal Audit Organizations

Quality control reviews are reviews by the cognizant audit agency of the work performed by the auditor on single audits and may be of two types:

(1) Narrow focus, which is a quality control review made to determine whether a portion of the audit work was properly performed.
(2) Comprehensive, which is a review of the quality of all audit work performed.

Quality control reviews are routinely performed by the cognizant audit agency to determine whether audit work performed was adequate and in accordance with prescribed requirements and standards. Cognizant audit agencies, upon disclosure of significant inadequacies in an audit, will advise the grantee of the inadequacies and request the auditor to take corrective actions. Although they rarely occur, if major inadequacies or repetitive substandard performance are evident, the cognizant audit agency may refer the auditor to appropriate professional organizations.

The Grantee's Role

The grantee's role is particularly important to ensuring a successful single audit. This is primarily due to the magnitude of the coordination process, internally and externally. In addition to coordinating with the cognizant audit agency and the audit firm, the grantee's role involves coordination among a wide variety of professional disciplines within the local government—accountants, engineers, social service workers, administrators and elected officials, among others. This can be further compounded when the Federal programs are from a variety of sources (each with separate compliance requirements) and dispersed to many internal or subrecipient agencies (each having distinct systems and procedures).

Because of these factors, the grantee should begin well in advance of the audit to systematically organize personnel and reference material and to develop a written policy and procedures program which will assign the duties and responsibilities of each party.

The grantee can get needed assistance from Federal program managers to help begin the single audit process. Federal program managers are required to inform each grantee of the single audit requirements for their respective programs. From a Federal department and agency perspective, these managers have sole responsibility for making sure the single audit process is underway. They should be able to provide grantees with appropriate reference material, such as pertinent

OMB circulars, including Attachment P to OMB Circular A-102 and the other documents listed in that Attachment. Federal program managers will also have information available such as audit due dates and, if known, contact persons at the grantee's cognizant audit agency for technical assistance in conducting the audit. The Federal program manager should also be able to provide information to grantees on any requirements, recommended procedures for obtaining the services of an auditor.

Complete centralization of grant authority and responsibility is not necessry for a successful Attachment P engagement; however, it is important that one person within the organization be assigned to coordinate the Attachment P activities.

Developing an Inventory of Federal Programs

The initial phase of a single audit for the grantee, after designation of a cognizant audit agency and after the initial meeting with the auditor and cognizant audit agency discussed previously, is to determine the Federal assistance programs for which the grantee has responsibility. This inventory can be developed by reference to department or fund budgets and contract files as well as communication with department managers.

The inventory should identify the particular program, the approved funding level, the responsible Federal grantor agency, the department responsible for the program and the expected expenditures for the period under audit. Revised Attachment P defines Federal assistance and Federal assistance programs as follows:

> *"a. 'Federal assistance' means: the transfer of money, property, services or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, through grants, cooperative agreements, loans, loan guarantees, interest subsidies, insurance, direct appropriations and work study programs, whether received directly from the Federal Government, or indirectly through another level of government (pass throughs); and cost type contracts which are entered into under Federal procurement regulations for purchase, lease or barter of property or services for the direct benefit or use of the Federal Government (an entity will be deemed to be the recipient of Federal assistance for as long as it has an outstanding loan due the Federal Government in excess of $25,000).*
>
> *"b. 'Federal assistance program' is a grouping of one or more activities for which Federal assistance monies are disbursed in order to achieve a public purpose. Federal assistance programs are generally listed in the Catalogue of Federal Domestic Assistance."*

Also important in determining and preparing the inventory is to identify the original Federal source of funds. In many instances, funds may be passed through several government levels: Federal to state, state to county or city, county or city to urban development agency, etc. Regardless of the level or tier at which a local government received the funds, if a Federal assistance agreement was the original source of funds, Attachment P of Circular A-102 will apply in all respects. Often, the only way to be certain is by thoroughly reading the agreement for references to Federal laws and regulations or by communicating with the state or local agency disseminating the funds.

Finally, it is important to identify any sub-recipients with which the grantee has contracted to perform services for the Federal programs. Revised Attachment P specifically deals with state, local or Indian tribal governments which pass funds through to lower tier organizations. It states:

> *"The transfer (pass-through) of Federal monies by the recipient entity to sub-recipients will result in certain additional audit-related responsibilities:*
>
> *"a. The recipient entity is responsible for determining that the expenditures of Federal monies by the sub-recipients are also in accordance with applicable laws and regulations. This responsibility may be discharged by relying upon independent audits performed for the sub-recipients, relying upon appropriate procedures performed by the recipient's internal audit or program management personnel, expanding the scope of the independent financial and compliance audit of the recipient to encompass testing of sub-recipients' charges or a combination of these procedures.*
>
> *"b. The recipient entity is responsible for reviewing audit and other reports sub-*

mitted by and for sub-recipients and identifying questioned costs and other findings pertaining to the Federal monies passed through to the sub-recipients; and properly accounting for questioned costs and pursuing recovery or taking other appropriate follow-up actions.

"c. The recipient's independent auditor is responsible for reviewing the recipient's systems for monitoring and disbursing funds to sub-recipients and for obtaining and acting on sub-recipient audit reports; testing to determine whether these systems are functioning in accordance with the prescribed procedures; commenting on the recipient's monitoring and disbursing procedures with respect to sub-recipients, if warranted by the circumstances; and considering whether reported sub-recipient questioned costs require adjustment of the recipient's financial statements, footnote disclosure, or modification of the auditor's report. The procedures to fulfill these responsibilities shall be determined by the auditor, exercising professional judgment.

"d. The recipient should discuss the above matters, as necessary, with its sub-recipients, and particularly sub-recipients for whom a Federal cognizant agency has not been assigned."

Attachment P does not specifically address sub-recipient organizations which are private "for profit" or "nonprofit" entities. The grantee is responsible under Attachment P for such organizations because the grantee is required to establish and maintain systems of internal control to ensure compliance with laws and regulations affecting the expenditure of Federal funds. Some testing of these private sub-recipient entities' transactions may be performed by the auditor through sampling procedures unless the grantee requires them to obtain independent audits. The level of auditor testing of particular sub-recipient organizations may also be reduced if the grantee employs internal auditors to regularly monitor and review these organizations.

Regardless of the scope of auditor testing, an inventory of all sub-recipient organizations receiving Federal funds should be developed to allow for appropriate levels of testing by the auditor.

Preparing for the Audit

In preparing for the single audit, the grantee should be aware that the audit will focus on the legal and regulatory compliance features of the Federal assistance programs and on the internal control procedures operating to assure compliance.

The grantee's audit coordinator should become familiar, prior to the audit, with the applicable laws and regulations of the Federal assistance programs. A good starting point is to obtain and read Attachment P of OMB Circular A-102. Attachment P, with its compliance supplement, addresses the minimum audit requirements for (1) financial reporting and (2) compliance purposes. Many questions about the single audit may result from the initial reading of Attachment P. OMB has anticipated this and has published a booklet entitled *Questions and Answers* on the single audit provisions of OMB Circular A-102. The booklet is easy to read and a very useful tool for reaching a better understanding of some of the more frequent areas of concern about the single audit. Preparation time may also be spent conducting an examination of grant files, resolving potential findings, preparing required audit schedules and conducting workshops for project managers to explain the process and what will be required of them during the audit process.

Some limited pre-audit reviews were conducted by the City of Portland's central grant management staff in suspected problem areas. The staff met with each of the grant program managers to brief them on the timing and extent of the audit, staff and space needs and to establish a reliable line of communication internally. This was aided by having a central automated accounting system and ready access to grant agreements, letters of credit and a library of reference materials.

Under a decentralized system, as employed by the City of Portland prior to 1980, a large amount of time may have to be spent accumulating and reading grant applications and agreements, reconciling grant financial reports to one or several general ledgers and developing a small library of reference materials. This is primarily a one-time investment which will assist the audit coordinator for several years to come.

The importance of the coordinator being available and assisting project managers cannot be overemphasized at this stage. Thorough planning

will minimize auditor findings at a later date, many of which may come about as a result of inadequate or disorganized records.

Identifying and Resolving Areas of Suspected Noncompliance

The single audit process normally results in identification by the auditor of suspected questioned costs or costs recommended for disallowance resulting from failure to comply with the compliance requirements of the Federal assistance programs. The auditor may also have identified certain weaknesses in internal controls which will be included in the audit report as a finding.

Prior to resolution of all findings, it is important that the grantee fully understand the specifics of each finding. Findings may sometimes result from incorrect understanding of the applicable law or regulation. Many potential findings can be resolved by making sure an uncondensed version of the law is available and thoroughly reviewed. Other findings may be resolved through a more thorough search by the grantee of file data. Findings should never initially be taken at face value, but should be fully researched too make sure they are accurate.

The grantee should review a written report draft of the findings, prior to publication, to ensure that the findings are fair statements of fact. For example, isolated instances of noncompliance should not be presented as internal control system deficiencies.

Taking Corrective Action

The results of the audit may require the grantee to correct system deficiencies as well as provide additional responses to the applicable grantor agencies regarding questioned costs, costs recommend for disallowance and the correction of deficiencies. According to the latest revision to OMB Circular A-102, Federal agencies are required by OMB Circular A-50 to obtain resolution of audit findings within six months after receipt of an audit report submitted by nonfederal auditors. Although resolution may be achieved within six months, it may take up to a year before final action on major findings has been taken. Therefore, it is important that the audit coordinator continue in this role until all findings are considered resolved and corrective action has been taken, or acknowledged, by the applicable grantor agencies.

Documentation of the results of corrective actions should be maintained by the grantee for subsequent year reviews by the auditor, a grantor agency, or the cognizant audit agency.

Paying for the Audit

The OMB recognizes that the cost of doing audits of Federally assisted programs is a legitimate and allowable cost. However, some Federal grants provide directly for audit costs while others do not. In instances where they do not, OMB has issued instructions to Federal departments that, for grantees with an indirect cost allocation plan, costs for the audit should be included in the plan. Where no cost allocation plan exists, the grantee may develop such a plan specifically to cover the costs of the audit attributable to Federal assistance programs.

At the City of Portland, the grant portion of the audit fee was allocated based on direct audit hours for programs specifically examined with dollar volume allocation for programs not specifically examined by the auditor. The City chose the direct charging method for payment over using its indirect cost allocation plan because many of the City's grants do not include indirect costs, or they have been negotiated so low that a minority of the grants would end up paying for a majority of the audit.

The Auditors' Role

The auditors' role is to determine if the grantee is in compliance with the applicable laws and regulations governing the Federal assistance programs. The financial audit aspects are secondary to the compliance elements of the single audit. In achieving this objective, there are many important steps which the auditor needs to carry out, particularly during the planning phase of the audit.

Selecting the Scope of Federal Programs to be Audited

Using the grantee's inventory of Federal assistance programs, the auditor must select and test transactions from each Federal assistance program with total expenditures (during a one-year period encompassed by the audit) equal to, or exceeding either $500,000 or 3% of the grantee's total expenditure of Federal assistance funds, whichever is greater. A representative sample of

transactions must also be tested for other Federal assistance programs below the aforementioned limit. The number of other Federal assistance programs selected for audit will depend on the number of assistance programs which fall under the limit previously mentioned and through other professional judgements.

Regardless of the number and dollar amount of Federal assistance programs selected for audit, the auditor should review the selection with the grantee.and the selection should be submitted to the cognizant audit agency for concurrence.

Federal assistance programs under Attachment P are defined by the five digit reference number contained in the OMB's *Catalogue of Federal Domestic Assistance*. These reference numbers are the same numbers which identify Federal assistance programs in the *Compliance Supplement for Single Audits of State and Local Governments* (the Green Book) issued by OMB. Grantees may have several grants which fall within a particular program. The auditor should become thoroughly familiar with the Green Book since it will primarily serve as the basis for development of the audit plan.

The auditor should also consider including in the selection of Federal assistance programs to be audited those programs where there are known or suspected areas of noncompliance. Such areas of known or suspected noncompliance can be obtained through conversations with the grantee, newspaper publications, grantor correspondence or other sources.

If any of the Federal assistance programs selected have sub-recipients, a random and/or stratified sampling of those sub-recipients should also be included in the audit if the sub-recipients do not already conduct their own independent audits, or the grantee does not have internal auditors which perform such audits or reviews.

Determining the Required Information to be Included in the Audit Report

The financial information included in the audit report for a single audit should be comprehensive enough to allow the various Federal grantors to agree program expenditures and unexpended balances to cumulative financial status reports received from the grantees. This was accomplished in the City of Portland single audit by including an additional financial schedule of grant activity for the period under audit in the City's comprehensive annual financial report which contained:

- Grantor and grant agreement number
- Grant reporting period
- Grant award and cumulative grant drawdowns*
- Cumulative expenditures for the grant reporting period*
- Unexpected grant balance

**If the grant reporting period is different than the period under audit, current audit period drawdowns and expenditures should also be reported.*

Information regarding drawdowns and expenditures should agree to the grantee reports filed with the grantor and to the grantee's audited books of account.

All auditors' findings and deficiencies should be included in the audit report. Findings and deficiencies will result from a failure to comply with applicable laws and regulations which include inadequate documentation of expenditures, expenditures which do not meet the basic purpose of the grant and other specific violations of the grant agreements. Findings and deficiencies should be quantified and may ultimately result in a disallowance of costs by the grantor. Findings which cannot be quantified should also be disclosed. All findings and deficiencies, regardless of their significance, *must* be disclosed in the audit report.

The format and level of information to be included in the audit report for the Attachment P audit should be reviewed with the cognizant audit agency and grantee for concurrence prior to beginning the audit.

Paragraph 13 of Revised Attachment P specifies what is to be included in the auditor's reports:

> *"(a) The audit report shall state that the audit was performed in accordance with the provisions of Paragraph 7 [the Standards for Audit of Governmental Organizations, Programs, Activities and Functions (Yellow Book)] and include:*
>
> *"(1) An auditor's report on financial statements and on a schedule of Federal assistance; the entity's basic financial statements; and a schedule of Federal assistance showing the total expenditures for each Federal assistance program.*

"(2) An auditor's report on the study and evaluation of internal control performed as part of the financial and compliance audit, including the material weaknesses identified as a result of the evaluation.

"(3) An auditor's report containing a statement of positive assurance with respect to items tested for compliance with the applicable laws and regulations, including the laws and regulations pertaining to financial reports and claims to Federal agencies for advances and reimbursements, and negative assurance for untested items; and the material instances of noncompliance and instances or indications of fraud, abuse, or illegal acts found during or in connection with, the audit. The latter should include an identification of the total amounts questioned, if any, as a result of noncompliance, fraud, abuse, or illegal acts for each Federal assistance program, without regard to whether a condition giving rise to the questioned cost has been corrected and/or the recipient entity does or does not agree with the finding or questioned cost; and the individual amounts of questioned costs for material instances of noncompliance and instances and indications of fraud, abuse or illegal acts with materiality determined on the basis of the relationship of the amount questioned to the Federal awards or claims for advance or reimbursement; the potential cumulative effect of instances which by themselves may not be material, and the Federal Government's obligation to recover claims that are improper or not supported.

"(b) The three parts of the audit report may be bound into a single report, or simultaneously presented to the cognizant audit agency as separate documents."

Developing the Audit Plan

The general audit plan should be developed in accordance with the provisions of the *Standards for Audit of Governmental Organizations, Programs, Activities and Functions* (Yellow Book) promulgated by the Comptroller General as they pertain to financial and compliance audits and the *Guidelines for Financial and Compliance Audits of Federally Assisted Programs* (Red Book). These publications address the general audit procedures which need to be followed and standards which should be maintained.

The most important part of the audit plan is the development of procedures to determine compliance with the laws and regulations of the selected Federal assistance programs. The sources which the auditor should use are the *Compliance Supplement for Single Audits of State and Local Governments* issued by the OMB (Green Book), the various grant agreements, and Attachments A through O of OMB Circular A-102.

The Green Book identifies major compliance requirements of about 90% of all Federal assistance programs. The auditor's obligation under a single audit, for those Federal assistance programs selected for audit which are included in the Green Book, is to determine if the grantee has complied with all the requirements included in the Green Book. The auditor is not responsible for determining compliance with additional requirements included in the grant agreements which were omitted from the Green Book.

The auditor may select for audit Federal assistance programs which have not been included in the Green Book. In these cases, the auditor should refer to the specific grant agreements to develop the audit procedures. All compliance aspects of the grant agreements for these programs should be examined by the auditor.

Attachments A through O of Circular A-102 deal with specific compliance requirements which overlap most, if not all, Federal assistance programs. These attachments, which deal with property control and cash management and procurement practices, among others, should be an integral part of the development of the audit plan.

Allocation of indirect costs to grant programs is a common practice among state and local governments. OMB Circular A-87 specifically deals with indirect cost allocation plans and should also be used by the auditor in developing the audit plan.

Attachment P stresses the importance of a systems approach to the audit. The auditor should test the internal controls of the grantee to determine if systems are in place to ensure compliance with the grant provisions. This approach is most practical and efficient when compliance requirements are the same for many programs. When compliance requirements overlap many of the programs to be tested, the auditor should consider designing audit procedures to place reliance

on the systems of internal controls. In many instances, however, compliance requirements do not overlap and the auditor must design audit procedures with emphasis on direct verification of compliance requirements rather than controls reliance.

Communicating the Audit Requirements

The auditor and grantee must be certain that each fully understands the scope of the work to be performed and the process of resolving differences as well as findings and deficiencies. Communication between both parties should exist during the selection of Federal assistance programs to be audited, development of the audit plan and conducting the audit. Misunderstandings can be reduced if the auditor and grantee clearly define and understand the following:

- Who has overall grantee responsibility for the single audit?
- What audit schedules will be prepared by the grantee: by whom and in what time frame?
- What specifically is to be accomplished by the auditor?
- What is the process for communicating suspected audit findings and deficiencies to the grantee?
- How and in what time frame will audit findings and deficiencies attempt to be resolved?
- What is the time frame for starting and completing the audit?
- Communication of audit requirements to subrecipients, who will do it and in what time frame?

Conducting the Audit

When performing the audit procedures, the auditor may identify certain expenditures that are in violation of the grant provisions. The auditor should identify and report the violation to the grantee as soon as possible to enable the grantee to attempt to resolve the issue or reach a concurrence. In some instances, violations can be resolved by obtaining additional audit evidence which could not be previously located. If the issue cannot be resolved, then the auditor is required to report the finding in the audit report.

If the auditor determined that there may be a number of similar violations in the population of transactions being tested, then the auditor may want to extend the audit procedures to identify such items.

In certain cases, the auditor may identify or become aware of instances of fraud. The auditor is required by Federal law to notify the cognizant audit agency of the fraud once the transaction has specifically been identified. The cognizant audit agency will then make a determination as to what course of action is to be taken. It is also important that upper levels of grantee management be notified as well at the time the transaction is identified.

The auditor must also adequately document in the audit workpapers the extent of the work performed. A simple narrative that the work was completed is not sufficient. The workpapers should identify what transactions were tested, how and why they were tested and the conclusions reached. The auditor's workpapers may be subject to quality control review by the cognizant audit agency and such workpapers, to be acceptable, must demonstrate and document the level and extent of work performed.

Summary

A single audit can be an effective way to examine Federal assistance programs if the roles of the cognizant audit agency, the auditor and grantee are fully understood by each party and properly carried out. At the City of Portland, the initial Attachment P audit cost 47 percent less than in the prior year when individual program audits were performed and the audit was much more comprehensive, covering 60 percent of all Federal program dollar volume. The savings enabled more money to be spent on program operations instead of administrative costs.

Additionally, the reduction of individual grant audits because of implementation of Attachment P at the City of Portland has allowed more staff to be available for implementing broad-based improvements to internal control procedures. This has allowed Portland to make gradual reductions of staffing levels as the systems improvements become operational.

State and local governments which have not implemented the single audit process should begin now to develop plans for its implementation in the near future. The single audit, if properly implemented and conducted, can be a more efficient and effective means of performing Federal assistance program audits.

MEMORANDUM State of Alaska

TO: Hon. John Pugh, Commissioner
Department of Health &
Social Services

DATE: March 18, 1985

FILE NO: 366-341-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Payment of lump sum appropriations for hospital construction

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

You have asked if it is permissible for the Department of Health and Social Services (DHSS) to pay money granted to the City of Cordova for hospital construction in a lump sum. The city admits that it is not prepared to begin work on the hospital project. The city is requesting this advance in the form of an endowment so that it can invest the money and obtain interest income. The city believes it can, through investment of the endowment, increase the amount ultimately available for hospital construction.

We believe that the investment of public grant money during a delay pending implementation of the purpose of the grant is an unauthorized use. The appropriation was made to DHSS to finance renovation and repair of various public health facilities. Sec. 4, Ch. 24, SLA 1984, p. 55, l. 15. The department finances grants for the construction of health care facilities under AS 18.25 from accounts credited with amounts from the appropriation. We believe the legislature did not intend to appropriate money to capitalize an investment program for the grant recipient. Use of public grant money for investment capital constitutes a diversion from the purpose assigned by the legislature for the appropriation made to finance the grant. A state certifying officer who authorizes a payment voucher for the disbursement of money to a grantee with knowledge that the grantee intends a diversion is subject to the duties imposed by AS 37.10.030(3), 37.10.040 and the criminal penalties imposed by AS 44.21.050.

We recognize that it is reasonable for a grantee to temporarily secure grant money in some way pending disbursement for the purpose of the grant. It would be wasteful to penalize grantees for productive use of the money pending disbursement. However, it is not proper for a grantee to unduly delay the disbursement of grant money in its possession. Traditionally, interest earned on advances of public grant money during a period of "undue" delay is considered property of the grantor. 1 R. Cappalli, Federal Grants and Cooperative Agreements § 5.11

(1982). In his treatise, Cappalli observes: "Nothing preordains this result except its historical respectability." Id., ch. 5, p. 23. This view is probably one that will be adopted by the Alaska courts. Some indication of the Alaska Supreme Court's philosophy may be found in Ellis v. City of Valdez, 686 P.2d 700 (Alaska 1974). In Ellis, the court declared "discretion to spend or not to spend within the parameters set by the legislature, rests with the agency for whose use the funds have been appropriated." 686 P.2d at 705 (citation omitted). By this the court meant that the power to choose the means to accomplish the purpose assigned by the legislature is up to the administering state agency. This places squarely upon the administering agency the responsibility to prevent the diversion of an appropriation for unauthorized purposes.

The legislative purpose assigned by law for the Cordova Hospital is "DHSS renovation and repair." Sec. 4, ch. 24, SLA 1984, p. 55, line 15. Use of the money to generate further revenue for the grant recipient, absent specific statutory authority, would be an unauthorized use of public money. If the money in the state treasury exceeds the amount necessary to finance obligations, the commissioner of revenue invests it in accordance with AS 37.10.070. The interest income earned is credited to the treasury and is considered an unrestricted receipt available for appropriation for any purpose.

State court decisions precisely on this issue were not located. It is probable that fiscal procedures and interpretations applied by the federal government constitute persuasive authority because nearly all of the statutes applicable to government fund accounting are derived from the days when Alaska was a federal territory. The federal comptroller general has consistently held that interest earned by a grantee on money advanced by the United States under a grant agreement belongs to the United States rather than to the grantee. All interest is required to be accounted for as money of the United States, and must be deposited in the treasury as miscellaneous receipts under 31 U.S.C. 484. 42 Comp. Gen. 289 (1962); 40 Comp. Gen. 81 (1960).

This general rule applies whether the grantee is a public or private agency. Exceptions to this rule may only be authorized by law. For example, states are specifically permitted by 42 U.S.C. 4213 to retain interest earned on grant money held awaiting disbursement. The rationale for the prohibition is that statutes authorizing grant programs contemplate that recipients may not profit other than in the manner and to the extent provided by law. Money paid to a grantee is not to be held, but is to be applied promptly to the grant purposes. 1 Comp. Gen. 652

(1922). "In other words, money is paid out to a grantee to accomplish the grant purposes, not for the grantee to invest the money and earn interest at the expense of the treasury."

Care should be taken when applying the advice given in this opinion to other grant programs established under authority other than AS 18.25. It appears that AS 37.05.315(d) authorizes advance payment of a municipal grant. The department is required to disburse 20 percent of the grant upon execution of the grant agreement. Further disbursements are payable based upon the previous month's expenditures. Another provision allows the department to make lump sum payment of a grant. However, our conclusion regarding the ownership of interest earned on advances of municipal grant money remains the same. The intent of the lump sum payment authorization is to accommodate municipalities making bulk purchases of materials and equipment to meet transportation and delivery schedules dictated by weather conditions. For each request for lump sum payment of municipal grant money, the commissioner of administration must determine that the money will be disbursed by the grantee without undue delay. A state agency may disburse grant money only if it determines that the grantee has an intent to proceed with execution of the purpose of the grant.

The Department of Health and Social Services has adopted 7 AAC 78.210 which appears to apply to the grant now under review. This regulation confers broad powers on a grantee to retain grant income if it is spent for the purposes of the grant. However, the term "grant income" is defined to mean "income earned by a grant project during the grant period." 7 AAC 78.320(10)(emphasis added). The regulations apparently do not authorize investment activity separate from that earned by the project financed by the grant. Rather, 7 AAC 78.190 requires monthly or quarterly disbursements of grant money to a grantee and makes no provision for advance payment of grant money. From this we conclude that existing regulations would not permit the disbursement requested by Cordova. We recommend that your department carry out its responsibility required by AS 18.25.100(2) and amend 7 AAC 78 to specifically establish fiscal and accounting procedures and controls necessary to prevent the investment activity proposed by the city and other similarly situated grantees.

We hope this memo has answered your question. Please call if you need further assistance.

JLB/pjg

cc: Hon. Lisa Rudd, Commissioner
Department of Administration

Hon. Loren H. Lounsbury, Commissioner
Department of Commerce &
Economic Development

Hon. Emil Notti, Commissioner
Department of Community &
Regional Affairs

Hon. Harold Raynolds, Sr., Commissioner
Department of Education

Hon. William A. Ross, Commissioner
Department of Environmental Conservation

Hon. Don W. Collinsworth, Commissioner
Department of Fish & Game

Hon. Esther Wunnicke, Commissioner
Department of Natural Resources

Hon. Robert Sundberg, Commissioner
Department of Public Safety

Take audit requirements, for example, which are described in Item 18 of the Special Conditions that I wrote for BIA. Grantee-engaged audits must be conducted at least every two years on an organization-wide basis to determine whether financial operations are conducted properly, financial statements are presented fairly, the organization has complied with laws and regulations affecting the expenditure of federal funds, internal procedures have been established to meet the objectives of federally-assisted programs, and financial reports to the government contain accurate and reliable information.

Moreover, the federal government requires that audits be made in accordance with generally accepted auditing standards established by the American Institute of Certified Public Accountants and standards and guidelines for audits of federally-assisted programs published by the U.S. General Accounting Office. Given the fact that such audits are required on an organization wide basis (rather than of the grant alone), it should be very easy for state grants to be worked into the audit. (If you want to obtain copies of the GAO standards I did have them reprinted while I was at BIA and they should be available through Bob Elliott, Chief of Support Services. If he does not know where they are, you can tell him that they are in storage in the basement, along with copies of A-102 and A-110.)

I believe the grant forms and Special Conditions I developed contain a number of requirements that might well be incorporated into Alaska's requirements for grantees. For example:

o The proposed beginning and completion dates of the grant and an annual budget period must be specified in the grant award.

o Definitions of grant, notice of grant awaard, grantee, granting officer, grants officer's representative, etc, are provided.

o The grantee must monitor its own performance under grant-supported activities and report quarterly on its performance.

o Grantees must have personnel and property management systems that meet minimum requirements.

o The approved budget must be in accordance with established cost principles

o Conditions for amending the grant and grant budget are specified and must be adhered to.

o Grantee financial management systems must meet the standards prescribed in the OMB circulars and the grantee must report quarterly on its grant expenditures, obligations, and proposed budget modifications.

o Transactions for procurement of property, construction, or services must be conducted in a manner that provides maximum open and free competition, whether by competititve sealed bids, competitive negotiation or noncompetititve negotiation.

o Some form of grantee cost or price analysis must be performed in connection with every procurement transaction.

CHAPTER 478

FORMERLY

HOUSE JOINT RESOLUTION NO. 25
AS AMENDED BY HOUSE AMENDMENT NO. 3 AND SENATE AMENDMENTS NOS. 4, 5 AND 6

ESTABLISHING CHANGES IN THE PROCESS FOR AWARDING GRANTS-IN-AID.

WHEREAS, the Speaker of the House of Representatives has appointed a House Ad Hoc Grant-in-Aid Reform Committee, and

WHEREAS, this Committee was charged with investigating any and all aspects of the grant-in-aid process that it deems necessary, and

WHEREAS, this Committee was charged to recommend criteria that would govern the awarding and auditing of grants, and

WHEREAS, it is considered urgent that the legislature initiate improvements in the grant-in-aid process, and

WHEREAS, the Committee is to recommend improvements in the grant-in-aid process rather than to become involved in the administrative procedure, and

WHEREAS, the Committee has developed an application for the Joint Finance Committee to use in its deliberations concerning grants-in-aid, and

WHEREAS, the Committee is to present a report to the Speaker of the House of Representatives by January 15, 1982, and

WHEREAS, this Resolution responds to the use of the proposed application and to the criteria to be considered for a grant-in-aid for FY 1983.

NOW, THEREFORE:

BE IT RESOLVED by the House of Representatives and the Senate of the 131st General Assembly of the State of Delaware, with the approval of the Governor, that the application form developed by the House Ad Hoc Grant-in-Aid Reform Committee be completed, as applicable, for any and all grants-in-aid to be awarded during FY 1983.

BE IT FURTHER RESOLVED that in order for an agency to be considered for a grant-in-aid for FY 1983, the agency must

1. be incorporated, non-profit (or under umbrella of parent organization which is incorporated, non-profit).
2. have by-laws that clearly state the purpose of the Corporation, and include definition of duties of Board of Directors.
3. have an active, community-represented, volunteer Board of Directors that sets policies, goals and objectives, and maintains minutes of regularly scheduled meetings and any special meetings.
4. have programs that are unduplicated, and satisfy unmet human needs of the community.
5. have personnel policies including job descriptions and classifications.
6. have competent executives, competent staffing and reasonable facilities.
7. practice non-discrimination.
8. have accounting (budget) procedures and an annual audit.
9. use funds in accordance with the application.
10. demonstrate community support.

ATTACHMENT A — STANDARD PROVISIONS

Article 1. Definitions. In this grant agreement, attachments and amendments, "Certifying Officer" means the person who signs this grant agreement on behalf of the Department and includes a successor or authorized representative.

Article 2. State Saved Harmless. The Grantee shall indemnify and hold and save the State, its officers, agents and employees harmless from liability of any nature or kind, which may arise from the performance of this grant agreement in any way whatsoever. Such liability may include, but is not limited to, costs and expenses for or on account of any and all legal actions or claims of any character whatsoever resulting from injuries or damages sustained by any person or persons or property which may arise from the performance of this grant agreement in any way whatsoever.

Article 3. Inspections and Retention of Records. The State may inspect, in the manner and at reasonable times it considers appropriate, all of the Grantee's facilities, records and activities under this grant agreement.

The Grantee shall retain financial and other records relating to the performance of this grant agreement for a period of three years from completion of the project and shall furnish access to the State upon request.

Article 4. Disputes. Any dispute concerning a question of fact arising under this grant agreement which is not disposed of by mutual agreement, shall be decided without bias by the Certifying Officer. The decision shall be in writing and mailed or otherwise furnished to the Grantee. The decision of the Certifying Officer is final and conclusive, unless, within 30 days from the date of receipt of the decision, the Grantee mails or otherwise furnishes a written appeal addressed to the Commissioner of the Department. The Commissioner shall hear the appeal. The decision of the Commissioner is final and conclusive, unless it is fraudulent or not supported by substantial evidence. In any proceeding under this Article, the Grantee has a right to offer evidence in support of its appeal. Pending final decision of a dispute, the Grantee shall proceed with the performance of the grant agreement in accordance with the Certifying Officer's decision.

Article 5. Equal Employment Opportunity (EEO). The Grantee may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy, or parenthood. The Grantee shall post in a conspicuous place, available to employees and applicants for employment, a notice setting out the provisions of this paragraph.

ATTACHMENT A — STANDARD PROVISIONS

The Grantee shall state, in all solicitations or advertisements for employees to work on State funded projects, that it is an equal opportunity employer (EEO) and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

The Grantee shall include the provisions of this EEO article in every contract relating to this grant agreement and shall require the inclusion of these provisions in every agreement entered into by any of its contractors, so that those provisions will be binding upon each contractor and subcontractor.

Article 6. Termination. The Certifying Officer, by written notice may terminate this grant agreement, in whole or in part, when it is in the best interest of the State. The State is liable only for payment in accordance with the provisions of this grant agreement for services rendered before the effective date of termination.

Article 7. No Assignment or Delegation. The Grantee may not assign or delegate this grant agreement, or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Certifying Officer.

Article 8. No Additional Work or Material. No claim will be allowed for services, not specifically provided for in this grant agreement, which are performed or furnished by the Grantee.

Article 9. Independent Grantee. The Grantee and any agents and employees of the Grantee act in an independent capacity and are not officers or employees or agents of the State in the performance of this grant agreement.

Article 10. Payment of Taxes. As a condition of this grant agreement, the Grantee shall pay all Federal, State and Local taxes incurred by the Grantee and shall require their payment by any contractor or any other persons in the performance of this grant agreement.

Article 11. Workers' Compensation Insurance. The Grantee shall provide and maintain workers' compensation insurance as required by AS 23.30 for all employees engaged in work under this grant agreement. The Grantee shall require any contractor to provide and maintain workers compensation insurance for its employees as required by AS 23.30.

ATTACHMENT A — STANDARD PROVISIONS

Article 12. Insurance. The Grantee is responsible for obtaining any necessary liability insurance.

Article 13. Current Prevailing Rates of Wage and Employment Preference. Certain grant projects are constrained by the provisions of AS 36. PUBLIC CONTRACTS. To the extent that such provisions apply to the project which is the subject of this grant agreement, the Grantee shall pay the current prevailing rates of wage to employees as required by AS 36.05.010. The Grantee shall also require any contractor to pay the current prevailing rates of wage as required by AS 36.05.010. Further, in accordance with AS 36.10.010, 95 per cent of the work force employed in the completion of this project shall be local residents where they are available and qualified. If 10 or fewer persons are employed, then 90 per cent of the project work force shall be local residents where they are available and qualified.

Article 14. Budget Flexibility. Notwithstanding the provisions of Article 18, Attachment A, "Changes", the Grantee may revise the project budget in Attachment B without a formal amendment to this agreement. Such revisions are limited to a maximum of 10% of the total amount of this agreement or $10,000, whichever is less over the entire term of this agreement. Such budget revisions shall be limited to changes to existing budget line items, and the creation of new budget line items which are within the scope of the project. Budget revisions may not be used to increase any budget item for project administrative expenses.

Changes to the budget beyond the limits authorized by this provision may only be made by a formal amendment to this agreement.

Article 15. Governing Law. This grant agreement is governed by the laws of the State of Alaska. The Grantee shall perform all aspects of this project in compliance with all appropriate laws and regulations. It is the responsibility of the Grantee to ensure that all permits required for the construction and operation of this project by the Federal, State or Local governments have been obtained.

Article 16. Officials not to Benefit. No member of or delegate to Congress or the Legislature, or officials or employees of the State or Federal government may share any part of this grant agreement or any benefit to arise from it.

ATTACHMENT A — STANDARD PROVISIONS

Article 17. Covenant Against Contingent Fees. The Grantee warrants that no person or agency has been employed or retained to solicit or secure this grant agreement upon an agreement or understanding for a commission, percentage, contingent fee, or brokerage except employees or agencies maintained by the Grantee for the purpose of securing business. For the breach or violation of this warranty, the State may terminate this grant agreement without liability or in its discretion, deduct from the grant agreement price or consideration the full amount of the commission, percentage, brokerage, or contingent fee.

Article 18. Changes. Any changes which have been agreed to by both parties will be attached and made a part of this grant agreement by use of an Amendment. Any such Amendment must be dated and must be signed by both parties before the change is considered official and approved.

Article 19. Public Purposes. The Grantee agrees that the project to which this grant agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

Article 20. Site Control. If the grant project involves the occupancy and use of real property, the grantee assures that it has the legal right to occupy and use such real property for the purposes of the grant, and further that there is legal access to such property.

Article 21. Operation and Maintenance. Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

Article 22. Assurance. The Grantee shall spend monies appropriated under this grant only for the purposes specified in this grant agreement.

Article 23. Remission. The Grantee shall return all unexpended grant monies to the State within 90 days of the project completion.

ATTACHMENT A — STANDARD PROVISIONS

Article 24. Reporting requirements. The Grantee shall submit progress reports to the Department according to the schedule established in Attachment B of this grant agreement. The Department shall provide forms and instructions necessary for the preparation of such reports.

Article 25. Right to withhold funds. The Department may withhold payments under this grant agreement for any violation of the provisions of this grant agreement.

Article 26. Sovereign Immunity. If the Grantee is an entity which possesses sovereign immunity, it has been required as a condition of this grant to irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

ARTICLE 27. Extension of term. Unless one or both parties to this agreement object in writing, the terms of this agreement may be extended for a maximum of six months without a formal amendment to this agreement..

ARTICLE 28. Changes to Construction Plans. Changes to construction plans which do not materially change the scope of the project do not require a formal amendment to the grant agreement.

Article 29. Personnel. (a) All of the services required hereunder will be performed by the Grantee or under his supervision, and all personnel engaged in the work shall be fully qualified and shall be authorized under State and local law to perform such services.

(b) None of the work or services covered by the contract shall be subcontracted without the prior written approval of the Department.

Article 30. Interest of Members of Department and Others. No officer, member, or employee of the Department and no members of its governing body, and no other public official of the governing body of the locality or localities in which the Project is situated or being carried out who exercise any functions or responsibilities in the review or approval of the undertaking or carrying out of this Project shall participate in any decision relating to this Contract which affects his personal interest or the interest of any corporation, partnership, or association in which he is, directly or indirectly, interested or having any personal or pecuniary interest, direct or indirect, in this Contract or the proceeds thereof.

ATTACHMENT A — STANDARD PROVISIONS

Article 31. Interest of Grantee. The Grantee covenants that he presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Contract. The Grantee further covenants that in the performance of this Contract, no person having any such interest shall be employed.

Article 32. Identification of Documents. All reports, maps, and other documents completed as a part of this Contract, other than documents exclusively for internal use within the Department, shall carry the following notation on the front cover or a title page (or in the case of maps, in the title block) containing the name of the Department:

"The preparation of this (report, map, document, etc.) was financed in part by funds from the State of Alaska, administered by the Municipal and Regional Assistance Division, Department of Community and Regional Affairs."

CH	SEC	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO CODE	DIV	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATN #	EXEC. CONT.	AWARDED CONTR.	EST. COMP.	UNEXPENDED BALANCE (PBA 1/31/85)
CH 18	2	3	23	Eagle Village/Yukon River Erosion Study	100.0	21-79-8-040	MRAD	None	Y	Y	N/A	Y		12/31/84	$15,570
CH 18	2	3	25	Circle - Plann. Design & Engineering	240.0	21-79-8-041	MRAD	None	Y		N/A				
CH 18	2	4	5	Noatak - Erosion Control	6.0	21-79-8-042	MRAD	None	Y	Y	N/A				
CH 20	2	7	8	Minto Water and Sewer Expansion	200.0	21-79-8-044	MRAD	None	Y	Y	N/A	Y		6/30/85	$200,000
CH 20	2	7	10	Egegik - Three Wells	271.0	21-79-8-045	MRAD	None	Y	Y	N/A	Y		5/31/86	$82,700
CH 21	2	5	14	Angoon Comm Assn./Ferry Terminal	30.0	21-72-8-665	MRAD	None	Y	Y	N/A				
CH 21	2	5	15	Bidarki Corp. - Cordova Youth Services Building	40.0	21-72-8-666	MRAD	None	Y		N/A				
CH 21	2	13	8	Hyder Firefighting Equipment	50.0	21-72-8-668	MRAD	None	Y	Y	N/A	Y		6/30/85	-0-
CH 21	2	13	10	Klukwan Development	55.0	21-72-8-669	MRAD	None	Y		N/A				
CH 21	2	13	12	Bear Creek Safety Equipment	55.5	21-72-8-670	MRAD	None	Y	Y	N/A	Y		6/30/85	$5,550
CH 21	2	13	14	Cooper Landing Ambulance Building	60.0	21-72-8-671	MRAD	None	Y	Y	N/A	Y		12/31/84	$6,000
CH 21	2	13	15	Moose Pass Building Repair/ Fire Equipment	30.0	21-72-8-672	MRAD	None	Y	Y	N/A				
CH 21	2	13	18	Cantwell Sanitary Landfill	100.0	21-72-8-673	MRAD	None	Y		N/A				
CH 21	2	13	20	Chistochina Municipal Projects	40.0	21-72-8-674	MRAD	None	Y	Y	N/A	Y		10/31/85	$29,000
CH 21	2	13	21	Dot Lake Storage Building	65.0	21-72-8-675	MRAD	None	Y	Y	N/A	Y		12/31/84	$1,800
CH 21	2	13	22	Eagle Village Holding Cells	40.0	21-72-8-676	MRAD	None	Y	Y	N/A	Y		12/31/84	-0-
CH 21	2	13	23	Gulkana Campground	25.0	21-72-8-677	MRAD	None	Y		N/A				
CH 21	2	14	5	Tanacross Fire Truck	85.0	21-72-8-678	MRAD	None	Y	Y	N/A	Y		6/30/85	-0-
CH 21	2	14	6	Tetlin Community Clinic	25.0	21-72-8-679	MRAD	None	Y	Y	N/A				
CH 21	2	14	7	Tok Clinic/Ambulance Storage	25.0	21-72-8-680	MRAD	None	Y	Y	N/A				
CH 21	2	14	9	Tuntutuliak Community Hall	225.0	21-72-8-681	MRAD	None	Y	Y	N/A	Y		6/30/85	$225,000
CH 21	2	14	12	Iliamna Health Clinic	40.0	21-72-8-682	MRAD	None	Y		N/A				
CH 21	2	14	14	Pedro Bay Electrification	400.0	21-72-8-683	MRAD	None	Y	Y	N/A	Y		6/30/85	-0-
CH 22	2	9	13	Copper Center Road Planning/Training	370.0	21-89-8-045	MRAD	None	Y	Y	N/A	Y(2)		12/31/84, 8/19/85	$53,946
CH 22	2	9	14	Tetlin Airport Completion	35.0	21-89-8-046	MRAD	None	Y	Y	N/A				
CH 22	2	9	16	Atka - Airport Access Road/Dump Road	29.8	21-89-8-047	MRAD	None	Y	Y	N/A	Y		12/31/85	$14,900
CH 22	2	9	17	New Stuyahok Diesel Dump Truck	90.0	21-89-8-048	MRAD	None	Y	Y	N/A	Y		6/30/85	$35,150
CH 24	2	15	17	Gastineau Humane Society	160.0	21-29-8-001	MRAD	None	Y	Y	N/A	Y		6/30/86	$98,000
CH 24	2	16	14	Kawerak Reindeer Project	75.0	21-72-8-687	MRAD	None	Y	Y	N/A	Y		6/30/86	$7,500
CH 24	2	16	17	Kuskokwim Agricultural Project	33.0	21-72-8-688	MRAD	None	Y	Y	N/A	Y		12/31/85	$33,000
CH 24	2	47	14	Arctic Village Clinic	100.0	21-39-8-015	MRAD	None	Y	Y	N/A	Y		10/30/85	$100,000
CH 24	2	47	20	Takotna Fire Station	95.0	21-59-8-018	MRAD	None	Y	Y	N/A	Y		6/30/85	$25,800

PUB	SEC	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO CODE	DIV	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATN #	EXEC. CONT.	AWARDED CONTR.	EST. COMP.	UNEXPENDED BALANCE (PBA 1-31-85)
CH 24	2	47	21	Tyonek Police Vehicle/Equipment	20.0	21-59-8-019	MRAD	None	Y	Y	N/A	Y		12/31/84	-0-
CH 24	2	47	22	Stevens Village Fire Equipment/ Building	100.0	21-59-8-020	MRAD	None	Y	Y	N/A	Y		6/30/85	$53,369.16
CH 24	2	47	25	Klukwan ANB & ANS Hall	75.0	21-79-8-050	MRAD	None	Y		N/A	Y		9/30/85	$7,500
CH 24	2	48	11	Dot Lake Storage Bldg.	10.0	21-79-8-051	MRAD	None	Y	Y	N/A	Y		12/31/84	-0-
CH 24	2	48	12	Healy Lake Community Center	37.0	21-79-8-052	MRAD	None	Y	Y	N/A	Y		12/31/85	$3,700
CH 24	2	48	13	Northway Landfill Equipment	100.0	21-79-8-053	MRAD	None	Y	Y	N/A	Y		10/31/84	-0-
CH 24	2	48	14	Northway Clinic Building	97.0	21-79-8-054	MRAD	None	Y		N/A	Y		5/31/85	-0-
CH 24	2	48	15	Tanacross Village Laundromat	32.5	21-79-8-055	MRAD	None	Y	Y	N/A				
CH 24	2	48	20	Arctic Village Electrical Upgrade	150.0	21-79-8-056	MRAD	None	Y	Y	N/A	Y		10/31/87	$138,800
CH 24	2	48	23	Chalkyitsik Multipurpose Building	175.0	21-79-8-057	MRAD	None	Y	Y	N/A	Y		8/31/85	$160,000
CH 24	2	49	4	Crooked Creek Multipurpose Bldg	91.0	21-79-8-058	MRAD	None	Y	Y	N/A	Y		7/31/85	$53,045.92
CH 24	2	49	5	Sleetmute Multipurpose Bldg.	200.0	21-79-8-059	MRAD	None	Y	Y	N/A	Y		9/30/85	$175,000
CH 24	2	49	6	Stoney River Heavy Equipment	100.0	21-79-8-060	MRAD	None	Y	Y	N/A	Y		6/30/85	$2,072.58
CH 24	2	49	7	Takotna Septic Tanks	150.0	21-79-8-061	MRAD	None	Y		N/A				
CH 24	2	49	9	Venetie Electrification Dist. System	220.0	21-79-8-062	MRAD	None	Y	Y	N/A	Y		10/31/86	$207,980
CH 24	2	49	11	Kipnuk Sanitary Landfill Road	292.0	21-79-8-063	MRAD	None	Y	Y	N/A				
CH 24	2	49	14	Ugashik Tow Compactor/Tractor	25.0	21-79-8-064	MRAD	None	Y		N/A				
CH 24	2	49	21	Tok Airport Upgrade	87.3	21-89-8-065	MRAD	None	Y		N/A				
CH 24	2	49	23	Arctic Village Road Construction	50.0	21-89-8-066	MRAD	None	Y	Y	N/A	Y		10/31/85	$50,000
CH 24	2	50	4	Sleetmute Road Construction & Equip.	200.0	21-89-8-067	MRAD	None	Y	Y	N/A	Y		12/31/84	$20,000
CH 24	2	50	6	Egegik Roads Upgrade	55.8	21-89-8-068	MRAD	None						(RSA to DOT)	
CH 24	2	50	7	Nelson Lagoon Dump Truck	57.0	21-89-8-069	MRAD	None	Y	Y	N/A	Y		12/31/85	$4,100
CH 45	2	31	8	Stevens Village Agriculture	25.0	21-49-8-018	MRAD	None	Y	Y	N/A	Y		12/31/84	$5,295
CH 45	2	31	11	Elfin Cove Community Building	350.0	21-79-8-072	MRAD	None	Y	Y	N/A	Y		6/30/86	$252,500
CH 45	2	31	13	Cooper Landing Fire Equipment	30.0	21-79-8-073	MRAD	None	Y	Y	N/A	Y		12/31/85	-0-
CH 45	2	31	19	Northway Emergency Radio	25.0	21-79-8-074	MRAD	None	Y	Y	N/A	Y		11/30/84	-0-
CH 45	2	31	21	Tok Clinic & Ambulance Storage	40.0	21-79-8-075	MRAD	None	Y	Y	N/A				
CH 45	2	31	24	Chalkyitsik Recreation Equipment	25.0	21-79-8-076	MRAD	None	Y	Y	N/A	Y		12/31/84	$23,800
CH 45	2	32	7	Levelock Medical-Emergency Building	294.8	21-79-8-077	MRAD	None	Y	Y	N/A	Y		12/31/85	$144,800
CH 45	2	32	8	Twin Hills Heavy Equipment	100.0	21-79-8-078	MRAD	None	Y	Y	N/A	Y		10/31/84	-0-
CH 97	1	1	10	Alaska Special Olympics	100.0	21-72-8-705	MRAD	6/30/85	Y	Y	N/A	Y		12/31/85	$50,000

17300/2

CH	YR	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO CODE	DIV	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	RFP #	EXEC. CONT.	AWARDED CONTR.	EST. COMP.	UNEXPENDED BALANCE (PBA 1-31-85)
CH 21	2	42	9	Telida Electrification	25.0	21-79-2-014	MRAD	None	Y		N/A				
CH 21	2	42	13	Kokhanok Electrification	25.0	21-79-2-015	DCD	None	Y	Y	N/A	Y		12/31/84	$20,000
CH 21	2	42	16	Karluk Electrification System	233.0	21-79-2-016	DCD	None	Y	Y	N/A	Y			$233,000
CH 21	2	14	17	Karluk Street Lighting	27.0	21-72-8-684	DCD	None	Y	Y	N/A	Y			27,000
CH 21	4	69	22	Motlakatla Dam Repair	100.0	21-29-2-015	DCD	None	Y	Y	N/A	Y		1/31/85	-0-
CH 21	4	73	15	Kwigillingok Power Generator	80.0	21-79-2-025	DCD	None	Y	Y	N/A	Y		1/31/85	$37,266
CH 15	2	32	5	Igiugig Electrification, Phase II	167.2	21-79-2-020	DCD	None	Y	Y	N/A	Y		9/30/85	$43,700
CH 15	2	32	6	Kokhanok Electrification	400.0	21-79-2-021	DCD	None	Y	Y	N/A	Y		12/30/84	$115,000
CH 21	2	5	18	Enop'ut Childrens Center	85.0	21-72-2-058	DCD	None	Y	Y	N/A	+			
CH 21	2	15	19	Enop'ut Childrens Center	65.0	21-29-2-010	DCD	None	Y	Y	N/A	+			
CH 24	2	16	6	SE Alaska Comm. Action Youth Equip.	25.0	21-72-2-060	DCD	None	Y	Y	85-0135	Y		6/30/85	$25,000
CH 21	2	16	13	Cape Beaufort Coal Development	2,000.0	21-73-2-215	DCD	None	Y	Y	85-0108	Y**		11/30/84	**
CH 21	2	16	16	Minto Electrification New Housing	100.0	21-73-2-216	DCD	None	Y	Y	85-0150	Y****		6/30/85	$82,500
CH 24	2	48	9	Copper Center Geothermal, Phase II	100.0	21-79-2-010	DCD	None	Y	Y	85-0169	Y		6/30/85	$50,000
CH 24	2	48	18	Noatak Electric Project	75.0	21-79-2-011	DCD	None	Y	Y	N/A	Y		5/31/85	$48,000
CH 24	2	48	21	Beaver Electrification, Phase I	180.0	21-79-2-012	DCD	None	Y	Y	N/A	Y		1/31/85	$77,256.25
CH 24	2	48	22	Birch Creek Electrical Upgrade	75.0	21-79-2-013	DCD	None	Y	Y	N/A	Y		1/31/85	$3,000

+ ON HOLD. WAITING TO HEAR FROM CONTRACTOR

** ALASKA NATIVE FOUNDATION
Appropriation - 2,000,000
Executed Contract - 670,000
Unexpended Balance of Contract - 5,104.86
Available for Contracts - 1,330,000

**** INTERIOR REGIONAL HOUSING AUTHORITY

1290P/2

FILE	TEST	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO CODE	DIV	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATN #	EXEC. CONT.	AWARDED CONTR.	EST. COMP.	UNEXPENDED BALANCE (PBA 1-31-85)
CP	21	2	15	Nome Eskimo Community Center Plumbing	40.0	21-29-1-001	AS	None	Y	Y	85-0090	Y		6/30/85	$31,500
CP	21	2	15	Community Planning Project	200.0	21-72-1-200	C.O.	None	*	*		*			$71,336.35
CP	21	2	16	Alaska Black History Film	42.0	21-72-1-201	HAD	None	Y	Y	85-0068	Y		6/30/85	$22,000

* Appropriation - 200,000
Executed Contract - 137,000
Balance of Contract - 71,336.35
Available for Contract - 63,000

1730B/4

PUR	SECT	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO CODE	DIV	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATH #	EXEC. CONT.	AWARDED CONTR.	EST. COMP.	UNEXPENDED BALANCE (PBA 1-31-85)
CH 21	2	5	16	Paines Senior Center	34.0	21-71-6-357	HAD	None	Y	Y	84-0667	Y		6/15/85	-0-
CH 21	2	16	8	Anchorage Neighborhood Housing Services Cap.	750.0	21-71-6-450	HAD	None	Y	Y	85-0072	Y		12/31/90	-0-
CH 21	2	48	10	Pot Lake Sr. Citizens Transportation	40.0	21-79-6-010	MRAD	None	Y	Y	85-0089	Y		11/30/86	$12,500

1730P/5

PUB L	SECT	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO. CODE	DIV.	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATH #	EXEC. CONT.	EST. COMPL.	UNEXPENDED BALANCE (PBA 1-31-85)
CH122	22	52	13	Kawarek	305,000	21-21-2-111	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$152,500
CH122	22	53	5	Maniilaq Youth Employment	75,000	21-25-2-271	DCD	6/30/85	Y	Y	85-0295	Y	6/30/85	$50,000
CH122	22	53	8	Kawarek Youth Employment	75,000	21-25-2-271	DCD	6/30/85	Y	Y	85-0225	Y	6/30/85	$50,000
CH122	22	53	9	AIM Youth Employment	220,000	21-25-2-271	DCD	6/30/85	Y	Y	85-0194	Y	6/30/85	$30,613.37
CH122	22	53	13	Kuskokwim Native Assn. Summer Youth Program	35,500	21-25-2-271	DCD	6/30/85	Y	**	N/A			
CH122	22	53	16	Maniilaq Manpower Career Guidance	182,000	21-25-2-293	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	103,324.51
CH122	22	53	21	FNA Employment Services	221,000	21-25-2-293	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$221,000
CH122	22	55	5	Koyukon Regional Job Development	125,000	21-72-8-180	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$44,180
CH122	22	55	11	NSB Voc. Ed. Pilot Program	150,000	21-72-8-180	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$123,684
CH122	22	55	14	Railbelt Comm. Development Small Business Loans	100,000	21-72-8-180	DCD		(RSA to Commerce)					
CH122	22	55	22	Sealaska Heritage Foundation	200,000	21-72-8-180	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$133,333
CH122	22	56	7	Rural Entrepreneurship Prgm	200,000	21-72-8-180	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$180,000
CH122	22	56	25	TCC Energy Self-Sufficiency	120,000	21-73-2-002	DCD	6/30/85	Y	Y	N/A	Y	12/31/85	$100,000
CH122	22	57	5	Nunam Kitlutsisti Energy Demand	75,000	21-73-2-002	DCD	6/30/85	Y	Y	85-0173	Y	10/31/85	$34,621.27
CH122	22	57	14	Yukon-Kuskokwim Energy and Mineral Development	125,000	21-72-8-360	DCD	6/30/85	Y	Y	85-0172	Y	10/31/85	$59,000
CH122	22	57	25	Bering Sea Fisherman's Association	250,000	21-72-8-360	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$187,500
CH122	22	58	19	Alaska Legal Services	1,200,000	21-72-1-001	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$618,703.43

** THIS PROGRAM IS SCHEDULED TO START IN JUNE, 1985.

1702P/1

BILL	SECT	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO. CODE	DIV.	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATN #	EXEC. CONT.	EST. COMPL.	UNEXPENDED BALANCE (PCA 1-31-85)
CH122	22	54	13	FNA Native Economic Dev.	190,000	21-72-8-100	DCD	6/30/85	Y	Y	85-0201	Y	6/30/85	$154,797
CH122	22	54	17	Rural Citizens Airport Asst. Anchorage	45,000	21-72-8-100	MRAD	6/30/85	Y	Y	85-0215	Y	6/30/85	$10,800
CH122	22	54	23	Assn. for Stranded Rural Alaskans	210,000	21-72-8-180	MRAD	6/30/85	Y	Y	N/A	Y	6/30/85	$70,000
CH122	22	54	26	ANF for Alaska Native Leadership	200,000	21-72-8-180	MRAD	6/30/85	Y	Y	N/A	Y	12/30/85	$150,000
CH122	22	55	[illegible]	Bristol Bay Native Assn. Fisheries	75,000	21-72-8-180	MRAD	6/30/85	Y	Y	N/A	Y	6/30/85	$32,000
CH122	22	55	19	Municipality of Akutan	44,500	21-72-8-180	MRAD	6/30/85	Y	Y	N/A	Y	7/15/85	-0-
CH122	22	55	25	Yukon-Kuskokwim Mayor's Conf.	25,000	21-72-8-180	MRAD	6/30/85	Y	Y	N/A	Y	6/30/85	$20,512
CH122	22	56	4	Orutsararmuit Nelson Island Reindeer Industry	70,000	21-72-8-180	MRAD	6/30/85	Y	Y	N/A			
CH122	22	57	22	Kuskokwim Native Assn. Ag. Program	47,000	21-72-8-360	MRAD	6/30/85	Y	Y	N/A	Y	12/31/85	$47,000
CH122	22	58	11	AFN ANCSA Plan of Survey	250,000	21-72-8-401	MRAD	6/30/85	Y	Y	N/A	Y	10/16/85	$200,000

1792B/2

BILL	SECT	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO. CODE	DIV.	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	ATN #	EXEC. CONT.	EST. COMPL.	UNEXPENDED BALANCE (PBA 1-31-85)
CH171	262	50	2	AVCP Low-Income Energy Program	120.0	21-73-2-220	DCD	6/30/85	Y	Y	N/A	Y		$98,302.24
CH171	157	25	24	Education & Career Internship	38.6	21-25-2-960	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$19,873
CH171	245	37	17	World Eskimo & Indian Olympics	30.0	21-25-2-961	DCD	6/30/85	Y	Y	N/A	Y	11/30/84	-0-
CH171	319	78	18	Chitina Hydroelectric Restoration	261.0	21-79-2-012	DCD	None	Y	Y	N/A	*		
CH171	319	78	21	Healy Lake Electrification	30.0	21-79-2-013	DCD	None	Y	Y	N/A	Y	1/31/85	$3,000
CH171	319	59	8	Anchorage Neighborhood Housing Services	300.0	21-71-6-359	HAD	None	Y	Y	N/A	Y	12/31/90	-0-
CH171	319	59	9	Cook Inlet Intermediate Care	750.0	21-71-6-360	HAD	None	Y	Y	85-0254	Y		$250,000
CH171	70	13	24	Oscarville Riverbank & Loading Facility	200.0	21-89-8-201	MRAD	6/30/85	Y		N/A			
CH171	107	19	1	Kodiak Island Borough Village Fisheries Education	35.0	21-72-8-691	MRAD	6/30/85	Y	Y	N/A	Y	6/30/85	$3,500
CH171	110	19	14	Regional Resource Development Authorities CH 107, SLA 83, Sec 33 (Not recorded in FY 84)	30.0	21-72-1-068	MRAD	None	HOLD		N/A			
CH171	131	22	11	Metlakatla Electric Utilities	60.0	21-49-8-204	MRAD	6/30/85	Y	Y	N/A	Y	12/31/84	-0-
CH171	137	23	12	Northway Fire Truck	125.0	21-72-8-692	MRAD	6/30/85	Y	Y	N/A	Y	1/31/85	-0-
CH171	172	27	22	Pedro Bay Electrification	500.0	21-72-8-693	MRAD	6/30/85	Y	Y	N/A	Y	6/30/85	$90,000
CH171	222	34	13	Kongiganak Airport Freight Terminal	40.0	21-72-8-694	MRAD	6/30/85	Y		N/A			
CH171	235	36	10	Halibut Cove Well Digging	40.0	21-72-8-695	MRAD	6/30/85	Y		N/A			
CH171	257	39	4	McGrath Office Bldg. - Lib. Complex	330.0	21-72-8-696	MRAD	6/30/85	Y		N/A	Y	6/30/85	$330,000
CH171	319	58	18	Anchorage Salvation Army Lodging	1,000.0	21-29-8-014	MRAD	None	Y		N/A			
CH171	319	58	19	Midnight Sun Council Scout Camp	100.0	21-29-8-015	MRAD	None	Y		N/A	Y	6/30/86	$50,000
CH171	319	58	22	Alaska Medical Housing Facility	1,500.0	21-39-8-020	MRAD	None	Y		N/A	Y	7/30/86	$349,000
CH171	319	58	25	Thorne Bay Project Plan & Design	40.0	21-72-8-697	MRAD	None	Y		N/A	Y	7/31/85	$40,000
CH171	319	59	5	Tlingit-Haida SE Data Profile	200.0	21-72-8-698	MRAD	None	Y	Y	N/A	Y	4/1/86	$135,000
CH171	319	59	10	Cook Inlet Cultural Heritage	250.0	21-72-8-699	MRAD	None	Y	Y	N/A	Y	6/30/86	$125,000
CH171	319	59	11	Deltana Rika's Landing	220.0	21-72-8-700	MRAD	None	Y		N/A			
CH171	319	59	12	Wrangell TV & Radio	150.0	21-72-8-701	MRAD	None	Y	Y	N/A	Y	6/30/85	15,000
CH171	319	78	13	Tanacross Fire Truck Supplemental	40.0	21-79-8-090	MRAD	None	Y	Y	N/A	Y	6/30/85	-0-
CH171	319	78	17	Chistochina Community Hall	116.0	21-79-8-081	MRAD	None	Y	Y	N/A	Y	12/31/85	$98,100
CH171	319	78	19	Copper Center Water & Sewer	24.0	21-79-8-082	MRAD	None	Y	Y	N/A			
CH171	319	78	20	Dot Lake Rec. Facility & Equipment	25.0	21-79-8-083	MRAD	None	Y	Y	N/A	Y	10/31/85	$12,780

* WAITING FOR QUESTIONNAIRE TO BE COMPLETED BEFORE CONTRACT CAN BE WRITTEN.

1799B/1

BILL	SECT	PG	LN	DESCRIPTION	APPROPRIATION AMOUNT	COLLO. CODE	DIV.	LAPSE DATE	NOTICE OF AWARD	CONTRACT NEGOT.	CONTRACT ATN #	EXEC. CONT.	EST. COMPL.	UNEXPENDED BALANCE (PBA 1-31-85)
CH171	319	78	22	Tanacross Village Street Lights	30.0	21-79-8-084	MRAD	None	Y		N/A			
CH171	319	78	23	Tetlin Landfill/Waste Disposal	60.0	21-79-8-085	MRAD	None	Y	Y	N/A			
CH171	319	79	4	Tok Community Center	115.0	21-79-8-086	MRAD	None	Y			Y	6/30/85	$86,250
CH171	319	79	6	Telida Electrification	20.0	21-79-8-087	MRAD	None	Y					
CH171	319	79	8	Twin Hills Heavy Equipment	120.0	21-79-8-088	MRAD	None	Y	Y	N/A	Y	6/30/85	$2,950
CH171	319	79	11	Glennallen Heights 3/4 Mile Road	72.0	21-89-8-071	MRAD	None	Y	(RSA to DOT)				
CH20	2	6	12	Pedro Bay Sewer & Water	63.0	21-79-8-046	MRAD		Y	Y	N/A	Y	9/30/85	$6,300
CH171	183	28	28	Kodiak Area Native Association Energy Audit Program Completion	45.87	21-73-2-225	DCD	6/30/85	Y	Y	N/A	Y	6/30/85	$21,360.66

1799B/2

PROPOSED AMENDMENTS TO
HOUSE BILL 139

Seperate DCRA Regulations

Section 2. of the bill would be amended to read as follows:

Section 37.05.318. REGULATIONS. The Commissioner of Administration ~~shall~~ must adopt regulations to implement the provisions of AS 37.05.315 -- 37.05.316 [37.05.317]. The Commissioner of Community and Regional Affairs ~~shall~~ may adopt regulations to implement the provisions of AS 37.05.317. These regulations ~~must~~ may include provisions that establish procedures for safekeeping and investment of grant money, management and disposition of property acquired by grant money, and post audit of grant transactions.

Sec. 37.05.190. Pre-audit of claims. (a) The Department of Administration shall examine and audit every receipt, account, bill, claim, refund, and demand on the funds in the state treasury arising from activities carried on or administered by state agencies. It shall determine whether or not the obligation is incurred in accordance with laws and regulations adopted under authority of law, and that the amount is correct and is unpaid.

(b) The department may not approve for payment an account, bill, claim, refund, or demand on funds in the state treasury unless the claim is ordered by act of the legislature or is contracted against the state by an authorized officer or agent of the state. (§ 6 art III ch 82 SLA 1955; am § 5 ch 186 SLA 1957)

and unless the claim is contracted in accordance with applicable state and local laws.

PROPOSED DRAFT LANGUAGE HB 139

(1) Funds advanced by the state to a recipient shall be deposited in a federally insured interest bearing account. Interest earned on those funds shall either be applied to the cost of the project or returned to the state upon completion of the project.

(2) Accounting procedures for funds received under this chapter shall be in accordance with standards established by the American Institute of Certified Public Accountants.

(3) Each recipient of a grant of $100,000 or more must prepare and submit a biennial financial and compliance audit. The audit may be requested annually by the state. A post-audit shall be prepared and submitted by the recipient upon completion of the project.

not stringent
This work for
Small communities

to The G.A.

similar to draft regulations by D.O.A.

being prepared

A M E N D M E N T

Offered in the HOUSE By Furnace

TO: HB 139

Page 2, lines 4 - 10, delete all material and insert:

"* Sec. 2. AS 37.05.318 is amended to read:

Sec. 37.05.318. FURTHER REGULATIONS LIMITED [PROHIBITED]. (a) Notwithstanding the Administrative Procedure Act (AS 44.62), the Fiscal Procedures Act (AS 37.05), and the Executive Budget Act (AS 37.07), except as provided in (b) of this section a state agency may not adopt regulations or impose additional requirements or procedures to implement, interpret, make specific, or otherwise carry out the provisions of AS 37.05.315 - 37.05.317 unless required by the federal government for participation in federal programs.

(b) The commissioner of administration shall adopt regulations to implement the provisions of AS 37.05.315 - 37.05.317, but the regulations may include only provisions that establish procedures for safekeeping and investment of grant money, management and disposition of property acquired by grant money and post audit of grant transactions.

HB 139

SUGGESTED REVISION OF SECTION 2, PAGE 2

* Sec. 2. AS 37.05.318 is repealed and reenacted to read:

Sec. 37.05.318. REGULATIONS. The commissioner of administration shall adopt regulations to implement the provisions of AS 37.05.315 - 37.05.317. These regulations must include provisions that require compliance with all state and local laws; establish procedures for safekeeping and investment of grant money, management and disposition of property acquired by grant money, and post audit of grant transactions; establish mechanisms for assisting citizens with complaints about violations of laws or regulations; and establish penalties for failure to follow all applicable state and local laws and regulations, including the immediate cutting off of unpaid portions of a grant or return of a lump sum grant if an Alaskan Court rules that the grantee has violated state or local laws.

Submitted by [illegible] Blue (Legal Name Betty Breck)
Box 316
Juneau, Alaska 99802
586-5840

Fairbanks North Star Borough

Mayor: B.B. Allen

April 3, 1985

Representative Niilo Koponen
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Representative Koponen:

Attached is a Position Paper on House Bill No. 139, "An Act relating to the administration of certain grants passed by the Legislature; and providing for an effective date." Section 2 of this act has the potential to increase the Borough's administrative cost thereby reducing program dollars. As stated in the Position Paper, we have already established procedures which are consistant with statutes, Borough ordinances, and accepted accounting principles. We believe that this is the most effective method to regulate these grants in terms of both cost and programs.

While we realize the need to regulate grants, we hope the Legislature realizes that many communities such as Anchorage, Mat-Su and ourselves have effective local regulations already in place. These regulations provide all of the safeguards for grant funds that are provided to every other public dollar which we are entrusted to handle. We would, therefore, urge you to give consideration to our efforts in your quest to protect against abuses in the use of grant funds.

Sincerely,

Bill

B. B. Allen,
Borough Mayor

BBA/rek
Enclosures

P.O. Box 1267 Fairbanks, Alaska 99707 (907) 452-4761

POSITION PAPER - HOUSE BILL NO. 139

Section 1 of this bill does not apply to the Fairbanks North Star Borough.

Section 2 of House Bill No. 139 would amend A.S.37.05.318 to require the commissioner of administration to adopt regulations pertaining to grants awarded by the Legislature through the Department of Administration. This requirement is a total reversal of the existing A.S.37.05.318 which prohibits the commissioner from regulating these grants. While we can support the fact that grant monies need to be controlled, we do have some concerns.

Responsible local governments in various parts of the state have long recognized that the grant funds need to have rules and safeguards. As a result, we have created our own administrative regulations to ensure that grant funds - like all public dollars - are handled in accordance with existing statutes, regulations and accepted principles of government accounting. During the time that these local safeguards have been in place, they ha e served to ensure that grant funds receive the same scrutiny as other Borough funds. Therefore, where those safeguards are in effect and have proven to work, we feel that the local standard should prevail over any regulations developed by the commissioner of administration.

If the alternative is to be pursued, Section 2 of House Bill No. 139 should be changed by adding a sentence to the end as follows:

> "When procedures established by the municipality provide for the aforementioned safeguards and are consistant with state statute, the provisions of the municipal codes shall prevail over regulations promulgated under the authority of this section.

If this solution is not acceptable, then we would like to see some language built into the statute that would protect political subdivisions from wasteful redundancy and artificial requirements that serve only administrative convenience at the expense of the various programs. To this end, we would propose that the audit of grant funds be made as a part of the annual external audit of municipal funds required by A.S.29.48.220. Under this solution, all grant funds would be audited at the end of each fiscal year. This is currently done in the Fairbanks North Star Borough. There are multiple benefits to this approach. First, it would provide a mechanism to systematically have grants examined each fiscal year. Second, it would prevent the loss of staff time occasioned by multiple audits per year. Third, it would prevent an increase in costs to the state by not requiring the hiring of auditors by the Department of Administration.

We would further propose that the right of municipalities to maintain a central treasury be protected. The costs of establishing separate accounts and tracking the investments for each grant fund would greatly outweigh any benefit to be derived. Further, the position that municipalities are gaining great amounts of interest from grant dollars at the expense of projects just is not true in the Fairbanks North Star Borough. The majority of our grants provide only 20% in front money. This means that during our short construction season, we are often using the Borough's General Fund to pay contractors prior to obtaining reimbursement.

Therefore, any system requiring interest tracing would have to be a by day system calculating not only how much interest a grant was earning but also how much grant interest is due to the Borough for revenues lost between the time we spend Borough money and the state reimburses it. A system of this type would be extremely expensive and would erode program dollars by driving up indirect costs.

If this alternative is chosen, then Section 2 of House Bill No. 139 should be changed by adding two sentences at the end as follows:

> "An audit conducted in accordance with A.S.29.48.220 may be used to satisfy any post audit requirement imposed by regulations of the commissioner. Nothing prescribed by this section or regulations promulgated hereunder may be construed to interfere with the right of a municipality to establish and maintain a central treasury."

Bannister
4/9/85

Original sponsor: Rules/Governor

IN THE HOUSE

BY THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 139 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the administration of certain grants passed by the legislature; and providing for an effective date."

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

* Section 1. AS 37.05.316 is amended to read:

Sec. 37.05.316. GRANTS TO NAMED RECIPIENTS. When an amount is appropriated or allocated to a department as a grant for a named recipient that [WHICH] is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act [, OR BOTH,] for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services [, OR BOTH,] in the same area. The department shall award the grant to [CONTRACT WITH] the named recipient unless the Office of the Governor, with due regard for the [ANY] local expertise or experience of [AMONG] those making proposals, determines that an award [OF THE CONTRACT] to a different party would better serve the public interest. If the grant [CONTRACT] is awarded to a [ANOTHER] party other than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A grant agreement must [CONTRACT SHALL]

be executed within 60 days after the effective date of the appropriation or allocation. [THE PURCHASE OF THE GOODS OR SERVICES, OR BOTH, SHALL BE IN ACCORDANCE WITH AS 37.05.230(1)(B).]

Sec. 2. AS 37.05.318 is repealed and reenacted to read:

Sec. 37.05.318. REGULATIONS. The commissioner of administration shall adopt regulations to implement the provisions of AS 37.05.315 - 37.05.316. The commissioner of community and regional affairs shall adopt regulations to implement the provisions of AS 37.05.317. These regulations must include provisions that establish procedures for the safekeeping and investment of grant money, the management and disposition of property acquired by grant money, and the post audit of grant transactions. An audit required by these regulations is a cost of the grant. The regulations adopted under this section may not interfere with the implementation of the grant, but shall be designed to prevent the mismanagement of the grant and the misuse of grant funds.

* Sec. 3. This Act takes effect July 1, 1985.

Alaska State Legislature

House of Representatives

Committee on
Community & Regional Affairs

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4833

MEMORANDUM

To: Representative Peter Goll, Chair and Members
House Community and Regional Affairs Committee

From: Representative Andre Marrou
HCRA Committee Member

Date: February 22, 1985

Re: Proposed Amendment HB 139

The following proposed amendment is now before the House Community and Regional Affairs Committee for its consideration. Your attention to the amendment prior to the next scheduled hearing on HB 139 is appreciated:

Page 2, * Section 2. AS 37.05.318 REGULATIONS.

Line 10, INSERT the following language:

"Such regulation shall not impede, hinder, nor interfere with the appropriations or allocations of grant monies, but shall be adopted to prevent abuses or misimplementations of grant monies."

Statute prevails over conflicting regulation. — The statute delegating its law-making power to government agencies to make law through regulations defines the agency's authority to promulgate regulations and thus if there is a conflict between the statute and a regulation, the statute prevails. Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Attorney general could not save provisions of former AS 30.25 from unconstitutionality under Alas. Const. art. IX, § 7, by directing promulgation of regulations inconsistent with statute. — See Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Judicial review of administrative regulation. — Where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, the supreme court will review the regulation in the following manner: First, it will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, the supreme court will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

Standard of review. — This section and AS 44.62.030 provide guidance as to the standard of review for regulations adopted pursuant to an administrative agency's quasi-legislative rule-making function. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

Collateral references. — 1 Am. Jur. 2d, Administrative Law, §§ 92 to 97.

73 C.J.S., Public Administrative Law and Procedure, § 87 et seq.

Sec. 44.62.030. Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute. (§ 5 art I (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Statute prevails over conflicting regulation. — The statute delegating its law-making power to government agencies to make law through regulations defines the agency's authority to promulgate regulations and thus if there is a conflict between the statute and a regulation, the statute prevails. Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Attorney general could not save provisions of former AS 30.25 from unconstitutionality under Alas. Const., art. IX, § 7, by directing promulgation of regulations inconsistent with statute. — See Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Regulation accorded presumption of validity. — An administrative regulation must be accorded a presumption of validity, and the challenger of the regulation must demonstrate its invalidity. Union Oil Co. v. State, Sup. Ct. Op. No. 1563 (File No. 2650), 574 P.2d 1266 (1978).

Judicial review of administrative regulation. — Where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it

appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, the supreme court will review the regulation in the following manner: First, it will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, the court will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

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Quoted in Chevron U.S.A., Inc. v. LeResche, Sup. Ct. Op. No. 2659 (File Nos. 6396, 6648), 663 P.2d 923 (1983); Kuhn v. State, Sup. Ct. Op. No. 2710 (File Nos. 6833, 7080), P.2d (1983).

Article 2. Submission, Filing and Publication of Regulations.

Sec. 44.62.040. Submitting regulations. (a) Every state agency which by statute possesses regulation-making authority shall submit to the lieutenant governor for filing a certified original and one duplicate copy of every regulation or order of repeal adopted by it, except one which

(1) establishes or fixes rates, prices or tariffs;

(2) relates to the use of public works, including streets and highways, under the jurisdiction of a state agency if the effect of the order is indicated to the public by means of signs or signals; or

(3) is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

(b) Citation of the general statutory authority under which a regulation is adopted, as well as citation of specific statutory sections being implemented, interpreted or made clear, shall follow the text of each regulation submitted under (a) of this section. (§ 1 art II (ch 1) ch 143 SLA 1959; am § 1 ch 40 SLA 1969)

NOTES TO DECISIONS

Regulations adopted by the Commissioner of Natural Resources are subject to the rule-making provisions of the Administrative Procedure Act and must be adopted according to the procedures set forth therein. Among the required procedures for adoption of regulations are notice of the proposed adoption, a public hearing in which any interested person may submit statements to the agency, filing of the regulation, if adopted, with the secretary of state, and publication. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

Regulations promulgated under AS 15.15.330, dealing with the early counting of election votes, are not exempt from the requirements of the Administrative Proce-

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 139
Title: An Act Relating to the Administration of Certain Grants
Sponsor: Governor
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: General Government
BRU, Program or Subprogram(s) Affected: General Services & Supply

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL	0	0	0	0	0	0
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0
POSITIONS:	0	0	0	0	0	0
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) This Bill recognizes that a grant is more often akin to a unilateral contract (in that there is no specific performance on the State's part other then the provision of funding) than it is to a bilateral contract (where there is an exchange of promises with specific performance on the part of both parties). This bill further recognizes that the difference warrants a separate set of procedures under which the grant will be expended.

Prepared By: Robert J. Link Phone: 465-2250
Division: General Services & Supply Date: December 27, 1984

Approved by Commissioner: Lisa Rudd Date: 1/11/85
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Bannister
4/3/85

Original sponsor: Rules/Governor

IN THE HOUSE

BY THE COMMUNITY AND REGIONAL
REGIONAL AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 139 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the administration of certain grants passed by the legislature; and providing for an effective date."

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

* Section 1. AS 37.05.316 is amended to read:

Sec. 37.05.316. GRANTS TO NAMED RECIPIENTS. When an amount is appropriated or allocated to a department as a grant for a named recipient that [WHICH] is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act [, OR BOTH], for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services [, OR BOTH,] in the same area. The department shall award the grant to [CONTRACT WITH] the named recipient unless the Office of the Governor, with due regard for the [ANY] local expertise or experience of [AMONG] those making proposals, determines that an award [OF THE CONTRACT] to a different party would better serve the public interest. If the grant [CONTRACT] is awarded to another party than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A grant agreement must [CONTRACT SHALL] be executed within 60 days after the effective date of the appropriation or allocation.

The grant recipient shall state in the grant agreement that the grant recipient will, to the extent consistent with the purpose of the appropriation or allocation, make the facilities and services provided with the grant available for the use of the general public. [THE PURCHASE OF THE GOODS OR SERVICES, OR BOTH, SHALL BE IN ACCORDANCE WITH AS 37.05.230(1)(B).]

* Sec. 2. AS 37.05.318 is repealed and reenacted to read:

Sec. 37.05.318. REGULATIONS. The commissioner of administration shall adopt regulations to implement the provisions of AS 37.05.315 - 37.05.316. The commissioner of community and regional affairs shall adopt regulations to implement the provisions of AS 37.05.317. These regulations must include provisions for the safekeeping and investment of grant money, the management and disposition of property acquired by grant money, the audit of grant transactions, and the administration of the grant, including the requirement that the grant recipient:

(1) deposit in a federally insured interest-bearing account the funds advanced by the state, and apply the interest earned on the funds to the project or return the interest earned on the funds to the state when the project is completed;

(2) establish and use recognized accounting procedures for the grant funds based on the standards established by the American Institute of Certified Public Accountants;

(3) when the grant is for $100,000 or more, submit for a grant project to the granting agency a biennial financial and compliance audit, an annual financial and compliance audit if requested by the granting agency, and a financial and compliance post-audit at the completion of the grant project;

(4) establish specific procedures for complying with local hire to the extent allowed by law;

(5) establish specific procedures for avoiding discrimination based on the person's race, color, sex, creed, national origin or, unless otherwise contrary to law, the person's political opinions or affiliations;

(6) provide the granting agency with a project status report on the grant project on or before January 10 of each year if the grant project has not been completed during the previous state fiscal year.

* Sec. 3. This Act takes effect July 1, 1985.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA STATE LEGISLATURE by and through the LEGISLATIVE BUDGET & AUDIT COMMITTEE of the ALASKA STATE LEGISLATURE; and REPRESENTATIVE JIM DUNCAN, CHAIRMAN; SENATOR GEORGE HOHMAN, VICE-CHAIRMAN; REPRESENTATIVE RUSS MEEKINS; SENATOR ARLIS STURGULEWSKI; REPRESENTATIVE PATRICK J. CARNEY and REPRESENTATIVE ROBERT BETTISWORTH, Plaintiffs, vs. JAY S. HAMMOND, Governor of the State of Alaska, and WILLIAM R. HUDSON, Commissioner of the Department of Administration of the State of Alaska, Defendants.	No. 1JU-80-1163 Civil

MEMORANDUM OF DECISION

Table of Contents

Table of Contents - continued

INTRODUCTION

Presently before the court is the 77 count counterclaim of defendant challenging, on constitutional and statutory grounds, scores of appropriations made by the Twelfth Alaska Legislature. The defendants (hereinafter, "the Governor") have advanced several reasons why the appropriations are unlawful and have moved for summary judgment, while abandoning in excess of 40 particular counts. Plaintiffs (hereinafter, "the Legislature") have also moved for summary judgment, while conceding that three of the appropriations were unconstitutional (though not for the reasons advanced by the Governor). Although the cross motions for summary judgment discussed each appropriation separately, the court established five principal categories of infirmities alleged by the Governor, and requested that the parties submit further briefing which addressed these categories.[1] After that briefing was completed, oral argument was heard.

Although it is necessary to address many appropriations individually, and while there are certain exceptions to the following generalizations, this court generally finds as follows:

1) Those appropriations challenged by the Governor as violative of the separation of powers doctrine do not violate that doctrine and thus are not invalid for that reason;[2]

---

1. To avoid the possibility that it incorrectly interpreted the Governor's case, the court requested that both sides "independently review the Governor's motion for summary judgment and determine that the court has correctly interpreted the legal theories proposed by the Governor and correctly enumerated which appropriations are challenged under each theory." Order Continuing Hearing Date and Requiring Further Briefing 7. Neither side has indicated disagreement with the categories noted by the court or with the determination of which appropriations should be considered under each of the categories.

2. Many appropriations are challenged for more than one reason. Thus, that an appropriation survives a separation of powers attack does not ensure its legality; it may fall for some other reason.

2) Those appropriations challenged by the Governor for failure to state a public purpose do fail to state a public purpose and are thus invalid;

3) Most of those appropriations challenged by the Governor because they violated the confinement requirement or article II, section 13 of the Alaska Constitution do violate that section, while some do not;

4) Those appropriations challenged by the governor because they provided direct aid to private educational institutions did not provide direct aid to private educational institutions are thus are not invalid for that reason;

5) The "appropriation" [3] challenged by the governor as an invalid delegation of legislative powers to the executive branch was such an invalid delegation and thus it was improper.

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3. Actually, the item in question was a directive in the appropriation act that $5,267,248 be reduced from the total personal services line items for operating expenditures in the act, which reduction was to be "equitably allocated among the state agencies by the division of budget and management." § 50, ch. 120 SLA 1980 at 12-13. It amounted to a one percent reduction in all personal service line items.

I. SEPARATION OF POWERS

A. General Discussion

In 24 of the appropriations challenged in this case, the Legislature specifically designated the recipient of the appropriation. This was accomplished by appropriating a specified sum from the general fund to a particular executive department "for payment as a grant" to a designated entity, usually a private non-profit corporation. The controversy between the parties is whether the Legislature may designate the particular recipient of the funds. The Governor contends that it may not, that at most it may appropriate sums from the general fund to a particular department and specify the purpose of the appropriation. Under the Governor's theory, it would then be the task of the department to determine which entity should receive the funds as a grant.

1) Burden of Proof

At the outset, and throughout discussion of these various challenges, it is critical to note and to remember that parts of the counterclaim seek to have declared unconstitutional acts of the Alaska Legislature. A party, even the Governor, who seeks a declaration that an act of the Legislature is unconstitutional bears a heavy burden. It is axiomatic that laws which have been validly enacted bear a presumption of constitutionality:

> The courts frequently reiterate that in the exercise of this authority [to determine whether legislative enactments are constitutional] they begin with a presumption in favor of validity, and that a court is not empowered to substitute its judgment for that of the legislature on matters of policy, nor to strike down a statute which is not manifestly unconstitutional even though the court may consider it unwise.

1 Sands, Sutherland Statutory Construction § 2.01, at 13 (4th ed.

1972) (emphasis added).

Several courts from other states, in decisions concerning the power of the governor versus that of the legislature, have stated that the burden upon a party challenging the constitutionality of a legislative enactment is the highest burden known in the law: proof beyond a reasonable doubt. In Litchfield Elementary School District v. Babbitt, 608 P.2d 792 (Ariz. App. 1980) the court noted:

> No task in the adjudication of civil controversies is more grave than passing upon the constitutionality of legislation. The legislature possesses plenary power to make the laws, subject only to the limitations of our state and federal constitutions. We face our task bearing in mind that there is a strong presumption supporting the constitutionality of a legislative enactment, and the party asserting its unconstitutionality bears the burden of overcoming the presumption. [Citation.] Unconstitutionality must appear beyond a reasonable doubt. New Times, Inc. v. Arizona Board of Regents, 519 P.2d 169 (1974).

608 P.2d at 800 (emphasis added). In Board of Regents v. Judge, 543 P.2d 1323 (Mont. 1976), the court relied on settled law to the effect that

> the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.

543 P.2d at 1330, quoting State ex rel. Mills v. Dixon, 213 P. 227, 229 (Mont. 1923) (emphasis added).

Other courts have adopted this same high standard. In State ex rel. Hammerhill Paper Co. v. La Plante, 205 N.W.2d 784 (Wisc. 1973), the court stated:

> Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative

> enactment's constitutionality, it must be resolved in favor of constitutionality.

Id. at 792. See also Hopper v. City of Madison, 256 N.W.2d 139, 142-43 (Wisc. 1977); Way v. Grand Lake Ass'n, Inc., 635 P.2d 1010, 1017 (Okla. 1981); State ex rel. Lucero v. Marron, 128 P. 485, 488 (N.M. 1912).

It is not clear whether the Alaska Supreme Court would adopt such an extreme presumption in favor of the constitutionality of validly enacted legislation. It has not done so to date, which suggests that it might not.[4/] Nonetheless, it has reiterated in several decisions that validly enacted statutes enjoy a presumption of constitutional validity. Bonjour v. Bonjour, 592 P.2d 1233, 1237 (Alaska 1979); Larson v. State, 564 P.2d 365, 372 (Alaska 1977). Thus, if a statute may reasonably be construed to avoid unconstiutionality, the court must do so. Hoffman v. State, 404 P.2d 644, 646 (Alaska 1965). If a narrow construction will avoid the constitutional infirmity "without doing violence to the manifest legislative intent," such a construction should be given. Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978); State v. Martin, 532 P.2d 316, 321 (Alaska 1975).

Whatever the precise formulation of the Governor's burden in this case, unless he can demonstrate that the

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4. Unfortunately for predictive purposes, the Alaska Supreme Court has not had the occasion to set out or discuss the proper standard in cases involving a challenge by the executive to the legislature. The cases discussed in this section involve either disputes between individuals or between the state and an individual. Considering that in the present dispute the party attacking the legislation, the Governor, has substantial constitutional powers which an individual disputant does not enjoy, the Alaska Supreme Court might be inclined to adopt the more rigorous test adopted by its sister courts in Wisconsin, Arizona, Montana, New Mexico (and elsewhere) as noted above. On the other hand, it did not do so in cases such as Bradner v. Hammond, 553 P.2d 1 (1976), although the court discussed in that case its "duty to reconcile, whenever possible, challenged legislation with the constitution by rendering a [harmonizing] construction . . . ." Id. at 7 n.22.

challenged legislation is clearly unconstitutional, it must stand.

2) Nature of the Power To Designate Grant Recipients

The Alaska Constitution does not specifically answer the question whether the Legislature may designate grant recipients. Article II, section 1 states that "[t]he legislative power of the State is vested in a legislature consisting of a senate . . . and a house of representatives . . . ." Article III, section 1 states that "[t]he executive power of the state is vested in the governor."

Thus, the legislative power is vested in the Legislature and the executive power in the Governor. But is the designation of grant recipients an exercise of the legislative power or of the executive power? There is no doubt that the Legislature may appropriate sums to an executive department for a stated purpose and permit or require the department to designate the recipient. May it also designate the recipient itself?

The answer must be yes unless the Governor shows clearly that the Constitution forbids it. Because he has not done so, the separation of powers argument must fall.

The Governor argues that the separation of powers doctrine seeks "the avoidance of tyrranical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers," citing Bradner v. Hammond, 553 P.2d 1, 5 (Alaska 1976). That may be agreed. He then alleges that the power to name grant recipients is vested in the executive branch by the Constitution and that it is not a legislative power. Last, he argues that it cannot be shared by both branches. The Governor's analysis rests on an unproven assumption. He concludes that the naming of grant recipients is an executive function because he assumes that such grantees "enforce the laws" or "execute the laws". Because the assumption is

unproven (and is ultimately unpersuasive to this court), the Governor cannot sustain his heavy burden of showing that the appropriations in question are violative of the separation of powers doctrine.

The Governor argues at length that the Constitution of Alaska vested the power in question in the executive. He notes the framers' intent to create a strong executive (which is not disputed) and quotes from the Constitutional Convention Proceedings to the effect that the framers wished "to centralize authority and responsibility for the administration of government and the enforcement of laws in a single elected official." Alaska Constitutional Convention Proceedings, Dec. 16, 1955, Commentary on the Executive Branch Article, Committee Proposal No. 10, p. 1.

The critical question, however, is whether the designation of grant recipients is a part of the appropriation power or part of the power to enforce the law. No one disputes the Governor's authority to enforce or execute the law. By the same token, no one should question the Legislature's authority to spend. Is naming grant recipients a part of the spending power or is it the execution of the law?

The term "appropriation" is not defined in the Alaska Constitution, but there is a substantial body of case law regarding the term. In Thomas v. Rosen, 569 P.2d 793 (Alaska 1977), the Supreme Court quoted approvingly the following definition from the Wisconsin Supreme Court's decision in State ex rel. Finnegan v. Dammann, 264 N.W. 622, 624 (1936):

> An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.

569 P.2d at 796 (emphasis added). The emphasized language suggests that the legislature may properly designate a specific recipient.

Other definitions suggest the same conclusion. In Leonarason v. Moon, 451 P.2d 542 (Idaho 1969), the Idaho Supreme Court gleaned from several of its earlier cases the following definition:

> These cases define an appropriation as (1) authority from the legislature, (2) expressly given, (3) in legal form, (4) to proper officers, (5) to pay from public monies, (6) a specified sum, and no more, and (7) for a specified purpose, and no other.

Id. at 550 (emphasis added). Black's Law Dictionary defines an appropriation as follows:

> The act by which the legislative department of government designates a particular fund, or sets aside a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense. [Citation] Authority given by Legislature to proper officers to apply distinctly specified sum from designated fund out of treasury in given year for specified object or demand against state.

Black's Law Dictionary 131 (4th ed. 1951) (emphasis added).

These authorities are certainly not dispositive,[5/] but they at least suggest that naming the grantee is a part of the appropriation power.

As noted above, the appropriation power is clearly

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5. It might be argued, for the Governor, that "object" connotes only the general objective, and not a specific recipient.

legislative. Art. II, § 13; Art. IX, § 12. As the Supreme Court of Mississippi held at the turn of the century, in an opinion widely quoted:

> Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or bridged, save by the Constitution itself, without disturbing the balance of this system and endangering the liberties of the people.

Colbert v. State, 39 So. 65, 66 (Miss. 1905). Colbert reaffirmed the right of the legislature to determine "the objects upon which [public revenue] shall be expended." Id.

It is true that the Alaska Constitution gives the governor some substantial control over the "purse strings", the term used in Colbert. Most significantly, he has an item veto power over appropriations bills. Art. II, § 15. The history of article II, section 15 "indicates a desire by the delegates to create a strong executive branch with 'a strong control on the purse strings' of the state." Thomas v. Rosen, supra, 569 P.2d at 795, quoting 3 Proceedings of the Alaska Constitutional Convention 1740. But this control is defined in this and other specific constitutional provisions,[6/] as Colbert notes. The Governor's role regarding appropriations is limited to those specific constitutional limitations on the otherwise plenary power of the legislature.

That the Governor has no more power to control appropriations than that given him specifically by the Constitution is a basic constitutional tenet:

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6. For example, art. IX, § 12 (governor to submit annual budget).

> According to conventional approaches in constitutional construction, since the states were antecedent political entities exercising general powers of government and the United States is a federation created by them to serve specific, defined purposes, the Congress of the United States is understood to have only such powers as are affirmatively granted to it, expressly or by implication, whereas state legislatures have residual law-making powers subject only to such limitations as are affirmatively imposed by the state or federal constitutions.

1 Sands, Sutherland Statutory Construction § 2.01, at 13 (4th ed. 1972) (emphasis added).

3) Alaska Constitutional History

The Alaska Constitution contains no specific affirmative limitation on the Legislature's power to appropriate to a designated recipient. In these circumstances, and considering the definitional authority cited above which suggests that naming a grantee is part of the appropriation power, it appears that the power is legislative because it is part of the spending power.

It is significant that the constitutional convention could have included a specific affirmative limitation on the Legislature's power to appropriate to a designated non-governmental recipient, but did not do so. Indeed, the delegates considered at least a partial ban on direct governmental grants to private institutions. Although the delegates did not directly discuss the issue of who might have had the authority to designate particular recipients, the context of their discussions suggest that they considered the question.

The matter came up in this way. The original version of what was to become article VII, section 1 of the constitution provided that "No money shall be paid from public funds for the direct benefit of any religious or other private institution." 6 Proceedings of the Constitutional Convention 68, Committee Proposal No. 7, § 1, lines 6-8. The convention received com-

munications from persons and agencies concerned that prohibiting the expenditure of public funds for the direct benefit of any private institution would change existing practice to the great detriment of the state. E.g., Memorandum of December 28, 1955, to the delegates from Lois M. Jund, Administrative Director, Alaska Dept. of Health (unpublished files of the Alaska Constitutional Convention, Legislative Affairs Agency Library, Juneau):

> The Alaska Department of Health is quite concerned regarding the proposed articles in the Alaska Constitution which prohibit direct grants of public funds beneficial to religious and other private institutions.
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> . . . .
>
> The inclusion of articles such as are proposed . . . would probably result in the closing of many hospitals throughout Alaska . . . .
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> . . . .
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> For the above reasons, the Alaska Department of Health strongly recommends that these sections or parts of sections be struck from the proposed State Constitution and that no clause be inserted in the constitution which would restrict the legislature from appropriating monies to private and denominational institutions, if a public purpose was served thereby.

See also Memorandum of December 27, 1955, to the delegates from Robert N. Druxman (unpublished files of the Alaska Constitutional Convention, Legislative Affairs Agency Library, Juneau). The committee having responsibility for this article recommended that the word "educational" be inserted after the word "private". A committee member, delegate R. Rolland Armstrong, speaking for the committee, emphasized its intention

> to take any doubt away on the part of this Convention of our motives, and we state that where there are welfare cases for children in homes and when there are indigents in hospitals that we do not wish to interfere with that practice of helping to serve people through those institutions.

2 Proceedings of the Alaska Constitutional Convention 1514-15 (emphasis added).

4) Pre-1955 Case Law

It is significant to this court that the "practice of helping to serve people through . . . institutions" as endorsed by the Alaska Constitutional Convention was historically well established in 1955, the time of that convention.[7] There was by then a rich history in several states of direct legislative appropriations to specifically designated recipients. Presumably, the delegates were aware of that history in other states as well as in the Territory of Alaska. It is instructive to review that history.

In Hager v. Kentucky Children's Home Society, 83 S.W. 605 (Ky. 1904), the court upheld the constitutionality of a direct grant to the appellee, a private corporation organized for charitable purposes. The court noted that, while the care of indigent orphans was generally given over to counties and cities by the laws of the state, "the state is not precluded by these several provisions from exercising some part of the same power in some other proper way." Id. at 606. It then went on to consider whether the state could act "otherwise than through its own officers". It found that it could:

> When the Legislature is authorized to do a thing generally, and no particular method is prescribed, it may pursue its own course in the means adapted to the accomplishment of the purpose.

Id. at 607. The court then went on to review several cases,

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7. The Memorandum of December 28, 1955, of Lois Jund, cited above, showed there was a well-established history, by 1955, of direct grants to hospitals in the Territory of Alaska. Several hospitals, privately owned, had been the recipients over the years of millions of dollars. Id. And the practice of assisting private hospitals apparently continued into statehood. Cf. Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963) (proceeds of municipal bond sale could aid in construction of private hospital).

from other states as well as Kentucky, upholding the power of a legislature to make direct grants to non-governmental entities so long as the grant was for a public purpose. It concluded

> These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.

Id. at 608 (emphasis added).

Literally scores of cases followed Hager or reached the same result in the first half of this century. Extensive discussion of these cases is not necessary here, although one such case, relied on by the Legislature, is instructive. In Finan v. Mayor of Cumberland, 141 A. 269 (Md. 1928), the court upheld the disbursal of funds from a public bond sale for the building and maintenance of a wing of a hospital run by a private nonprofit corporation. The court had no question that the state (and hence a municipality, id. at 271), could make such a disbursal to a private entity as long as it was for a public purpose and was done under "proper legislative authority" (presumably, the act authorizing the bond sale):

> Long before, it had been decided that public funds might under proper legislative authority be appropriated to aid private agencies performing services to the community which were public in nature. [Citations]. And from the beginning of state government it had been the policy and practice to accomplish public purposes indirectly by such means; and all Constitutions promulgated since the beginning had been performed unquestionably in full knowledge of this policy and practice, and in none was anything inserted or changed to interfere.

Id. at 271. The court went on to point out that a governmental board existed to supervise such expenditures, and its report "lists over one hundred private agencies aided, including a

large number of hospitals".[8/] Id. None of these appropriations or disbursals had been successfully challenged. See also People ex rel. State Board v. Brady, 115 N.E. 204 (Ill. 1917).

There were a substantial number of cases in the years immediately before the Alaska Constitutional Convention which upheld direct appropriations to or the issuance of bonds for the benefit of non-governmental agencies. In Legat v. Adorno, 83 A.2d 185, 192 (Conn. 1951), the court referred to "the very large number of decisions from other states" which generally indicated "an overwhelming weight of authority in accord with our own decisons to the effect that maintenance grants to charitable institutions for a public purpose are valid."

In Craig v. Mercy Hospital, 45 So. 2d 809, 819 (Miss 1950), the court quoted approvingly from 51 Am. Jur. § 390 at 381: "It is well settled that a private agency may be utilized as the pipeline through which a public expenditure is made, . . ."

In Johns Hopkins University v. Williams, 86 A.2d 892, 900 (Md. 1952), the court reviewed five decades of legislative appropriation to or authorization of bonds for private institutions which carried out public purposes. It declined to invalidate a procedure so firmly established.

It is true that the focus of most of these cases -- and the ones which follow in this section -- was on whether the appropriations were for a public purpose or whether they violated a constitutional prohibition against the giving or loaning of the credit of the state for any private corporation or

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8. It is not clear from the opinion whether the report referred to listed agencies aided for that year only, or over a longer period. In any event, the number of appropriations is impressive.

association. The Governor, in this section, raises a separation of powers claim, and not these issues. But the fact remains that the practice of appropriation of public funds to non-governmental entities was well-established in this country at the time of the Alaska Constitutional Convention, and these cases demonstrate that.

There is substantial case law following the constitutional convention which shows that the practice of appropriations to private entities continued, and that the courts continued to uphold it against constitutional challenges. E.g., United Community Services v. Omaha Nat'l Bank, 77 N.W.2d 576, 586-87 (Neb. 1956); Ezelle v. City of Paducah, 441 S.W.2d 162, 164 (Ky. 1969). Cf. Kentucky Region Eight Mental Health Board, Inc. v. Commonwealth, 507 S.W.2d 489, 490-91 (Ky. 1974) ("mere fact that corporations receive and administer grants of state funds does not mean that they are state agencies"); West v. Tennessee Housing Development Agency, 512 S.W.2d 275 (Tenn. 1974) (giving of state credit not prohibited if for public purpose); New Jersey Mortgage Finance Agency v. McCrane, 267 A.2d 24, 29 (N.J. 1970) (provisions against lending state's credit do not prohibit government from employing third person or private corporation to do any lawful act which government has the right to have done).

5) Conclusion

Against this backdrop, then, the failure of the delegates to the Alaska Constitutional Convention to adopt a specific limitation on the Legislature's power to appropr to designated non-governmental recipients takes on added ing. That they could have done so is clear. Indeed, they almost did approve language which would have had that effect, but specifically declined to do so. (See discussion above at 12.) Moreover, several other states do have constitutional

prohibitions against appropriations to non-governmental entities, Leg. Memo 19-22, and, as the Legislature argues, if the delegates wanted to prohibit the practice "they had several models from which to choose." Id. at 22.

Faced with substantial authority supporting direct grants to non-governmental agencies, the Governor concedes in his Reply Memorandum that "the legislature can make appropriations for charitable purposes." However, he attempts to limit, in a single sentence, the Legislature's authority by asserting that "in none of those cases was the court confronted with numerous appropriations, large sums of general fund money, and dubious enactment procedures." Gov. Reply 5. The attempt to distinguish is not persuasive.

First, it appears factually to be incorrect in several respects. As noted above, courts upholding these types of appropriations have relied, among other things, on scores of similar appropriations involving large sums of money.

Second, there is no claim here that any of the enactment procedures were "dubious", much less any showing of dubious or in any way irregular enactment procedures.

Finally, and most importantly, the Governor's legal analysis appears wrong, even if it be conceded that these appropriations were greater in number and dollar amount than those upheld in other cases: What constitutional principle permits a few appropriations to non-governmental entities but does not permit "numerous" such appropriations? What constitutional basis is there for upholding appropriations of small sums of public money while striking down appropriations of "large" sums? The Governor's concession -- without some principled way to draw the dividing line (and he suggests none) -- effectively concedes that the Legislature may do what it has attempted to do without violating the separation of

powers doctrine.

Under all of these circumstances, this court cannot conclude that the Alaska Constitution prohibits, as a matter of separation of powers, the appropriation of a specified sum from the general fund to a particular executive department for payment as a grant to a designated non-governmental entity.

B. The Challenged Appropriations

This court earlier grouped the appropriations challenged under the separation of powers doctrine into two categories: first, grants to specifically designated recipients who perform charitable or civic functions, and second, appropriations in which a specific agent has been designated to perform a governmental task, or, at least, appropriations in which the specifically designated recipient does not perform charitable or civic functions. While these categories are not absolute and their boundaries somewhat difficult to draw, they provide a framework for analyzing the challenged appropriations.

Under the principles set out above at pp. 5-18, all of the appropriations in the first category survive the separation of powers attack. Without examining them in detail, they involve aid for such purposes as prematernal medical care (FAAC 10; Prematernal Home Project in Bethel), emergency food for the indigent (FAAC 12; Bean's Cafe in Anchorage), social services and housing assistance for the elderly (FAAC 6; Heritage House in Anchorage), aid to the victims of child abuse (FAAC 13; Anchorage Child Abuse Board), recreational counseling services to children (FAAC 14; Eyak Youth Services in Cordova), and housing improvement for the poor (FAAC 16; Tlingit-Haida Housing Improvement Program in Southeast Alaska). Several involve aid to the arts. (E.g., FAAC 3 [Institute for Alaska Native Arts]; FAAC 5 [Anchorage Civic Opera]; FAAC 77 [Alaska Repertory Theater].) Some involve assistance to minority groups to assist

in specific fields such as employment or education. (E.g., FAAC 9 [Upper Tanana Development Corp., for minority hire study]; FAAC 11 [Alaska Black Leadership Conference, for a summer tutorial program for children]; FAAC 32a [MBE Service Centers, Inc., to further minority business enterprises].) In all of these cases, this court has been unable to find constitutional authority for the Governor's position that the Legislature must defer to the Governor in the selection of the recipient of the public funds in question.[9/] Indeed, these cases appear substantially similar to the cases mentioned above from other states where courts have upheld legislative appropriations to hospitals, educational institutions, community service organizations, etc. Under these circumstances, the appropriations cannot be said to violate the separation of powers doctrine.

The appropriations in the second category must be analyzed separately for they involve several different issues.

1) FAAC 18

The appropriation challenged in FAAC 18 reads as follows:

> The sum of $175,000 is appropriated from the general fund to the Legislative Council for a feasibility study of the Yukon Kuskokwim Crossing.

§ 225, ch. 50, SLA 1980 at p. 34.

The Governor argues, persuasively, that "the Legislature, by this appropriation, has involved itself in the routine execution of the law -- engineering studies on a public works project -- functions committed to" the Department of Transportation and Public Facilities. A review of the contract

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9. This court intends to express no opinion as to whether the naming of grant recipients is sound as a matter of good governmental practice or public policy. That determination is for the Legislature.

entered into by the Legislative Council pursuant to this appropriation shows that the Governor's argument is correct (see below at p. 48) and that the Legislature, in this instance, has involved itself in the execution of the laws, invading powers reserved to the executive.

2) FAAC 19

There is an unresolved factual dispute which precludes summary judgment disposition here. See discussion below at p. 50.

3) FAAC 25

The appropriation challenged in FAAC 25 reads as follows:

> Fairbanks North Star Borough/
> Association for The Education
> of Young Children $20,000

§ 286, ch. 50, SLA 1980 at p. 53.

It appears now that this appropriation should have been grouped -- for purposes of the separation of powers argument -- in the first category. It involves a grant to a private non-profit organization for what might generally be termed a civic purpose. Apart from the question whether it offends the constitutional prohibition against direct aid to private educational institutions (see discussion below at p. 63), it appears to raise issues substantially similar to those considered in the first category, above. It does not offend the separation of powers doctrine.

4) FAAC 35

The appropriation challenged in FAAC 35 reads as follows:

> Alternative Energy $85,500
> Technical Assistance Program
>
> The appropriation of $85,500 is
> to be paid as a grant to
> Alternative Energy Technical
> Assistance Program, Inc. for

public education and technical assistance statewide.

§ 286, ch. 50, SLA 1980 at p. 66.

This appropriation involves a close question which is difficult to decide. On the one hand, if the cases upholding grants to non-governmental entities discussed at length above are read broadly to include not only charitable and civic agencies but also any entities which carry out a purpose which might properly be termed "public", then it would stand. If, on the other hand, they are read narrowly to include only the traditional types of agencies which have received such funds (e.g., hospitals, homes for the poor, etc.), then it might not.

The Governor argues that the provision of technical assistance and public education in the field of alternative energy has been committed in AS 44.33.040(13) and (14) to the executive. The Legislature responds that the Governor reads that statute too broadly and, even if the statute does allow the executive to carry out those functions, there is no constitutional or statutory prohibition against this type of grant. In addition, the Legislature contends that former AS 37.05.315(d) [10/] is all the statutory authority which is necessary for the appropriation.

Both parties address former AS 37.05.315(d) in considerable detail. As enacted in 1980, it provided:

> When an amount is appropriated or allocated to a department as a grant for a named recipient which is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation

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10. Now AS 37.05.316.

> act, or both, for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services, or both, in the same area. The department shall contract with the named recipient unless the Office of the Governor, with due regard for any local expertise or experience among those making proposals, determines that an award of the contract to a different party would better serve the public interest. If the contract is awarded to another party than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A contract shall be executed within 60 days after the effective date of the appropriation or allocation. The purchase of the goods or services, or both, shall be in accordance with AS 37.05.230(1)(C).

In accordance with the statute, a named grant recipient might not receive the grant. The department through which the grant is passed must request proposals from other qualified persons in the same area and may contract with one of these other qualified persons if it determines that this would better serve the public interest.

The Legislature argues that the existence of this statute "totally extinguishes [the Governor's] separation of powers complaint", since the Legislature is not selecting specific recipients but is merely "specifying the purpose and amount of an appropriation and making a recommendation to the executive agency regarding its preference for a grant recipient." The Legislature concludes that the final authority to select recipients rests with the Governor as a result of this delegation, and hence there is no violation of separation of

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powers. [11]

The Governor responds that the statute is unconstitutional. He argues that in giving a preference to the designated recipient over other equally qualified bidders, the Legislature "has denied other qualified persons equal opportunity under the law." Additionally, the Governor argues that the statute is unconstitutional because it violates the separation of powers doctrine.

The Governor's argument that the statute is unconstitutional is ultimately unpersuasive. Given the flexibility of the equal protection analysis mandated by the Alaska Supreme

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11. The Legislature, while taking this position, is not particularly enamored of AS 37.05.315(d). It recites the legislative history of the statute showing that the original bill consisted of a single sentence authorizing the commissioner of revenue to disburse appropriations for grants made by the Legislature. The Governor opposed the bill and "a political impasse" resulted. It was broken by a compromise allegedly drafted by the attorney general's office with the Governor's approval: The Legislature's naming of a recipient would be only a recommendation, and the executive would retain final authority to select a different recipient after a bid process and upon a statement of written reasons.

Thus, the Legislature argues that while the statute is constitutional, it is not good policy. The Legislature identifies two problems with it: (1) "it delegates to the Governor the power to re-make decisions of the Legislature with respect to appropriations for grants", and (2) it incorporates procedures traditionally used by the executive to select contractors to assist it in carrying out the law, which is presumably inappropriate in regard to grant recipients who, the Legislature consisently argues, execute no laws.

The Legislature concludes:

> Thus, this essential separation of powers issue need not be decided by reference to the language of AS 37.05.315(d). That statute confuses rather than clarifies, and, as a practical matter, a decision on the separation of powers issue will determine the fate of the statute. The validity of AS 37.05.315(d) is not the constitutional issue before this court, it is merely a symptom of the dispute.

Leg. Mem. Opp. 16 .

Court in State v. Erickson, 574 P.2d 1, 12 (Alaska 1978) and subsequent cases such as Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1264 (Alaska 1980) -- cases which are not even cited much less applied here by the Governor -- it cannot be concluded that this statute offends equal protection. The statute also does not offend the separation of powers doctrine. If, as found above, the power to name grant recipients is a part of the spending power, then it must follow that a statute by which the Legislature shares this power with the executive cannot encroach upon the Governor's powers. Considering too the heavy burden of showing the unconstitutionality of challenged legislation, this court concludes that former AS 37.05.315(d) must stand.

Returning to consideration of FAAC 35, the Governor's reading of AS 44.33.040(13) and (14) appears correct, to the extent that those sections appear to give to the executive the authority to provide technical assistance and public education in the field of alternative energy. But it also appears true that neither these sections nor any other statute -- nor constitutional provision -- prohibits the Legislature from making the type of grant in question. Further, given the presumption in favor of constitutionality of legislative acts, including appropriations, it seems proper to read broadly the cases cited above. Such a reading would uphold grants to non-governmental agencies as long as a public purpose were involved. Finally, to the extent that statutory authority is necessary, it is provided by AS 37.05.315(d).

This conclusion that this appropriation does not violate the separation of powers doctrine is reinforced by the fact that the Governor still wields considerable constitutional power with respect to such appropriations: He can veto them. Moreover, he can do so on an item basis. Thus, while the issue

is close, this resolution of it leaves each of the contesting parties with substantial powers in the area.

5) FAAC 37

The appropriation challenged in FAAC 37 reads as follows:

> Department of Natural Resources
>
> Kuskokwim Native Association -- Agriculture $200,000
>
> Koyokon Development Corporation -- Agriculture $200,000
>
> It is the intent of the Legislature that the appropriations to the Kuskokwim Native Association and Koyokon Development Corporation be used for the purchase of D-6 bulldozers or their equivalent, and for land clearing and other expense relating to agriculture.

§ 286, ch. 50, SLA 1980 at p. 67.

The issue presented here is similar to that presented in FAAC 35, and resolution again is difficult. It is true, as the Governor argues, that the Legislature has authorized the Department of Natural Resources "to direct experimental work to develop the agricultural industry in the state" pursuant to AS 03.05.010. However, there appears to be no statutory or constitutional impediment to a grant to a non-governmental entity, through the department which has authority in the area, to perform an act which has a public purpose. For this reason, and those additionally set out in the discussion of FAAC 35 above, this appropriation does not offend the separation of powers doctrine.

6) FAAC 42

The appropriation challenged in FAAC 42 reads as follows:

> Fairbanks
> Fairbanks Development Authority $500,000

§ 286, ch. 50, SLA 1980 at p. 77.

The Fairbanks Development Authority is a private non-profit corporation formed for the purpose of directing the urban redevelopment of Fairbanks. As the agreement between the Department of Administration and the City of Fairbanks provided, the grant "would provide a pool of money to leverage private dollars for major developments which would include malls, parking structures, civic or convention centers." Leg. Ex. 42b (p. 1 of Standard Agreement Form For Municipal Grants).

As with the two previous appropriations, the Governor argues that a statute (here AS 44.33.020) authorizes a particular executive department to carry out the functions which the Legislature has here assigned to a non-governmental entity through a grant to that entity. It is not clear that the statute cited actually gives to the Department of Commerce and Economic Development the authority which the Governor claims it does. But assuming, arguendo, that the claim is correct, there is no showing that the Legislature is prohibited, as a matter of separation of powers, from appropriating money to be paid as a grant to a non-governmental entity to carry out those functions.

7) FAAC 44

The appropriation challenged in FAAC 44 reads as follows:

> Victory/Eureka Electric Line $300,000
>
> The appropriation for the Victory/Eureka Electric Line is to be paid to the NEA Mat-Su Electrical Association.

§ 286, ch. 50, SLA 1980 at p. 79.

For the reasons set out in the discussion of the three preceding appropriations, this appropriation does not appear to offend the separation of powers doctrine, although, like the others, it presents a close question. However, the Governor raises another objection, namely, that the Legislature

has passed the grant in question "through a general law municipality which has not assumed the power to provide the services called for in the appropriations act." The Governor argues that, by doing this, the Legislature has "usurped" the power of the electorate residing in the municipality. Because the Mat-Su Borough has not assumed the power to provide light, power and heat under AS 29.48.030 in the area outside cities, and because to assume the power to provide electric service the procedure set out in AS 29.38.040 and .050 must be followed (which require voter approval before assumption of the power), the appropriation should not stand.

The Legislature does not respond to this argument. While it may well be correct, it is not clear that the Governor has standing to raise the argument that the appropriation usurps the powers of voters residing in the affected municipality. Moreover, the issue does not involve the separation of powers between the Governor and the Legislature, and thus need not be considered further here.

8) FAAC 58, 66 and 67

The Legislature concedes that the appropriations in FAAC 58, 66 and 67 are invalid. Leg. Supp. Mem. 41-42. The concession is based on a violation of the confinement requirement (that is, these appropriations effect changes in substantive law which can be accomplished only by amending existing statutes, not by an appropriation -- see Part III below) and not because they violate the separation of powers doctrine. Nonetheless, given this concession, it appears unnecessary further to consider these appropriations.

C. Conclusion

Virtually all of the appropriations challenged as violative of the separation of powers doctrine thus are upheld by this court. That result follows from several propositions

established above:

1) A party seeking to overturn a legislative enactment as unconstitutional bears a very heavy burden;

2) The legislative practice of making grants to named non-governmental recipients was well established in this country and in the Territory of Alaska before 1955;

3) The framers of the Alaska Constitution had the opportunity to prohibit grants by the Legislature to named non-governmental recipients, but chose not to do so; and

4) The power to name grant recipients is thus constitutionally a part of the spending power, and hence is legislative.

Thus, the Governor has not met his heavy burden and the legislation must stand.

The Legislature's argument, while broader and theoretically more appealing than this approach, has been difficult for this court to apply. The Legislature acknowledges that "there are many activities which, by their nature, must be performed under the sovereign power of the state and under the direct supervision of the Governor." Leg. Supp. Mem. 11. Thus, for example, it eschews the power to make grants to private entities to

> regulate utilities, license morticians, register motor vehicles, enforce fish and game laws, police the highways [and] collect taxes . . . .

Leg. Rep. Mem. 7. It would strictly limit these, however, to "inherently governmental functions." Id. Since the functions in question are not core governmental functions, they may be performed by the private grantees named by the Legislature.

While this dividing line is attractive, its application is difficult. Is large scale urban redevelopment a governmental function? What about the provision of electric

power in remote areas where the provision of power by private utilities has proven over years to be economically unfeasible? To some these might constitute "basic" services or governmental activities; to others, they might not. Thus, while this court reaches the result urged by the Legislature on the separation of powers issue, that result is reached more because the Governor has not overcome the presumption of constitutionality which attaches to legislation and less because of a complete acceptance of the "inherent governmental functions" theory of the Legislature. That theory is helpful, but it is not dispositive, especially in the close cases.

For somewhat similar reasons, this court has been unable to rely extensively on the analysis in Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), and other cases cited by the parties. While the general discussion of the separation of powers doctrine which is found in Chadha is extremely helpful, see id. at 422-25, application of it to the several fact patterns presented by the 24 contested counterclaims here yields no certain answers. As with so many aspects of this case, the separation of powers issue appears to resist application of general principles. Perhaps the instant case is covered by Chadha's warning that

> Courts cannot, however, parse every allocation of power under the separation doctrine. We are not the ideal arbiters of efficient administration in many instances because we are not constituted to choose and to apply optimal theories of political and organizational science applicable to the routine operation of the Government.

Id. at 424. In these circumstances, basing the outcome on the determination that the Governor has not met his high burden of proof because of the history of the Constitutional Convention and the development of relevant case law seems much more

appropriate than relying on a general statement of the separation of powers doctrine.

II. FAILURE TO STATE PUBLIC PURPOSE

A. General Discussion

The Governor challenges four appropriations on the basis that the appropriations did not state a public purpose. This requirement is statutory and not constitutional. Although the Alaska Constitution provides that "[n]o 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", Art. IX, § 6, these appropriations are not challenged as violative of this section. That is, it is conceded that the money was to be used (and was used) for public purposes. Rather, the appropriations are challenged as violative of AS 24.30.030. That statute provides:

> Bills for appropriations shall be confined to appropriations and shall include the amount involved and the purpose, method, manner and other related conditions of payment.

(emphasis added). The Legislature concedes that if there were no statement of purpose whatsoever, "the appropriation would constitute an invalid delegation of appropriation power to the Governor" and thus the appropriation would be invalid.

A review of the appropriations involved makes it clear that there is no statement of purpose set out for each appropriation. The Legislature attempts to remedy this failure by arguing that when an appropriation is to a recipient that performs a narrow range of services, this designation of the recipient may be a sufficient statement of purpose. For example, a grant to Alaska Semi-Supportive Homes, Inc. is obviously for the purpose of supporting the functions performed by this organization, which are quite limited. Thus, the Legislature reasons, naming the recipient may be a sufficient statement of the purpose if the recipient performs a specific and limited function.

This argument is not persuasive. If it were correct, the

specific statutory requirement found in AS 24.30.030 that the purpose of the appropriation be stated would in almost all instances be a nullity. In many, if not most, cases of appropriations, a reviewing court (or the executive) could postulate that the purpose of the appropriation to a governmental agency or to a particular non-governmental entity was to carry out the purpose for which that agency or entity was created; if the functions were sufficiently narrow, no public purpose would need to be included in the legislation. But this is not what the statute says. It says that the appropriation bill "shall include . . . the purpose . . . of the payment."

The Legislature makes several other arguments concerning this statutory requirement, none of which is persuasive. It notes that the Governor disbursed the funds in every case, arguing that he was able to ascertain "with precision" the purpose of the appropriation. First, that is bald speculation. Second, and more importantly, whether the Governor (or a court) could devine the Legislature's purpose or not, it remains that no purpose was stated. The Legislature questions the wisdom of abstract decisions in important constitutional areas. This argument is unpersuasive because a decision here is not constitutional at all,[12/] it is based on failure to comply with the statute. Moreover, it is not an abstract decision or one which seeks to set guidelines for future cases. It merely states that

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12. The Legislature attempts to make the argument turn on constitutional grounds, and then argues that the court should not render an abstract decision on a constitutional question. Its theory is that article IX, section 13 requires a statement of public purpose (separate and apart from the requirement of article IX, section 6 that public moneys be spent for a public purpose). It is unnecessary to reach this argument, for it is clear that the statute is violated and a court should not render a decision on constitutional grounds where a decision is possible on other grounds. Bonjour v. Bonjour, 592 P.2d 1233, 1237 (Alaska 1979); Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978).

absolute silence concerning the purpose of an appropriation does not meet the statutory requirement. The Legislature finds irony in the Governor's complaint here that legislation is not specific enough when the Governor complains (in his separation of powers argument) that the Legislature has been too specific (in naming particular recipients of grants). The argument is not well-taken: different issues are involved.

B. The Challenged Appropriations

1) FAAC 6

The appropriation challenged in FAAC 6 reads in its entirety:

> The sum of $14,500 is appropriated from the general fund to the Department of Health & Social Services, adult support services, for payment as a grant to Alaska Semi-Supportive Homes, Inc.

§ 73, ch. 50, SLA 1980 at pp. 10-11. No statement of purpose is included. It is possible to speculate, probably with a high degree of confidence, that the purpose of the appropriation is to support the activities of the grantee in carrying out its functions: providing "support services" to adults. But later judicial speculation is not tantamount to a specific legislative statement of purpose. The appropriation violates AS 24.30.030.

2) FAAC 12

The appropriation challenged in FAAC 12 reads in its entirety:

> The sum of $10,000 is appropriated from the general fund to the municipal grant account for payment as a grant to the Municipality of Anchorage for Beans Cafe.

§ 107, ch. 50, SLA 1980 at p. 15.

The analysis applied to FAAC 6, above, applies here also. Because no statement of purpose is included, the appropriation violates AS 24.30.030.

3) FAAC 32

The appropriations challenged in FAAC 32 read in their entirety:

MBE Service Centers, Inc.	$198,600
Bering Sea Fisherman's Association grant	$226,000

§ 286, ch. 50, SLA 1980 at p.65. Because these are separate appropriations, they will be discussed individually.

(a) MBE Service Centers, Inc.

There is no statement of the purpose of the appropriation to MBE Service Centers, Inc. This grantee appears to provide a wider range of services than the grantees in FAAC 6 and FAAC 12. (Compare Leg. Ex. 32B (Ex. A) with Leg. Ex. 12B (Art. III(a) and with Leg. Ex. 6A). Moreover, it is apparent that, at the time of the passage of the legislation, the purpose of the appropriation was not entirely clear. Gov. Ex. 32a, 32b. Even under the Legislature's theory that a grant to a grantee which performs only a narrow range of functions need not state a purpose because that purpose is obvious, (which theory has been rejected by this court), this appropriation would fail to pass muster.

(b) Bering Sea Fisherman's Association

The Bering Sea Fisherman's Association is apparently involved in fisheries development in western Alaska. Gov. Ex. 32h (Art. III). The grant was used to fund a program of providing up-to-date information and services to commercial fishermen in the region to encourage broader participation and economic development of the herring fishery. Gov. Exs. 32g and 32j. The appropriation does not specify that this is the purpose of the grant, and it is not at all apparent that this is the only type of function performed by the Bering Sea Fisherman's Association. Accordingly, it is not apparent that a grant to this organization must necessarily have been for that

purpose. Even under the Legislature's theory, there is an insufficient statement of the purpose of the appropriation. The appropriation violates AS 24.30.030.

4) FAAC 42

The appropriation challenged in FAAC 42 provided as follows:

Fairbanks/Fairbanks Development Authority	$500,000

§ 286, ch. 50 SLA 1980 at p. 77. The appropriation contains no statement of its purpose. On its face it violates AS 24.30.030.

Additionally, the grantee's purposes, as established by its articles of incorporation, are varied. See Gov. Ex. 42a (Art. II). As noted by the Governor, the specific purpose of the appropriation appears not to have been established until a municipal grant agreement was made between the Department of Administration and the City of Fairbanks. Gov. Ex. 42b. Even under the Legislature's theory, this appropriation would be invalid.

C. Judicial Remedy

While the Legislature argued in its supplemental memorandum that this case is an inappropriate one in which to determine what statement of purpose is sufficient, for the reason that all of the appropriations at issue were properly disbursed and the issue is thus moot, it retracted this position at oral argument. It remains to determine what judicial action, if any, is appropriate in these circumstances.

It does not appear that the Governor seeks a determination that the legislation is void, with a subsequent attempt by the executive to recover State funds from the grantees. It appears sufficient for the purposes of the parties to this litigation, to treat this opinion as a declaratory judgment insofar as the issue of the statement of public purpose is

concerned. AS 22.10.020(b).

It should be emphasized that this opinion contains no finding that any of the appropriations challenged are void because they were not for a public purpose. Thus, there is no claim that article IX, section 6 of the Constitution, set out above, was violated.[13] The only issue in this regard, on which this court finds in favor of the Governor, is that the challenged appropriations did not specify a public purpose as required by AS 24.30.030.

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13. Such a claim would be extremely difficult to sustain. Judicial deference to the legislature regarding the existence of a public purpose is extremely high. See DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alaska 1962) (legislature's determination that appropriation is for a public purose must be upheld "unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact"). See also Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970); Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966); Suber v. Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966); and Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963), all of which upheld legislative (state or local) enactments against attacks that claimed there was no public purpose for the enactments.

III. CONFINEMENT REQUIREMENT: CHANGES IN SUBSTANTIVE LAW

A. General Discussion

Eleven appropriations have been challenged by the Governor on the basis that they violated article II, section 13 of the Alaska Constitution, chiefly that they "impermissibly effected a change in the law", but also in other ways.

Article II, section 13 of the Alaska Constitution provides in relevant part:

> Every bill shall be confined to one subject when it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title.

As the Governor notes, the purpose in restricting appropriations bills to appropriations was to avoid the practice of "logrolling". Logrolling occurs when a measure which could not command majority legislative support on its own merits is combined with another measure or measures, and cumulatively they obtain passage. It is a particularly insidious practice when it occurs through an appropriations bill, because frequently the appropriations bill is the result of a free conference committee. As such, it must be voted on in its entirety by the membership and cannot be amended on the floor. Uniform Rules Alaska State Legislature R. 42b (1981).

Various courts have noted the evil inherent in the practice. Flanders v. Morris, 558 P.2d 769, 772 (Wash. 1977) ("It is obvious why a legislator would hesitate to hold up the funding of the entire state government in order to prevent the enactment of a certain provision, even though he would have voted against it if it had been presented as independent legislation"); Sellers v. Frohmiller, 24 P.2d 666, 669 (Ariz. 1933). As the Governor notes, these considerations motivated the framers of the Alaska Constitution. Alaska Constitutional

Convention, Commentary on Legislative Article at 7.

There are other purposes of the "confinement" requirement in appropriations bills. As the Governor argues, the requirement insures that a governor's item veto power will not be unfairly blunted by the inclusion, in an appropriation item, of material which actually is a "general law" measure:

> The legislature cannot by location of a bill give it immunity from executive veto. Nor can it circumvent the Governor's veto power of substantive legislation by artfully drafting general law measures so that they appear to be true conditions or limitations on an item of appropriation.

Henry v. Edwards, 346 So. 2d 153, 158 (La. 1977). This evil might constitute, as well, a violation of the separation of powers doctrine: to the extent that the objectionable material requires something which, in the absence of positive legislation, would be the executive's prerogative to determine, it would invade a governor's powers.

The Governor here claims that the challenged appropriations in this section are objectionable in one of two primary ways. First, some appropriations attach specific conditions which are in reality changes in or enactments of substantive law. The attempt to accomplish this in an appropriations bill violates the requirement that appropriations bills be confined to appropriations. Second, in directing a state agency to spend money (or to disburse money to another entity to spend) to perform a function which that state agency does not have the specific legal authority to perform, an appropriation in effect amends the law to give it that authority. This too, the Governor argues, violates the "confinement" requirement.

The Legislature generally responds that the constitutional provision in question must be interpreted liberally so as to give the legislature the flexibility it needs in making

appropriations, and that an appropriation may contain reasonable conditions, limitations and restrictions. The challenged appropriations, the Legislature concludes, contain nothing more than constitutionally permissible qualifying language.

While it is relatively simple to set out the outlines of the dispute, this court has encountered extreme difficulty in uncovering the proper test to determine when an appropriation goes beyond what is permitted by the constitution. [14/] It is

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14. A good example of how relatively easy it is to define the problem and how difficult it is to answer it may be seen from this excerpt from Henry v. Edwards, 346 So. 2d 153, 157-58 (La. 1977):

> Just as the Governor may not use his item-veto power to usurp constitutional powers conferred on the legislature, neither can the legislature deprive the Governor of the constitutional powers conferred on him as the chief executive officer of the state by including in a general appropriation bill matters more properly enacted in separate legislation. The Governor's constitutional power to veto bills of general legislation cannot be abridged by the careful placement of such measures in a general appropriation bill, thereby forcing the Governor to choose between approving unacceptable substantive legislation or vetoing "items" of expenditure essential to the operation of government. The legislature cannot by location of a bill give it immunity from executive veto. Nor can it circumvent the Governor's veto power over substantive legislation by artfully drafting general law measures so that they appear to be true conditions or limitations on an item of appropriation. Otherwise, the legislature would be permitted to impair the constitutional responsibilities and functions of a co-equal branch of government in contravention of the separation of powers doctrine . . . .
>
> We are no more willing to allow the legislature to use its appropriation power to infringe on the Governor's constitutional right to veto matters of substantive legislation than we were to allow the Governor to encroach on the constitutional powers

(footnote continued on page 41)

Footnote 14 continued

> of the legislature. In order to avoid this result, we hold that, when the legislature inserts inappropriate provisions in a general appropriation bill, such provisions must be treated as "items" for purposes of the Governor's item veto power over general appropriation bills.
>
> The distinction between what constitutes a condition or limitation properly included in a general appropriation bill and what amounts to a provision which is essentially a matter of general legislation more appropriately dealt with in a separate enactment appears, on first consideration, to be difficult to draw. However, this need not be the case if the legislative and executive branches of the government adhere to the spirit of the constitution, each exercising its respective powers with due deference for the constitutional prerogatives of the other. [The Louisiana Constitution] directs the legislature to pass an "itemized" appropriation bill, essentially a budgetary schedule of distinct fiscal units. The Governor's corollary power to veto the "items" of expenditure included therein casts further light on what was contemplated for insertion in the general appropriation bill. These provisions were never intended to hamstring the legislature in its legitimate efforts to control the purse strings of government. On the other hand, legislative control cannot be exercised in such a manner as to encumber the general appropriation bill with veto-proof "logrolling measures," special interest provisions which could not succeed if separately enacted, or "riders," substantive pieces of legislation incorporated in a bill to insure passage without veto. It is not enough that a provision be related to the institution or agency to which funds are appropriated. Conditions and limitations properly included in an appropriation bill must exhibit such a connexity with money items of appropriation that they logically belong in a schedule of expenditures. We conclude, as did the trial judge, that the ultimate test is one of appropriateness.

With all due respect to the Supreme Court of Louisiana, the test of "appropriateness" is hardly self-defining. Nor does the language "such a connexity with money items of appropriation that they logically belong in a schedule of expenditures" provide much guidance. That opinion goes on to uphold some appropriations (footnote continued on page 42)

probably of great significance that virtually every court which has been faced with this issue has announced that it should be decided on a "case by case" basis. As the Supreme Court of Nebraska said in deciding a confinement case:

> All authorities are in agreement that it is impossible to fix exact limits in the area of constitutional separation of powers. All states approach the problem on a case-by-case basis.

State ex rel. Meyer v. State Board of Equalization and Assessment. 176 N.W.2d 920 (Neb. 1970). Unfortunately, the present dispute involves 11 instances of claimed unconstitutional appropriations in this section alone. Thus, Part III of this opinion alone may be said to be comprised of 11 separate "cases".

The Alaska Supreme Court has not yet decided a case raising a claim that particular legislation violates the constitutional requirement that bills for appropriations be confined to appropriations.[15/] There are cases construing the single subject rule, which is also found in article II, section 13, e.g., Short v. State, 600 P.2d 20 (Alaska 1979). However, because of the distinction between appropriation bills and other bills, the Alaska cases construing the single subject rule are

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Footnote 14 continued

and to strike down others for reasons which are not clear and in a pattern which does not seem to be required by the "test" quoted above. See id. at 159-65.

15. In his dissent in Thomas v. Rosen, 569 P.2d 793, 799 (Alaska, 1977), Chief Justice Boochever noted: ."While art. II, sec. 13 generally requires that bills containing appropriations be confined to appropriations, I believe that the legislature has the power to include qualifications or restrictions in an appropriation bill." The majority did not find it necessary to reach that issue, however. Id.

of very little value in interpreting the confinement requirement. Thus, the Legislature's attempt to argue that the confinement requirement should be read to allow the Legislature great freedom, because that is how the Alaska Supreme Court has interpreted the single subject rule, [16] is not persuasive.

Appropriations bills may and almost always do include appropriations for a multitude of purposes. By definition they embrace several subjects. Thus, the cases interpreting the single subject rule are of little direct assistance in interpreting the confinement requirement. It seems likely that the Alaska Supreme Court would not automatically apply its single subject rule analysis to a confinement case, but would seek to fashion a rule appropriate to confinement cases.

The Governor does not suggest a particular test for confinement cases, instead citing to several authorities and arguing generally that the challenged appropriations are invalid. The Legislature does propose a particular test, that formulated in Biles v. Dept. of Public Welfare, 403 A.2d 1341 (Pa. Comm. 1979).

The Biles test contains three elements. It was stated by the court as follows:

> To be constitutional the language in an appropriation bill must be germane to the appropriations, must not conflict with existing law, and it must not extend beyond the life of the appropriations bill itself.

403 A.2d at 1343. While it is superficially attractive, the test does not go far enough. Under it, the Legislature (or

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16. In Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974), the court stated: "The constitutional provision should . . . be construed with considerable breadth. Otherwise statutes might be restricted unduly in scope and permissible subject matter, thereby multiplying and complicating the number of necessary enactments and their interrelationships." See also Short v. State, 600 P.2d 20, 23 (Alaska 1979) and cases cited at n.7 therein.

selected members of the Legislature -- the free conference committee) could enact general law through an appropriations bill, and do so session after session, and thereby vitiate completely the confinement requirement.

Certainly qualifying language must be "germane" to the appropriation (some courts use the slightly broader adjective, "appropriate"). Certainly the qualifying language or condition must not conflict with existing law. But what of the situation when there is no existing law in an area? May the Legislature (or worse, the few members of a free conference committee on an appropriations bill) enact new law in an appropriations bill and defend it under Biles simply because it does not conflict with any existing law? The answer must surely be no. Finally, certainly the qualifying language or condition must not remain in effect beyond the life of the appropriation. But that life may be extended, indeed. In the case of capital projects, "[a]n appropriation made for a capital project is valid for the life of the project . . . . " AS 37.25.020. Even in the case of operating expenses of government, the evil in the enactment of general law through an appropriations bill is hardly lessened by the fact that that evil will last only for a limited period of time. The Biles test, alone, draws no useful line.

The problem needs to be approached from the proper perspective. The constitution commands that "[b]ills for appropriations shall be confined to appropriations." The language is limiting, literally confining. It restricts the Legislature. The test to be used by the court must approach from the same perspective -- because appropriations bills must be limited to appropriations, the qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the

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program of expenditures.[17] It must not enact law or amend existing law.[18] It must not extend beyond the life of the appropriation.[19] Finally, the language must be germane,[20] that is, appropriate,[21] to an appropriations bill.

This court entertains no illusions that this test may easily or mechanistically be applied. Every instance where language is challenged in an appropriations bill is a new case which must be examined separately. Courts applying what appear to be similar tests to apparently similar facts reach opposite conclusions. Compare Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975) with Henry v. Edwards, 346 So. 2d 153, 159-65 (La. 1977). This formulation is synthesized from several cases, and attempts to give fair meaning to the Alaska Constitution without unfairly restricting the Legislature's spending power.[22] It must now be applied to the challenged appropriations.

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17. State ex rel. Meyer v. State Board, supra, 176 N.W.2d at 926.

18. Biles v. Dept. of Public Welfare, supra, 403 A.2d at 1343 (as to amending law); Flanders v. Morris, supra, 558 P.2d at 772.

19. Biles, supra.

20. Id.

21. Henry v. Edwards, 346 So. 2d 153, 158 (La. 1977).

22. An analysis which is much more restrictive of the Legislature's power is offered by Levy, Constitutional Limitations on Appropriations, 11 UCLA-Alaska L. Rev. 189 (1982).

B. The Challenged Appropriations

1) FAAC 9

The appropriation challenged in FAAC 9 reads as follows:

> The sum of $20,000 is appropriated from the general fund to the Department of Health and Social Services for payment as a grant to the Upper Tanana Development Corporation as a minority hire study.

§ 96, ch. 50, SLA 1980 at p. 14.

As the Governor notes, the Department of Health and Social Services does not have the statutory authority to undertake minority hire studies. The powers of that department are set out in AS 44.29.020. Although they are broad, they do not either specifically or generally embrace that function. The Legislature undoubtedly could charge the department with that function, but it must do so through general law, by amending AS 44.29.020, and it may not accomplish such an amendment through an appropriation bill.

The Governor also correctly points out that the State Commission for Human Rights has been created by the Legislature, AS 18.80.010, and has been given the power to "study the problems of discrimination in all or specific fields of human relationships," AS 18.80.060(5). It would clearly have the power to conduct the minority hire study in question. It would also have the power, under the analysis of Part I, above, to receive an appropriation for a minority hire study and disburse it as a grant to the named grant recipient. It would have the power and the duty to administer the grant, to ensure that state law generally regarding the expenditures of public funds was complied with. But this court is unable to discern how the Department of Health and Social Services has a proper role in this field. Because the appropriation purports to confer on

that department a power which it has not been given, it attempts to amend existing law. For this reason, the appropriation is invalid.

2) FAAC 18

The appropriation challenged in FAAC 18 reads as follows:

> The sum of $175,000 is appropriated from the general fund to the Legislative Council for a feasibility study of the Yukon Kuskokwim Crossing.

§ 225, ch. 50, SLA 1980 at p. 34.

The powers of the Legislative Council are set out at AS 24.20.060. They do not include the power to undertake the kind of detailed engineering studies which would be required to determine the feasibility of a major construction project. Rather, that duty has been assigned by the Legislature to the Department of Transportation and Public Facilities. AS 35.05.010. Because the appropriation purports to confer on the Legislative Council a power which it has not been given, it attempts to amend existing law. For this reason, the appropriation is invalid.

The Legislature makes two primary arguments to uphold the validity of this appropriation. First, it argues that the Legislative Council provides "full-time technical assistance to the Legislature", and that the Legislature, through its interim committees, "has broad latitude to study alternatives for the future." The argument is based on AS 24.20.060(4)(A). That statute provides that the Legislative Council has the power to:

> Provide the technical staff assistance in research, reporting, drafting and counseling requested by standing, interim and special committees and spot research and drafting services for individual members in conformity with law and legislative rules.

The Legislature's reading of this statute appears overly broad. This matter does not involve a request by a committee for assistance in researching or drafting a bill. Nor does it involve a request from an individual legislator for "spot research". Rather, it involves a contract in the amount of $175,000 between the Legislative Affairs Agency and a joint venture to perform a highly detailed construction plan. Even a brief review of the contract which was executed shows how different this detailed feasibility study was from the type of function set out in AS 24.20.060(4)(A). Among other things, the contractor was to

> Obtain a permit to perform the necessary reconnaissance surveys on Native and public lands within the proposed Yukon-Kuskokwim Crossing corridor. Perform a reconnaissance survey of the route corridor on ground. Secure aerial mapping photography of the route corridor suitable for preparing a photogrammetric map of the route corridor. Perform a reconnaissance hydrographic survey from the main channel of the Kuskokwim River and from the main channel of the Yukon River to the respective dock sites.
>
> Prepare a photogrammetric map of the route corridor at a scale of 1" equals 400' and a contour interval of 10'. Prepare an aerial photo strip mosaic of the route corridor at a scale of 1" equals 2,000'.
>
> Locate the proposed Portage Road, docks, pipelines, yards, staging areas and buildings on the photogrammetric map. Locate gravel sources and problem soils along the route by aerial photo-analysis with sufficient test pits to verify local photo-indicators of gravel sources and problem soils. Set permanent bench marks near the proposed dock location, refer hydrographic surveys to these bench marks, and extrapolate river stages from the nearest USGS river gaging stations and/or National Weather Service hydrologic stations on the Yukon and the Kuskokwim River.
>
> Provide a preliminary estimate of construction quantities and costs for

> the road, docks, pipelines, yards, staging areas, building and equipment. Propose basic construction methods and material sources. Prepare a preliminary environmental assessment of the proposed Yukon-Kuskokwim Crossing, with particular references to probable impacts on fish and game. Prepare a preliminary social assessment of the proposed Yukon-Kuskokwim Crossing, with particular references to the probable influences on social conditions in Upper Kalskag and other Kuskokwim and Yukon villages and towns.
>
> Propose a schedule of legislative and administrative action, hearings, surveys, design, right-of-way acquisition and construction for the proposed Yukon-Kuskokwim Crossing.

Gov. Ex. 18a. The members of the joint venture contractor with the Legislative Council are registered civil engineers. Gov. Ex. 18b. It is evident from the exhibits that the functions being undertaken by the Legislative Council in this instance go far beyond the powers established in that body by AS 24.20.060.

The Legislature's second argument is that, under AS 35.10.015, the Legislature reviews an annual report required to be submitted by the Department of Transportation and Public Facilities, including its "estimates and recommended priorities". Under AS 35.10.180, the Legislature must approve, reject, or modify the department's proposed plans and policies. Thus, the Legislature argues, its commission of this study was "incidental to the carrying out of its legislative functions, which include closely reviewing DOT/PF's proposed projects prior to appropriating funds for those projects." This argument is unpersuasive. There is no showing in the record that this detailed construction study was ordered to assist the Legislature in reviewing any proposed project of DOT/PF. There is no showing that the DOT/PF annual report even proposed such a project. Finally, if the Legislature desires to have such a feasibility study prepared, it certainly may require that it be done. However,

under the law as it presently exists, the Legislative Council has no authority to conduct such a study or to contract with others for it to be conducted.

3) FAAC 19

The appropriation challenged in FAAC 19 reads as follows:

> The sum of $250,000 is appropriated from the general fund to the Office of the Governor, special projects office, for the Northern Southeast Aquaculture Association.

§ 259, ch. 50, SLA 1980, p. 35.

There is an unresolved factual question concerning this appropriation which precludes disposition of it by summary judgment. The Legislature alleges in its Supplemental Memorandum in Opposition to Governor's Motion for Summary Judgment that this appropriation was requested by the Governor's office. Leg. Supp. Mem. 53. The Governor's response is unintelligible. He says first that the Legislature "provides no support for these assertions", then concedes that "this item was added by the legislature after the bill was intoduced by the governor." The Governor then argues that "[a]n invalid appropriation is not made valid because the governor requested it." Gov. Reply 24. If it is the case that this appropriation was included in the appropriations bill at the request of the Governor, it would appear that the Governor is estopped from contesting its constitutionality. See Jamison v. Consolidated Utilities, Inc., 576 P.2d 97 (Alaska 1978). Because there is an unresolved issue of material fact, summary judgment appears inappropriate in regard to FAAC 19. Alaska Rule of Civil Procedure 56; Wickwire v. McFadden, 576 P.2d 986 (Alaska 1978).

4) FAAC 32

As noted above, there are two appropriations

which are challenged in FAAC 32. The first of these, an appropriation of $198,600 to MBE Service Centers, Inc., through the Department of Commerce and Economic Development, raises no confinement question. It is the second appropriation, $226,000 to the Bering Sea Fisherman's Association, through the Department of Commerce and Ecoromic Development, which is challenged by the Governor on the grounds that it violates the confinement requirement.

The appropriation in question (FAAC 32(b)) reads as follows:

> Department of Commerce and Econonic Development
>
> Bering Sea Fisherman's Association grant $226,000

§ 286, ch. 50, SLA 1980, p. 65.

This appropriation is discussed above in Part II. B.3(b). Although the purpose of the grant was not set out in the appropriation, the exhibits submitted by the parties established that the grant was used to fund a program of providing up-to-date information and services to commercial fishermen in western Alaska to assist in the development of the herring fishery in that region.

The Governor argues that the Legislature has assigned to the Department of Fish and Game the authority to "collect, classify and disseminate statistics, data and information that tends to promote the purposes" of the fish and game laws of the State, including the enhancement of fisheries. The Governor also argues that the Department of Commerce and Economic Development is "not specifically charged with responsibility in this area" and thus concludes that the appropriation purports to enact substantive law by giving the Department of Commerce and Economic Development authority which it previously did not have.

A review of the enabling legislation for the Department of Commerce and Economic Development makes clear that the Governor's argument is incorrect. AS 44.33.020 establishes the duties of the department. Among them are the following. The department shall "cooperate with private, governmental and other public institutions and agencies in the execution of economic development programs." AS 44.33.020(17). The department shall "conduct studies, enter into contracts and agreements, and make surveys relating to the economic development of the state . . . ." Id., § 12. In addition to these specific duties, the department shall "perform all other duties and powers necessary or proper in relation to economic development and planning for the state." Id., § 20. Under these grants of powers, the Department of Commerce and Economic Development clearly has the power to enter into a contract with a regional association to assist in the development of the herring fishery. The Governor's argument that the appropriation somehow amended existing law is not correct. The appropriation is not in violation of the confinement requirement of the Alaska Constitution.

5) FAAC 37

The appropriation challenged in FAAC 37 reads as follows:

> Department of Natural Resources
>
> Kuskokwim Native Association $200,000
> Koyokon Development Corp. $200,000
>
> It is the intent of the Legislature that the appropriations to the Kuskokwim Native Association and Koyokon Development Corporation be used for the purchase of D-6 bulldozers or their equivalent, and for land clearing and other expense relating to agriculture.

§ 286, ch. 50, SLA 1980, p. 67.

The Governor agrees that the Department of Natural Resources has the power under AS 03.05.010 to direct experimental

work to promote and develop the agricultural industry in the State. He concedes that "[i]t is appropriate for the legislature to channel money through the department for this purpose." The Governor contends, however, that inclusion of intricate details such as the designation of the specific model bulldozer to be used in this project "constitutes the enactment of substantive law" and thus violates the confinement requirement.

The Legislature argues that the Governor's position would force it to enact a separate piece of specific legislation describing in detail the purposes of each appropriation or forego its right to specify such details. The Legislature finds the alternative of "enacting a separate piece of general legislation for hundreds of appropriations which require conditions or qualifications" to be an "unacceptable alternative both from a legal and practical standpoint." The Legislature points to past practice of providing "fine details" and argues:

> The alternative to this type of precise detailing of appropriations for specific uses and purposes is an incredible volume of separate pieces of general legislation. Since this is, in the real world, virtually impossible, the Legislature's power to control the use of state funds would effectively be handed over to the executive branch, a concept rejected by the drafters of the Alaska Constitution. Further, it is absurd for the legislature to enact a permanent stautory program when it desires only to authorize disbursement of public funds to specific recipients for specific items or purposes on a one-time basis.

Leg. Supp. Memo. 59.

The line in instances like this one is difficult to draw. In one respect the Legislature's argument is not persuasive. If, in a given appropriation, it seeks to do more than merely appropriate, it must enact separate, substantive

legislation. That is what the constitution requires. On the other hand, does the challenged language here do more than qualify and explain the appropriation? Does it offend any element of the test set out above?

While the issue is close, it appears to this court that the language does go beyond the minimum necessary to explain how the money is to be spent. It takes over a portion of the administration of the program of expenditures. It does so by directing that money appropriated for agricultural development be expended to purchase a particular type of equipment. That type of determination is one properly made by the entity which is administering or executing the law. It seems "inappropriate to a schedule of expenditures". It probably ought not to be in an appropriations bill.

However, given the authorities set out above which establish that legislation enjoys a presumption of constitutionality, this court is reluctant to conclude that a particular appropriation is unconstitutional in what appears to be a close case. For that reason, and even though the appropriation challenged in FAAC 37 appears to cross the line, no such declaration will be made and the appropriation is upheld.

6) FAAC 45, FAAC 47, FAAC 48 and FAAC 49

The appropriations challenged by the Governor in these four counts of his counterclaim are highly detailed appropriations to the Department of Transportation and Public Facilities for rural airport improvements in the scores of villages in Alaska. (The Governor says 33 rural airports are affected, and the Legislature notes there are 38 airports affected. These figures are accurate as to one or the other of the specific improvements mandated, but they are inaccurate as to the total number of airports affected. For example, 77 village airports were to receive air-to-ground radios under the

appropriation. The total number of different village airports affected was probably well over 100.) Approximately $35,000,000 was appropriated for rural airport runway improvements; almost $5,000,000 was appropriated for rural airport lighting improvements; almost $3,000,000 for rural airport navigational aids; and approximately $2,000,000 was appropriated for rural airport terminal storage buildings. The appropriations are highly detailed, filling eight pages in the Session Laws of Alaska, § 286, ch. 50, SLA 1980, pp. 79-87, but, much more significantly, they refer to and incorporate by reference much longer and extremely detailed studies concerning rural airport improvement. In addition, the appropriations established minimum standards for runway size, directed the Department of Transportation and Public Facilities to identify villages where expansion of the runway would involve the acquisition of land from the village under the Alaska Native Land Claims Settlement Act and submit a list of these projects to the Legislative Budget and Audit Committee, established extremely detailed standards for improvement to airport lighting (by incorporating descriptions and standards found in DOT/PF documents and FAA documents), established the size and general lay-out of airport terminal storage buildings, et cetera.

Rural Airport Improvement Appropriations

The legislation in question goes far beyond what may be included in an appropriations bill. There is no question here that the challenged language amounts to full-scale, detailed administration of a massive rural airport improvement program. It effectively enacts law concerning the design of airports all over the state. The language is inappropriate for a schedule of expenditures. In virtually every respect, the appropriations in question offend the test for determining their validity.

The Legislature certainly could amend existing law (or create new law) establishing that airports built or

improved with state funds shall conform to certain standards. But such legislation must be separate from the appropriations bill, for all of the reasons discussed at the beginning of Part III. Or, the Legislature could appropriate the sums in question to the Department of Transportation and Public Facilities for rural airport runway improvements, rural airport lighting improvements, et cetera. It cannot, however, through the use of an appropriations bill, take over the detailed administration of carrying out a program design to improve rural airports in the state. The appropriations challenged in all of these counts of the counterclaim offend article II, section 13 of the Alaska Constitution.

7) FAAC 57

The appropriation challenged in FAAC 57 reads as follows:

> Department of Revenue
>
> Child Support Enforcement $2,432,900
>
> The Department of Revenue will establish a sliding scale collection fee schedule for the non AFDC caseload based upon an individuals [sic] economic ability to pay. The amount of this general fund appropriation is to be reduced by the amount of those non AFDC case collection fee receipts. . .

§ 51, ch. 20, SLA 1980, p. 25.

The Governor objects to the language requiring the Department of Revenue to establish a sliding scale collection fee schedule. He argues that such a requirement may not constitutionally be inserted into an appropriations bill. The Legislature points to AS 47.23.100 which, at the time of the appropriation, required the Department of Revenue to adopt regulations assessing costs for obligees financially able to pay for the services provided by the department. Thus, the Legislature argues, it neither added nor changed any stautory

requirements; it merely conditioned its appropriation to the agency on the agency complying with an existing statutory requirement.

The Legislature's argument is not persausive, for it mischaracterizes what the challenged language attempts to do. It not only requires that the department adopt regulations by which costs may be assessed against people who are able to pay, but it specifies that the regulation shall be of a specific type -- a sliding scale collection fee schedule. The Legislature has the power to require that such regulations be adopted, but it may not do so in an appropriations bill. The effect of that requirement clearly is to amend existing law. It is to require regulations of a particular type, where that type was not required before. The challenged language violates the confinement requirement.

8) FAAC 70

Supreme Court (35 positions) $1,832,500

No funds from this appropriation are to be used to move the clerk of the supreme court and the clerks [sic] office and staff from Juneau.

§ 51, ch. 120, SLA 1980, p. 50.

The Governor objects to the language prohibiting use of the appropriation to move the office of the clerk of the supreme court from Juneau on the grounds that it is "essentially substantive law" with its import that "the supreme court clerk shall remain in Juneau". The argument is not persuasive. Assuming that the Governor would even have standing to raise this issue, there is nothing in the challenged language which requires that the clerk's office remain in Juneau. It merely prohibits the use of funds from this appropriation for that use. It does not prohibit the use of other funds for that purpose. The challenged language simply does not do what the Governor

claims it does. There is no violation here of the confinement requirement.

C. Judicial Remedy

The Governor has not addressed, either in his original Memorandum in Support of Motion for Summary Judgment or in his Supplemental Memorandum in Reply, what judicial remedy might be proper given a finding that any of the appropriations violated the confinement requirement of article II, section 13 of the Alaska Constitution. From the extensive exhibits submitted by the parties, it appears likely that disbursement of most of the funds in question occurred even before the First Amended Answer and Counterclaim was filed, (see, e.g., Leg. Ex. 9B, Gov. Ex. 18a, Gov. Ex. 19b). Additionally, there are substantial policy reasons why this court should limit its decision to a declaration of the rights and legal relations of the parties. Under all of these circumstances, this decision, to the extent it holds any appropriation to be unconstitutional, should be treated as a declaratory judgment under AS 22.10.020(b), and no more. If any appriation declared invalid has not been disbursed, it shall lapse.

IV. PRIVATE EDUCATIONAL INSTITUTIONS

A. Standing

The Legislature contends that the Governor has no standing to challenge the two appropriations which he challenges on the grounds that they constitute aid to private educational institutions. The Legislature relies on its memorandum in support of motion to dismiss defendant's counterclaim, which was filed near the outset of this case when the case was before The Honorable Thomas B. Stewart. The Governor responded with an opposition memorandum advocating not only that he had standing, but that the Legislature did not have standing to raise the issue. The issue was fully briefed before Judge Stewart.

After consideration of the various briefs, Judge Stewart issued an order denying both the plaintiffs' and the defendants' motions to strike. In that order, he explicitly stated:

> The motions challenge the standing of the respective parties to sue the other, and assert additional grounds for dismissal. The motions have been heard and the court is fully advised thereon. It is hereby ORDERED that the motions to dismiss are denied.

Order Denying Motions to Dismiss, October 5, 1981. Because the issue of standing was fully briefed and considered by the predecessor court, and because the parties make no new arguments and allege no new facts concerning standing, this court will not reconsider Judge Stewart's earlier ruling. It is the law of this case, and ought not to be changed except upon a specific showing that it is erroneous. Stepanov v. Gavrilovich, 594 P.2d 30, 36 (Alaska 1979). While it is within this court's power to reconsider, the power "is not to be used lightly." Id. No showing has been made as to why it should be exercised here. Thus, the Governor has standing to challenge these appropriations.

B. General Discussion

Two appropriations have been challenged by the Governor on the basis that they provide direct aid for private education in violation of article VII, section 1 of the Alaska Constitution. That section provides:

> The legislature shall by general law establish and maintain a system of public schools open to all children f the State, and may provide for oth r blic educational institutions. S hools d institutions so established shall be ee from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The Governor's challenge is based upon the last sentence of the section. The critical inquiry regarding both appropriations is whether the grantee may be characterized as a "private educational institution."

No Alaska case has construed the meaning of the term "private educational institution", but it is not a particularly difficult term to define. It would certainly include schools, as well as societies, corporations, and organizations, which are other than public, and which are organized or established for the purpose of providing education. If there is any uncertainty in the application of this constitutional prohibition, it arises when a private organization which undertakes a number of functions, one of which may be characterized as educational, receives assistance directly from the State.

The history of the Alaska Constitutional Convention is helpful in this regard. Delegate Armstrong, speaking for the Committee on Health, Education and Welfare, which drafted the section in question, indicated a number of things about its intent. Significantly, while it was the intention of the framers "to provide and protect for the future of our public schools", the language was drafted so that it would "not prohibit the use

of funds in other educational matters." 2 Proceedings of the Alaska Constitutional Convention 1514. Delegate Armstrong then made reference to special cases where children in homes or hospitals or other private institutions would not be prohibited from receiving aid under the section. Id. at 1514-15. The thrust of these comments seems to be that aid to a private organization or institution is not prohibited, even if it carries out some educational assistance, as long as it is not primarily an educational institution.

It is also important to keep in mind, as noted above at 3-4, that a showing of unconstitutionality must be "manifest" to overcome the presumption of validity to which validly enacted statutes are entitled.

C. The Challenged Appropriations

1) FAAC 11

The appropriation challenged in FAAC 11 reads as follows:

> The sum of $100,000 is appropriated from the general fund to the municipal grant account for payment as a grant to the Municipality of Anchorage for a grant to the Alaska Black Leadership Conference for community-based education enrichment.

§ 106, ch. 50, SLA 1980 at p. 4. The grant was to finance a six week summer program for 200 minority students. Leg. Ex. 11 C.

The Alaska Black Leadership Conference is not properly described as an educational institution, as the constitution uses that phrase. While the organization undertakes some educational activities, the evidence submitted by the parties suggests that it may accurately be described as an umbrella organization for several groups which seeks the advancement, in several spheres, of Alaska's black citizens. Its purposes include "promoting and stimultating cohesiveness within the Black Community." Gov. Ex. 11a. Member organizations

include the Alaska Black Caucus, the Alaska Women's Civic and Social Club, the Black Coalition, the Ministerial Alliance, Mothers for Christian Fellowship, both the Anchorage and Fairbanks branches of the NAACP, the Greater Fairbanks Black Caucus, and diverse other groups. Leg. Ex. 11C. The purposes and powers of the Alaska Black Leadership Conference, as expressed in its articles of incorporation, embrace "charitable, educational, civic, literary and cultural" purposes. Gov. Ex. 11a (art. III). Under these circumstances, it would not appear appropriate to conclude that the Alaska Black Leadership Conference is a "private educational institution" within the meaning of the constitution.

In some instances, of course, it might be appropriate to look through a corporate structure, for example, if the organization undertook only educational functions, to determine if it really was no more than an educational institution. But that does not appear to be the case here. While the Governor hints in that direction, noting that the organization was incorporated in September, 1980, after the appropriation in question was passed, one of the exhibits submitted by the Governor shows that the organization was functioning at least since 1978. Gov. Ex. 11b. Neither party has raised a question of fact in this regard, and both parties seek resolution by summary judgment. In these circumstances, and without even the allegation of a genuine issue of material fact, this court is not inclined to look behind the exhibits presented to attempt to find a factual dispute concerning the organization's activities.

Because the Alaska Black Leadership Conference is not a "private educational institution", the appropriation of public money to it does not offend article VII, section 1 of the Alaska Constitution.

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2) FAAC 25

The appropriation challenged in FAAC 25 reads as follows:

> Fairbanks North Star Borough
> Association for Education
> of Young Children $20,000
> For child care equipment

§ 286, ch. 50, SLA 1980 at p. 53.

The Fairbanks Association for the Education of Young Children is a private non-profit organization comprised of nine day care and pre-school organizations in the Fairbanks area. Leg. Ex. 25C. Its goal is "to provide information and support for young children". Gov. Ex. 25a. It sought, and obtained in the challenged appropriation, $15,000 for play equipment and $5,000 for audio-visual equipment, to be used by its various member organizations. Leg. Ex. 25C.

As with the previous appropriation to the Alaska Black Leadership Conference, the issue is whether the Fairbanks Association for the Education of Young Children is a private educational institution. This question is substantially closer than that involving the Alaska Black Leadership Conference in the preceding appropriation.

Supporting the Governor is the fact that the name of the association suggests that it is organized primarily for educational purposes. Additionally, a letter to Representative Brian Rogers from the vice president of the organization, Gov. Ex. 25a, suggests that education is the primary purpose of the Fairbanks Association for the Education of Young Children. For example, it refers to the goal of development of "physical and cognitive skills" of children, refers to the "teacher/child ratio" in its day care centers, and refers to the fact that the day care centers provide care for both preschool and "young school age children".

The Legislature argues that the primary function of the Fairbanks Association for the Education of Young Children is to provide, through its member day care centers, child care to pre-school children. The Legislature contends that "FAEYC is a non-profit organization whose goal is to provide information and support for affiliate day care centers." Leg. Ex. 25A. The grant was used to purchase play equipment and audio-visual equipment for child care centers affiliated with FAEYC.

The Legislature seeks to distinguish day care centers or child care centers from "private educational institutions" in two ways. First, the former are regulated by the Department of Health and Social Services. See 7 AAC 50.120-770. Second, expenses for child care are tax deductible to parents, and, under the Internal Revenue Code, are considered employment related expenses, while private school tuition is not a deductible expense. Thus, the Legislature argues, day care may be distinguished from education. The Legislature also relies upon a lower court decision from Ohio which held that a day care center is not included within the term "educational use" in a zoning ordinance which provided that permitted uses in a residential district include "educational use, public library or museum." Staker v. Brown, 324 N.E.2d 793, 795 (Ohio Com. Pl. 1974). The Legislature concludes that "any educational benefits conferred on children in day care centers is secondary to their basic function which is to allow parents to participate in the work force."

A further argument advanced by the Legislature is based on the existence of AS 44.33.240-257, which authorizes the Department of Commerce and Economic Development to make loans which directly benefit child care facilities. If aid to private day care centers constitutes prohibited public benefit

to "private educational institutions", the Legislature argues, AS 44.33.240 et seq. must be unconstitutional also.

As noted above, this issue is closer than the one raised by the grant of the Alaska Black Leadership Conference. On balance, the arguments of the Legislature are more persuasive. As noted in the opinion of the Alaska Supreme Court in Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979), the purpose of article VII, section 1 was "to support and protect a strong system of public schools." Id. at 129. It seems likely that these appropriations would not frustrate that purpose. The majority of the children to be benefited by the appropriation at issue here are not school age children, and those who are of school age are not diverted from the public schools by FAEYC. There is presumably no or little competition from the public school system for these dollars. Indeed, it might well be argued that expenditure of these funds enhances the public school system, in helping to insure that children who begin formal schooling will have had benefits provided to them during their pre-school years. Moreover, the statement by Delegate Armstrong, quoted above at 60, to the effect that the section was not intended to "prohibit the use of funds in other educational matters", 2 Proceedings of the Alaska Constitutional Convention 1514, suggests that the appropriation is valid.

Under all of these circumstances, and remembering the heavy burden that is faced by one who challenges the constitutionality of a validly enacted statute, this court concludes that the Fairbanks Association for the Education of Young Children was not a "private educational institution" as that term is used in the Alaska Constitution. For that reason, the appropriation is not prohibited by article VII, section 1 of that document.

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V. UNCONSTITUTIONAL DELEGATION OF POWER

The Governor challenges one item in one of the appropriation acts in question on the theory that it is an unconstitutional delegation of power. In § 50, ch. 120, SLA 1980 at p. 65, the Legislature provided:

> The sum of $5,267,248 shall be reduced from the total of the personal services line items contained in the appropriations made by this Act for operating expenditures for the fiscal year beginning July 1, 1980, and ending June 30, 1981. The total reduction shall be from general fund appropriations and reductions shall be equitably allocated among the state agencies by the division of budget and management, Office of the Governor.

The Legislature's delegation of the power to decide how the reduction should specifically be allocated among state agencies is challenged by the Governor as an invalid delegation of legislative authority to the Governor. 23/

The Legislature argues that "[a] delegation of discretion to the executive branch of government is constitutional

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23. In his Memorandum in Support of Summary Judgment, at p. 64, the Governor states: "This item was vetoed by the governor. However, the court has ruled that this veto was improperly exercised. Mem. decision motion for partial judgment on pleadings, February 26, 1982." This court has reviewed the Memorandum of Decision of February 26, 1982, and can find no indication in the memorandum that the court ruled that the Governor's item veto power was improperly exercised regarding this item. That Memorandum of Decision was issued by The Honorable Thomas E. Schulz, to whom this case was assigned for a brief period following Judge Stewart's retirement. Therefore, this court also reviewed Judge Stewart's Memorandum of Decision of December 2, 1981, upon which Judge Schulz's Partial Judgment was based, and could not find any indication that Judge Stewart had ruled that the Governor's veto was improperly exercised in regard to this item in that document, either. Therefore, the Governor's statement that "the court has ruled that this veto was improperly exercised" appears to be incorrect.

Technically, the matter may be moot. However, under the "public interest" exception to the mootness doctrine, In Re G.M.B., 483 P.2d 1006, 1008, (Alaska, 1971), it is appropriate to resolve this matter. That is, this dispute is likely a recurring one, and its nature is such that the mootness doctrine, if applied, would effectively preclude review of the issue.

where the Legislature provides sufficient standards for the exercise of that discretion." The Legislature notes that the approach it took was an alternative to merely reducing all personal services line items by one percent, which it clearly had the power to do, and that the Governor was given "specific criteria sufficiently definite to pass constitutional muster," that is, the direction that the reductions be "equitably allocated" among the state agencies.

In DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alaska 1972), the Supreme Court cited with approval a treatise to the effect that "a legislature may delegate its non-legislative functions and confer discretion in the administration of the law, but may not delegate purely legislative powers in the absence of constitutional authorization." Id. at 723 n.16, citing 16 CJS Constitutional Law § 133 (1956). The Legislature has, in this case, argued often and persuasively that the spending power is a legislative power, and only a legislative power (with the Governor playing a limited constitutional role through the exercise of the veto). Thus, unless the Legislature can point to a specific constitutional authorization to delegate away part of that power, the item in question must be an invalid delegation.

The Legislature points to no such constitutional provision. It argues at length that this case is distinguishable from a case cited by the Governor, but that argument misses the mark. The case in question, State of New Mexico, ex rel. Holmes v. State Board of Finance, 367 P.2d 929 (N.M. 1961), held invalid a statute delegating discretion to an executive agency to apportion reductions in appropriations. The Legislature attempts to distinguish Holmes on the grounds that the reductions there were non-mandatory, non-specific, and there was no direction as to which type of appropriations should be reduced. This exercise of distinguishing Holmes overlooks the Governor's

central argument that the power in question here, the spending power, cannot be delegated at all -- even if standards for the exercise of the power are set out with great particularity by the legislature.

Even assuming that the Legislature could show that this power may be delegated, it is questionable whether the standards set out in the act in question are specifically definite. An almost identical provision in a general appropriation bill in 1963 was the subject of an attorney general opinion in this state. The provision in question read as follows:

> The total amount appropriated from the general fund by section 6 of this Act is reduced by the amount of $900,000. The apportionment of this reduction shall be made by the Governor from among the sums appropriated to the departments of the executive branch.

s 7, CSHB 34 (1963). This provision specified exactly the amount to be reduced, directed the Governor to make the reduction, and said that the reduction should be apportioned among the executive departments. The only difference between i and the item in the instant case is that it did not decree an "equitable" allocation (though that might be inferred from the use of the word "apportionment"), and it was not restricted to personal services items. This almost identical provision was, in the opinion of the attorney general, unconstitutional, for the reason that it was an improper delegation of legislative power to the executive. The opinion relied to some extent on Holmes, supra, and noted that Holmes "was based on the more specific grounds, also applicable to CSHB No. 34, that there was a lack of sufficient standards to guide the [executive] in its determinations." 1963 Opn. Atty. Gen. No. 9, April 9, 1963 at 3. This court agrees that a second basis for striking down the item in question would be a lack of sufficient standards to

L SHEFFIELD
GOVERNOR

HB 139

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 28, 1985

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the administration of certain grants passed by the legislature.

The bill was requested by the Department of Administration to provide specific authority to establish a separate method of administering certain grants to municipalities under AS 37.05.315, named recipients under AS 37.05.316, and to unincorporated communities under AS 37.05.317. Under current procedures, all grants are administered by the Department of Administration in the same manner as professional services contracts. The nature of a grant is more often akin to a unilateral contract than a bilateral contract. This difference warrants the adoption of a body of administrative law that sets out the ground rules under which the grants will be expended. Certainly, this distinction between a grant and a contract can only be implemented if the department has the power to provide for adequate safeguards to assure that grantees and the state operate in the public interest.

This bill reverses the provisions of AS 37.05.318, to permit the creation of safeguards through the adoption of administrative regulations. Under existing law, the adoption of regulations to interpret and make specific the grant statutes is prohibited. I know that many members of the legislature are becoming increasingly alarmed at the

lack of responsiveness of grantees to expeditiously accomplish the intent of the legislature. This bill offers an opportunity for a change that will result in the speedy accomplishment of legislatively assigned purposes of grant appropriations.

Sincerely,

Bill Sheffield
Governor

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)