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SB 186

THIS BILL WOULD REMOVE THE BIDDING REQUIREMENTS ON NAMED RECIPIENT GRANTS. ORIGINALLY, THE HAMMOND ADMINISTRATION INSISTED UPON THE BID REQUIREMENT. LAST YEAR, THE COURTS RULED IN THE LEGISLATURE VERSUS HAMMOND CASE FILE: IJU-80-1163-CIVIL THAT THE LEGISLATURE IS WELL WITHIN ITS AUTHORITY TO APPROPRIATE FUNDS DIRECTLY TO A NAMED RECIPIENT.

SB 186 WOULD REPEAL THE SECTION OF THE GRANTS LAW THAT LIMITS THE WILL OF THE LEGISLATURE TO APPROPRIATE DIRECTLY TO NAMED RECIPIENTS.

SB 186 WOULD ALLOW GRANTS TO NAMED RECIPIENTS TO BE TREATED THE SAME AS MUNICIPAL GRANTS. THE NAMED RECIPIENT GRANTEEES ARE BOUND BY THE SAME ACCOUNTING, REPORTING AND AUDIT REQUIREMENTS AS MUNICIPALITIES. THIS WILL ENSURE THE GRANT FUNDS ARE EXPENDED ACCORDING TO THE LAW. EACH DEPARTMENT, WHO WILL ADMINISTER THE THE GRANTS, WILL PROVIDE CONTROL AS WELL AS THE DEPARTMENT OF ADMINISTRATION WHO IS RESPONSIBLE FOR ENSURING THE CONTRACTS ARE EXECUTED IN ACCORDANCE WITH THE LAW. THIS YEAR'S BUDGET CONTAINS TWO FIELD AUDITORS WITHIN THE DEPARTMENT OF ADMINISTRATION TO PROVIDE GREATER ACCOUNTABILITY. THIS SYSTEM SHOULD PROVIDE MORE THAN ADEQUATE CONTROLS ON THE NAMED RECIPIENT GRANTS. THIS LEGISLATIONS WILL ALSO PROVIDE A DEGREE OF LOCAL

CONTROL BECAUSE MOST NAMED RECIPIENT GRANTS GO TO LOCALLY
BASED ORGANIZATIONS WHO PROVIDE NEEDED SERVICES.

THERE IS NO FISCAL NOTE. THE ACT TAKES EFFECT IMMEDIATELY.

I HAVE AN AMENDMENT THAT WOULD RETAIN EXISTING LAW TO
PROVIDE THAT THE DEPARTMENTS SHALL ENTER INTO A CONTRACT
WITHIN 60 DAYS AFTER THE EFFECTIVE DATE OF THE APPROPRIATION
OR ALLOCATION AND TO HAVE THIS APPLY TO RURAL ALASKA.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

May 22, 1984

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POSITION PAPER

RE: SB 186 am
SPONSOR: Sackett & Ferguson

PROGRAM EFFECTS:

This bill would remove the bidding requirement on named recipient grants in rural areas.

COMMENTS:

Under this bill, grants to name recipients are bound by the same accounting, reporting and audit requirements as municipal grants.

While eliminating the solicitation requirement, adequate controls still exist to ensure the contracts are executed according to the law. Thus, the Department supports this legislation.

APPROVED: Emil Notti
Emil Notti, Commissioner

STATE OF ALASKA

Bill Sheffield, Governor

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

POUCH B
JUNEAU, ALASKA 99811
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March 25, 1983

POSITION PAPER

RE: Senate Bill 186

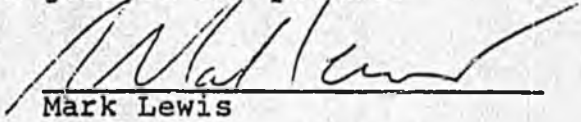
SPONSOR: Senator Sackett

Program Effects

This bill amends AS 37.05.316, deleting the option allowing a Department assigned to administer a grant to a named recipient to issue requests for proposals from qualified persons other than the named-recipient to carry out the intent and purpose of the grant.

Comments

This Department withholds comment on its position on this bill pending review by the Department of Law on separation of powers issues that were first raised by the previous Administration. On its face, this bill does appear to infringe the Executive branch's power to execute the implementation of projects, services, and programs by limiting how it selects persons to provide goods and services. The process by which public funding is awarded should be open and accountable. The request for proposal process is important to insure that all qualified persons are free to participate in the awarding of State grants. The RFP process also provides a check to provide some guarantee that projects are awarded on the basis of merit and that the best possible product is delivered to satisfy the intent of the Legislature and the good of the public.


Mark Lewis
Commissioner

SB 186 TITLE & SPONSOR SUMMARY

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AMENDED TITLE: SB 186AM

AN ACT RELATING TO NAMED RECIPIENT GRANTS; AND PROVIDING FOR AN EFFECTIVE DATE

PRIME SPONSOR: SACKETT.

CO-SPONSORS: FERGUSON.

CURRENT STATUS: 5/17/84 IN (H) STATE AFFAI

SB 186 SENATE ACTION
DATE SEQ PAGE

12:05 5/22/84 PAGE 2 OF 3

LEGISLATIVE ACTION

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| 03/18/83 | 01 | 0434 | FIRST READING -- COMMITTEE REPORTS |
| 03/30/83 | 02 | 0536 | C&A -- DP02, NR01 |
| 05/03/84 | 03 | 2901 | FIN -- DP05 NR01 |
| 05/15/84 | 04 | 3094 | RLS -- OTHER04 |
| | | | TAKEN UP IMMEDIATELY |
| 05/15/84 | 05 | 3094 | SECOND READING |
| 05/15/84 | 06 | 3094 | ADVANCED TO 3RD READING BY UNAN CONSENT |
| 05/16/84 | 10 | 3115 | AM01 ADOPTED BY UNAN CONSENT |
| 05/16/84 | 11 | 3110 | AM02 ADOPTED BY UNAN CONSENT |
| 05/16/84 | 12 | 0000 | ADVANCED TO 3RD READING BY UNAN CONSENT |
| 05/15/84 | 07 | 3095 | THIRD READING |
| 05/15/84 | 08 | 3095 | POSTPONED UNTIL 05/16/84 BY UNAN CONSENT |
| 05/16/84 | 09 | 3115 | RETURNED TO 2ND READING BY UNAN CONSENT |
| 05/16/84 | 13 | 3110 | PASSED BY DIV 14-06-00 |
| 05/16/84 | 14 | 3119 | EFFECTIVE DATE VOTE SAME AS PASSAGE |
| **** | ** | ** | *** ** * |

SB 186 HOUSE ACTION
DATE SEQ PAGE

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LEGISLATIVE ACTION

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| 05/17/84 | 15 | 3889 | FIRST READING -- COMMITTEE REPORTS |
| | | | STATE AFFAIRS |
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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

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

4 Most of those appropriations challenged by the Governor
5 because they violated the confinement requirement of article II,
6 section 13 of the Alaska Constitution do violate that section,
7 while some do not;

8 4) Those appropriations challenged by the governor be-
9 cause they provided direct aid to private educational institu-
10 tions did not provide direct aid to private educational institu-
11 tions are thus are not invalid for that reason;

12 5) The "appropriation"^{3/} challenged by the governor as an
13 invalid delegation of legislative powers to the executive branch
14 was such an invalid delegation and thus it was improper.

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29 3. Actually, the item in question was a directive in the
30 appropriation act that \$5,267,248 be reduced from the total
31 personal services line items for operating expenditures in the
32 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.

1 I. SEPARATION OF POWERS

2 A. General Discussion

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

16 1) Burden of Proof

17 At the outset, and throughout discussion of these
18 various challenges, it is critical to note and to remember
19 that parts of the counterclaim seek to have declared uncon-
20 constitutional acts of the Alaska Legislature. A party, even the
21 Governor, who seeks a declaration that an act of the Legislature
22 is unconstitutional bears a heavy burden. It is axiomatic that
23 laws which have been validly enacted bear a presumption of con-
24 stitutionality:

25 The courts frequently reiterate that
26 in the exercise of this authority
27 [to determine whether legislative
28 enactments are constitutional] they
29 begin with a presumption in favor of
30 validity, and that a court is not
31 empowered to substitute its judgment
32 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.

1 1972) (emphasis added).

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

9 No task in the adjudication of
10 civil controversies is more grave
11 than passing upon the constitutionality
12 of legislation. The legislature possesses
13 plenary power to make the laws, subject
14 only to the limitations of our state and
15 federal constitutions. We face our task
16 bearing in mind that there is a strong
17 presumption supporting the constitutionality
18 of a legislative enactment, and the party
19 asserting its unconstitutionality bears
20 the burden of overcoming the presumption.
21 [Citation.] Unconstitutionality must appear
22 beyond a reasonable doubt. New Times, Inc.
23 v. Arizona Board of Regents, 519 P.2d 169
24 (1974).

25 608 P.2d at 800 (emphasis added). In Board of Regents v. Judge,
26 543 P.2d 1323 (Mont. 1976), the court relied on settled law to
27 the effect that

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

33 543 P.2d at 1330, quoting State ex rel. Mills v. Dixon, 213 P.
34 227, 229 (Mont. 1923) (emphasis added).

35 Other courts have adopted this same high standard.
36 In State ex rel. Hammerhill Paper Co. v. La Plante, 205 N.W.2d
37 784 (Wisc. 1973), the court stated:

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

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

3 id. at 792. See also Hopper v. City of Madison, 256 N.W.2d 139,
4 142-43 (Wash. 1977); Way v. Grand Lake Ass'n, Inc., 635 P.2d
5 1010, 1017 (Okla. 1981); State ex rel. Lucero v. Marron, 128 P.
6 485, 488 (N.M. 1912).

7 It is not clear whether the Alaska Supreme Court would
8 adopt such an extreme presumption in favor of the constitution-
9 ality of validly enacted legislation. It has not done so to
10 date, which suggests that it might not.^{4/} Nonetheless, it has
11 reiterated in several decisions that validly enacted statutes
12 enjoy a presumption of constitutional validity. Bonjour v.
13 Bonjour, 532 P.2d 1233, 1237 (Alaska 1979), Larson v. State,
14 564 P.2d 365, 372 (Alaska 1977). Thus, if a statute may reason-
15 ably be construed to avoid unconstitutionality, the court must do
16 so. Hoffmar v. State, 404 P.2d 644, 646 (Alaska 1965). If a
17 narrow construction will avoid the constitutional infirmity
18 "without doing violence to the manifest legislative intent,"
19 such a construction should be given. Gottschalk v. State, 575
20 P.2d 289, 296 (Alaska 1978); State v. Martin, 532 P.2d 316, 321
21 (Alaska 1975).

22 Whatever the precise formulation of the Governor's
23 burden in this case, unless he can demonstrate that the
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26 4. Unfortunately for predictive purposes, the Alaska
27 Supreme Court has not had the occasion to set out or discuss the
28 proper standard in cases involving a challenge by the executive
29 to the legislature. The cases discussed in this section in-
30 volve either disputes between individuals or between the state
31 and an individual. Considering that in the present dispute the
32 party attacking the legislation, the Governor, has substantial
constitutional powers which an individual disputant does not
possess, 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.

1 challenged legislation is clearly unconstitutional, it must
2 stand.

3 2) Nature of the Power To Designate Grant Recipients

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

11 Thus, the legislative power is vested in the Legis-
12 lature and the executive power in the Governor. But is the
13 designation of grant recipients an exercise of the legislative
14 power or of the executive power? There is no doubt that the
15 Legislature may appropriate sums to an executive department for
16 a stated purpose and permit or require the department to desig-
17 nate the recipient. May it also designate the recipient itself?

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

21 The Governor argues that the separation of powers
22 doctrine seeks "the avoidance of tyrannical aggrandizement of
23 power by a single branch of government through the mechanism of
24 diffusion of governmental powers," citing Bradner v. Hammond,
25 553 P.2d 1, 5 (Alaska 1976). That may be agreed. He then
26 alleges that the power to name grant recipients is vested in the
27 executive branch by the Constitution and that it is not a legis-
28 lative power. Last, he argues that it cannot be shared by both
29 branches. The Governor's analysis rests on an unproven assump-
30 tion. He concludes that the naming of grant recipients is an
31 executive function because he assumes that such grantees "enforce
32 the laws" or "execute the laws". Because the assumption is

1 unproven (and is ultimately unpersuasive to this court); the
2 Governor cannot sustain his heavy burden of showing that the
3 appropriations in question are violative of the separation of
4 powers doctrine?

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

15 The critical question, however, is whether the desig-
16 nation of grant recipients is a part of the appropriation power
17 or part of the power to enforce the law. No one disputes the
18 Governor's authority to enforce or execute the law. By the same
19 token, no one should question the Legislature's authority to
20 spend. Is naming grant recipients a part of the spending power
21 or is it the execution of the law?

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

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

1 569 P.2d at 796 (emphasis added). The emphasized language
2 suggests that the legislature may properly designate a specific
3 recipient.

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

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

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

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

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

30 These authorities are certainly not dispositive,^{5/}
31 but they at least suggest that naming the grantee is a part of
32 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.

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

4 Under all constitutional governments
5 recognizing three distinct and
6 independent magistracies, the control
7 of the purse strings of government is
8 a legislative function. Indeed, it is
9 the supreme legislative prerogative,
10 indispensable to the independence and
11 integrity of the Legislature, and not
12 to be surrendered or bridged, save by
13 the Constitution itself, without dis-
14 turbing the balance of this system and
15 endangering the liberties of the people.

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

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

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

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

1 According to conventional approaches
2 in constitutional construction, since
3 the states were antecedent political
4 entities exercising general powers of
5 government and the United States is a
6 federation created by them to serve
7 specific, defined purposes, the Congress
8 of the United States is understood to
9 have only such powers as are af-
10 firmatively granted to it, expressly
11 or by implication, whereas state
12 legislatures have residual law-making
13 powers subject only to such limitations
14 as are affirmatively imposed by the
15 state or federal constitutions.

16 1 Sands, Sutherland Statutory Construction § 2.01, at 13 (4th ed.
17 1972) (emphasis added).

18 3) Alaska Constitutional History

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

25 It is significant that the constitutional convention
26 could have included a specific affirmative limitation on the
27 Legislature's power to appropriate to a designated non-
28 governmental recipient, but did not do so. Indeed, the dele-
29 gates considered at least a partial ban on direct governmental
30 grants to private institutions. Although the delegates did not
31 directly discuss the issue of who might have had the authority
32 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-

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

9 The Alaska Department of Health
10 is quite concerned regarding the pro-
11 posed articles in the Alaska Constitution
12 which prohibit direct grants of public
13 funds beneficial to religious and other
14 private institutions.

15
16 The inclusion of articles such as
17 are proposed . . . would probably result
18 in the closing of many hospitals through-
19 out Alaska

20
21 For the above reasons, the Alaska
22 Department of Health strongly recommends
23 that these sections or parts of sections
24 be struck from the proposed State Con-
25 stitution and that no clause be inserted
26 in the constitution which would restrict
27 the legislature from appropriating monies
28 to private and denominational institutions,
29 if a public purpose was served thereby.

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

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

1 2 Proceedings of the Alaska Constitutional Convention 1514-15
2 (emphasis added).

3 4) Pre-1955 Case Law

4 It is significant to this court that the "practice of
5 helping to serve people through . . . institutions" as endorsed
6 by the Alaska Constitutional Convention was historically well
7 established in 1955, the time of that convention. ⁷ There was
8 by then a rich history in several states of direct legislative
9 appropriations to specifically designated recipients. Pre-
10 sumably, the delegates were aware of that history in other states
11 as well as in the Territory of Alaska. It is instructive to
12 review that history.

13 In Hager v. Kentucky Children's Home Society, 83 S.W.
14 605 (Ky. 1904), the court upheld the constitutionality of a
15 direct grant to the appellee, a private corporation organized
16 for charitable purposes. The court noted that, while the care
17 of indigent orphans was generally given over to counties and
18 cities by the laws of the state, "the state is not precluded by
19 these several provisions from exercising some part of the same
20 power in some other proper way." Id. at 606. It then went on
21 to consider whether the state could act "otherwise than through
22 its own officers". It found that it could:

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

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

29 7. The Memorandum of December 28, 1955, of Lois Jund,
30 cited above, showed there was a well-established history, by
31 1955, of direct grants to hospitals in the Territory of Alaska.
32 Several hospitals, privately owned, had been the recipients
33 over the years of millions of dollars. Id. And the practice
of assisting private hospitals apparently continued into state-
hood. Cf. Lien v. City of Ketchikan, 383 P.2d 721 (Alaska
1963) (proceeds of municipal bond sale could aid in construction
of private hospital).

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

4 These authorities clearly settle
5 that the vital point in all such ap-
6 propriations is whether the purpose
7 is public; and that, if it is, it does
8 not matter whether the agency through
9 which it is dispensed is public or is
10 not; that the appropriation is not made
11 for the agency, but for the object which
12 it serves; the test is in the end, not
13 in the means.

14 Id. at 608 (emphasis added).

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

27 Long before, it had been decided that
28 public funds might under proper legis-
29 lative authority be appropriated to
30 aid private agencies performing services
31 to the community which were public in
32 nature. [Citations]. And from the
33 beginning of state government it had
34 been the policy and practice to accomplish
35 public purposes indirectly by such means;
36 and all Constitutions promulgated since
37 the beginning had been performed unquestion-
38 ably in full knowledge of this policy and
39 practice, and in none was anything inserted
40 or changed to interfere.

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

1 large number of hospitals". ^{2/} Id. None of these appropria-
2 tions or disbursals had been successfully challenged. See
3 also People ex rel. State Board v. Brady, 115 N.E. 204 (Ill.
4 1917).

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

14 In Craig v. Mercy Hospital, 45 So. 2d 809, 819 (Miss
15 1950), the court quoted approvingly from 51 Am. Jur. 5 390 at
16 381: "It is well settled that a private agency may be utilized
17 as the pipeline through which a public expenditure is made,
18 . . ."

19 In Johns Hopkins University v. Williams, 86 A.2d 892,
20 900 (Md. 1952), the court reviewed five decades of legislative
21 appropriation to or authorization of bonds for private institu-
22 tions which carried out public purposes. It declined to in-
23 validate a procedure so firmly established.

24 It is true that the focus of most of these cases --
25 and the ones which follow in this section -- was on whether the
26 appropriations were for a public purpose or whether they vio-
27 lated a constitutional prohibition against the giving or loaning
28 of the credit of the state for any private corporation or
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31 9. It is not clear from the opinion whether the report
32 referred to listed agencies aided for that year only, or over
a longer period. In any event, the number of appropriations is
impressive.

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

7 There is substantial case law following the con-
8 stitutional convention which shows that the practice of appro-
9 priations to private entities continued, and that the courts
10 continued to uphold it against constitutional challenges. E.g.,
11 United Community Services v. Omaha Nat'l Bank, '77 N.W.2d 576,
12 586-87 (Neb. 1956); Ezelle v. City of Paducah, 441 S.W.2d 162,
13 164 (Ky. 1959). Cf. Kentucky Region Eight Mental Health Board,
14 Inc. v. Commonwealth, 507 S.W.2d 489, 490-91 (Ky. 1974) ("mere
15 fact that corporations receive and administer grants of state
16 funds does not mean that they are state agencies"); West v.
17 Tennessee Housing Development Agency, 512 S.W.2d 275 (Tenn.
18 1974) (giving of state credit not prohibited if for public
19 purpose); New Jersey Mortgage Finance Agency v. McCrane, 267
20 A.2d 24, 29 (N.J. 1970) (provisions against lending state's
21 credit do not prohibit government from employing third person
22 or private corporation to do any lawful act which government has
23 the right to have done).

24 5) Conclusion

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

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

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

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

18 Second, there is no claim here that any of the enact-
19 ment procedures were "dubious", much less any showing of dubious
20 or in any way irregular enactment procedure.

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

1 powers doctrine.

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

7 B. The Challenged Appropriations

8 This court earlier grouped the appropriations chal-
9 langed under the separation of powers doctrine into two cate-
10 gories: first, grants to specifically designated recipients
11 who perform charitable or civic functions, and second, ap-
12 propriations in which a specific agent has been designated to
13 perform a governmental task, or, at least, appropriations in
14 which the specifically designated recipient does not perform
15 charitable or civic functions. While these categories are not
16 absolute and their boundaries somewhat difficult to draw, they
17 provide a framework for analyzing the challenged appropriations.

18 Under the principles set out above at pp. 3-18, all
19 of the appropriations in the first category survive the
20 separation of powers attack. Without examining them in detail,
21 they involve aid for such purposes as prematernal medical care
22 (FAAC 10; Prematernal Home Project in Bethel), emergency food
23 for the indigent (FAAC 12; Bean's Cafe in Anchorage), social
24 services and housing assistance for the elderly (FAAC 14; Heritage
25 House in Anchorage), aid to the victims of child abuse (FAAC 13;
26 Anchorage Child Abuse Board), recreational counseling services
27 to children (FAAC 11; Ryak Youth Services in Cordova), and
28 housing improvement for the poor (FAAC 16; Tlingit-Haida Housing
29 Improvement Program in Southeast Alaska). Several involve aid
30 to the arts. (E.g., FAAC 3 [Institute for Alaska Native Arts];
31 FAAC 5 [Anchorage Civic Opera]; FAAC 77 [Alaska Repertory
32 Theater].) Some involve assistance to minority groups to assist

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

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

17 1) FAAC 18

18 The appropriation challenged in FAAC 18 reads as
19 follows:

20 The sum of \$175,000 is
21 appropriated from the general
22 fund to the Legislative Council
23 for a feasibility study of the
24 Yukon Kuskokwim Crossing.

25 § 225, ch. 50, SLA 1980 at p. 34.

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

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

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

6 2) FAAC 19

7 There is an unresolved factual dispute which pre-
8 cludes summary judgment disposition here. See discussion
9 below at p. 50.

10 3) FAAC 25

11 The appropriation challenged in FAAC 25 reads
12 as follows:

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

15 § 286, ch. 50, SLA 1980 at p. 53.

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

26 4) FAAC 35

27 The appropriation challenged in FAAC 35 reads as
28 follows:

29 Alternative Energy \$85,500
30 Technical Assistance Program

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

1 public education and technical
2 assistance statewide.
3 S 286, ch. 50, SLA 1980 at p. 66.

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

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

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

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

32 10. Now AS 37.05.316.

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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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1 powers. 11/

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

9 The Governor's argument that the statute is uncon-
10 stitutional is ultimately unpersuasive. Given the flexibility
11 of the equal protection analysis mandated by the Alaska Supreme
12

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14 11. The Legislature, while taking this position, is not
15 particularly enamored of AS 37.05.315(d). It recites the legis-
16 lative history of the statute showing that the original bill
17 consisted of a single sentence authorizing the commissioner of
18 revenue to disburse appropriations for grants made by the Legis-
19 lature. The Governor opposed the bill and "a political impasse"
20 resulted. It was broken by a compromise allegedly drafted by
21 the attorney general's office with the Governor's approval:
22 The Legislature's naming of a recipient would be only a recom-
23 mendation, and the executive would retain final authority to
24 select a different recipient after a bid process and upon a
25 statement of written reasons.

26 Thus, the Legislature argues that while the statute is
27 constitutional, it is not good policy. The Legislature
28 identifies two problems with it: (1) "it delegates to the
29 Governor the power to re-make decisions of the Legislature with
30 respect to appropriations for grants", and (2) it incorporates
31 procedures traditionally used by the executive to select con-
32 tractors to assist it in carrying out the law, which is pre-
33 sumably inappropriate in regard to grant recipients who, the
34 Legislature consistently argues, execute no laws.

35 The Legislature concludes:

36 Thus, this essential separation of
37 powers issue need not be decided
38 by reference to the language of
39 AS 37.05.315(d). That statute
40 confuses rather than clarifies,
41 and, as a practical matter, a
42 decision on the separation of
43 powers issue will determine the . .
44 fate of the statute. The validity
45 of AS 37.05.315(d) is not the con-
46 stitutional issue before this court,
47 it is merely a symptom of the dispute.

48 Log. Mem. Opp. 16 .

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

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

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

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

3 5) FAAC 37

4 The appropriation challenged in FAAC 37 reads as
5 follows:

6 Department of Natural Resources

7 Kuskokwim Native Association --
8 Agriculture \$200,000

9 Koyokon Development Corporation --
10 Agriculture \$200,000

11 It is the intent of the Legislature that
12 the appropriations to the Kuskokwim Native
13 Association and Koyokon Development
14 Corporation be used for the purchase of
15 D-6 bulldozers or their equivalent, and
16 for land clearing and other expense
17 relating to agriculture.

18 § 286, ch. 50, SLA 1980 at p. 67.

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

31 6) FAAC 42

32 The appropriation challenged in FAAC 42 reads as
33 follows:

34 Fairbanks
35 Fairbanks Development Authority \$500,000

36 § 286, ch. 50, SLA 1980 at p. 77.

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

9 As with the two previous appropriations, the
10 Governor argues that a statute (here AS 44.33.020) authorizes a
11 particular executive department to carry out the functions which
12 the Legislature has here assigned to a non-governmental entity
13 through a grant to that entity. It is not clear that the statute
14 cited actually gives to the Department of Commerce and Economic
15 Development the authority which the Governor claims it does.

16 ~~But assuming, arguendo, that the claim is correct, there is no~~
17 ~~showing that the Legislature is prohibited, as a matter of~~
18 ~~separation of powers, from appropriating money to be paid as a~~
19 ~~grant to a non-governmental entity to carry out those functions.~~

20 7) FAAC 44

21 The appropriation challenged in FAAC 44 reads as
22 follows:

23 Victory/Eureka Electric Line \$300,000

24 The appropriation for the Victory/Eureka
25 Electric Line is to be paid to the
26 NEA Mat-Su Electrical Association.

27 § 286, ch. 50, SJA 1980 at p. 79.

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

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

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

19 B) FAAC 58, 66 and 67

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

29 C. Conclusion

30 Virtually all of the appropriations challenged
31 as violative of the separation of powers doctrine thus are up-
32 held by this court. That result follows from several propositions

1 established above:

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

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

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

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

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

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

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

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

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

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

12 For somewhat similar reasons, this court has been
13 unable to rely extensively on the analysis in Chadha v. Immigra-
14 tion and Naturalization Service, 634 F.2d 408 (9th Cir. 1980),
15 and other cases cited by the parties. While the general
16 discussion of the separation of powers doctrine which is found
17 in Chadha is extremely helpful, see id. at 422-25, application
18 of it to the several fact patterns presented by the 24 contested
19 counterclaims here yields no certain answers. As with so many
20 aspects of this case, the separation of powers issue appears to
21 resist application of general principles. Perhaps the instant
22 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.

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

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

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1 II. FAILURE TO STATE PUBLIC PURPOSE

2 A. General Discussion

3 The Governor challenges four appropriations on the
4 basis that the appropriations did not state a public purpose.
5 This requirement is statutory and not constitutional. Although
6 the Alaska Constitution provides that "[n]o tax shall be levied,
7 or appropriation of public money made, or public property trans-
8 ferred, nor shall the public credit be used, except for a public
9 purpose", Art. IX, § 6, these appropriations are not challenged
10 as violative of this section. That is, it is conceded that the
11 money was to be used (and was used) for public purposes. Rather,
12 the appropriations are challenged as violative of AS 24.30.030.
13 That statute provides:

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

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

21 A review of the appropriations involved makes it clear
22 that there is no statement of purpose set out for each appropri-
23 ation. The Legislature attempts to remedy this failure by
24 arguing that when an appropriation is to a recipient that per-
25 forms a narrow range of services, this designation of the recip-
26 ient may be a sufficient statement of purpose. For example, a
27 grant to Alaska Semi-Supportive Homes, Inc. is obviously for the
28 purpose of supporting the functions performed by this organiza-
29 tion, which are quite limited. Thus, the Legislature reasons,
30 naming the recipient may be a sufficient statement of the purpose
31 if the recipient performs a specific and limited function.

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

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

12 The Legislature makes several other arguments concern-
13 ing this statutory requirement, none of which is persuasive. It
14 notes that the Governor disbursed the funds in every case,
15 arguing that he was able to ascertain "with precision" the
16 purpose of the appropriation. First, that is bald speculation.
17 Second, and more importantly, whether the Governor (or a court)
18 could divine the Legislature's purpose or not, it remains that
19 no purpose was stated. The Legislature questions the wisdom of
20 abstract decisions in important constitutional areas. This
21 argument is unpersuasive because a decision here is not con-
22 stitutional at all. ~~it is based on failure to comply with the~~
23 ~~statute. Moreover, it is not an abstract decision or one which~~
24 ~~seeks to set guidelines for future cases. It merely states that~~
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27 12. The Legislature attempts to make the argument turn on
28 constitutional grounds, and then argues that the court should
29 not render an abstract decision on a constitutional question.
30 Its theory is that article IX, section 13 requires a statement
31 of public purpose (separate and apart from the requirement of
32 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).

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

8 B. The Challenged Appropriations

9 1) FAAC 6

10 The appropriation challenged in FAAC 6 reads in
11 its entirety:

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

16 § 73, ch. 50, SLA 1980 at pp. 10-11. No statement of purpose is
17 included. It is possible to speculate, probably with a high
18 degree of confidence, that the purpose of the appropriation is
19 to support the activities of the grantee in carrying out its
20 functions: providing "support services" to adults. But later
21 judicial speculation is not tantamount to a specific legislative
22 statement of purpose. The appropriation violates AS 24.30.030.

23 2) FAAC 12

24 The appropriation challenged in FAAC 12 reads in
25 its entirety:

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

29 § 107, ch. 30, SLA 1980 at p. 15.

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

1 3) FAAC 32

2 The appropriations challenged in FAAC 32 read in
3 their entirety:

| | |
|---|-----------|
| 4 MBE Service Centers, Inc. | \$198,600 |
| 5 Bering Sea Fisherman's 6 Association grant | \$226,000 |

7 § 286, ch. 50, SLA 1980 at p.65. Because these are separate
8 appropriations, they will be discussed individually.

9 (a) MBE Service Centers, Inc.

10 There is no statement of the purpose of the
11 appropriation to MBE Service Centers, Inc. This grantee appears
12 to provide a wider range of services than the grantees in FAAC
13 6 and FAAC 12. (Compare Leg. Ex. 32B (Ex. A) with Leg. Ex. 12B
14 (Art. III(a) and with Leg. Ex. 6A). Moreover, it is apparent
15 that, at the time of the passage of the legislation, the purpose
16 of the appropriation was not entirely clear. Gov. Ex. 32a, 32b.
17 Even under the Legislature's theory that a grant to a grantee
18 which performs only a narrow range of functions need not state
19 a purpose because that purpose is obvious, (which theory has
20 been rejected by this court), this appropriation would fail to
21 pass muster.

22 (b) Bering Sea Fisherman's Association

23 The Bering Sea Fisherman's Association is
24 apparently involved in fisheries development in western Alaska.
25 Gov. Ex. 32h (Art. III). The grant was used to fund a program
26 of providing up-to-date information and services to commercial
27 fishermen in the region to encourage broader participation and
28 economic development of the herring fishery. Gov. Exs. 32g and
29 32j. The appropriation does not specify that this is the
30 purpose of the grant, and it is not at all apparent that this
31 is the only type of function performed by the Bering Sea Fish-
32 erman's Association. Accordingly, it is not apparent that a
grant to this organization must necessarily have been for that

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

4 4) FAAC 42

5 The appropriation challenged in FAAC 42 provided
6 as follows:

7 Fairbanks/Fairbanks Development
8 Authority \$500,000

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

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

19 C. Judicial Remedy

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

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

1 concerned. AS 22.10.020(b).

2 It should be emphasized that this opinion contains no
3 finding that any of the appropriations challenged are void be-
4 cause they were not for a public purpose. Thus, there is no
5 claim that article IX, section 6 of the Constitution, set out
6 above, was violated.^{13/} The only issue in this regard, on which
7 this court finds in favor of the Governor, is that the challenged
8 appropriations did not specify a public purpose as required by
9 AS 24.30.030.

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26 13. Such a claim would be extremely difficult to sustain.
27 Judicial deference to the legislature regarding the existence of
28 a public purpose is extremely high. See DeArmond v. Alaska State
29 Development Corp., 376 P.2d 717 (Alaska 1962) (legislature's
30 determination that appropriation is for a public purpose must be
31 upheld "unless it clearly appears that such finding is arbitrary
32 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.

1 III. CONFINEMENT REQUIREMENT: CHANGES IN SUBSTANTIVE LAW

2 A. General Discussion

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

7 Article II, section 13 of the Alaska Constitution pro-
8 vides in relevant part:

9 Every bill shall be confined to one
10 subject when it is an appropriation bill
11 or one codifying, revising, or rearranging
12 existing laws. Bills for appropriations
13 shall be confined to appropriations. The
14 subject of each bill shall be expressed
15 in the title.

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

27 Various courts have noted the evil inherent in the
28 practice. Flanders v. Morris, 553 P.2d 769, 772 (Wash. 1977)
29 ("It is obvious why a legislator would hesitate to hold up the
30 funding of the entire state government in order to prevent the
31 enactment of a certain provision, even though he would have
32 voted against it if it had been presented as independent legis-
laton"); Sellers v. I Miller, 24 P.2d 666, 669 (Ariz. 1933).
As the Governor notes, these considerations motivated the
framers of the Alaska Constitution. Alaska Constitutional

1 Convention, Commentary on Legislative Article at 7.

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

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

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

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

33 The Legislature generally responds that the con-
34 stitutional provision in question must be interpreted liberally
35 so as to give the legislature the flexibility it needs in making

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

5 While it is relatively simple to set out the outlines
6 of the dispute, this court has encountered extreme difficulty
7 in uncovering the proper test to determine when an appropriation
8 goes beyond what is permitted by the constitution. ^{14/} It is
9

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

13 Just as the Governor may not use
14 his item-veto power to usurp constitu-
15 tional powers conferred on the legis-
16 lature, neither can the legislature
17 deprive the Governor of the constitutional
18 powers conferred on him as the chief
19 executive officer of the state by
20 including in a general appropriation
21 bill matters more properly enacted in
22 separate legislation. The Governor's
23 constitutional power to veto bills of
24 general legislation cannot be abridged
25 by the careful placement of such measures
26 in a general appropriation bill, thereby
27 forcing the Governor to choose between
28 approving unacceptable substantive
29 legislation or vetoing "items" of
30 expenditure essential to the operation
31 of government. The legislature cannot
32 by location of a bill give it immunity
from executive veto. Nor can it circum-
vent 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 con-
travention of the separation of powers
doctrine

33 We are no more willing to allow the
34 legislature to use its appropriation power
35 to infringe on the Governor's constitutional
36 right to veto matters of substantive legis-
37 lation than we were to allow the Governor
38 to encroach on the constitutional powers
39 (footnote continued on page 41)

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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" provide much guidance. That opinion goes on to uphold some appropriations (footnote continued on page 42)

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

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

8 State ex rel. Mever v. State Board of Equalization and Assess-
9 ment. 176 N.W.2d 920 (Neb. 1970). Unfortunately, the present
10 dispute involves 11 instances of claimed unconstitutional ap-
11 propriations in this section alone. Thus, Part III of this
12 opinion alone may be said to be comprised of 11 separate "cases".

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

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22 ///////////////
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25 _____
26 Footnote 14 continued
27 and to strike down others for reasons which are not clear and
28 in a pattern which does not seem to be required by the "test"
29 quoted above. See id. at 159-65.

29 15. In his dissent in Thomas v. Rosen, 569 P.2d 793, 799
30 (Alaska, 1977), Chief Justice Boochever noted: "While art. II,
31 sec. 13 generally requires that bills containing appropriations
32 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.

1 of very little value in interpreting the confinement requirement.
2 Thus, the Legislature's attempt to argue that the confinement
3 requirement should be read to allow the Legislature great free-
4 dom, because that is how the Alaska Supreme Court has interpreted
5 the single subject rule, ^{16/} is not persuasive.

6
7 Appropriations bills may and almost always do include
8 appropriations for a multitude of purposes. By definition they
9 embrace several subjects. Thus, the cases interpreting the
10 single subject rule are of little direct assistance in inter-
11 preting the confinement requirement. It seems likely that the
12 Alaska Supreme Court would not automatically apply its single
13 subject rule analysis to a confinement case, but would seek to
14 fashion a rule appropriate to confinement cases.

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

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

23 To be constitutional the language in
24 an appropriation bill must be germane
25 to the appropriations, must not con-
26 flict with existing law, and it must
27 not extend beyond the life of the
28 appropriations bill itself.

29 403 A.2d at 1343. While it is superficially attractive, the
30 test does not go far enough. Under it, the Legislature (or

31
32 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.

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

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

23 The problem needs to be approached from the proper
24 perspective. The constitution commands that "[b]ills for ap-
25 propriations shall be confined to appropriations." The language
26 is limiting, literally confining. It restricts the Legislature.
27 ~~The test to be used by the court must approach from the same~~
28 ~~perspective -- because appropriations bills must be limited to~~
29 ~~appropriations, the qualifying language must be the minimum~~
30 ~~necessary to explain the Legislature's intent regarding how the~~
31 ~~money appropriated is to be spent. It must not administer the~~
32

////////////////////

1 program of expenditures. ^{17/} It must not enact law or amend
2 existing law. ^{18/} It must not extend beyond the life of the
3 appropriation. ^{19/} Finally, the language must be germane, ^{20/}
4 that is, appropriate, ^{21/} to an appropriations bill.

5 This court entertains no illusions that this test may
6 easily or mechanistically be applied. Every instance where
7 language is challenged in an appropriations bill is a new case
8 which must be examined separately. Courts applying what appear
9 to be similar tests to apparently similar facts reach opposite
10 conclusions. Compare Welden v. Ray, 229 N.W.2d 706, 710 (Iowa
11 1975) with Henry v. Edwards, 346 So. 2d 153, 159-65 (La. 1977).
12 This formulation is synthesized from several cases, and attempts
13 to give fair meaning to the Alaska Constitution without unfairly
14 restricting the Legislature's spending power. ^{22/} It must now be
15 applied to the challenged appropriations.

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

26 18. Biles v. Dept. of Public Welfare, supra, 403 A.2d at
27 1343 (as to amending law); Flanders v. Morris, supra, 559 P.2d
at 772.

28 19. Biles, supra.

29 20. Id.

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

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

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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 any proper role in this field. Because the appropriation purports to confer on

1 program of expenditures. ^{17/} It must not enact law or amend
2 existing law. ^{18/} It must not extend beyond the life of the
3 appropriation. ^{19/} Finally, the language must be germane, ^{20/}
4 that is, appropriate, ^{21/} to an appropriations bill.

5 This court entertains no illusions that this test may
6 easily or mechanistically be applied. Every instance where
7 language is challenged in an appropriations bill is a new case
8 which must be examined separately. Courts applying what appear
9 to be similar tests to apparently similar facts reach opposite
10 conclusions. Compare Welden v. Ray, 229 N.W.2d 706, 710 (Iowa
11 1975) with Henry v. Edwards, 346 So. 2d 153, 159-65 (La. 1977).
12 This formulation is synthesized from several cases, and attempts
13 to give fair meaning to the Alaska Constitution without unfairly
14 restricting the Legislature's spending power. ^{22/} It must now be
15 applied to the challenged appropriations.

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

26 18. Biles v. Dept. of Public Welfare, supra, 403 A.2d at
27 1343 (as to amending law); Flanders v. Morris, supra, 558 P.2d
at 772.

28 19. Biles, supra.

29 20. Id.

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

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

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

4 2) FAAC 18

5 The appropriation challenged in FAAC 18 reads as
6 follows:

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

10 § 225, ch. 50, SLA 1980 at p. 34.

11 The powers of the Legislative Council are set out
12 at AS 24.20.060. They do not include the power to undertake the
13 kind of detailed engineering studies which would be required to
14 determine the feasibility of a major construction project.
15 Rather, that duty has been assigned by the Legislature to the
16 Department of Transportation and Public Facilities. AS
17 35.65.010. Because the appropriation purports to confer on
18 the Legislative Council a power which it has not been given, it
19 attempts to amend existing law. For this reason, the appropri-
20 ation is invalid.

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

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

1 The Legislature's reading of this statute appears overly broad.
2 This matter does not involve a request by a committee for
3 assistance in researching or drafting a bill. Nor does it
4 involve a request from an individual legislator for "spot
5 research". Rather, it involves a contract in the amount of
6 \$175,000 between the Legislative Affairs Agency and a joint
7 venture to perform a highly detailed construction plan. Even a
8 brief review of the contract which was executed shows how dif-
9 ferent this detailed feasibility study was from the type of
10 function set out in AS 24.20.060(4)(A). Among other things,
11 the contractor was to

12 Obtain a permit to perform
13 the necessary reconnaissance surveys
14 on Native and public lands within
15 the proposed Yukon-Kuskokwim Crossing
16 corridor. Perform a reconnaissance
17 survey of the route corridor on ground.
18 Secure aerial mapping photography of
19 the route corridor suitable for pre-
20 paring a photogrammetric map of the
21 route corridor. Perform a reconnaissance
22 hydrographic survey from the main channel
23 of the Kuskokwim River and from the main
24 channel of the Yukon River to the
25 respective dock sites.

26 Prepare a photogrammetric map of
27 the route corridor at a scale of 1"
28 equals 400' and a contour interval
29 of 10'. Prepare an aerial photo strip
30 mosaic of the route corridor at a scale
31 of 1" equals 2,000'.

32 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

1 the road, docks, pipelines, yards,
2 staging areas, building and equipment.
3 Propose basic construction methods and
4 material sources. Prepare a preliminary
5 environmental assessment of the proposed
6 Yukon-Kuskokwim Crossing, with
7 particular references to probable
8 impacts on fish and game. Prepare
9 a preliminary social assessment of
10 the proposed Yukon-Kuskokwim Crossing,
11 with particular references to the
12 probable influences on social con-
13 ditions in Upper Kalskag and other
14 Kuskokwim and Yukon villages and
15 towns.

16 Propose a schedule of legislative
17 and administrative action, hearings,
18 surveys, design, right-of-way acquisition
19 and construction for the proposed Yukon-
20 Kuskokwim Crossing.

21 Gov. Ex. 18a. The members of the joint venture contractor with
22 the Legislative Council are registered civil engineers. Gov.

23 Ex. 18b. It is evident from the exhibits that the functions
24 being undertaken by the Legislative Council in this instance go
25 far beyond the powers established in that body by AS 24.20.060.

26 The Legislature's second argument is that, under
27 AS 35.10.015, the Legislature reviews an annual report required
28 to be submitted by the Department of Transportation and Public
29 Facilities, including its "estimates and recommended priorities".
30 Under AS 35.10.180, the Legislature must approve, reject, or
31 modify the department's proposed plans and policies. Thus, the
32 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 appropri-
ating 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,

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

4 3) FAAC 19

5 The appropriation challenged in FAAC 19 reads as
6 follows:

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

11 § 259, ch. 50, SLA 1980, p. 35.

12 There is an unresolved factual question concern-
13 ing this appropriation which precludes disposition of it by
14 summary judgment. The Legislature alleges in its Supplemental
15 Memorandum in Opposition to Governor's Motion for Summary Judg-
16 ment that this appropriation was requested by the Governor's
17 office. Leg. Supp. Mem. 53. The Governor's response is un-
18 intelligible. He says first that the Legislature "provides no
19 support for these assertions", then concedes that "this item was
20 added by the legislature after the bill was introduced by the
21 governor." The Governor then argues that "[a]n invalid ap-
22 propriation is not made valid because the governor requested it."
23 Gov. Reply 24. If it is the case that this appropriation was
24 included in the appropriations bill at the request of the
25 Governor, it would appear that the Governor is estopped from
26 contesting its constitutionality. See Jamison v. Consolidated
27 Utilities, Inc., 576 P.2d 97 (Alaska 1978). Because there is
28 an unresolved issue of material fact, summary judgment appears
29 inappropriate in regard to FAAC 19. Alaska Rule of Civil Pro-
30 cedure 56; Wickwire v. McFadden, 576 P.2d 986 (Alaska 1978).

31 4) FAAC 32

32 As noted above, there are two appropriations

1 which are challenged in FAAC 32. The first of these, an ap-
2 propriation of \$198,600 to MBE Service Centers, Inc., through
3 the Department of Commerce and Economic Development, raises no
4 confinement question. It is the second appropriation, \$226,000
5 to the Bering Sea Fisherman's Association, through the Department
6 of Commerce and Economic Development, which is challenged by
7 the Governor on the grounds that it violates the confinement
8 requirement.

9 The appropriation in question (FAAC 32(b)) reads
10 as follows:

11 Department of Commerce and Economic Development
12 Bering Sea Fisherman's
13 Association grant \$226,000

14 § 286, ch. 50, SLA 1980, p. 65.

15 This appropriation is discussed above in Part II.
16 B.3(b). Although the purpose of the grant was not set out in
17 the appropriation, the exhibits submitted by the parties estab-
18 lished that the grant was used to fund a program of providing
19 up-to-date information and services to commercial fishermen in
20 western Alaska to assist in the development of the herring
21 fishery in that region.

22 The Governor argues that the Legislature has
23 assigned to the Department of Fish and Game the authority to
24 "collect, classify and disseminate statistics, data and informa-
25 tion that tends to promote the purposes" of the fish and game
26 laws of the State, including the enhancement of fisheries. The
27 Governor also argues that the Department of Commerce and Economic
28 Development is "not specifically charged with responsibility in
29 this area" and thus concludes that the appropriation purports
30 to enact substantive law by giving the Department of Commerce
31 and Economic Development authority which it previously did not
32 have.

1 A review of the enabling legislation for the
2 Department of Commerce and Economic Development makes clear
3 that the Governor's argument is incorrect. AS 44.33.020
4 establishes the duties of the department. Among them are the
5 following. The department shall "cooperate with private,
6 governmental and other public institutions and agencies in the
7 execution of economic development programs." AS 44.33.020(17).
8 The department shall "conduct studies, enter into contracts and
9 agreements, and make surveys relating to the economic development
10 of the state" Id., § 12. In addition to these
11 specific duties, the department shall "perform all other duties
12 and powers necessary or proper in relation to economic develop-
13 ment and planning for the state." Id., § 20. Under these grants
14 of powers, the Department of Commerce and Economic Development
15 clearly has the power to enter into a contract with a regional
16 association to assist in the development of the herring fishery.
17 The Governor's argument that the appropriation somehow amended
18 existing law is not correct. The appropriation is not in vio-
19 lation of the confinement requirement of the Alaska Constitution.

20 5) FAAC 37

21 The appropriation challenged in FAAC 37 reads as
22 follows:

23 Department of Natural Resources

24 Kuskokwim Native Association \$200,000
25 Koyokon Development Corp. \$200,000

26 It is the intent of the Legislature
27 that the appropriations to the Kuskokwim
28 Native Association and Koyokon Develop-
29 ment Corporation be used for the purchase
 of D-6 bulldozers or their equivalent,
 and for land clearing and other expense
 relating to agriculture.

30 § 286, ch. 50, SLA 1980, p. 67.

31 The Governor agrees that the Department of Natural
32 Resources has the power under AS 03.05.016 to direct experimental

1 work to promote and develop the agricultural industry in the
2 State. He concedes that "[i]t is appropriate for the legislature
3 to channel money through the department for this purpose." The
4 Governor contends, however, that inclusion of intricate details
5 such as the designation of the specific model bulldozer to be
6 used in this project "constitutes the enactment of substantive
7 law" and thus violates the confinement requirement.

8 The Legislature argues that the Governor's position
9 would force it to enact a separate piece of specific legisla-
10 tion describing in detail the purposes of each appropriation or
11 forego its right to specify such details. The Legislature finds
12 the alternative of "enacting a separate piece of general legis-
13 lation for hundreds of appropriations which require conditions
14 or qualifications" to be an "unacceptable alternative both from
15 a legal and practical standpoint." The Legislature points to
16 past practice of providing "fine details" and argues:

17 The alternative to this type
18 of precise detailing of ap-
19 propriations for specific uses
20 and purposes is an incredible
21 volume of separate pieces of
22 general legislation. Since this
23 is, in the real world, virtually
24 impossible, the Legislature's
25 power to control the use of state
26 funds would effectively be handed
27 over to the executive branch, a
28 concept rejected by the drafters
29 of the Alaska Constitution. Further,
30 it is absurd for the legislature to
31 enact a permanent statutory program
32 when it desires only to authorize
disbursement of public funds to
specific recipients for specific
items or purposes on a one-time
basis.

28 Leg. Supp. Memo. 59.

29 The line in instances like this one is difficult
30 to draw. In one respect the Legislature's argument is not
31 persuasive. If, in a given appropriation, it seeks to do more
32 than merely appropriate, it must enact separate, substantive

1 legislation. That is what the constitution requires. On the
2 other hand, does the challenged language here do more than
3 qualify and explain the appropriation? Does it offend any
4 element of the test set out above?

5 While the issue is close, it appears to this
6 court that the language does go beyond the minimum necessary to
7 explain how the money is to be spent. It takes over a portion
8 of the administration of the program of expenditures. It does
9 so by directing that money appropriated for agricultural develop-
10 ment be expended to purchase a particular type of equipment.
11 That type of determination is one properly made by the entity
12 which is administering or executing the law. It seems "inap-
13 propriate to a schedule of expenditures". It probably ought not
14 to be in an appropriations bill.

15 However, given the authorities set out above which
16 establish that legislation enjoys a presumption of constitution-
17 ality, this court is reluctant to conclude that a particular
18 appropriation is unconstitutional in what appears to be a close
19 case. For that reason, and even though the appropriation chal-
20 lenged in FAAC 37 appears to cross the line, no such declaration
21 will be made and the appropriation is upheld.

22 6) FAAC 45, FAAC 47, FAAC 48 and FAAC 49

23 The appropriations challenged by the Governor in
24 these four counts of his counterclaim are highly detailed ap-
25 propriations to the Department of Transportation and Public
26 Facilities for rural airport improvements in the scores of
27 villages in Alaska. (The Governor says 33 rural airports are
28 affected, and the legislature notes there are 38 airports af-
29 fected. These figures are accurate as to one or the other of the
30 specific improvements mandated, but they are inaccurate as to the
31 total number of airports affected. For example, 77 village air-
32 ports were to receive air-to-ground radios under the

1 appropriation. The total number of different village airports
2 affected was probably well over 100.) Approximately \$35,000,000
3 was appropriated for rural airport runway improvements; almost
4 \$5,000,000 was appropriated for rural airport lighting improve-
5 ments; almost \$3,000,000 for rural airport navigational aids;
6 and approximately \$2,000,000 was appropriated for rural airport
7 terminal storage buildings. The appropriations are highly
8 detailed, filling eight pages in the Session Laws of Alaska,
9 § 286, ch. 50, SLA 1980, pp. 79-87, but, much more significantly,
10 they refer to and incorporate by reference much longer and
11 extremely detailed studies concerning rural airport improvement.
12 In addition, the appropriations established minimum standards
13 for runway size, directed the Department of Transportation and
14 Public Facilities to identify villages where expansion of the
15 runway would involve the acquisition of land from the village
16 under the Alaska Native Land Claims Settlement Act and submit a
17 list of these projects to the Legislative Budget and Audit Com-
18 mittee, established extremely detailed standards for improvement
19 to airport lighting (by incorporating descriptions and standards
20 found in DOT/PF documents and FAA documents), established the
21 size and general lay-out of airport terminal storage buildings,
22 et cetera.

23 The legislation in question goes far beyond what
24 may be included in an appropriations bill. There is no question
25 here that the changed language amounts to full-scale, detailed
26 administration of a massive rural airport improvement program.
27 It effectively enacts law concerning the design of airports all
28 over the state. The language is inappropriate for a schedule of
29 expenditures. In virtually every respect, the appropriations in
30 question offend the test for determining their validity.

31 The Legislature certainly could amend existing
32 law (or create new law) establishing that airports built or

1 improved with state funds shall conform to certain standards.
2 But such legislation must be separate from the appropriations
3 bill, for all of the reasons discussed at the beginning of Part
4 III. Or, the Legislature could appropriate the sums in question
5 to the Department of Transportation and Public Facilities for
6 rural airport runway improvements, rural airport lighting
7 improvements, et cetera. It cannot, however, through the use
8 of an appropriations bill, take over the detailed administration
9 of carrying out a program design to improve rural airports in
10 the state. The appropriations challenged in all of these counts
11 of the counterclaim offend article II, section 13 of the Alaska
12 Constitution.

13 7) FAAC 57

14 The appropriation challenged in FAAC 57 reads as
15 follows:

16 Department of Revenue

17 Child Support Enforcement \$2,432,900

18 The Department of Revenue will
19 establish a sliding scale col-
20 lection fee schedule for the
21 non AFDC caseload based upon an
22 individuals [sic] economic ability
23 to pay. The amount of this general
24 fund appropriation is to be reduced
25 by the amount of those non AFDC case
26 collection fee receipts.

27 § 51, ch. 20, SLA 1980, p. 25.

28 The Governor objects to the language requiring
29 the Department of Revenue to establish a sliding scale collection
30 fee schedule. He argues that such a requirement may not con-
31 stitutionally be inserted into an appropriations bill. The
32 Legislature points to AS 47.23.100 which, at the time of the
33 appropriation, required the Department of Revenue to adopt
34 regulations assessing costs for obligees financially able to
35 pay for the services provided by the department. Thus, the
36 Legislature argues, it neither added nor changed any statutory

1 requirements; it merely conditioned its appropriation to the
2 agency on the agency complying with an existing statutory re-
3 quirement.

4 The Legislature's argument is not persuasive, for
5 it mischaracterizes what the challenged language attempts to do,
6 It not only requires that the department adopt regulations by
7 which costs may be assessed against people who are able to pay,
8 but it specifies that the regulation shall be of a specific
9 type -- a sliding scale collection fee schedule. The Legislature
10 has the power to require that such regulations be adopted, but
11 it may not do so in an appropriations bill. The effect of that
12 requirement clearly is to amend existing law. It is to require
13 regulations of a particular type, where that type was not re-
14 quired before. The challenged language violates the confinement
15 requirement.

16 8) FAAC 70

17 Supreme Court (35 positions) \$1,832,500

18 No funds from this appropriation are to
19 be used to move the clerk of the supreme
20 court and the clerks [sic] office and
staff from Juneau.

21 § 51, ch. 120, SLA 1980, p. 50.

22 The Governor objects to the language prohibiting
23 use of the appropriation to move the office of the clerk of the
24 supreme court from Juneau on the grounds that it is "essentially
25 substantive law" with its import that "the supreme court clerk
26 shall remain in Juneau". The argument is not persuasive.
27 Assuming that the Governor would even have standing to raise
28 this issue, there is nothing in the challenged language which
29 requires that the clerk's office remain in Juneau. It merely
30 prohibits the use of funds from this appropriation for that use.
31 It does not prohibit the use of other funds for that purpose.
32 The challenged language simply does not do what the Governor

1 claims it does. There is no violation here of the confinement
2 requirement.

3 C. Judicial Remedy

4 The Governor has not addressed, either in his original
5 Memorandum in Support of Motion for Summary Judgment or in his
6 Supplemental Memorandum in Reply, what judicial remedy might be
7 proper given a finding that any of the appropriations violated
8 the confinement requirement of article II, section 13 of the
9 Alaska Constitution. From the extensive exhibits submitted by
10 the parties, it appears likely that disbursement of most of the
11 funds in question occurred even before the First Amended Answer
12 and Counterclaim was filed, (see, e.g., Leg. Ex. 9B, Gov. Ex.
13 18a, Gov. Ex. 19b). Additionally, there are substantial policy
14 reasons why this court should limit its decision to a declaration
15 of the rights and legal relations of the parties. ~~Under all of~~
16 ~~these circumstances, this decision, to the extent it holds any~~
17 ~~appropriation to be unconstitutional, should be treated as a~~
18 ~~declaratory judgment under AS 22.10.020(b), and no more! If any~~
19 ~~appropriation declared invalid has not been disbursed, it shall~~
20 ~~lapse.~~

1 IV. PRIVATE EDUCATIONAL INSTITUTIONS

2 A. Standing

3 The Legislature contends that the Governor has no
4 standing to challenge the two appropriations which he challenges
5 on the grounds that they constitute aid to private educational
6 institutions. The Legislature relies on its memorandum in
7 support of motion to dismiss defendant's counterclaim, which was
8 filed near the outset of this case when the case was before The
9 Honorable Thomas B. Stewart. The Governor responded with an
10 opposition memorandum advocating not only that he had standing,
11 but that the Legislature did not have standing to raise the
12 issue. The issue was fully briefed before Judge Stewart.

13 After consideration of the various briefs, Judge
14 Stewart issued an order denying both the plaintiffs' and the
15 defendants' motions to strike. In that order, he explicitly
16 stated:

17 The motions challenge the standing of
18 the respective parties to sue the other,
19 and assert additional grounds for dis-
20 missal. The motions have been heard and
the court is fully advised thereon. It
is hereby ORDERED that the motions to
dismiss are denied.

21 Order Denying Motions to Dismiss, October 3, 1981. Because the
22 issue of standing was fully briefed and considered by the
23 predecessor court, and because the parties make no new arguments
24 and allege no new facts concerning standing, this court will not
25 reconsider Judge Stewart's earlier ruling. It is the law of
26 this case, and ought not to be changed except upon a specific
27 showing that it is erroneous. Stepanov v. Gavrilovich, 594 P.2d
28 30, 36 (Alaska 1979). While it is within this court's power to
29 reconsider, the power "is not to be used lightly." Id. No show-
30 ing has been made as to why it should be exercised here. Thus,
31 the Governor has standing to challenge these appropriations.
32

1 B. General Discussion

2 Two appropriations have been challenged by the Governor
3 on the basis that they provide direct aid for private education
4 in violation of article VII, section 1 of the Alaska Constitution.
5 That section provides:

6 The legislature shall by general law
7 establish and maintain a system of
8 public schools open to all children
9 of the State, and may provide for other
10 public educational institutions. Schools
11 and institutions so established shall be
free from sectarian control. No money
shall be paid from public funds for the
direct benefit of any religious or other
private education institution.

12 The Governor's challenge is based upon the last sentence of the
13 section. The critical inquiry regarding both appropriations
14 is whether the grantee may be characterized as a "private
15 educational institution."

16 No Alaska case has construed the meaning of the term
17 "private educational institution", but it is not a particularly
18 difficult term to define. It would certainly include schools,
19 as well as societies, corporations, and organizations, which are
20 other than public, and which are organized or established for
21 the purpose of providing education. If there is any uncertainty
22 in the application of this constitutional prohibition, it arises
23 when a private organization which undertakes a number of func-
24 tions, one of which may be characterized as educational, receives
25 assistance directly from the State.

26 The history of the Alaska Constitutional Convention
27 is helpful in this regard. Delegate Armstrong, speaking for
28 the Committee on Health, Education and Welfare, which drafted
29 the section in question, indicated a number of things about its
30 intent. Significantly, while it was the intention of the framers
31 "to provide and protect for the future of our public schools",
32 the language was drafted so that it would "not prohibit the use

1 of funds in other educational matters." 2 Proceedings of the
3 Alaska Constitutional Convention 1514. Delegate Armstrong then
4 made reference to special cases where children in homes or
5 hospitals or other private institutions would not be prohibited
6 from receiving aid under the section. Id. at 1514-15. The
7 thrust of these comments seems to be that aid to a private
8 organization or institution is not prohibited, even if it carries
9 out some educational assistance, as long as it is not primarily
10 an educational institution.

11 It is also important to keep in mind, as noted above
12 at 3-4, that a showing of unconstitutionality must be "manifest"
13 to overcome the presumption of validity to which validly enacted
14 statutes are entitled.

15 C. The Challenged Appropriations

16 1) FAAC 11

17 The appropriation challenged in FAAC 11 reads
18 as follows:

19 The sum of \$100,000 is appropriated
20 from the general fund to the municipal
21 grant account for payment as a grant
22 to the Municipality of Anchorage for
23 a grant to the Alaska Black Leadership
24 Conference for community-based
25 education enrichment.

26 § 106, ch. 50, SLA 1980 at p. 4. The grant was to finance a six
27 week summer program for 200 minority students. Leg. Ex. 11 C.

28 The Alaska Black Leadership Conference is
29 not properly described as an educational institution, as
30 the constitution uses that phrase. While the organization under-
31 takes some educational activities, the evidence submitted by the
32 parties suggests that it may accurately be described as an
umbrella organization for several groups which seeks the advance-
ment, in several spheres, of Alaska's black citizens. Its
purposes include "promoting and stimulating cohesiveness within
the Black Community." Gov. Ex. 11a. Member organizations

1 include the Alaska Black Caucus, the Alaska Women's Civic and
2 Social Club, the Black Coalition, the Ministerial Alliance,
3 Mothers for Christian Fellowship, both the Anchorage and
4 Fairbanks branches of the NAACP, the Greater Fairbanks Black
5 Caucus, and diverse other groups. Leg. Ex. 11C. The purposes
6 and powers of the Alaska Black Leadership Conference, as ex-
7 pressed in its articles of incorporation, embrace "charitable,
8 educational, civic, literary and cultural" purposes. Gov. Ex.
9 11a (art. III). Under these circumstances, it would not appear
10 appropriate to conclude that the Alaska Black Leadership Con-
11 ference is a "private educational institutio." within the meaning
12 of the constitution.

13 In some instances, of course, it might be
14 appropriate to look through a corporate structure, for example,
15 if the organization undertook only educational functions, to
16 determine if it really was no more than an educational institu-
17 tion. But that does not appear to be the case here. While the
18 Governor hints in that direction, noting that the organization
19 was incorporated in September, 1980, after the appropriation in
20 question was passed, one of the exhibits submitted by the
21 Governor shows that the organization was functioning at least
22 since 1978. Gov. Ex. 11b. Neither party has raised a question
23 of fact in this regard, and both parties seek resolution by
24 summary judgment. In these circumstances, and without even the
25 allegation of a genuine issue of material fact, this court is
26 not inclined to look behind the exhibits presented to attempt to
27 find a factual dispute concerning the organization's activities.

28 Because the Alaska Black Leadership Con-
29 ference is not a "private educational institution", the appropri-
30 ation of public money to it does not offend article VII, section
31 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".

1 The Legislature argues that the primary
2 function of the Fairbanks Association for the Education of Young
3 Children is to provide, through its member day care centers,
4 child care to pre-school children. The Legislature contends that
5 "FAEYC is a non-profit organization whose goal is to provide
6 information and support for affiliate day care centers." Leg.
7 Ex. 25A. The grant was used to purchase play equipment and
8 audio-visual equipment for child care centers affiliated with
9 FAEYC.

10 The Legislature seeks to distinguish day care
11 centers or child care centers from "private educational institu-
12 tions" in two ways. First, the former are regulated by the
13 Department of Health and Social Services. See 7 AAC 50.120-775.
14 Second, expenses for child care are tax deductible to parents,
15 and, under the Internal Revenue Code, are considered employment
16 related expenses, while private school tuition is not a deduct-
17 ible expense. Thus, the Legislature argues, day care may be
18 distinguished from education. The Legislature also relies upon
19 a lower court decision from Ohio which held that a day care center
20 is not included within the term "educational use" in a zoning
21 ordinance which provided that permitted uses in a residential
22 district include "educational use, public library or museum."
23 Staker v. Brown, 324 N.E.2d 793, 795 (Ohio Com. Pl. 1974). The
24 Legislature concludes that "any educational benefits conferred
25 on children in day care centers is secondary to their basic
26 function which is to allow parents to participate in the work
27 force."

28 A further argument advanced by the Legis-
29 lature is based on the existence of AS 44.33.240-257, which
30 authorizes the Department of Commerce and Economic Development to
31 make loans which directly benefit child care facilities. If aid
32 to private day care centers constitutes prohibited public benefit

1 to "private educational institutions", the Legislature argues,
2 AS 44.33.240 et seq. must be unconstitutional also.

3 As noted above, this issue is closer than the
4 one raised by the grant of the Alaska Black Leadership Con-
5 ference. On balance, the arguments of the Legislature are more
6 persuasive. As noted in the opinion of the Alaska Supreme Court
7 in Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979),
8 the purpose of article VII, section 1 was "to support and protect
9 a strong system of public schools." Id. at 129. It seems
10 likely that these appropriations would not frustrate that
11 purpose. The majority of the children to be benefited by the
12 appropriation at issue here are not school age children, and
13 those who are of school age are not diverted from the public
14 schools by FAEYC. There is presumably no or little competition
15 from the public school system for these dollars. Indeed, it
16 might well be argued that expenditure of these funds enhances
17 the public school system, in helping to insure that children who
18 begin formal schooling will have had benefits provided to them
19 during their pre-school years. Moreover, the statement by
20 Delegate Armstrong, quoted above at 60, to the effect that the
21 section was not intended to "prohibit the use of funds in other
22 educational matters", 2 Proceedings of the Alaska Constitutional
23 Convention 1914, suggests that the appropriation is valid.

24 Under all of these circumstances, and
25 remembering the heavy burden that is faced by one who challenges
26 the constitutionality of a validly enacted statute, this court
27 concludes that the Fairbanks Association for the Education of
28 Young Children was not a "private educational institution" as
29 that term is used in the Alaska Constitution. For that reason,
30 the appropriation is not prohibited by article VII, section 1 of
31 that document.

32 ////////////////

1 V. UNCONSTITUTIONAL DELEGATION OF POWER

2 The Governor challenges one item in one of the ap-
3 propriation acts in question on the theory that it is an un-
4 constitutional delegation of power. In § 50, ch. 120, SLA 1980
5 at p. 65, the Legislature provided:

6 The sum of \$5,267,248 shall be reduced
7 from the total of the personal services
8 line items contained in the appropriations
9 made by this Act for operating expenditures
10 for the fiscal year beginning July 1, 1980,
11 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.

12 The Legislature's delegation of the power to decide how the
13 reduction should specifically be allocated among state agencies
14 is challenged by the Governor as an invalid delegation of
15 legislative authority to the Governor. ^{23/}

16 The Legislature argues that "[a] delegation of dis-
17 cretion to the executive branch of government is constitutional
18

19 23. In his Memorandum in Support of Summary Judgment, at
20 p. 64, the Governor states: "This item was vetoed by the
21 governor. However, the court has ruled that this veto was
22 improperly exercised. Mem. decision motion for partial judgment
23 on pleadings, February 26, 1982." This court has reviewed the
24 Memorandum of Decision of February 26, 1982, and can find no
25 indication in the memorandum that the court ruled that the
26 Governor's item veto power was improperly exercised regarding
27 this item. That Memorandum of Decision was issued by The
28 Honorable Thomas E. Schulz, to whom this case was assigned for
29 a brief period following Judge Stewart's retirement. Therefore,
30 this court also reviewed Judge Stewart's Memorandum of Decision
31 of December 2, 1981, upon which Judge Schulz's Partial Judgment
32 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.

33 Technically, the matter may be moot. However, under
34 the "public interest" exception to the mootness doctrine, In Re
35 G.M.B., 473 P.2d 1006, 1008, (Alaska, 1971), it is appropriate
36 to resolve this matter. That is, this dispute is likely a re-
37 curring one, and its nature is such that the mootness doctrine,
38 if applied, would effectively preclude review of the issue.

1 where the Legislature provides sufficient standards for the
2 exercise of that discretion." The Legislature notes that the
3 approach it took was an alternative to merely reducing all
4 personal services line items by one percent, which it clearly
5 had the power to do, and that the Governor was given "specific
6 criteria sufficiently definite to pass constitutional muster,"
7 that is, the direction that the reductions be "equitably al-
8 located" among the state agencies.

9 In DeArmond v. Alaska State Development Corp., 376 P.2d
10 717 (Alaska 1972), the Supreme Court cited with approval a
11 treatise to the effect that "a legislature may delegate its non-
12 legislative functions and confer discretion in the administration
13 of the law, but may not delegate purely legislative powers in the
14 absence of constitutional authorization." Id. at 723 n.16, citing
15 16 CJS Constitutional Law § 133 (1956). The Legislature has, in
16 this case, argued often and persuasively that the spending power
17 is a legislative power, and only a legislative power (with the
18 Governor playing a limited constitutional role through the
19 exercise of the veto). Thus, unless the Legislature can point
20 to a specific constitutional authorization to delegate away part
21 of that power, the item in question must be an invalid delegation.

22 The Legislature points to no such constitutional pro-
23 vision. It argues at length that this case is distinguishable
24 from a case cited by the Governor, but that argument misses the
25 mark. The case in question, State of New Mexico, ex rel.
26 Holmes v. State Board of Finance, 367 P.2d 929 (N.M. 1961), held
27 invalid a statute delegating discretion to an executive agency
28 to apportion reductions in appropriations. The Legislature
29 attempts to distinguish Holmes on the grounds that the reductions
30 there were non-mandatory, non-specific, and there was no
31 direction as to which type of appropriations should be reduced.
32 This exercise of distinguishing Holmes overlooks the Governor's

1 central argument that the power in question here, the spending
2 power, cannot be delegated at all -- even if standards for the
3 exercise of the power are set out with great particularity by
4 the legislature.

5 Even assuming that the Legislature could show that
6 this power may be delegated, it is questionable whether the
7 standards set out in the act in question are specifically
8 definite. An almost identical provision in a general ap-
9 propriation bill in 1963 was the subject of an attorney general
10 opinion in this state. The provision in question read as
11 follows:

12 The total amount appropriated from the
13 general fund by section 6 of this Act
14 is reduced by the amount of \$900,000.
15 The apportionment of this reduction
shall be made by the Governor from among
the sums appropriated to the departments
of the executive branch.

16 § 7, CSMB 34 (1963). This provision specified exactly the
17 amount to be reduced, directed the Governor to make the re-
18 duction, and said that the reduction should be apportioned
19 among the executive departments. The only difference between it
20 and the item in the instant case is that it did not decree an
21 "equitable" allocation (though that might be inferred from the
22 use of the word "apportionment"), and it was not restricted to
23 personal services items. This almost identical provision was,
24 in the opinion of the attorney general, unconstitutional, for
25 the reason that it was an improper delegation of legislative
26 power to the executive. The opinion relied to some extent on
27 Holmes, supra, and noted that Holmes "was based on the more
28 specific grounds, also applicable to CSMB No. 34, that there
29 was a lack of sufficient standards to guide the [executive] in
30 its determinations." 1963 Opn. Atty. Gen. No. 9, April 9, 1963,
31 at 3. This court agrees that a second basis for striking down
32 the item in question would be a lack of sufficient standards to

1 guide the executive, even assuming that the power could be
2 delegated at all.

3 CONCLUSION

4 For the reasons set out above, the challenged appropriations
5 are variously upheld or invalidated as noted above.

6 Plaintiffs shall prepare a judgment in conformity with the
7 foregoing opinion.

8 DONE at Juneau, Alaska, this 22 day of May, 1983.

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Walter E. Carpeneti
Superior Court Judge

12 CERTIFICATION

13 This is to certify that on the above date I provided a copy
14 of the above Memorandum of Decision to:

15 Theodore E. Fleischer, Esq.
16 Gordon E. Evans, Esq.
17 James L. Baldwin, Esq.

18
19

D. J. ...
Secretary to the Judge

STATE OF ALASKA
FISCAL NOTE

Revision Date 1983

I. REQUEST

Bill/Resolution No.: SB 186
Title: Named Recipient Grants
Sponsor: Senator Sackett
Requestor: Senate C&RA

II. FISCAL DETAIL

Agency Affected: DCRA
Program Category Affected: Development
BRU, Program of Subprogram(s) Affected: LGAD

EXPENDITURES/REVENUES: (Thousands of Dollars)

| | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 | FY 88 |
|-------------------------|-------|-------|-------|-------|-------|-------|
| OPERATING | | | | | | |
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANIS, CLAIMS, ETC | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |
| CAPITAL | -0- | -0- | -0- | -0- | -0- | -0- |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|------------------------|--|--|--|--|--|--|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |

POSITIONS:

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|-----------|--|--|--|--|--|--|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard Rainery Phone: 465-4703
 Division: Commissioner's Office Date: 3/25/93
 Approved by Commissioner: [Signature] Date: _____
 Department: _____

Distribution:

Original to Legislative Finance
 Copy to Office of Management and Budget (for Legislature introduced bills)
 Copy to Department (for Governor introduced bills)
 Copy to Sponsor
 Copy to Requestor (if different from Sponsor)

SB 469 cont'd

Senator Vic Fischer moved for unanimous consent for the adoption of the State Affairs Committee Substitute offered on page 2539. Without objection, FOR SENATE BILL NO. 469 (SA) was adopted.

CS FOR SENATE BILL NO. 469 (SA) was read the second time.

Senator Ray moved and asked unanimous consent that CS FOR SENATE BILL NO. 469 (SA) be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 469 (SA) was read the third time.

The question being: "Shall CS FOR SENATE BILL NO. 469 (SA) (credited service under the Public Employees' Retirement System; efd) pass the Senate?" The roll was taken with the following result:

CSSB 469 SA 3RD

Yeas: 20 Bennett, Eliason, Fahrenkamp,
Faiks, Ferguson, Fischer Paul,
Fischer Vic, Gilman, Halford,
Josephson, Kelly, Kerttula, Moss,
Mulcahy, Pettyjohn, Ray, Rodey,
Sackett, Sturgulewski, Ziegler

Nays: 0

and so, CS FOR SENATE BILL NO. 469 (SA) passed the Senate.

Senator Ray moved and asked unanimous consent that the roll call on the passage of the bill be considered the roll call on the effective date clause. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 469 (SA) was engrossed, signed by the President and Secretary and transmitted to the House for consideration.

SENATE BILLS IN THIRD READING

SB 186

SENATE BILL NO. 186 (named recipient grants; efd) which was held from May 15 was before the Senate in third reading.

Senator Ferguson moved and asked unanimous consent that SENATE BILL NO. 186 be returned to second reading for the purpose of a specific amendment. Without objection, it was so ordered.

Senator Ferguson offered Amendment No. 1:

Page 1, lines 27-29: Delete "A CONTRACT SHALL BE EXECUTED WITHIN 60 DAYS AFTER THE EFFECTIVE DATE OF THE APPROPRIATION OR ALLOCATION" and insert "A contract shall be executed within 60 days after the effective date of the appropriation or allocation"

Senator Ferguson moved and asked unanimous consent that Amendment No. 1 be adopted. Without objection, Amendment No. 1 was adopted.

SENATE BILL NO. 186 am was before the Senate in third reading.

Senator Ray moved that SENATE BILL NO. 186 am be placed at the bottom of the calendar. Without objection, it was so ordered.

SECOND READING OF HOUSE BILLS

HB 504

CS FOR HOUSE BILL NO. 504 (FIN) (establishing the teacher scholarship loan program; efd) was read the second time.

Senator Faiks moved and asked unanimous consent for the adoption of the Rules Senate Committee Substitute offered on page 1107. Senators Ray and Gilman objected.

SENATE BILLS IN THIRD READING

SB 186

SENATE BILL NO. 186 am (named recipient grants; efd) was before the Senate in third reading.

Senator Ferguson moved and asked unanimous consent that SENATE BILL NO. 186 am be returned to second reading for the purpose of a specific amendment. Without objection, it was so ordered.

Senator Ferguson offered Amendment No. 2:

Page 1, lines 17-29 through Page 2, line 1:
restore existing language

Page 2, line 12: insert new subsection to read: "(f) The rural areas as defined by A: 44.47.560(5)(A) and (B) are exempt from the requirements in subsection (a)."

Senator Ferguson moved for the adoption of Amendment No. 2. Senator Ray asked unanimous consent. Without objection, Amendment No. 2 was adopted.

SENATE BILL NO. 186 am was before the Senate in third reading.

The question being: "Shall SENATE BILL NO. 186 am (named recipient grants; efd) pass the Senate?" The roll was taken with the following result:

SB 186 AM 3RD

Yeas: 14 Bennett, Eliason, Fahrenkamp,
Falks, Ferguson, Fischer Vic, Gilman,
Josephson, Kerttula, Moss, Mulcahy,
Ray, Sackett, Ziegler

Nays: 6 Fischer Paul, Holford, Kelly,
Pattyjohn, Rodey, Sturgulewski

and so, SENATE BILL NO. 186 am passed the Senate.

SB 186 cont'd

Senator Ray moved and asked unanimous consent that the roll call on the passage of the bill be considered the roll call on the effective date clause. Without objection, it was so ordered.

SENATE BILL NO. 186 am was engrossed, signed by the President and Secretary and transmitted to the House for consideration.

CITATIONS

Senator Ray moved and asked unanimous consent that the Rules be suspended and the publication requirement be waived on the Citation In Memoriam - Lynda Michelle Farris and be taken up as a special order of business. Without objection, it was so ordered.

Senator Ray moved that the following citations be approved:

Honoring - Session IV Close-up Students
by Senators Ray, Ferguson and Sturgulewski
Representatives Adams and Fuller

Honoring - Session V Close-up Students
by Senators Ray, Ferguson and Sturgulewski
Representatives Adams and Fuller

Honoring - Ruth Allman
by Representatives M.M. Miller, Duncan,
Hayes, Liaka, Cato and Fritz
Senators Ray, Ziegler, Vic Fischer,
Sturgulewski and Kerttula

In Memoriam - Lynda Michelle Farris
by Senators Paul Fischer and Gilman
Representatives Fritz and Malone

Without objection, the citations were approved and referred to the Secretary for transmittal.

UNFINISHED BUSINESS

SJR 32

Senator Fahrenkamp, Chairman, moved and asked unanimous consent that the Resources Committee referral be waived on SENATE JOINT RESOLUTION NO. 32 (proposing an amendment to the Constitution of the State of Alaska creating a fund to finance the construction of capital projects). Without objection, it was so ordered.