HB144

HOUSE COMMITTEE REPORT

(H1)

Date Referred: March 11, 1991 FURTHER REFERRALS:

Date of Committee Action: 3/20/91

The FINANCE Committee considered: HB 144

HOUSE BILL NO. 144 LEGISLATIVE APPROVAL OF SUIT SETTLEMENTS

"An Act providing for legislative disapproval of certain proposed settlements of litigation by the attorney general."

RECOMMENDATIONS:
be replaced with CSHB 144 (FIN)

[ ] the same title
[✓] a new title

[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note Leg Aff. Agency

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

	SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Navarre	Mike Navarre		Bob A Sharp		✓	
Brown	Tim Brown		Ronald J. Larson		✓	
Kopper	[illegible]	✓				
Barnes	[illegible]					
Phillips	Rolla E Phillips	✓				
Ulmer	J. Ulmer	X				
Maclean	Eileen MacLean	X				

Mike Navarre E B MacLean
CHAIRMAN'S SIGNATURE

Navarre MacLean

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO: CSHB 144 (JUD)

Revision Date:
Department Affected: Legislative Affairs Agency
Title: "An Act providing for legislative approp. of the terms... proposed settlements of claims...
BRU: Legislative Council
Sponsor: House Finance
Component: Session Expenses
Requestor: House Finance

COMPONENT SERIAL NO: 782

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact.

Prepared By: Pamela A. Stoops, Director — Phone: 465-3850
Division: Administrative Services — Date: 3/18/91

Approved By: Warren W. Endicott, Executive Director
Agency: Legislative Affairs Agency — Date: 3/18/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CS FOR HOUSE BILL NO. 144 (FINANCE)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE FINANCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act providing for legislative appropriation of the terms of certain proposed settlements of claims; prohibiting the payment of those terms without an express appropriation; and requiring reports of settlements."

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

*** Section 1.** PURPOSE. It is the purpose of this Act

(1) to place all persons with claims against the state or against whom the state has claims on notice that settlements of those claims requiring large appropriations are subject to legislative action;

(2) to require the governor to submit to the legislature all settlements of claims by or against the state that require large appropriations, and to allow the legislature to give informal approval or disapproval of those settlements; and

(3) to prohibit the state from paying large claim settlements out of funds other than those expressly appropriated for that purpose.

*** Sec. 2.** AS 09.50.300 is amended to read:

Sec. 09.50.300. COMPROMISE BY ATTORNEY GENERAL. <u>Subject to the</u>

requirements of AS 44.23.070, the [THE] attorney general may, with the approval of the court, arbitrate, compromise, or settle any action filed under AS 09.50.250 - 09.50.300.

*** Sec. 3.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.631. LEGISLATIVE REVIEW. AS 44.23.070 applies to claims brought under AS 36.30.620.

*** Sec. 4.** AS 37.05.170 is amended by adding a new subsection to read:

(b) The Department of Administration may not make the certification required under (a) of this section for the payment of part or all of a claim settlement covered by AS 44.23.070 unless the legislature has made an express appropriation or expenditure authorization for that part of the settlement for which payment is requested. The Department of Administration may not make a certification for payment of a settlement covered by AS 44.23.070 based on a general appropriation to pay judgments against the state or a general appropriation to the division of risk management.

*** Sec. 5.** AS 44.23 is amended by adding new sections to read:

Sec. 44.23.070. LEGISLATIVE APPROVAL REQUIRED FOR CERTAIN PROPOSED SETTLEMENTS OF CLAIMS. (a) If a settlement of a claim by or against the state would require legislative appropriation of goods, services, or money, or a combination of them, worth a total of $10,000,000 or more, whether in one or more than one fiscal year, the terms of the settlement requiring appropriation may not take effect until the legislature has made a specific appropriation to carry out those terms.

(b) A settlement of a claim described in (a) of this section shall be reduced to a written agreement. The written agreement must contain a provision stating the requirements for legislative appropriation set out in (a) of this section. The governor shall submit the written agreement to the speaker of the house of representatives and the president of the senate within 15 days of the date that the written agreement is executed. The legislature may advise the governor by concurrent resolution if it approves or disapproves of the terms of the settlement. The approval of the terms of a settlement requiring appropriation under this subsection is a nonbinding, advisory expression of legislative intent. If the legislature disapproves the terms of the settlement under this subsection, the state and the adverse party may resume settlement negotiations.

(c) If the settlement provides for payments by the state in more than one fiscal year, the

legislature may enact an appropriation carrying out the entire terms of the settlement or may enact an appropriation carrying out only the terms that require appropriation in the next fiscal year. An appropriation for part of the terms of an agreement does not bind the legislature to appropriate for the remaining terms. An appropriation for part or all of the terms of a settlement is subject to repeal of the unexpended portion of the appropriation.

(d) This section applies to settlements where money is to be paid to the state but is designated for specific purposes and where a legislative appropriation of $10,000,000 or more, whether in one or more than one fiscal year, would be necessary to effectuate those purposes. This section applies whether the claim is settled before or after litigation is commenced.

(e) If a settlement would require the state to pay costs, attorney fees, or interest, the amount of costs, attorney fees, and interest that the state would be required to pay is included in calculating the $10,000,000 figure.

Sec. 44.23.080. REPORTS ON SETTLEMENT OF CLAIMS. (a) An agency in the executive branch that during a calendar year has settled a claim by or against the agency without the involvement of the attorney general shall report in writing to the attorney general, no later than January 15 of the year following the year in which the claim was settled, on the claim settled and the terms of the settlement.

(b) No later than February 1 of each year, the attorney general shall report in writing to the legislature regarding claims by or against the state that were settled during the previous year

(1) by the attorney general as a result of litigation;

(2) by the attorney general without litigation;

(3) by an executive branch agency with the involvement of the attorney general; or

(4) by an executive branch agency without the involvement of the attorney general.

(c) The report to the legislature under (b) of this section must set out the nature of the claims settled and the terms of the settlements.

(d) In this section "claim" means a demand for payment of money, goods, or services based on a legal cause of action.

* **Sec. 6.** AS 44.77 is amended by adding a new section to read:

Sec. 44.77.080. LEGISLATIVE REVIEW. AS 44.23.070 applies to claims brought under

this chapter.

Alaska State Legislature

HOUSE OF REPRESENTATIVES

REPRESENTATIVE FRAN ULMER

MEMORANDUM

TO: House Finance Committee Members DATE: March 14, 1991

FROM: Representative Fran Ulmer

SUBJ: HB 144

The House Finance Committee introduced HB 144 at my request to provide an opportunity to discuss the constitutional relationship between the Governor and the Legislature on settlements of litigation.

The question is where does the Attorney General's power end and the Legislature's power begin? The answer, I believe, is the Attorney General has authority under both common law and state statute to litigate on behalf of the state and to settle lawsuits whenever he or she chooses to do so. However, if the settlements involve the appropriation of funds, those settlements do not become final until the Legislature appropriates those funds.

CSHB 144 requires approval of settlements in excess of $10 million. It does so by providing for a notice of prior approval through a joint resolution and by requiring an appropriation prior to the settlement being final. I believe this is consistent with past practice by the Attorney General's office in seeking appropriations for settlements (see attachment A). Unfortunately not all departments file requests for appropriations for settlements. If they have adequate excess funds in their budget, they use the funds to pay settlements without specific approval. I suspect this current practice is illegal.

Attachment B is a lengthy response to Senator Cotten's questions about the Exxon settlement. Attachment C responds to Representative Koponen's similar questions. Both of these memos discuss the law in Alaska, clearly concluding that a settlement that allocates funds, goods or services requires legislative action.

One question I would like the committee to consider is the threshold amount for the prior approval process: The CS picks $10 million. Prior to that the bill provided for $1 million and originally I suggested $100 million.

I urge the committee's early consideration of this legislation.

FU/bvh
Attachments

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7-LS0745\D.1
Gaguine
03/18/91

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 144 (Judiciary)

Page 1, line 2:

Delete ", and"

Insert ";"

Page 1, line 2, after "appropriation":

Insert "; and requiring reports of settlements"

Page 2, line 13:

Delete "a new section"

Insert "new sections"

Page 3, following line 11:

Insert a new section to read:

"Sec. 44.23.080. REPORTS ON SETTLEMENT OF CLAIMS. (a) An agency in the executive branch that during a calendar year has settled a claim by or against the agency without the involvement of the attorney general shall report in writing to the attorney general, no later than January 15 of the year following the year in which the claim was settled, on the claim settled and the terms of the settlement.

(b) No later than February 1 of each year, the attorney general shall report in writing to the legislature regarding claims by or against the state that were settled during the previous year

(1) by the attorney general as a result of litigation;

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(3) by an executive branch agency with the involvement of the attorney general; or

(4) by an executive branch agency without the involvement of the attorney

general.

(c) The report to the legislature under (b) of this section must set out the nature of the claims settled and the terms of the settlements."

DIVISION OF LEGAL SERVICES

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Mail Stop 3101

MEMORANDUM February 15, 1991

SUBJECT: Settlement of claims related to the Exxon Valdez Oil Spill (Work Order 7-LS0777)

TO: Senator Sam Cotten

FROM: Pamela Finley
Assistant Revisor of Statutes

QUESTIONS PRESENTED. In light of an impending settlement of the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill, you have asked two questions:

(1) May the governor settle those claims with terms that require the defendants to give the state money dedicated to a particular purpose, or to provide services or property; and

(2) If the settlement contains such terms, what oversight authority does the legislature have?

SHORT ANSWER. Because the terms of a settlement have not been released, we cannot offer an opinion on the validity of particular provisions; this memo is confined to the general questions presented above. There are valid legal arguments to be made for and against the validity of a settlement with the terms described above. However, in my opinion a settlement that required money to be spent for a particular purpose or required the state to accept money or services would be beyond the constitutional power of the governor, although the legislature could ratify it by making an appropriation that carried out those terms. In addition, failure to deposit money recovered or received from Exxon in the general fund would violate AS 46.08.020(b). Your second question is difficult to answer until the specifics of the settlement are known, but I suspect that the discussion of the first question may address the real issue being raised by the second (i.e., the legislature's role). If you have more specific questions, or questions about a settlement once it is made public, please let me know.

DISCUSSION.

I. Attorney General's Authority. The attorney general has the power to dispose of the state's litigation as he thinks best, and "the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts." Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975)(dicta; emphasis added.) See Boyd v. U.S.,345 F. Supp. 790 (E.D. N.Y., 1972)(Attorney General's discretion does not prevent review based on allegations of bad faith, fraud, or illegality); People v. Santa Clara Lumber Co., 106 N.E. 927 (N.Y. Ct. App. 1914)(Settlement violating constitutional provision prohibiting cutting of timber on state land was void). The question then is whether a settlement of the type described above violates the constitution or statutory law.

II. Settlement Requiring Money to be Spent in Specified Way. A settlement that requires the money to be spent in a particular way would probably violate art.II, sec. 1 and art. IX, sec. 13 of the state constitution (vesting the legislative power in the legislature and requiring appropriations before money can be removed from the state treasury) and art. IX, sec. 7 of the state constitution (prohibiting dedicated funds).

A. The Power of Appropriation. Article II, sec. 1, Constitution of the State of Alaska, vests the legislative power in the legislature, and the power to appropriate is indisputably a legislative power. Article IX, sec. 13, Constitution of the State of Alaska, states that no money shall be withdrawn from the treasury except by appropriation. The Governor may argue that the latter section does not apply to a settlement if the money is not deposited in the state treasury, but that argument begs the real question, i.e., what money is subject to appropriation ?

In Colorado General Assembly v. Lamm, 700 P.2d 508, 524 (Colo. 1985), the court held that the proceeds of a settlement between Chevron and the federal Department of Energy, which according the settlement had to be used for specified purposes, were not subject to appropriation by the Colorado legislature. The court reasoned that the money was not subject to appropriation either because it was in trust from a private source, or because it was from a federal source, with restrictions placed on its use. While the Governor will no doubt advance the same arguments used by the court in Colorado General Assembly, there are some significant differences between that case and the situation at hand.

First, in the Colorado case there is no indication that the state was a party to the litigation. Therefore the state had no power to control the terms of the settlement, nor was the state trading the money for a legal claim the state had. Colorado really did have to accept the money, if at all, on the terms given, a fact that makes the money much more like a "gift" from a private party.

Second, under Colorado law the legislature does not have the power to appropriate most federal funds. Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987)(Except for federal funds subject to state match and portions that can be transferred to other block grants, executive has power to allocate money received from federal government); MacManus v. Love, 499 P.2d 609 (Colo. 1972)(Federal funds need not be appropriated). While Colorado is not the only state that does not require appropriation of federal trust funds, Opinion of the Justices to the Senate, 378 N.E.2d 433(Mass 1978), other states do require the legislature to appropriate federal funds, even though the federal funds are subject to restrictions on their use. Anderson v.Regan, 425 N.E.2d 792 (N.Y. Ct. App. 1981); Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630(1979). The Anderson case is especially important because the court's decision was based on a constitutional provision similar to art. IX, sec. 13 of Alaska's constitution.

Third, in Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E.2d 176 (Mass. 1980), the court rejected the "constructive trust" theory . In this case the state had sued a municipality for violation of laws involving sanitary landfills. The parties agreed to the entry of an order, but the town failed to comply with it and the court assessed a $30,000 fine and ordered that it be paid for a project that enhanced a natural resource, the specific project to be chosen from proposals submitted by political subdivisions and charitable organizations. The department argued that the money was not subject to deposit in the state treasury and to appropriation because the money was held by the state in trust, subject to certain conditions. The court recognized that money held by the state in trust was not subject to appropriation under Massachusetts law, but noted that this exception only applied when the money was held and to be disbursed "under legislatively prescribed conditions". Because the legislature had not established a program for the deposit and expenditure of such money, it had to be deposited in the state treasury and appropriated by the legislature.

Finally, Alaska's Supreme Court has held that the term "appropriation" as used in art. XI, sec. 7 (governing initiatives), involves "committing certain public assets to a particular purpose." McAlpine v. Univ. of Alaska, 762 P.2d 81,88 (Alaska 1988)(the transfer of property was an "appro[illegible]ion" that could not be accomplished by initiative). While the court in McAlpine was construing a provision governing initiatives rather than the legislative power or removal of money from the state treasury, the court explained that the purpose of the initiative provision was "to ensure that the legislature and only the legislature, retains control of the allocation of state assets among competing needs." McAlpine, 762 P.2d 81 at 88 (emphasis in original). It is worth noting that a broad reading of the term "asset" includes a claim for damages. McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983)(divorce action). Therefore, while the executive branch has the authority to determine

whether litigation will settle, and how much will be received in settlement, it is up to the legislature to determine how the proceeds of that settlement will be allocated.

B. Dedicated Funds. Article IX, sec. 7, Constitution of the State of Alaska states that the "proceeds of any state tax or license shall not be dedicated to a special purpose," and excepts from this prohibition dedicated funds existing at the time the state constitution was ratified, the permanent fund, and dedications required by the federal government for state participation in federal programs. Alaska's Supreme Court has, based on the history of the constitutional convention, interpreted the prohibition to apply to "the dedication of any source of revenue". State v. Alex, 646 P.2d 203, 210 (Alaska 1982). The Governor may claim that the settlement proceeds are required to be dedicated for state participation in federal programs. If the state were suing under the Clean Water Act, this might be a legitimate argument since sums recovered under that Act must be used to restore, rehabilitate, or acquire the equivalent of the nature resources damaged. 33 U.S.C. 1321(f)(5). Even if that were the case, however, it should be the legislature that decides exactly what programs will fulfill those purposes and how the money is to be allocated among those purposes. However, it is our understanding that the state is not making claims under the Clean Water Act. It does not appear that the "federal program" exception applies here.

C. Statutory Provisions Under state law, money received for cleanup reimbursement must be deposited in the general fund and credited to the oil and hazardous substance release mitigation account. AS 46.04.010. It would then be subject to legislative appropriation. AS 46.08.020(a)(2) and (b) require that money recovered "or otherwise received" from persons responsible for the containment and cleanup of oil from a specific site shall be deposited in the general fund and credited to the oil and hazardous substance release mitigation account." The legislature may then appropriate the money to the release response fund. Failure to place money received from Exxon in the general fund would violate AS 46.08.020(b).

III. Settlement Providing for Services or Property.

Because McAlpine construes the appropriation power to apply broadly to all "assets" of the state, and because the prohibition against dedicated funds applies to any "source of revenue," the above discussion should apply to services and property that might be given to the state in the settlement. Any property received would be the result of exchanging one state asset (the claim against Exxon) for another (the property). However, in applying the doctrine that the legislature alone has the power to allocate state assets, the question arises as to whether this means (1) the governor can agree to accept 10 bulldozers and the legislature has to allocate them to a particular program, or (2) the governor cannot agree to accept services or property in settling a state claim because that involves the allocation of resources. I have not been able to find any case law on this subject, but believe that interpretation (2) is more consistent with the separation of powers doctrine because the first

interpretation would allow the executive, without authority from the legislature, to determine how state resources are to be allocated.

It is possible that the court might uphold the donation of services or property to a department and for a specified purpose if the legislature has already authorized the department to accept services or property for that particular purpose. In this situation, the legislature would at least have authorized both the receipt of the property from private parties and its use for particular purposes. However, even this approach does not give the legislature the power to allocate a state asset (namely the proceeds of a legal claim) to competing programs and might therefore be unconstitutional. Examples of statutes authorizing the receipt of property from private persons are AS 16.05.050(2) (fish and game); AS 19.22.020(roads);AS 41.21.020(3) (recreation and park lands); and AS 42.40.250(7)(railroad).

If the settlement purports to accept property on behalf of the state and there is no statutory authority for the acceptance of that property for that purpose, the purported acceptance would be invalid because the state's power over its property is vested in the legislature. Wolverine Sign Works v. State Hwy. Com'n. 218 N.W.2d 863 (Mich. Ct. App. 1974)(Because statute did not authorize commission to acquire restrictive covenants, the covenants acquired were void); 81A C.J.S. States, sec. 145. AS 38.05.035(a)(12) makes the director of the division of lands the "certifying agent" for securing land available to the state, but I do not read this as granting the director the authority to accept all land for whatever purposes; rather it appears to give the director the authority to handle the mechanics of the transaction when the state's acceptance of land is otherwise provided for. See State v. Thomson. 449 P.2d 656 (N.M.1969)(Failure of governor to obtain deed did not nullify transfer of land to the state because the title vested by act of the legislature, and the governor's role was just to formalize the record of title).

Finally, even if a settlement purporting to give the state property or services to be used for a particular project were found to be constitutional (which I doubt), the state project would have to be authorized by the legislature and a project (state or private) would still be subject to regulatory restrictions (labor and environmental laws for instance). See South Carolina State Hwy. v. Butterfield. 58 S.E.2d 737 (S. Car. 1950)(Attorney General's statement that highway department would "take care" of septic tank in right of way did not bind highway department's actions.)

Aside from the considerations discussed above, if the settlement entered into is manifestly unfair to the interests of the state, the Governor may be found to have failed in his constitutional duty under Art. III, sec. 16 to "be responsible for the faithful execution of the laws."

PF:lmb
91-046.lmb

DIVISION OF LEGAL SERVICES

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MEMORANDUM March 11, 1991

SUBJECT: Trust Fund for Proceeds of Exxon Valdez Settlement (W.O. 7LS0912)

TO: Representative Niilo Koponen

FROM: Pam Finley Pam Finley
Assistant Revisor

QUESTION PRESENTED: You have asked whether the governor could put money received from a settlement with Exxon for the Exxon Valdez oil spill into a fund such that the legislature would have no power over the use of the money.

SHORT ANSWER: If such a settlement requires money recovered by the state under the federal Clean Water Act to be spent without appropriation by the state legislature, it is probably a violation of the state constitution and therefore it would be beyond the power of the attorney general to agree to such a settlement.

DISCUSSION: The Attorney General has suggested in hearings that a trust fund for the proceeds of an Exxon settlement would be based on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42. U.S.C. 9601 et seq. In general, CERCLA does not apply to spills of crude oil. The act contains many provisions governing "hazardous substances," but the definition of this term explicitly excludes crude oil. 42 U.S.C. 9601(14). However, a section of CERCLA, 42 U.S.C. 9651(c), authorizes the promulgation of regulations for the assessment of damages "resulting from a release of oil or a hazardous substance for the purposes of this Act (CERCLA) and section 311(f)(4) and (5) of the Federal Water Pollution Control Act...."

The water control act referred to, commonly know as the Clean Water Act (CWA), does cover releases of crude oil. 33 U.S.C. 1321(f)(4) and (5) allow a state to recover, as "trustee of the natural resources" damaged by an oil spill, the costs of replacing or restoring those natural resources. The Clean Water Act does not appear to cover economic losses. See, Piccolini v Simon's Wrecking, 686 F. Supp. 1063 (M.D. Pa. 1988)(Damages recoverable for response and remedial actions under

CERCLA did not include lost income.) The actual costs incurred by the state for the restoration or replacement of its resources, as distinguished from similar costs incurred by the federal government on the state's behalf, may be recovered only by the state. In re Allied Towing Corp., 478 F. Supp. 398,402 (E.D. Va. 1979). Any damages recovered by the state under 33 U.S.C. 1321(f)(5) must be used to "restore, rehabilitate, or acquire the equivalent of such natural resources." The state's remedy under the Clean Water Act is not exclusive; it does not preempt state laws that provide for recovery of damages caused by oil spills. Allied Towing, supra.

The state trustee who can recover these damages under federal law is appointed by the governor. 42 U.S.C. 9607(f)(2)(B). I do not know if the Governor of Alaska has appointed such a person, or if so, who he or she may be. The trustee so appointed has various powers, including devising and carrying out a plan for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. 40 C.F.R. 300.615(c)(4). Under regulations adopted under CERCLA, but applicable to the Clean Water Act, the money recovered by the state may be placed either in a separate account in the state treasury, or in an interest bearing account payable in trust to the state agency acting as the trustee. 43 C.F.R. 11.92(a)(2). The trustee is required to prepare an authorization plan describing how money recovered under the Clean Water Act will be used and to address what restoration, replacement, or acquisition of the equivalent resources will occur. 43 C.F.R. 11.93(a). This regulation has been upheld against a challenge that it exceeds the authority granted in the federal statute, and that it usurps the state sovereign powers by "micromanaging" state accounting and planning procedures. State of Ohio v. U.S. Dept. of the Interior, 880 F.2d 432, 473-474 (D.C. Cir. 1989).

However, while the regulation does require the state trustee to establish the plan, it does not on its face say that the plan, or expenditures under it, shall be accomplished without legislation or appropriation by the state legislature. In fact, the regulation allowing deposit of the money in a special account in the state treasury suggests legislative action would be allowed. If the regulation were interpreted to do away with a requirement of state legislative action, it would probably be beyond the executive's power to enter into an agreement under the regulation.

In my memo to Senator Cotten, which was distributed to all legislators at his request, I discussed both the appropriation power and the dedicated funds provision in Alaska's constitution; please refer to that memo for a fuller discussion of relevant cases. The gist of the memo was that (1) a state asset (money received in settlement of the state's claims) must be appropriated by the legislature before it can be spent, and (2) neither the executive nor the legislature can "dedicate" a revenue stream to a particular purpose. The latter is especially important if money is to be received over several years since this legislature, even if it "appropriated" whatever was received from the settlement to a trust fund, could not bind the actions of a future legislature with regard to money received in the future.

The existence of the federal regulations, however, requires a bit more elaboration. First, because the state is not required to sue under the Clean Water Act (and in fact, Alaska has sued in state court asserting claims based on state law), this is not a case of federal law (the regulation) being supreme over Alaska's constitutional provision vesting the law-making power (including the appropriation power) in the legislature. In this respect, the situation would be similar to the subsistence issue. Although federal law required a preference for rural residents on federal land and allowed the state to manage federal land only if that preference were honored, Alaska was not allowed to violate its constitutional provisions that prohibited a preference for rural residents. McDowell v. State, 785 P.2d 1 (Alaska 1989) As the court pointed out, the federal law did not require the state to manage federal land. McDowell, supra, 785 P.2d at 10, n. 20. Similarly, if federal law requires the proceeds of a lawsuit or settlement under federal law to be spent without legislation or appropriation in violation of the state constitution, then the state cannot sue or settle under federal law. There is certainly no requirement that it do so, and in fact the state has chosen to sue under state law. A settlement under the CWA/CERCLA regulations that allowed for the expenditure of state money without appropriation by the legislature, or established programs that were not authorized by state law would be unconstitutional. Therefore the governor would not have the authority to agree to it.

The second issue raised by the existence of the federal regulations is whether the federal regulations would allow the state to avoid the dedicated funds prohibition of art. IX, sec. 7, Constitution of the State of Alaska. That provision allows a dedicated fund "when required by the federal government for state participation in federal programs." Federal highway money is one example of this exception. The provisions vesting the law-making and appropriation power in the legislature, of course, have no such exception, and so this second issue is most important if the settlement provides for legislative appropriation and action and this legislature makes the necessary appropriations and law, and those appropriations purport to bind how money received in future years can be spent. Quite frankly, I do not know whether the court would find the trust fund to be a "federal program" since it consists of money paid by Exxon in settlement of claims by the state. It gets even harder to justify the trust fund as a "federal program" when one realizes that the money could have been recovered under state law (or settlement of claims under state law) without a required dedication. However, it is conceivable that the court would find the exception applicable.

Since we do not have a draft settlement or even a complaint based on federal claims before us, it is difficult to predict exactly what statute or regulation the Attorney General will assert is the basis for the settlement and the trust fund. Lacking the settlement and the Attorney General's explanation of why he believes it is constitutional, I can only guess about the applicable statute and regulations. Until I see a copy of the settlement itself, and hear the Attorney General's opinion as to why he

believes it is constitutional, I cannot give an opinion on its constitutionality. However, as a general matter a settlement of the state's CWA claims under the regulations at 43 C.F.R. 11.92 and 11.93 would violate the state constitution if it purported to divest the legislature of the power to appropriate the proceeds.

PLF:pi
91-147.plm

MEMORANDUM

State of Alaska
Department of Law

TO: Shelby Stastny, Director
Office of Management and Budget

DATE: February 7, 1991

FILE NO.:

TEL. NO.: 465-3600

SUBJECT: FY91 Supplementals

A

See PARA. IV.

FROM: Charles E. Cole
Attorney General

In accordance with your request of December 19, 1991, this is to advise that the Department of Law's supplemental requests for FY91 will still be required. For reasons explained in a separate memorandum, the amount required for Oil and Gas Litigation has been increased substantially. The following information is provided for your review.

I. Request: Oil and Gas Litigation

Amount: $12,000.0 (The initial request was for $8,000.0)

A. Accounting Information

1. $10,500.0 plus $3,500.0 provided by the Permanent Fund Corporation.

2. $10,814.4. (However outside counsel, expert witness and litigation support contractors have only been paid through their November service billings. These costs now average $1,959,385 per month. It is obvious that we will have a substantial shortfall when the December/January billings arrive in late February or early March.)

3. $3,185.6. The remaining encumbered funds include $1,945.7 for outside counsel and expert witnesses, and $1,239.9 for the inhouse expenses of the Oil and Gas Special Projects BRU.

4. $12,000.0.

5. A deficit of $12,000.0 is expected unless supplemental funding is provided.

B. Analysis Information

1. This supplemental is needed in order to prepare the state's case in the ANS royalty suit, which is scheduled to go to trial in November at which time the state will present its case against the

remaining defendants. As a result of the state aggressively pressing its case, three companies have already settled with the state, including ARCO Alaska in September for $287 million. The state's remaining claims are worth several hundred million dollars, and it is imperative to continue to press our case over the next several months.

2. Failure to fund a supplemental could set the state's case back many months, causing us to disband the cadre of lawyers and consultants who have been preparing our case for trial and our negotiations for potential settlements in lieu of trial. This result could place state claims in excess of $500,000,000 in jeopardy.

3. March 1, 1991 or earlier.

4. This supplemental does not impact personal services or positions.

5. A summary of past appropriations for Oil and Gas Litigation, as well as a summary of revenues received as a result of oil and gas litigation, is attached.

II. Request: Oil Spill Litigation

Amount: $ 7,612,200

A. Accounting Information

1. $7,000,000. (This appropriation was intentionally underfunded to give the new Administration the opportunity to review the state's position in this litigation.)

2. $1,976.2. (Outside counsel and expert witness contractors have been paid only through October, and the litigation support contractor has been paid only through November. Monthly contractor costs reached $900,700 in November, and these costs are steadily increasing as the discovery effort goes forward.)

3. $3,079.6. The encumbered funds include $593.0 for the department's inhouse staff costs and $2,486.6 for outside counsel and expert witness consultants.

4. $7,612.2. Current and expected contractor work effort and cashflow, discovery schedule, and automated litigation support evidence preparation schedule.

5. A deficit of $7,612.2 will occur unless supplemental funding is provided.

B. Analysis Information

1. This supplemental is needed because the initial appropriation was intentionally underfunded to give the new Administration the opportunity to set the state's position in this litigation.

2. The governor's bargaining position with Exxon, in respect to settling oil spill litigation, will be sharply reduced. The state would have to terminate its litigation efforts, and the other plaintiffs would carry the case.

3. March 1, 1991 or earlier.

4. The supplemental will not impact personal services or positions.

III. Request: Weiss v. State

Amount: $500,000

A. Accounting Information

1. $211.1.

2. $211.1. (All funds were expended by the award for October costs.)

3. -0-

4. $500.0 to $700.0, based on plaintiffs' current cost awards.

5. $500.0 to $700.0 deficit will occur if a supplemental is not awarded.

B. Analysis Information

1. This appropriation is needed to pay excess costs and fees (above the amount of $211,100 provided in

the Department of Law's budget) to plaintiffs in the Mental Health Trust Lands litigation, known as Weiss v. State. The costs that the state must pay are mandated by the court.

2. A deficit between $500.0 to $700.0 will occur unless a supplemental is provided. The attorney general, as well as the state's budget officer, would probably be held in contempt of court if a supplemental is not requested from the legislature because these monies are to pay court-awarded costs and fees. However, it is not necessary to pay upfront, but to pay within the normal budget-cycle after an award is made. Our request is a good faith attempt to accomplish this purpose.

3. $500.0 should be an early appropriation - March 1 or earlier. To the extent that plaintiffs' awards exceed the lower projection, a late supplemental, probably about $200.0, may also be needed.

4. The supplemental does not impact personal services or positions.

5. Plaintiffs have been awarded in excess of $1.5 million, over the past years. The Mental Health Trust Lands dispute requires a political, as well as a legal solution. These costs will continue until a solution is found.

IV. Request: Miscellaneous Judgments

Amount: $327.2

A. Accounting Information

1. -0-

2. -0-

3. -0-

4. Thus far 21 miscellaneous judgments against the state, in the amount of $327.2, have been received. A list of these judgments is attached. It is anticipated that additional judgments, in the amount of $200.0 or more, could be received and cost another $200.0 to $300.0, in time for a supplemental appropriation. We will amend our request as necessary.

5. Current deficit is $327.2.

B. Analysis Information

1. Because of its involvement in defending litigation against the state, the Department of Law coordinates and organizes the information required by OMB for appropriations to pay judgments awarded against the state. The department is legally obligated to submit supplemental requests once an award is made or once the state has agreed to settle a claim in lieu of an award. This request is made in view of that obligation.

2. We would probably be sanctioned by the court.

3. June 1, 1991.

4. No impact on personal services or positions.

5. A summary of past years' judgments is attached.

'91 Judgments (to date)

Updated-1/23/91

Judgement	Date of Judgement	Amount	Interest thru 06/30/91 Anticipated	Total	Cumulative Total
1) Trustees for Alaska v. State-DNR	8/20/90	478.22	N/A	478.22	478.22
2) Cresent Timber Co. v. State-DNR	10/1/90	431.38	N/A	431.38	909.60
3) Rice, Volland & Gleason Cleary v. State	9/21/90	7,200.00	592.21	7,792.21	8,701.81
4) Ak State Homebuilders v. state C&RA	5/11/89	5,000.00	1,137.51	6,137.51	14,839.32
5) City of Cordova v. state-H&SS	7/31/90	35,487.90	3,457.15	38,945.05	53,784.37
6) Petersburg Gen Hospital v. state- H&SS	7/31/90	7,823.30	762.13	8,585.43	62,369.80
7) Patrick T. Brown Shultz v. state-DNR	6/4/90	108,391.69	12,361.31	120,753.00	183,122.80
8) Ak Leg Svs Corp Newman v. State	9/30/90	7,500.00	597.19	8,097.19	191,219.99
9) David T. Walker					
Conklin Adoption-Costs	5/24/90	1,538.58	180.40		
Conklin Adoption-Fees	8/31/90	43,300.00	3,826.68	48,845.66	240,065.65
10) David George H. McDonald v. State	10/8/90	3,000.00	N/A	3,000.00	243,065.65
11) Jermain, Dunnagan					
P.S.E.A. v. state (A)	4/27/90	6,691.45	837.28		
P.S.E.A. v. state (B)	10/5/90	1,174.60	91.82	8,795.15	251,860.80
12) Laurie Wright v. State	8/28/90	400.00	10.85	410.85	252,271.65
13) Loren Domke Carlson v. State	10/5/90	750.00	N/A	750.00	253,021.65
14) Michael Jungreis State v. Mail Systems, et al.	11/1/90	500.00	N/A	500.00	253,521.65
15) A. Robinson					
Carney v. State-costs	8/23/90	897.83	81.44		
Carney v. State-costs	9/26/90	5,819.27	470.15	7,268.69	260,790.34

16) Kopperud & Hefferan Trust Fund					
Grabryszak v. State	8/2/90	2,250.00	217.88	2,467.88	263,258.22
17) Robert C Erwin					
Schade et. al. v State-costs	8/9/90	926.00	87.78		
Schade et. al. v State-fees	7/24/90	2,000.00	198.92		
" " Appeal-costs	6/14/90	305.60	33.96		
" " Appeal-fees	5/17/90	750.00	89.47	4,391.73	267,649.95
18) Alaska Legal Services Corp					
Cleary v. Smith	11/30/90	5,604.50	346.35	5,951.05	273,601.00
19)Rice, Voland & Gleason					
Cleary v. St(Costs/fees) (A)	9/21/90	28,664.93	2,357.72		
Cleary (Print'g & Dist) (B)	9/21/90	10,836.70	319.23	42,178.58	315,779.58
20) Cresent Timber Co.					
Ellis v. St.	8/24/89	5,010.00	932.38	5,942.38	321,721.96
21)Hughes Thorsness et. al					
Glacier/J & D Telecom v. St.	12/7/90	5,206.01	311.28	5,517.29	327,239.25

April 19, 1990

Summary of Judgments Paid by the State From Appropriations Made to The Department of Law For That Purpose

Year	Amount (Regular)	Weiss
FY72	48.0	
FY73	5.5	
FY74	186.6	
FY75	11.5	
FY76	58.1	
FY77	294.6	
FY78	17.0	
FY79	75.3	
FY80	62.8	
FY81	1,049.8	
FY82	106.6	
FY83	286.4	
FY84	520.6	
FY85	416.9	
FY86	479.9	
FY87	303.3	90.0
FY88	393.7	386.0
FY89	242.6	438.4
FY90	263.2 (Pending)	209.8 (Paid) 267.0 (Pending)

PLEASE MICROFILM TOP PAGE ONLY

THE FOLLOWING DOCUMENT HAS NOT BEEN FILMED BUT IS AVAILABLE IN THE ORIGINAL FILE.