MEETING:

1/5/99

Alaska State Legislature

House Judiciary Committee
Representative Joe Green, Chairman

Tentative AGENDA
HOUSE JUDICIARY COMMITTEE MEETING
JANUARY 5, 1999

2nd Floor Conference Room • Anchorage Legislative Information Office • 716 West 4th Ave.

9:00 AM Discussion of Y2K Problem

Overview - Mr. Bob Poe, Commissioner-nominee Department of Administration
Potential State Liability - Mr. Mike Ford, Legislative Legal Services
Mr. Dave Laurence, Chief Information Officer, Alyeska Pipeline
Public Testimony on Y2K

10:30 AM* Implementation of Ch. 116, SLA 98, Electronic Monitoring

Mr. Bruce Richards, Department of Corrections
Public Testimony on implementation of Electronic Monitoring

11:00 AM* - Update on Downtown Anchorage Jail

Mr. Steve Fishbach, RISE Alaska
Public Testimony on update of Downtown Anchorage Jail

11:30 AM* - Update on Delta/Ft. Greely Prison Proposal

Ms. Sarah Barton, RISE Alaska
Ms. Margo Knuth, Department of Law
Public Testimony on Delta/Ft. Greely Prison Proposal

NOON - Break

1:00 PM - Discussion of Preliminary Opinion and Order by Alaska Supreme Court in Bess v. Ulmer

Mr. George Utermole, Legislative Legal Services
Mr. Jim Baldwin, Department of Law
Public Testimony on Bess

3:00 PM - Adjourn

* = discussion on this topic may begin earlier if preceeding discussion ends earlier

From the State of Alaska Y2K Home Page

Year 2000 Problem

Definition

The Year 2000 problem is rooted in the way dates are recorded and evaluated on many computer systems. Since its inception, the computer industry in order to conserve on electronic date storage and reduce operation costs, used a two-digit number to represent the year component of a date; that is, the Year 1996 is represented in computer systems as "96". When the Year 2000 arrives, this two-digit year field will contain "00". With this two-digit format, the year 2000 is indistinguishable from 1900, 2001 from 1901, and so on. As a result, system or application programs that use dates to perform calculations, comparisons or sorting may generate incorrect results when working with years after 1999.

Project Description

Considering the scope of the Year 2000 problem, the State of Alaska's Office of the Governor realized the need to facilitate and coordinate Alaska's statewide effort in resolving this problem. One of the first steps taken was to establish the Y2K Project Office, whose primary role is to coordinate agency efforts and ensure that a collaborative approach is taken in order to reduce any duplicate work efforts. With the Project Office in place, Governor Tony Knowles issued an Administrative Order placing Year 2000 compliance to be a priority of the highest level. Additionally, this order required that the Senior Project manager of the Y2K Project Office function at the level of a member of the cabinet.

United States General Accounting Office

GAO

Report to Congressional Requesters

November 1998

YEAR 2000 COMPUTING CRISIS

Readiness of State Automated Systems to Support Federal Welfare Programs

GAO/AIMD-99-28

GAO

United States
General Accounting Office
Washington, D.C. 20548

Accounting and Information
Management Division

B-280131

November 6, 1998

Congressional Requesters

The federal government has a huge vested interest in automated state and local systems that support welfare programs. Many of these systems must be renovated to make the transition to the year 2000. Unless renovated, many systems will mistake data referring to 2000 as meaning 1900. Such corrupted data—used by a locality or provided by it to its federal counterpart (or vice versa)—can seriously hinder an agency's ability to provide essential services to the public.

This report responds to your request that we assess the Year 2000 status of the state and local automated systems used in federal welfare programs. Specifically, our objectives were to (1) determine the reported status of systems used in Medicaid; Temporary Assistance for Needy Families (TANF); Women, Infants, and Children (WIC); food stamps (FS); child support enforcement (CSE); child care (CC); and child welfare programs (CW), and the potential consequences of not modifying these systems in time for the Year 2000 change, (2) identify Year 2000 guidance provided by federal agencies to the states, and (3) identify any Year 2000 oversight and monitoring activities that the federal agencies have performed. We briefed your offices on October 8, 1998, on the results of our assessment. Materials presented during that briefing are included in appendixes I through IX.

To address our objectives, we developed a questionnaire which was sent to the 50 states, the District of Columbia, and three territories (Guam, Puerto Rico, and the Virgin Islands), and received responses from all but South Dakota. We conducted individual pretesting of our questionnaire in Georgia, Maryland, and Pennsylvania to ensure clarity before sending the questionnaires to all 54 entities. We used the pretest results to finalize our questionnaire. We mailed the questionnaire to each entity's Year 2000 coordinator. We reviewed the completed questionnaires and contacted respondents by telephone to obtain additional information where data were not provided or the answers were not clear.

We did not visit the state computer sites or evaluate the accuracy of the state reports. The information from states is self reported and may therefore vary in accuracy. All questionnaire data that were entered into our database and reports from the resulting analyses were individually verified by an independent analyst to ensure the data were entered

properly. We also met with federal oversight officials from the Department of Health and Human Service's (HHS) Health Care Financing Administration (HCFA) and Administration for Children and Families and from the Department of Agriculture's (USDA) Food and Nutrition Service.

Background

The Year 2000 problem is rooted in the way dates are recorded and computed in automated information systems. For the past several decades, systems have typically used two digits to represent the year, such as "98" representing 1998, in order to conserve electronic data storage and reduce operating costs. With this two-digit format, however, the year 2000 is indistinguishable from 1900, or 2001 from 1901.

The Office of Management and Budget (OMB) identified five phases agencies should complete in conducting their Year 2000 work and established target completion dates for each phase. After awareness of the need to make systems Year 2000 compliant, they must assess (June 1997) systems, including inventorying, analyzing, and prioritizing them. Agencies must then renovate (September 1998) their systems by converting or replacing them, validate (January 1999) through testing and verification that the renovation work was appropriate, and implement (March 1999) the converted or replaced systems. These phases are discussed in detail in our publications Year 2000 Computing Crisis: An Assessment Guide (GAO/AIMD-10.1.14, September 1997) and Year 2000 Computing Crisis: A Testing Guide (GAO/AIMD-10.1.21, Exposure Draft, June 1998).

Results in Brief

The states[1] reported that they are using 421 automated systems to manage the seven federal welfare programs in our survey. (See appendix I for further details.) Several states reported that they use more than one system to support a program. While many states do not require Year 2000 costs to be accounted for separately, states provided estimates totaling about $545 million (federal and state funding) during fiscal years 1997 through 2001 for completing Year 2000 conversion of their welfare information systems.

Failure to complete Year 2000 conversion could result in billions of dollars in benefits payments not being delivered. Potential problems states cited were that (1) new recipients could not be added to the recipient file, (2) eligibility for new applicants could not be determined, (3) recipients

[1]Meaning the 49 states, the District of Columbia, and the three territories that responded to our survey.

could be denied benefits, (4) payments could be underpaid or overpaid, and (5) payments could be delayed.

The reported status of state welfare systems is highlighted below and the details are in appendixes II to IX.

- Overall, about one-third of the systems are reported to be compliant. The compliance rate ranged from only 16 percent of the Medicaid systems to about half of the CC and CW systems. (See appendix II for details.)
- States reported that they had completed the assessment phase for about 80 percent of the welfare systems supporting these seven programs. (See appendix III for details.)
- According to OMB guidelines,[2] systems renovation work should have been completed by September 1998. By comparison, as of the July/August 1998 response dates, states reported having completed renovation on only about one-third of the systems. At that time, only Arkansas, Idaho, and Utah reported that they were over 75 percent complete in renovating all systems supporting the seven programs. Of those states that had not completed this phase, many systems (25 percent) were no more than one quarter complete. Eighteen states reported that they had completed renovating one quarter or fewer of their Medicaid claims processing systems. These 18 states had Medicaid expenditures of about $40 billion, one quarter of total Medicaid expenditures, for about 9.5 million recipients in fiscal year 1997. (See appendix IV for details.)
- About one quarter of the systems were reported as having completed the validation and implementation phases. Thorough testing is required to ensure that Year 2000 modifications function as intended and do not introduce new problems. Despite this need, states said that they had not developed test plans for about 27 percent of the systems. (See appendix V for details.)

In addition to Year 2000 systems conversions, states must continue to perform routine systems development and maintenance activities as well as implement other systems changes required to support their welfare programs. Eighty percent of the states noted that these systems activities have been delayed because of the Year 2000 compliance efforts. (See appendix VI for the types of system activities reported postponed due to Year 2000 effort.) Faced with these competing priorities, states reported that they are struggling to manage these workloads, including important

[2]On January 20, 1998, OMB issued a memorandum to the heads of executive departments and agencies entitled "Progress Reports on Fixing Year 2000 Difficulties." This memorandum revised the target dates for Year 2000 work and established September 1998 as the date for completion of renovation of systems.

initiatives such as tracking and reporting requirements of federal welfare reform, new HCFA programmatic requirements, and new child support requirements.

The states cited two federal agencies as most frequently providing guidance. USDA and HCFA were cited, respectively, by about 75 and 64 percent of the states for providing federal guidance. Other agencies, mentioned less than half of the time, included OMB, the Administration for Children and Families, and the Social Security Administration. (See appendix VII for details.) The top category of desired additional support mentioned by the states was funding (mentioned by 77 percent). Other categories, such as continuity planning and guidance in testing, were mentioned by about a quarter of the states. (See appendix VIII.)

States also cited USDA and HCFA as providing the most oversight, about 87 and 62 percent respectively. Less than half of the states noted that the Administration for Children and Families, Social Security Administration, and OMB provided oversight activities. These activities included site visits, focus groups, and required status reports. (See appendix IX.)

We sent copies of our briefing materials, which were used in preparing this report, to the federal oversight officials with whom we met at HCFA, the Administration for Children and Families, and USDA's Food and Nutrition Service. Copies were also sent to key officials at HHS, OMB, USDA, and the National Association of State Information Resource Executives, and we responded to their questions on these materials. Our work was performed from May through September 1998, in accordance with generally accepted government auditing standards.

As agreed with your offices, we are providing copies of this report to the Secretary of Health and Human Services; the Secretary of Agriculture; the Administrators, Health Care Financing Administration, Administration for Children and Families, and USDA Food and Nutrition Service; the Director, Office of Management and Budget; appropriate congressional committees; and other interested parties. Copies will also be made available to others upon request.

Please contact me or Christie Motley, Assistant Director, at (202) 512-6408 if you have any questions regarding this report. We can also be reached by e-mail at *willemssenj.aimd@gao.gov* and *motleyc.aimd@gao.gov*, respectively. Major contributors to this report are listed in appendix X.

Joel C. Willemssen
Director, Civil Agencies Information Systems

List of Congressional Requesters

The Honorable William V. Roth, Jr.
Chairman
The Honorable Daniel Patrick Moynihan
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable John D. Rockefeller, IV
United States Senate

The Honorable E. Clay Shaw, Jr.
Chairman
The Honorable Sander M. Levin
Ranking Minority Member
Subcommittee on Human Resources
Committee on Ways and Means
House of Representatives

The Honorable Nancy L. Johnson
Chairwoman
Subcommittee on Oversight
Committee on Ways and Means
House of Representatives

Contents

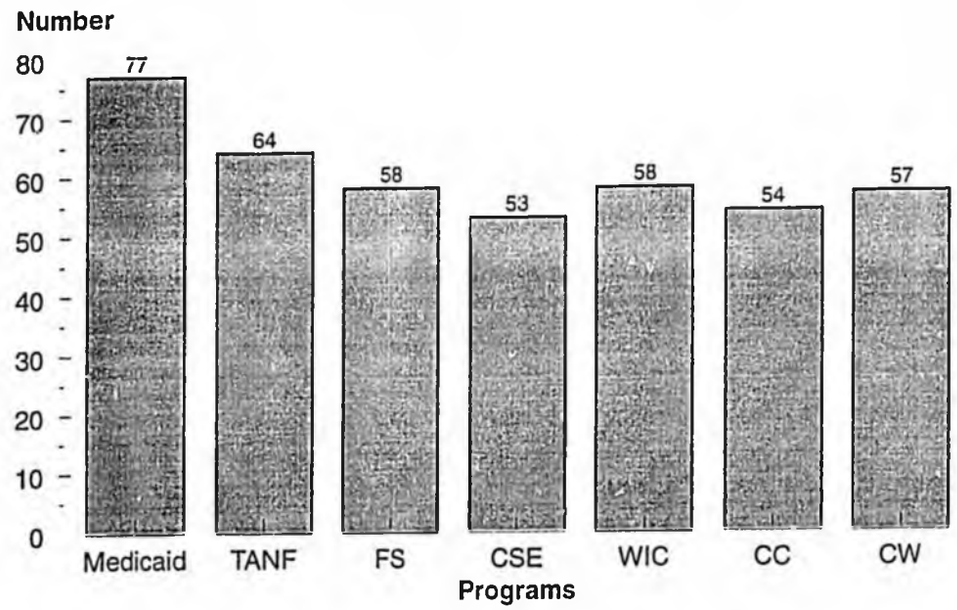
Abbreviations

CC	child care
CSE	child support enforcement
CW	child welfare programs
FNS	Food and Nutrition Service
FS	food stamps
HCFA	Health Care Financing Administration
HHS	Department of Health and Human Services
OMB	Office of Management and Budget
TANF	Temporary Assistance for Needy Families
USDA	Department of Agriculture
WIC	Women, Infants, and Children

Total Number of Reported State Welfare Systems

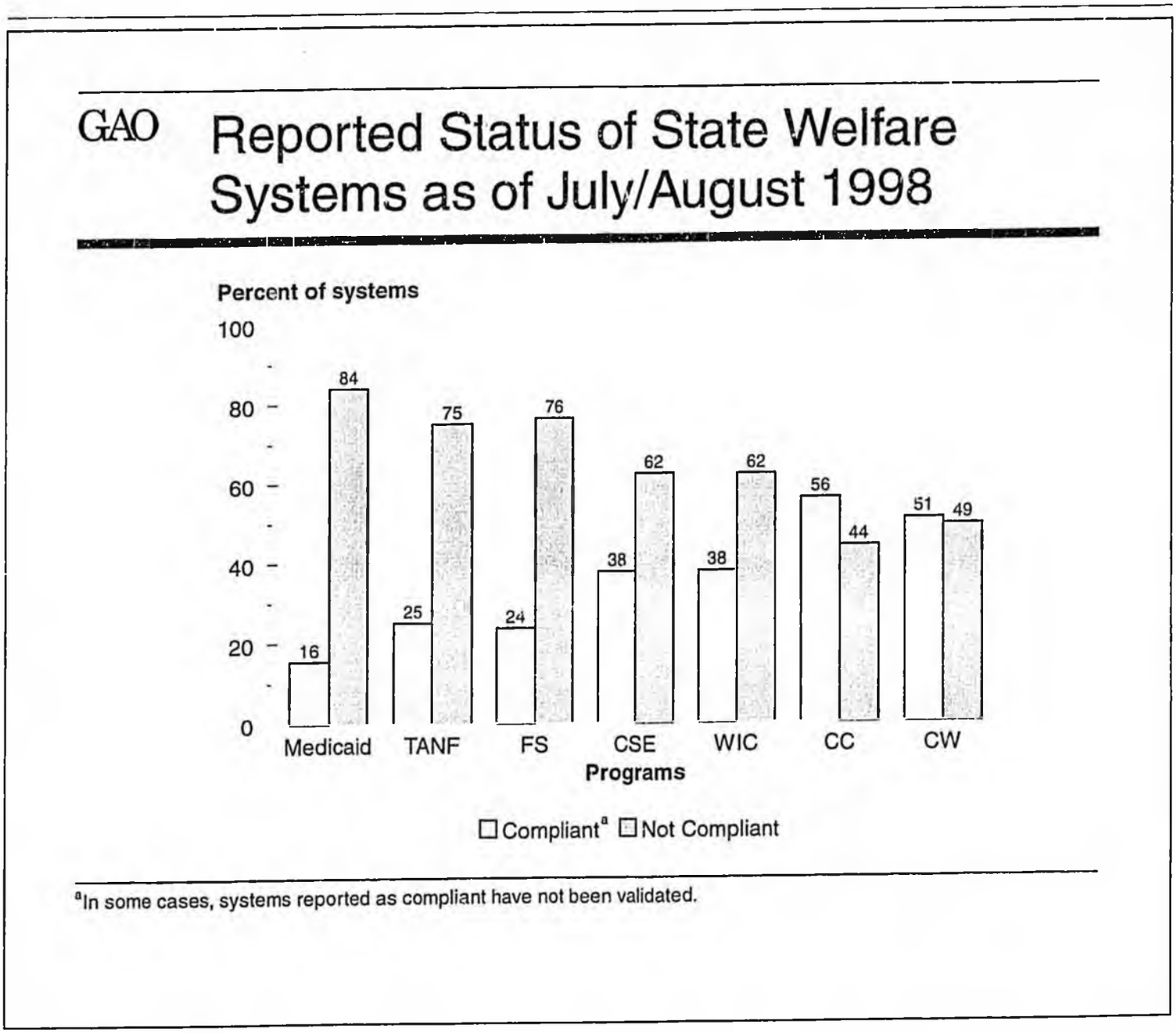
GAO

Total Number of Reported State Welfare Systems



[a] The states operate 421 automated systems to support the seven welfare programs. Several states reported using more than one system to support a program.

Reported Status of State Welfare Systems as of July/August 1998

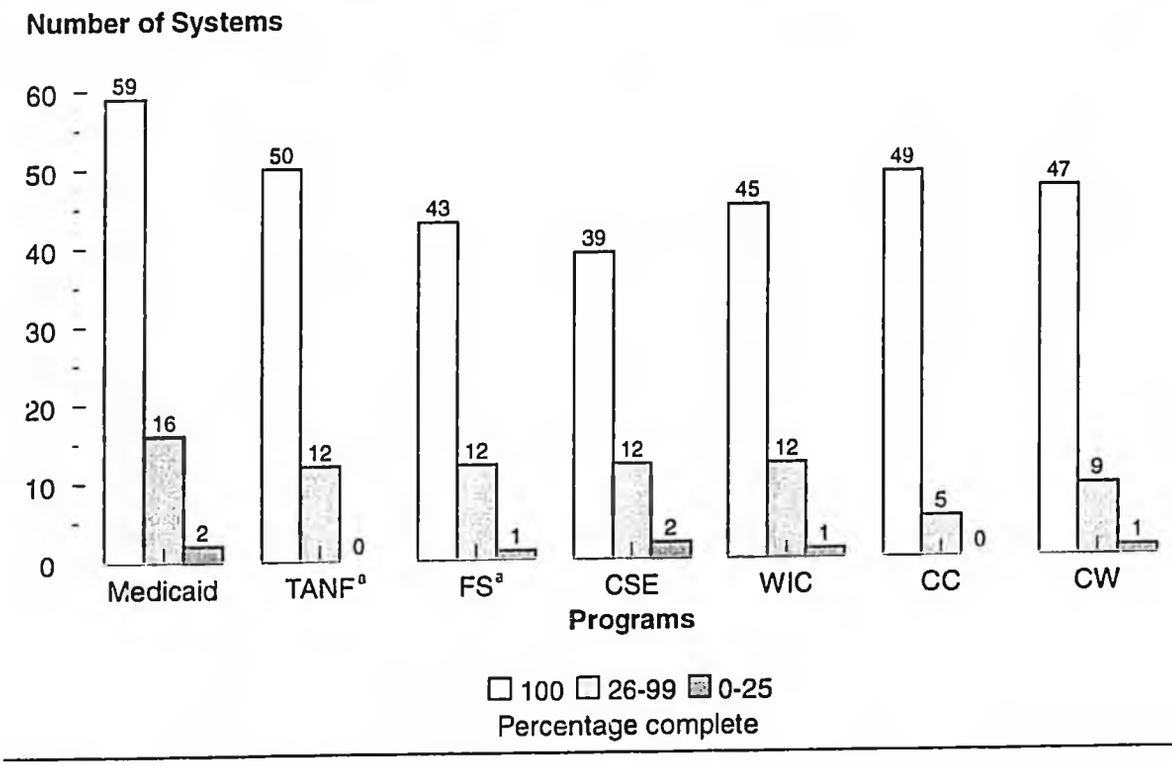


[a]In some cases, systems reported as compliant have not been validated.

Reported Status of the Assessment Phase

GAO

Assessment Phase - Reported Status of Completion

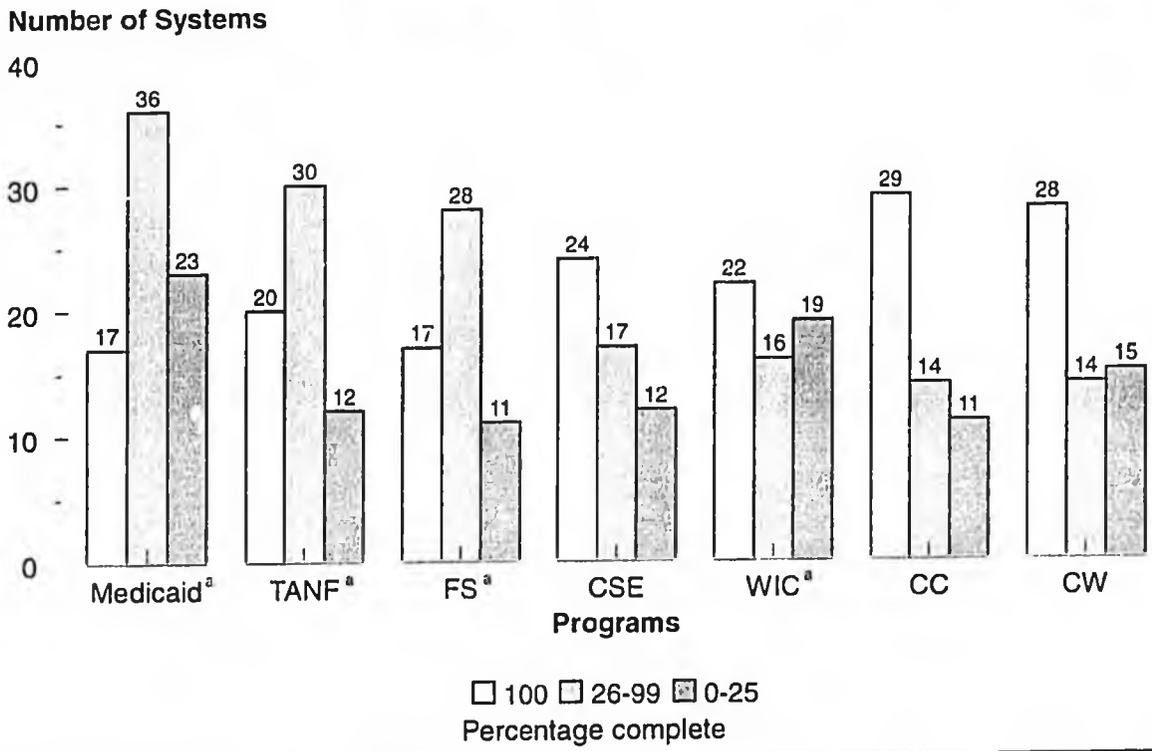


[a]Not all states reported percentage completed.

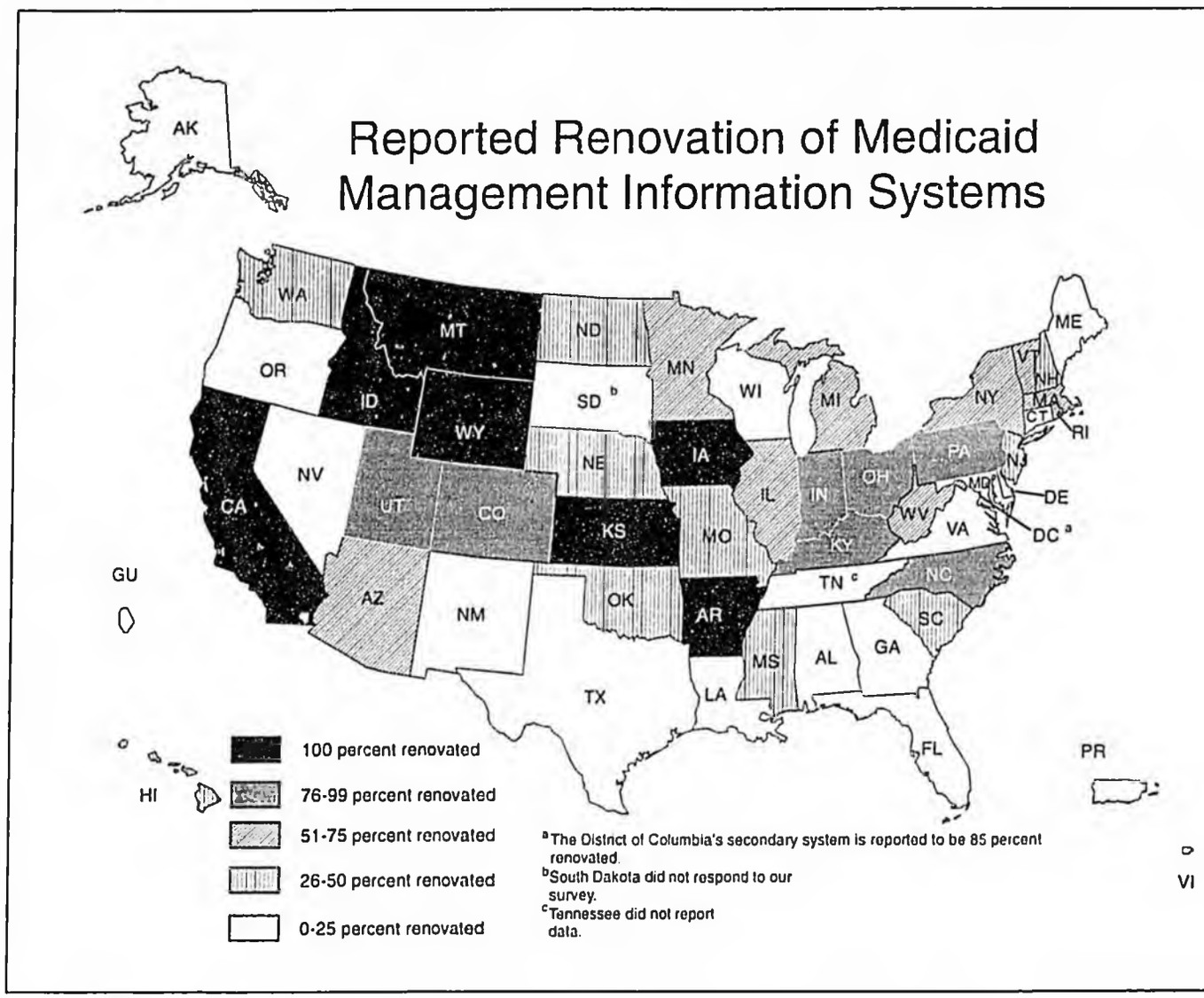
Reported Status of the Renovation Phase

GAO

Renovation Phase - Reported Status of Completion



[a]Not all states reported percentage completed.


Reported Renovation of Medicaid Management Information Systems
AK
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SD
NE
KS
OK
TX
MN
IA
MO
AR
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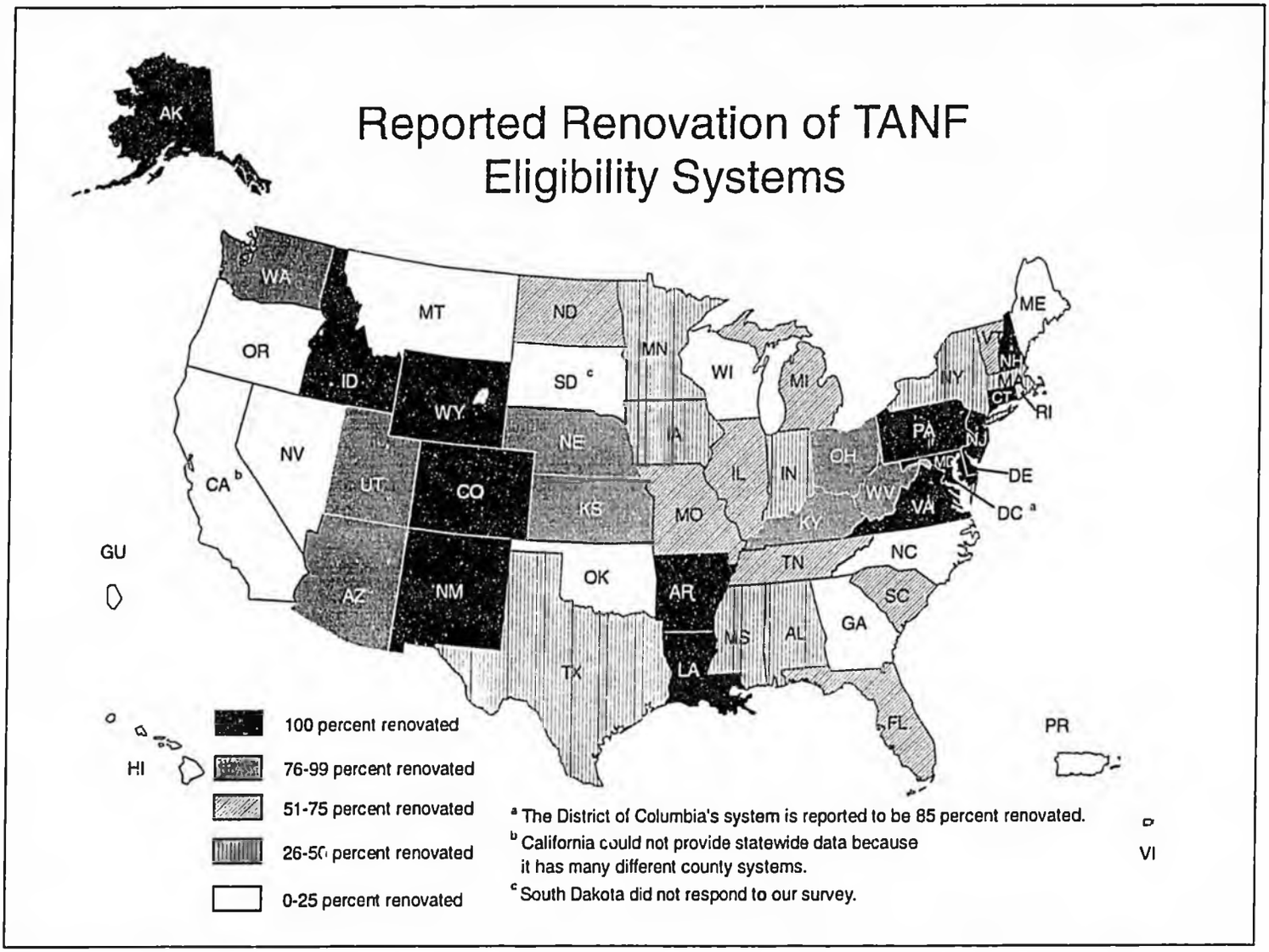
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
MD
DE
DC
NJ
CT
RI
MA
VT
NH
ME
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
[a] The District of Columbia's secondary system is reported to be 85 percent renovated.
[b] South Dakota did not respond to our survey.
[c] Tennessee did not report data.


Reported Renovation of TANF Eligibility Systems
AK
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OK
TX
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MO
AR
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IL
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KY
TN
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OH
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MA
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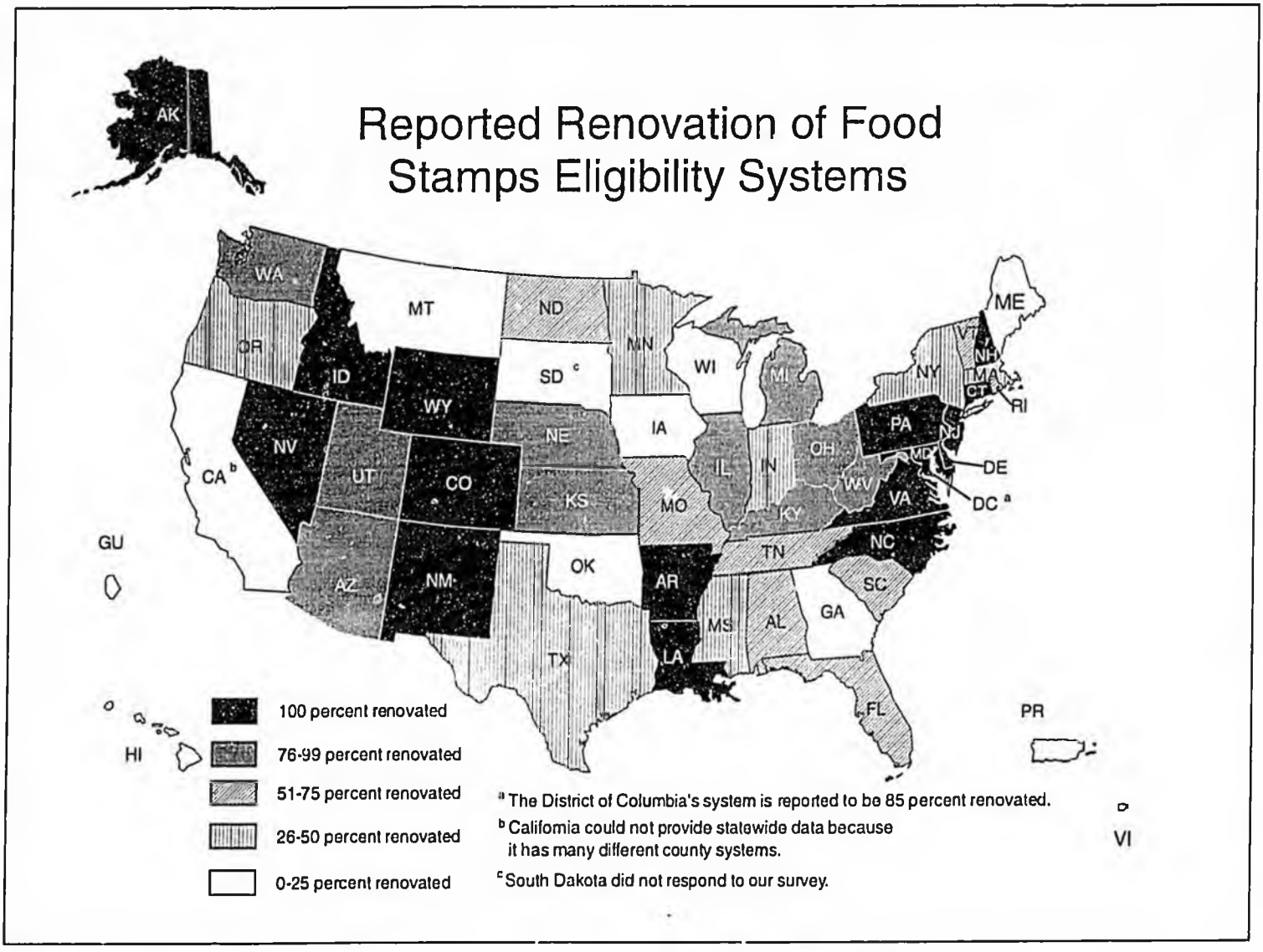
DE
DC a
GU
HI
PR
VI
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
a The District of Columbia's system is reported to be 85 percent renovated.
b California could not provide statewide data because it has many different county systems.
c South Dakota did not respond to our survey.


Reported Renovation of Food Stamps Eligibility Systems
AK
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CT
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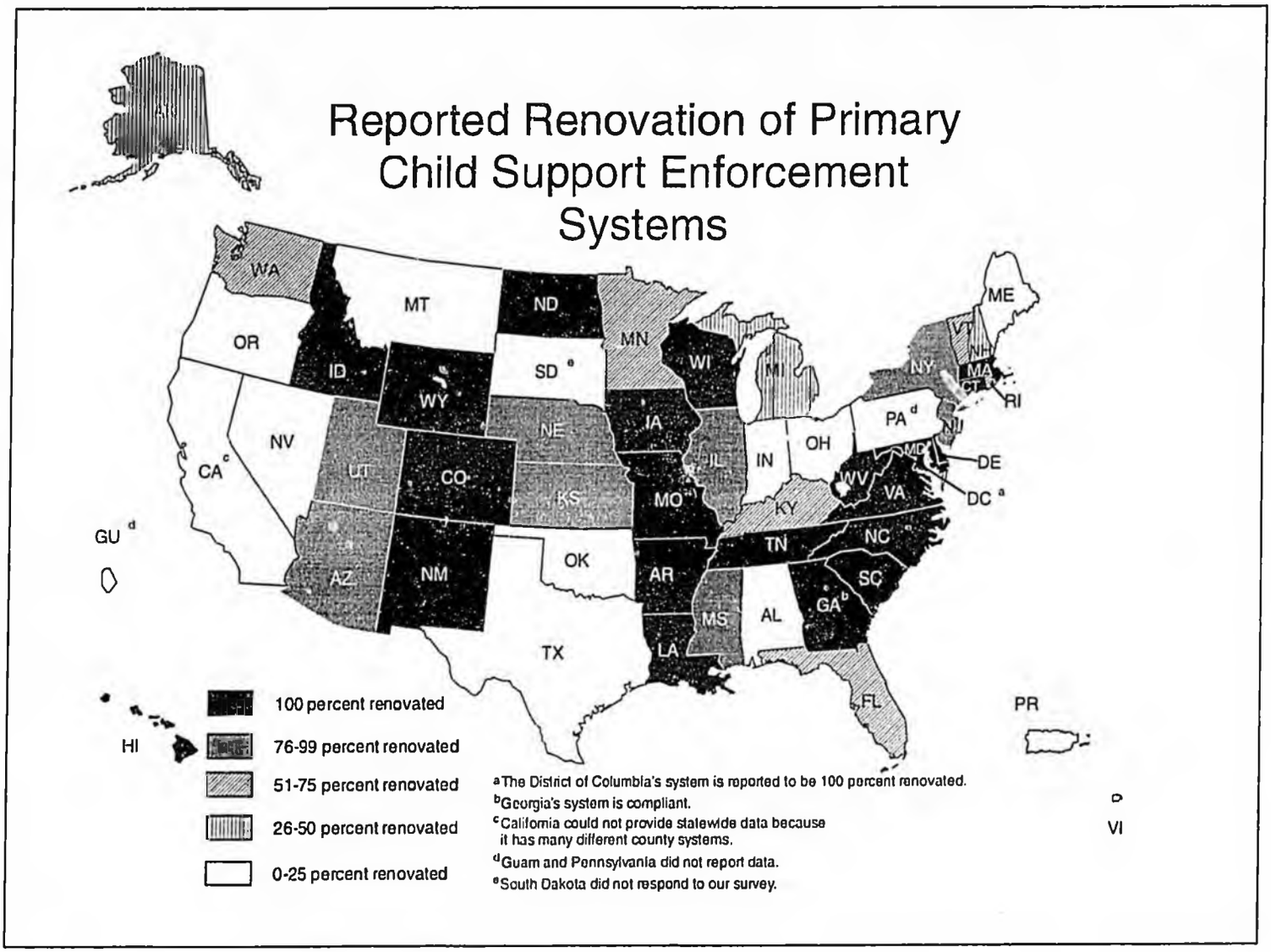
NH
ME
MA
GU
HI
PR
VI
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
a The District of Columbia's system is reported to be 85 percent renovated.
b California could not provide statewide data because it has many different county systems.
c South Dakota did not respond to our survey.


Reported Renovation of Primary Child Support Enforcement Systems
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FL
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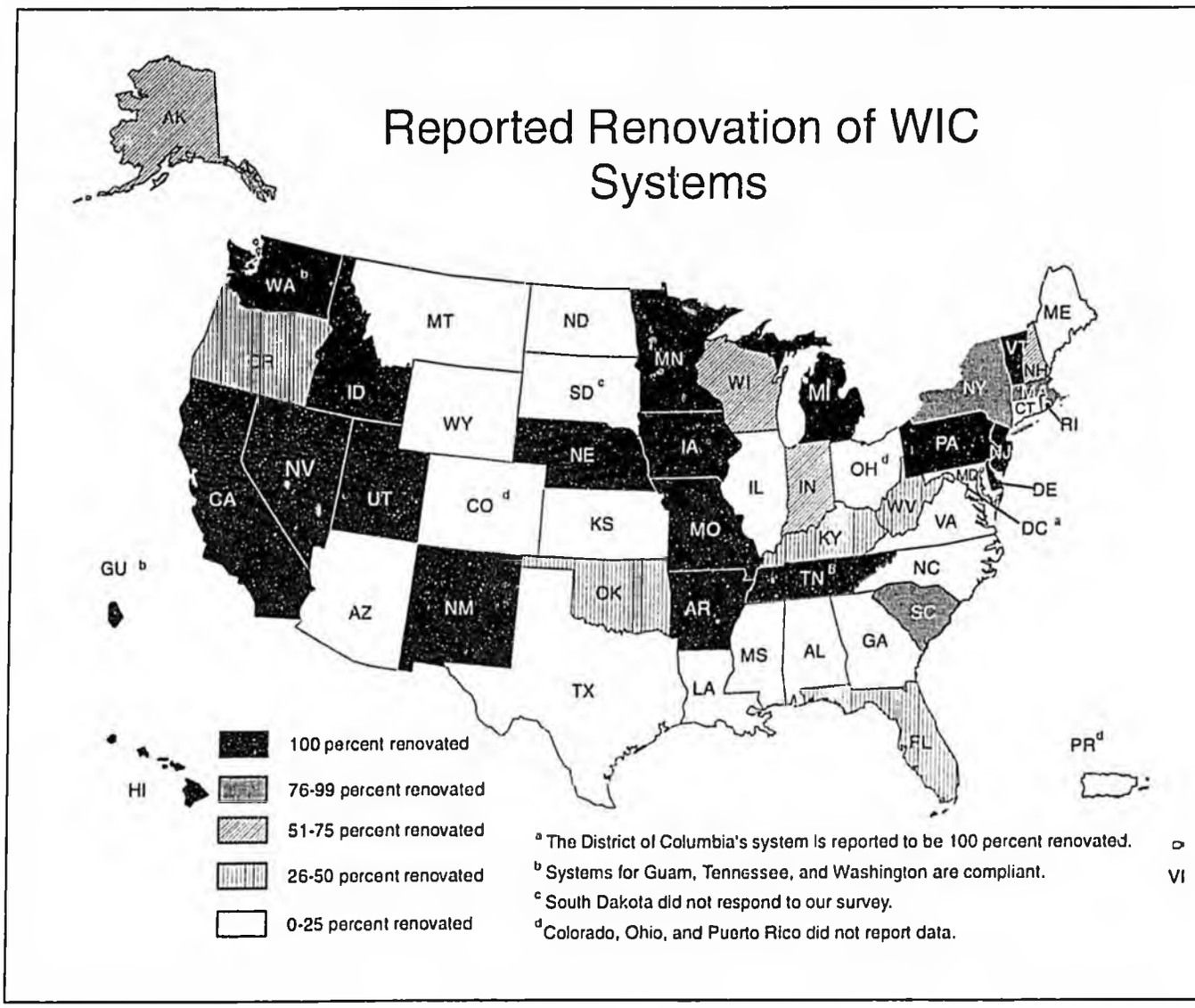
ME
VT
NH
MA
CT
RI
NJ
MD
DE
DC a
GU d
HI
PR
VI
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
a The District of Columbia's system is reported to be 100 percent renovated.
b Georgia's system is compliant.
c California could not provide statewide data because it has many different county systems.
d Guam and Pennsylvania did not report data.
e South Dakota did not respond to our survey.


Reported Renovation of WIC Systems
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CT
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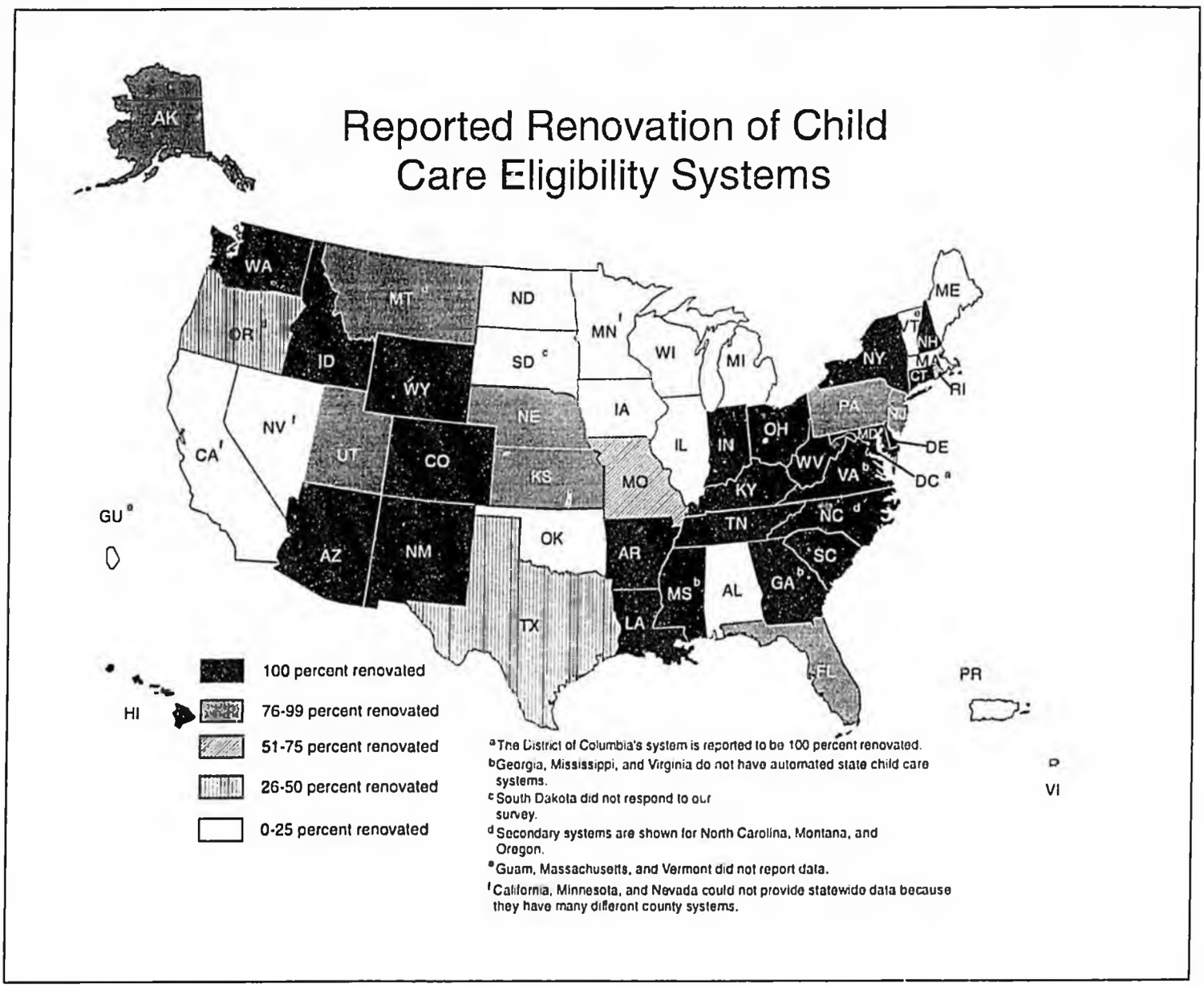
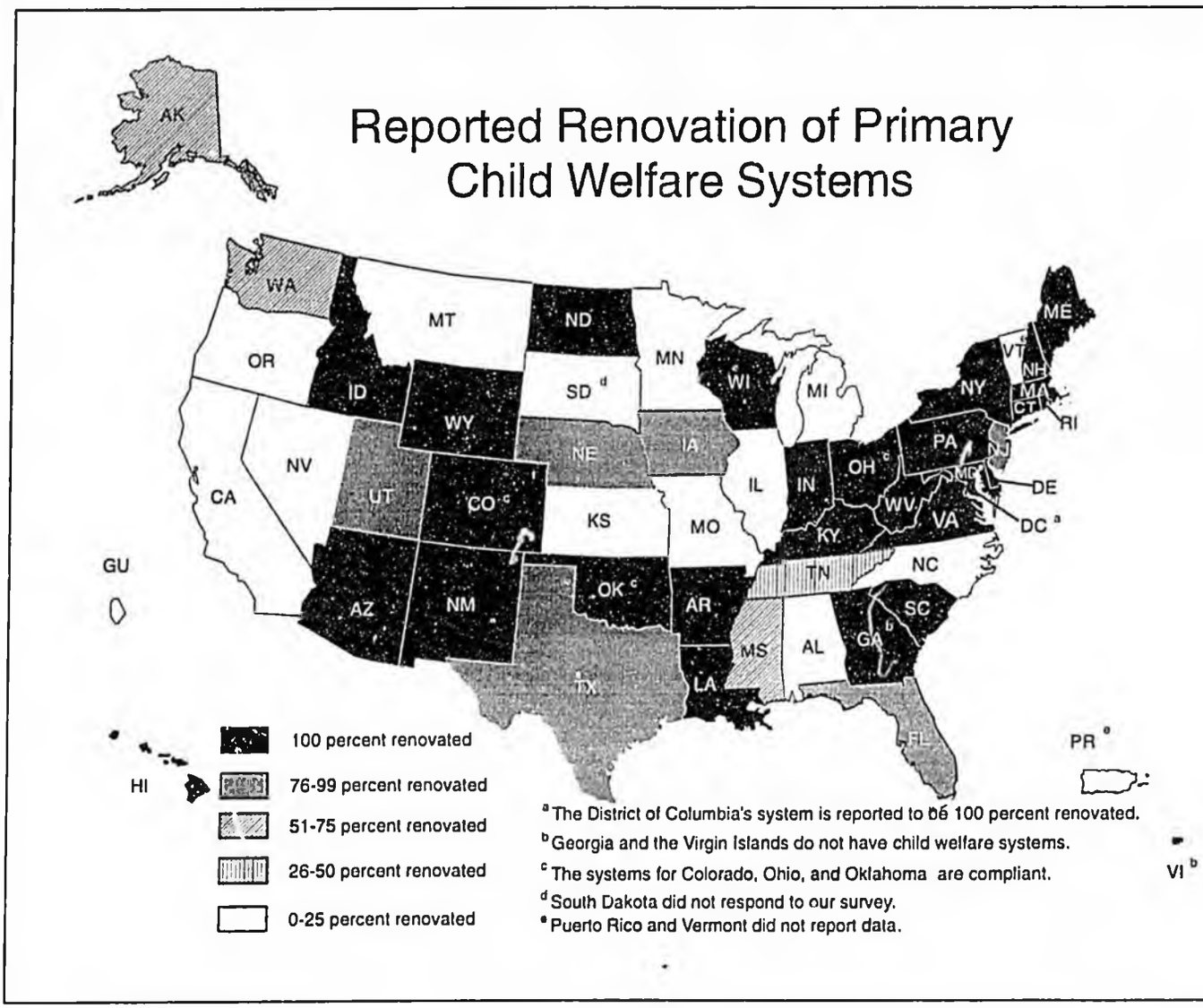
MD
DE
DC [a]
PR [d]
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
[a] The District of Columbia's system is reported to be 100 percent renovated.
[b] Systems for Guam, Tennessee, and Washington are compliant.
[c] South Dakota did not respond to our survey.
[d] Colorado, Ohio, and Puerto Rico did not report data.


Reported Renovation of Child Care Eligibility Systems
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
[a] The District of Columbia's system is reported to be 100 percent renovated.
[b] Georgia, Mississippi, and Virginia do not have automated state child care systems.
[c] South Dakota did not respond to our survey.
[d] Secondary systems are shown for North Carolina, Montana, and Oregon.
[e] Guam, Massachusetts, and Vermont did not report data.
[f] California, Minnesota, and Nevada could not provide statewide data because they have many different county systems.


Reported Renovation of Primary Child Welfare Systems
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CT
RI
MA
VT
NH
ME
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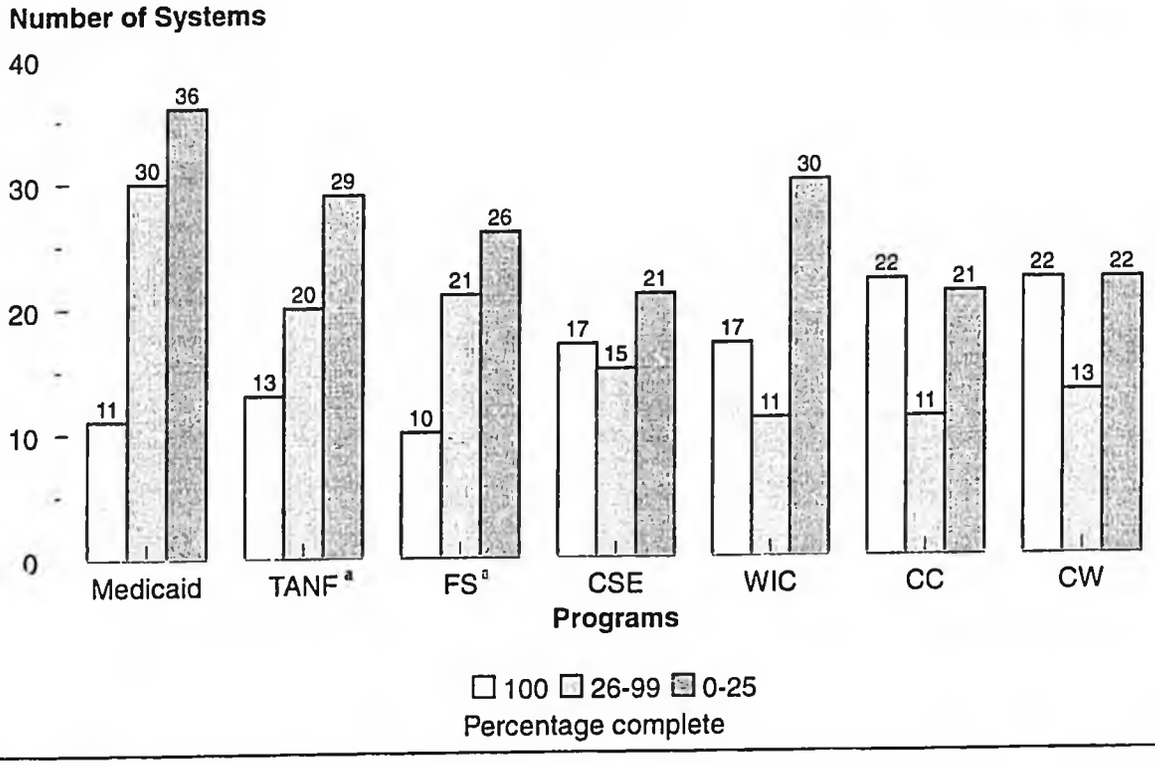
GU
PR e
VI b
100 percent renovated
76-99 percent renovated
51-75 percent renovated
26-50 percent renovated
0-25 percent renovated
a The District of Columbia's system is reported to be 100 percent renovated.
b Georgia and the Virgin Islands do not have child welfare systems.
c The systems for Colorado, Ohio, and Oklahoma are compliant.
d South Dakota did not respond to our survey.
e Puerto Rico and Vermont did not report data.

Reported Status of Validation and Implementation

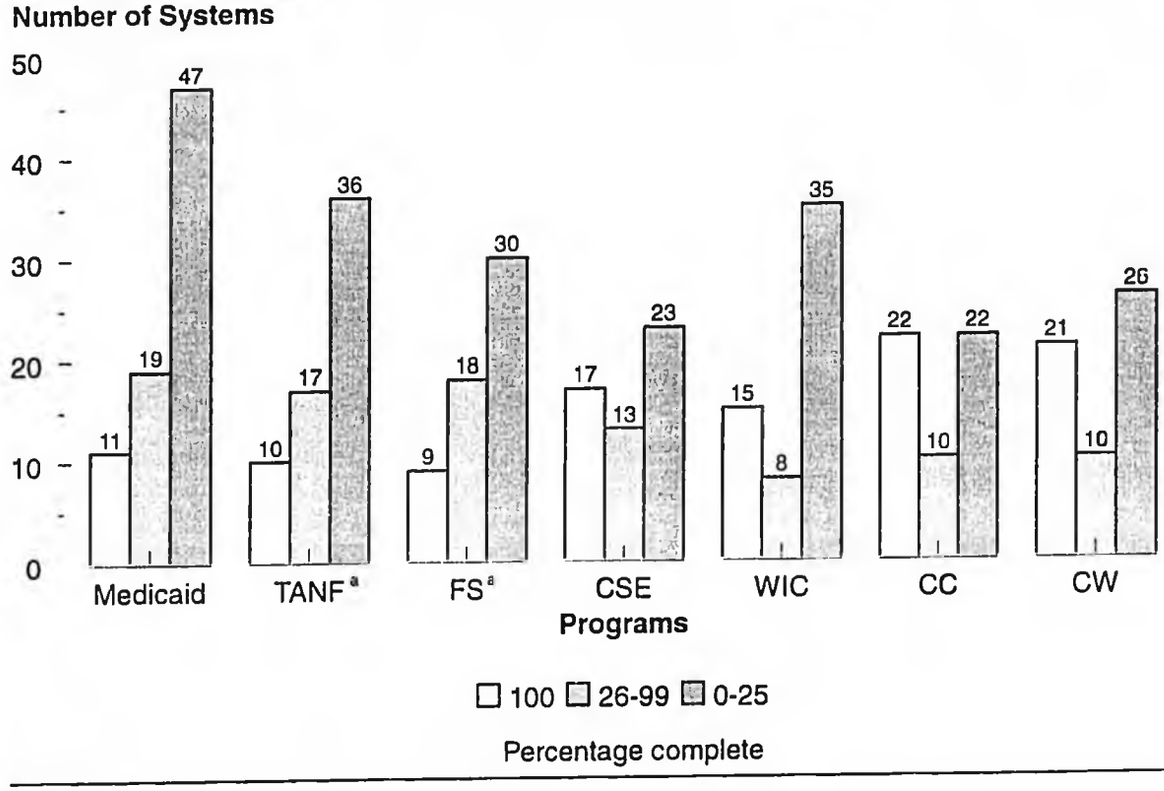
GAO Validation Phase - Reported Status of Completion



[a]Not all states reported percentage completed.

GAO

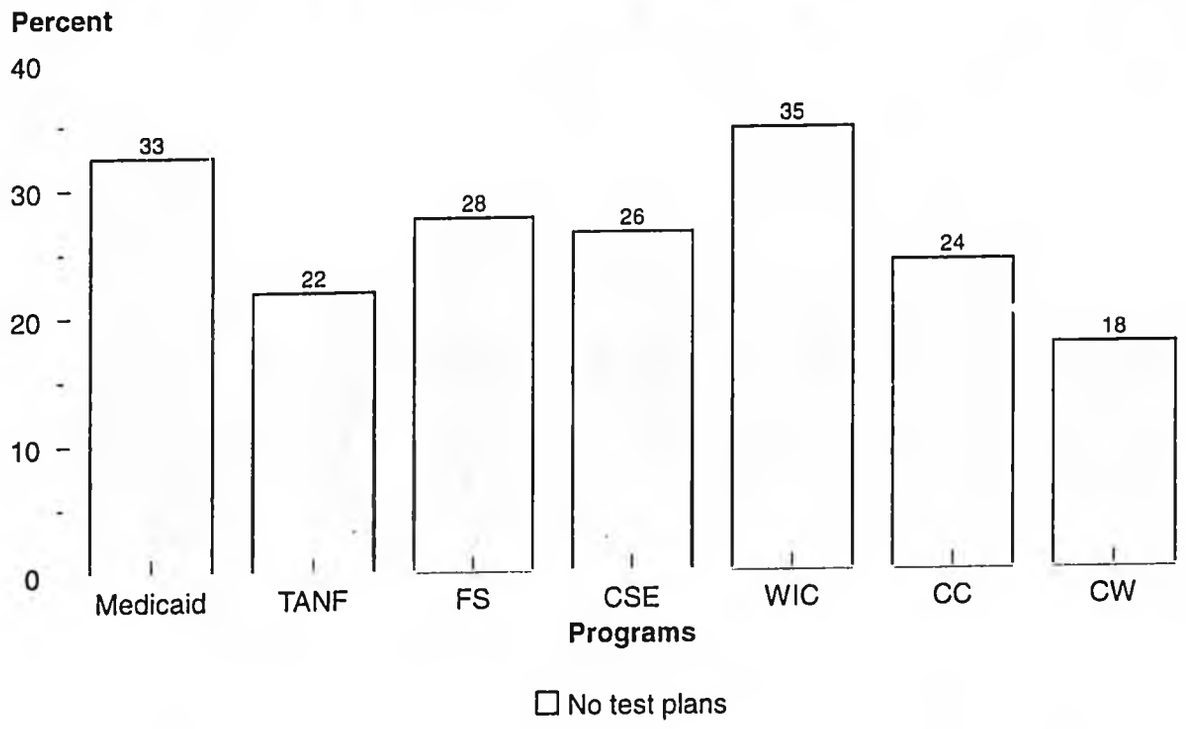
Implementation Phase - Reported Status of Completion



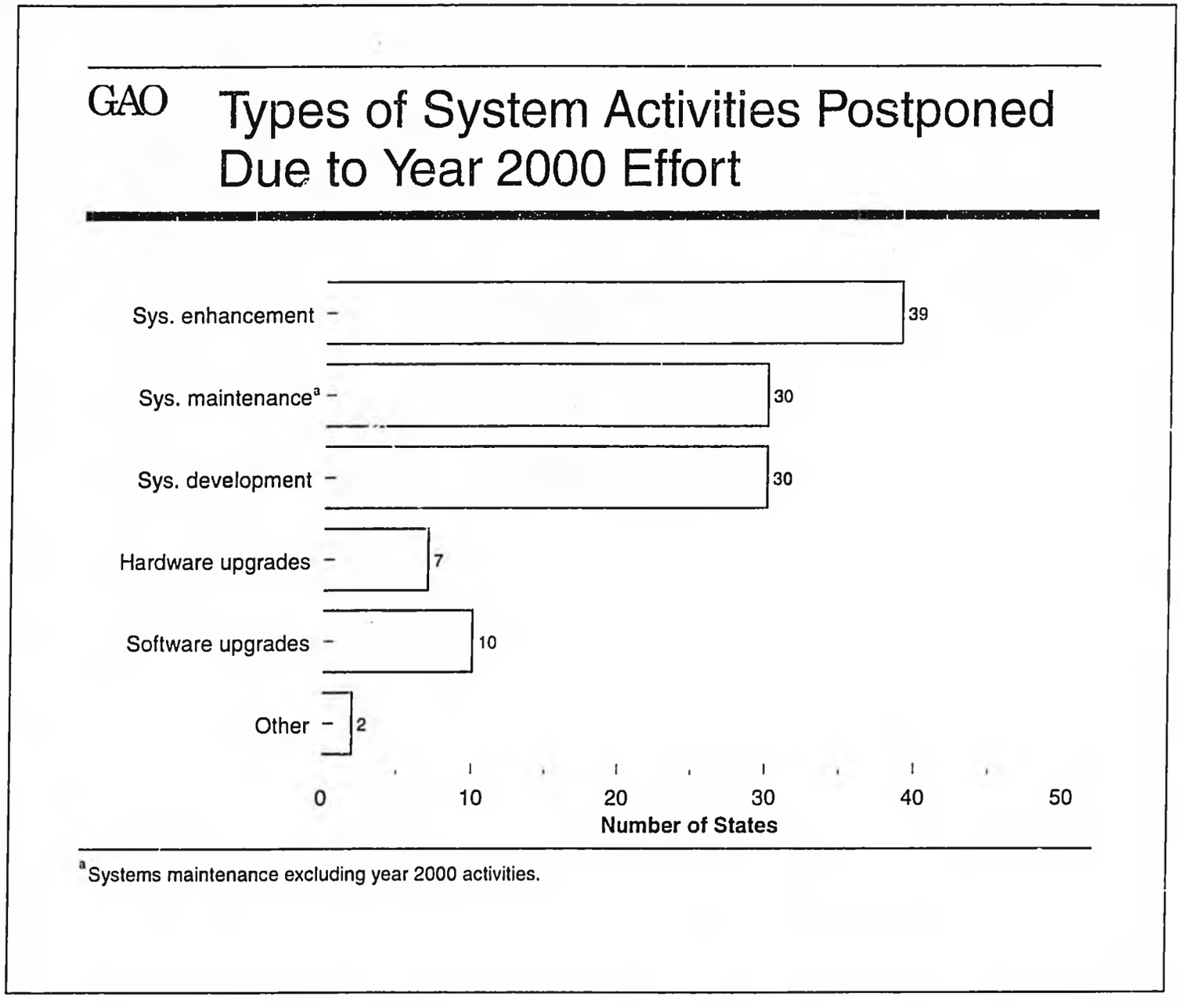
[a] Not all states reported percentage completed.

GAO

Percentage of Systems With No Test Plans Developed



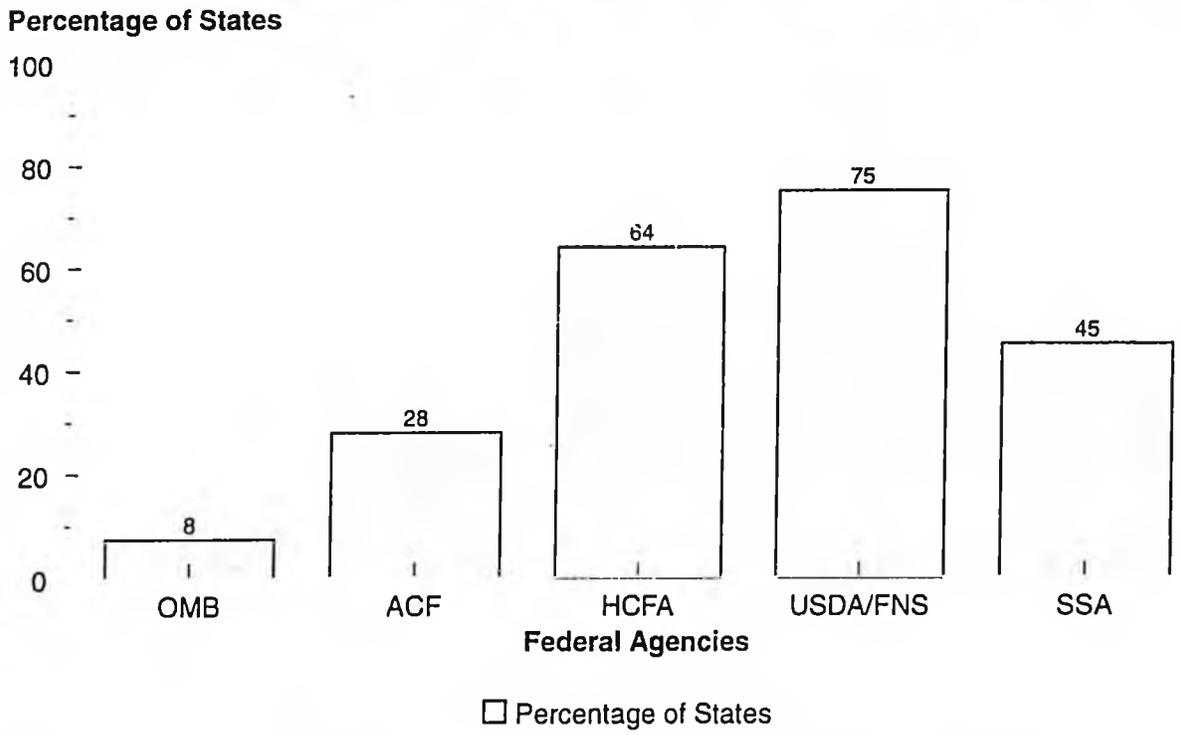
Types of System Activities Postponed Due to Year 2000 Effort



[a]Systems maintenance excluding year 2000 activities.

Federal Guidance

GAO Percentage of States Reporting Year 2000 Guidance from Selected Federal Agencies



GAO

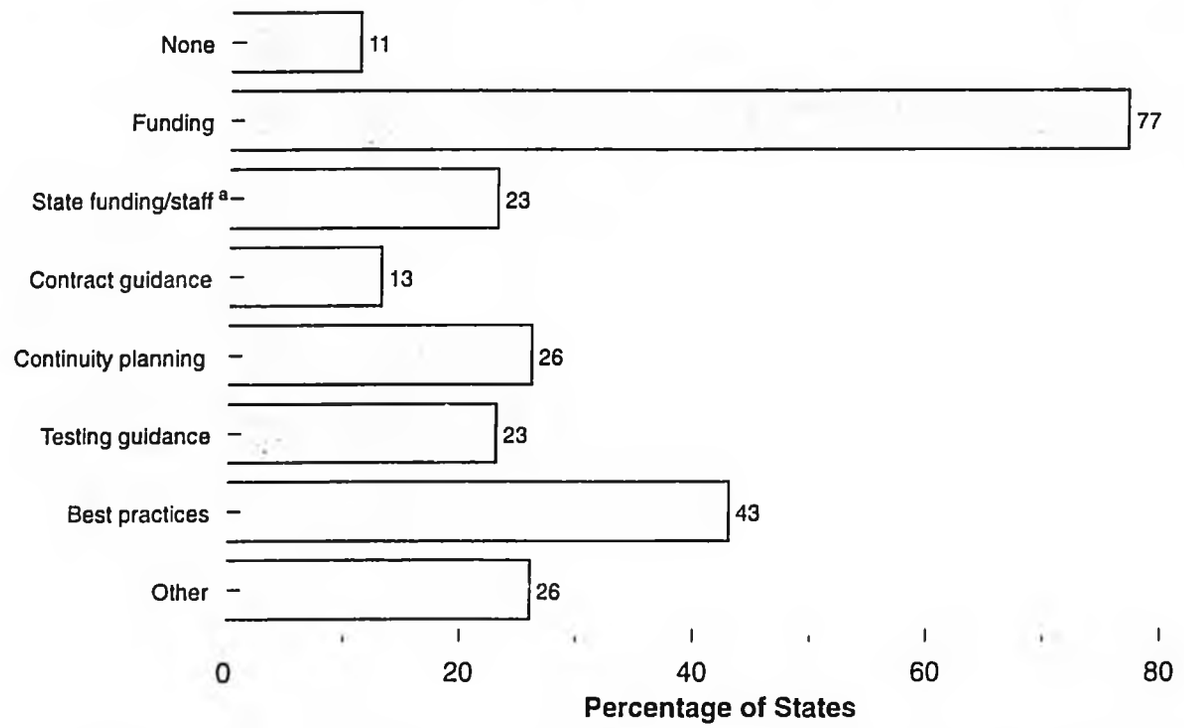
Types of Federal Guidance Received by States

- Date formatting standards for systems
- Planning year 2000 work
- Reporting year 2000 status
- Contingency planning
- Identifying data exchange issues

Additional Support Needed From Federal Government

GAO

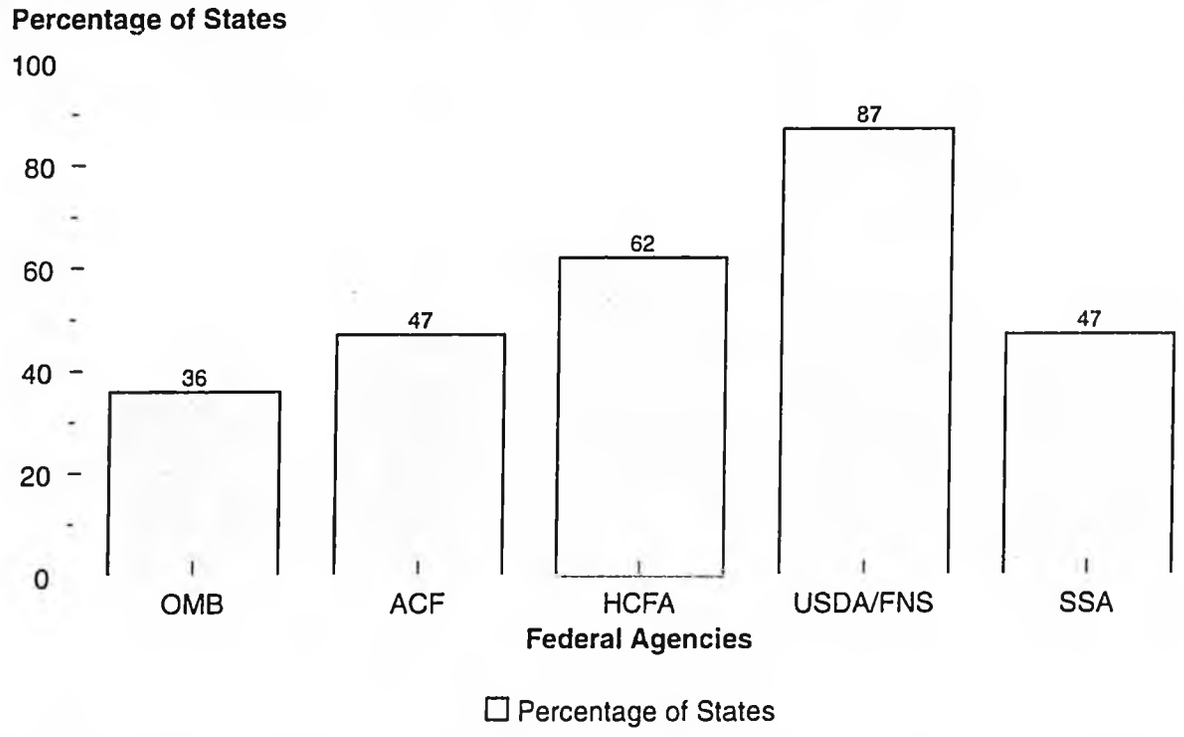
Additional Support Needed from Federal Government



[a]Assistance in obtaining state legislature support for funding and staffing.

Federal Oversight

GAO Percentage of States Reporting Year 2000 Oversight from Selected Federal Agencies



GAO

Types of Federal Oversight Provided

- Required status reports
- Telephone calls
- On site visits
- Focus groups
- Required to include year 2000 activity in Advance Planning Document

Major Contributors to This Report

Accounting and Information Management Division, Washington, D.C.	Mark E. Heatwole, Assistant Director Christie M. Motley, Assistant Director Norman F. Heyl, Business Process Analyst Sharon O. Byrd, Senior Auditor Michael P. Fruitman, Communications Analyst Rina Khemlani, Evaluator
Atlanta Field Office	Amanda C. Gili, Information Systems Analyst Pamlutricia G. Bens, Senior Evaluator Cynthia J. Scott, Senior Evaluator
Kansas City Field Office	John B. Mollet, Senior Evaluator John G. Snavely, Evaluator

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St. Paul Turns to a Bug to Squash a Bug

TO PUBLICIZE the potential problems of the Year 2000 computer glitch, the city of St. Paul is turning to a tool long prized by marketers: a cartoon character.

Millie the Millennium Bug is the star of a public service campaign on the Internet, cable television, radio and in newspapers. Its goal is to create awareness that all sorts of electronic devices could go haywire as the year 2000 begins. "It's not intended to scare the pants off people," says Erich Mische, executive vice president of Media Rare, the public relations firm running the campaign for the city. Rather, he says, it will explain the glitch and tell people where to get information and assistance. Public Technology Inc. and local government associations recommend that governments include community awareness in any Year 2000 strategy.

One thrust of the St. Paul campaign (www.stpaul.gov/millie/) is to alert residents and businesses that it's not just computers that could fail: Electronic devices such as elevators and programmable thermostats could too.

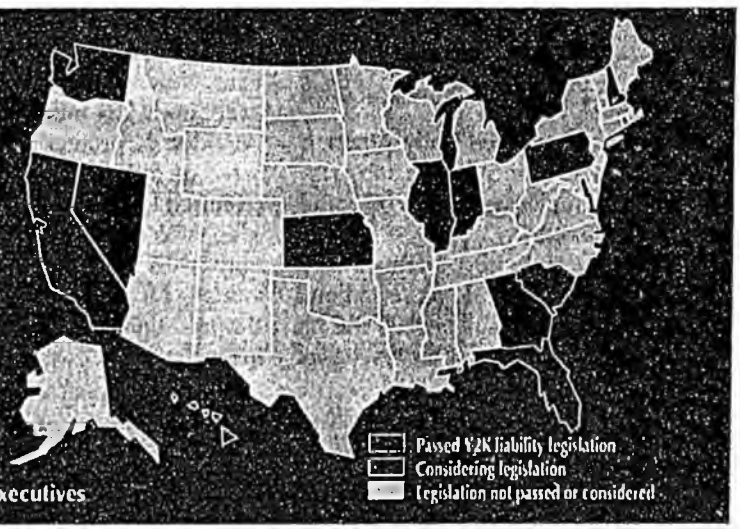
Thermostats certainly are an important issue for Minnesotans in the dead of winter. The city leadership is concerned that if hundreds or thousands of them malfunction, the city may need to find a warm place for people to stay come January 1, 2000. "We as a city have to be prepared," says Peter Hames, director of the Technology and Management Services Department. To that end, St. Paul has budgeted $2.6 million next year for making sure the city's computers and other electronic devices will work properly in the next millennium.

That, however, won't help residents and businesses overcome their own Y2K problems, which is where the Millie campaign comes in. "We're going to take as much leadership responsibility as possible," says Hames, "but in a lot of cases individuals will have to take care of the problem." *—Ellen Perlman*

PASSED = WA NV GA

THE Y2K LOOPHOLE

While every state is working to keep government computers from melting down when the clock ticks over to January 1, 2000, at least three states have gone a step further: As of late September, they had passed legislation to limit their legal liability for problems caused by computer malfunctions resulting from the century date change.



Source: National Association of State Information Resource Executives

INTERNET VOTING: A LITTLE CLOSER

MILLIONS OF AMERICANS will go to polling places to cast ballots this month, but in November of the year 2000, some of them may be going to their computers instead.

The era of Internet voting will inch closer this spring when a mock election is held in cyberspace. Dozens of U.S. military personnel stationed overseas will send ballots over the Internet using specially developed encryption software. The overseas electorate is seen as fertile ground for Internet voting because of the long time it takes to mail election materials back and forth.

Making the process secure and fraud-free was originally the biggest concern, but that worry is fading, says Linda Lunceford, clerk for Weber County, Utah, which is participating in the mock election.

"The biggest challenge is translating the ballots into HTML format for the Internet," she says. "In our county, there are around 40 different ballot formats, and we don't get them until close to the election date. In larger districts, there are hundreds of formats."

The project is being run by the Pentagon's Federal Voting Assistance Program. It is hoped that the system will get a live test in the year 2000 elections.

Meanwhile, Florida is also looking at Internet technology for more routine use in elections. The state is hoping to test a system next year, perhaps in a university's student government election. The idea is not only to provide remote access to the polls but also to revamp the technology used at the polling places themselves. Electronic voting machines now in use run $5,000 to $7,000 apiece, notes Paul Craft, a computer audit analyst with the state elections division. "With an intranet set up in each precinct, it would lower the cost of each machine to $1,000 or less and save a huge amount in paper costs." *—Christopher Swope*

Anchorage Daily News

WINNER PULITZER PRIZE GOLD MEDAL FOR PUBLIC SERVICE 1976 1986

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Y2K

Cold eye on the computer countdown

In 13 months does the brave new world turn into a pumpkin? That's when the clock strikes 12 on a thousand years of history. It should be a good time for philosophers, poets, theologians, dreamers, historians, futurists and revelers.

So far, most of the attention is going to computer technicians. Never mind the heart of humankind; it's the chip's flaw that needs work, for the sake of civilization as we know it.

Well, not quite.

. The confluence of millennial fever, our dependence on computers and a historic two-digit glitch has led some people to take a survivalist's view of the calendar. They see chips tripping over double zeros and chaos in systems from banking to electric power to law enforcement.

This is the result of thrift earlier in the century, when computer memory space was expensive and programmers were trained to save it. One way to save space was to cut the 19 off the years, a common shorthand. That didn't give computers an accurate way to read the year 2000, or Y2K, except to read it as 1900.

This decision could play hell with accounting, navigation and payrolls. Not to mention emergency communications and your local automated teller machine.

We've been warned before, but as the days go by the sense of urgency grows. The problem is real and pervasive. Bob Poe, the state of Alaska's senior project manager for the Y2K Project Office, has simple advice for Alaskans: Don't panic or try to prepare for the end of the world. Relax and prepare for inconvenience.

Mr. Poe's office has been up and running since early this year. Some other state agencies began work on the Y2K problem several years earlier. Mr. Poe said the state has identified 89 "mission-critical" areas that take priority for Y2K compliance. Those involve life, health, safety and economic well-being. Alaskans will be glad to know that the Alaska Permanent Fund accounting and portfolio systems appear to be in good shape.

But while Mr. Poe doesn't see apocalyptic horrors in imbedded chips with two-digit dates, he stresses that the trouble can't be ignored.

"Nobody's been through this before," he said. "It's not just some bureaucrats whining about computers. ... I can guarantee now things are gonna go wrong."

Mr. Poe has worked with both state agencies and private businesses to tackle the problem. He suggests six steps:

1) Do an inventory of your computer systems.

2) Does the system have a Y2K problem? If it makes any decisions based on dates, chances are it does.

3) Figure out how to fix the problem. "There's no silver bullet," Mr. Poe said. "No software genius has come up with one way to solve all the problems." In some cases, it's as simple as contacting the manufacturer for updated software and buying it.

4) Test the changes.

5) Implement the new system.

6) Make a contingency plan, a backup to use if something unforeseen happens at the turn of the millennium. You may have your systems in good shape, but you may be connected with other systems that are not.

"Most of this stuff can be fixed if you focus on it now," he said.

For individuals and families, Mr. Poe recommends some common-sense preparation for brief disruptions of some automated services and shortages of goods. He said that he intends to take some extra cash out of the bank and stock up on a few weeks' supply of food. Not because he expects a breakdown in the social order, but because the expected foul-ups may leave Alaska on the short end of supplies for a while.

As for the complete collapse of all the computer-driven machinery of society, Mr. Poe says that's the realm of fiction, not fact. "Nobody's found a car yet that won't start because of Y2K. My VCR is gonna blink just as well after the year 2000 as it does now."

The clincher, Mr. Poe said, is to get Alaskans working together to solve the problems now, and working together to deal with the ones that crop up as soon as June 30, 1999, the end of Alaska's fiscal year.

His office will ask the Legislature for about $16 million this year. Legislators should swiftly grant the request and let Mr. Poe and his colleagues do their work.

Mr. Poe invites Alaska individuals and business to get more information and assistance at the Y2K Project Office web site. The address is www.state.ak.us/y2000.

Knowles names computer bug czar to Cabinet post

DEC. 17 '98

By ROBERT KOWALSKI
Daily News Juneau Bureau

JUNEAU — A longtime state administrator who's worked for the Legislature and the administrations of several Alaska governors will take over as commissioner of the state Department of Administration next year, Gov. Tony Knowles said Wednesday.

Knowles appointed Bob Poe, 44, to replace outgoing Commissioner Mark Boyer as head of the department.

As administration commissioner, Poe will oversee state employee contracts and various agencies including the Alaska Public Offices Commission, the Pioneers' Homes, the Division of Motor Vehicles, and the Oil and Gas Conservation Commission.

Poe currently is coordinator of the state's efforts to prepare for the so-called Y2K problem associated with the effect of new dates at the turn of the century on computers and other electronic devices. He will continue that task in his new post.

Poe "has an extraordinary background in both public and private service," Knowles said in announcing the appointment.

"Certainly with low oil prices, Y2K and all of the bargaining unit negotiations coming up this year, we'll have our hands full," Poe said. "The way we're going to get that work done is through teamwork."

State Sen. Sean Parnell, an Anchorage Republican, praised Poe's work on the Y2K issue. "I can understand why the governor would make the appointment," Parnell said.

One of the chief tasks Poe will handle when he takes over the administration department is pending labor negotiations with state employee unions.

The state has contracts coming up for renewal with 12 bargaining units including about 12,000 of the 14,500 state employees outside of the University of Alaska system, said Alison Elgee, deputy commissioner of administration.

The Legislature is likely to demand that new state employee contracts contain no net increase in cost, said Rep. Brian Porter, an Anchorage Republican and the incoming speaker of the House.

Please see Page B-3, POE

Continued from Page B-1

State finances are expected to dominate the upcoming legislative session as the Kowles administration and lawmakers begin work on the fiscal year 2000 state budget. The state is facing a projected shortfall of more than $1 billion due to depressed oil prices.

Poe will be paid $83,844 when he takes over as commissioner of administration after Boyer leaves on Jan. 3. His appointment must be confirmed by the Legislature.

The administration department has about 1,500 employees and a general fund budget of $173 million this year.

Poe has a master's degree in business administration from the University of Missouri.

He joined state government in 1983, and has worked as deputy commissioner in the Department of Transportation, director of administrative services for the Department of Environmental Conservation and director of the Office of International Trade.

Reporter Robert Kowalski can be reached at rkowalski@adn.com.

LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM

December 15, 1998

SUBJECT: State liability for Y2K (Work Order 21-LS0193)

TO: Representative Joseph Green

FROM: Michael F. Ford
Legislative Counsel

You have asked what potential civil liability the State may face resulting from the Y2K situation. This memo will discuss the general principles of civil liability that would apply in this situation.

There is no question that many functions performed by State agencies rely on computers and computer data bases. It is possible that the Y2K problem could result in failure or disruption in some of these systems. For example the criminal justice system data base could produce false or incomplete information, state payroll systems could fail, or confidential information could be inadvertently disclosed. Determining the magnitude of the problem is extremely difficult given the pervasive use of computers and data bases to perform so many agency functions. To complicate matters further, many agencies share data with other systems. So even assuming that all agency systems are fixed, external computers connected to State systems could cause problems for the State.

Generally speaking, in determining liability the State is held to the same standard of care that applies to a private individual. State v. Abbott, 498 P.2d 712 (Alaska 1972). However, unlike an individual, the State will likely be able to claim at least partial immunity from tort claims relating to Y2K. Under AS 09.50.250 certain tort actions are barred. If the claim relates to the State's failure to adequately plan for the Y2K dilemma, the claim would likely be barred by AS 09.50.250. However, if the claim results from systems design, not planning, it would likely not be barred by immunity granted under AS 09.50.250. Basically once the State undertakes to address the problem at an operational level, the State has a duty to do so in a nonnegligent manner. For example, the State has been held liable for negligent design of an airport runway (Japan Air Lines v. State, 628 P.2d 934 (Alaska 1981). Another example involves State-maintained highways. The decision to maintain a highway is a planning decision for which the State is immune from liability under AS 09.50.250. However, once the State decides to maintain a highway, the State has a duty to do so in a nonnegligent manner. State v. Abbott, supra. Another example is fire safety inspections. The State is not liable for failing to inspect a building for fire safety violations. But once the State does an inspection and discovers fire code safety violations, it is liable for failure to enforce the safety code. Wallace v. State, 557 P.2d 1120 (Alaska 1976). In short, planning

or policy-making decisions made by State officials are considered discretionary acts that do not give rise to tort liability. Conversely, decisions that implement policy or are operational in nature are not considered to be discretionary and are not protected by statutory immunity offered under AS 09.50.250.

Assuming litigation does occur and the claim is not barred by AS 09.50.250, a claimant would still have to prove certain elements in order to successfully bring a claim for negligence. First the claimant has the burden to prove that the State had a duty to the claimant to meet a certain standard of conduct, usually that of acting in a reasonable manner; second, that the State failed to meet the standard required or failed to act as a reasonable person would; third, there was a sufficiently close connection between the State's conduct and the resulting injury; and finally, that the claimant suffered actual loss or damages. Punitive damages cannot be awarded against the State under AS 09.50.280.

While there is potential for the State to be a defendant, there is also potential for the State to be a claimant. Depending on the process used by the State to address the Y2K problem, the State may have a claim against hardware or software vendors, consultants, or manufacturers. See Sierra Diesel injection Serv. Inc. v. Borroughs Corp., 874 F.2d 653 (9th Cir. 1989). Finally, it should be noted that the Legislature could amend existing law to provide specific immunity for claims against the State resulting from Y2K. This could be done by amending AS 09.50.250 to include claims resulting from Y2K, essentially making the State immune to this particular civil claim.

If you have any questions on this matter please contact me.

MFF:jdr
98-319.jdr

MEMORANDUM

State of Alaska
Department of Law

TO: Bruce M. Botelho
Attorney General

DATE: October 7, 1998

FILE NO:

TEL NO: 465-3600

SUBJECT: Possible effect of Alaska Supreme Court decision on proposed subsistence amendment

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

You have requested an analysis of how the Alaska Supreme Court's recent opinion in Bess v. Ulmer, ___ P.2d ___, No. S-08811/08812 (Alaska September 22, 1998) would apply to a constitutional amendment establishing a priority for subsistence uses of fish and game.[1] In Bess the Court determined that the legislature's power to propose a change in the text of the Alaska Constitution is limited to amendments which are changes that are "few, simple and independent." The legislature may not propose revisions, basic changes to the form of government established in the constitution, or changes that substantially affect more than one article of the constitution. A proposition offered by the legislature as an amendment was removed from the 1998 general election ballot because the change proposed would have amounted to a revision to the constitution. According to the Court, a revision may only be proposed to the voters through action by a constitutional convention, not the legislature. See Alaska Const. art. XIII, §§ 1 and 4.[2]

In Bess, the court undertook the evaluation of three proposed amendments. The principal attack was against the marriage amendment.[3] However, two other proposed amendments

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[1] For the purpose of this memorandum, it is assumed that the proposed amendment would be similar in content to SJR 101 under consideration by the Twentieth Alaska State Legislature during its first special session. It is difficult to provide a complete analysis of this issue because the Court has not yet rendered a full opinion in the case and is not expected to immediately do so. This analysis must focus on the preliminary opinion and order which briefly outlines the reasons for the decision on the grounds for appeal. The case was heard on an expedited basis requiring the Court to use a shorthand method for announcing the result in a timely manner so that the division of elections could proceed with ballot preparation. It is expected that the Court will more fully explain the basis for decision in a way that may lend more clarity to the question addressed here.

[2] Bess Prelim. Op. at 2. An amendment would make changes of this nature, while a revision would not. The Court also associated this standard with the idea that an amendment is one that is easy to express to the voters and can be understood by them. Id. at 6.

[3] The marriage amendment was passed by the Twentieth Alaska Legislature during its second regular session in the form of HCS CSSJR 42(RLS) and is formally designated as Legislative

(continued...)

were implicated when the appellants argued that by offering three amendments, the legislature was attempting to revise the constitution without first convening a constitutional convention to adopt the proposals. These other amendments included the amendment restricting prisoners' rights to federal rights and the amendment reorganizing the reapportionment process.[4]

In its decision, the Court addressed the contention that collectively and individually these amendments constituted a "qualitative" revision of the state constitution. This contention involves a claim that a proposed amendment makes such basic changes to the form of government established in the constitution that something more than an amendment is being proposed to the voters.

The Court rested its analysis on a rationale developed by the Supreme Court of California. There has been only one reported case in which a California court annulled a purported amendment to a state constitution on the grounds that it was an impermissible revision.[5] That case is Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990).

The Raven court was considering a challenge to an initiative, entitled by its framers as the "Crime Victims Justice Reform Act," which altered various California constitutional provisions and statutes relating to criminal law and procedure. The Court upheld all of the challenged provisions against revision/amendment attack, except for one. It annulled a constitutional amendment that provided:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded

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[3] (...continued)
Resolve 71. This amendment would define marriage as being solely between a man and a woman.

[4] The prisoners' rights amendment, formally designated Legislative Resolve 59, would limit the rights of state prisoners to whatever rights they may have under the federal constitution. Legislative Resolve 74 proposes amendments to the article on legislative apportionment and would establish a redistricting board.

[5] This does not include cases where the purported amendment was unquestionably a revision. See, e.g., Holmes v. Appling, 392 P.2d 636 (Or. 1964) (upholding the secretary of state's refusal to prepare a ballot title for a "proposed constitutional amendment" which would have repealed the existing constitution and adopted an entirely new constitution); McFadden v. Jordan, 196 P.2d 787 (Cal. 1948)(striking down an initiative measure that would have added 21,000 words to the then existing 55,000-word constitution), cert. denied, 336 U.S. 918 (1949).

> by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

801 P.2d at 1086.[6]

Raven noted the analysis used by the California courts in deciding claims that an amendment was in fact a revision:

> [O]ur revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision.

Id. at 1085 (citations omitted). Because the two-sentence marriage amendment clearly was not alleged to be a revision due to quantitative effects,[7] the arguments before the court were limited to the discussion of the qualitative question.

The Raven court concluded that the amendment at issue there would qualitatively revise the state constitution because

> [i]n essence and practical effect, new article I, section 24 would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating.

Id. at 1087 (italics in original). The court went on to explain that new section 24 was invalid only because it was so sweeping:

> It is true, as the Attorney General observes, that in two earlier cases we rejected revision challenges to initiative measures which included somewhat similar restrictions on judicial power. In *In re Lance W.* (1985) 37 Cal.3d 873, 891, 210 Cal.Rptr. 631, 694 P.2d 744, we upheld a provision limiting the state exclusionary remedy for search and seizure violations to the boundaries fixed by the Fourth Amendment to the federal Constitution. In *People v. Frierson* (1979) 25 Cal.3d 142, 184-187, 158 Cal.Rptr. 281, 599 P.2d 587, we upheld a provision which in essence required California courts in capital cases to apply the state cruel or unusual punishment clause consistently with the federal Constitution.

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[6] The resemblance between this amendment and the Prisoners' Rights Amendment removed from the ballot in Bess is striking. In fact the state conceded during argument that if the Court were to adopt the rationale of the California Supreme Court, the Prisoner's Rights Amendment would be very difficult to defend against the argument that it constituted a proposed revision of the constitution.

[7] The Raven court found that the amendment at issue there was *not* a revision quantitatively, as it "deletes no existing constitutional language and it affects only *one* constitutional article, namely, article I." 801 P.2d at 1086-87 (italics in original).

> Both *Lance W.* and *Frierson* concluded that no constitutional revision was involved because the isolated provisions at issue therein achieved no far reaching, fundamental changes in our governmental plan. But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution. New article I, section 24, more closely resembles *Amador's* hypothetical provision vesting all judicial power in the Legislature, a provision we deemed would achieve a constitutional revision. As noted, in practical effect, the new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.

Id. at 1089.

In other cases, the California Supreme Court rejected "revision" attacks on constitutional amendments that made major changes to the structure and operation of the state government. See Amador Valley, 583 P.2d at 1286-89; Brosnahan v. Brown, 651 P.2d 274, 288-89 (Cal. 1982)(making numerous changes to the provisions of the constitution on rights of criminal defendants); Legislature of State of California v. Eu, 816 P.2d 1309, 1316-20 (Cal. 1991)(term limits on state legislators). These cases establish that substantial changes in the structure of government or the rights of individuals can still be proposed and ratified as amendments.

The fate of the subsistence amendment rests on whether it is so "far reaching and multifarious that it was revisory rather than amendatory in nature." Bess Prelim. Op. at 3. Also part of the analysis is whether other sections of the constitution would be substantially affected by the addition of the material contained in the measure under consideration. Id. at 4. In McDowell v. State, 785 P.2d 1 (Alaska 1989), a statute granting a preference to rural residents to take fish and game for subsistence purposes was found to violate the reservation for common use set out in article VIII, section 3 of the Alaska Constitution. Based on the scope of the decision in McDowell, the reach of the subsistence amendment would most likely be considered relatively self-contained and limited to only a change in the reservation for common use.

The arguments advanced against the proposed subsistence amendment during past regular and special sessions of the legislature appear to focus on allegations of a weakening of the right of equal access to fish and game afforded by existing articles I and VIII of the Alaska Constitution. In response to this argument, a subsistence preference can be analogized to the limited entry system authorized by article VIII, section 15 which was found to not violate the equal protection guaranty of the state and federal constitutions. State v. Ostrosky, 667 P.2d 1184 (Alaska 1983). Therefore, the subsistence preference could be construed in harmony with, rather than amending the equal protection rights of access accorded by articles I and VIII. Using this analysis it can be argued that the proposed subsistence amendment would not make a basic or substantial structural change in our constitutional system.

The interests of nonsubsistence users of fish and game could be balanced in a way that would permit a limited discrimination between users of the resource. Using this frame of reference, as imprecise as it may be, the change embodied in the subsistence proposal likely will not be considered so broad as to effect a qualitative revision of the constitution. In the words of the Alaska Supreme Court, the subsistence amendment recently under consideration by the legislature would be "few, simple, and independent." As for its quantitative effect, the proposed amendment

would bear on only two other provisions of the state constitution which together define the right of equal access to the resource.

Finally, the concept of a priority for use of fish or wildlife resource is not complex once all of the rhetoric concerning the effect of federal law is cleared away. For this reason, the meaning of the amendment could be easily explained to and understood by the voters. For the foregoing reasons, there is nothing in the preliminary opinion in Bess that conclusively prevents the legislature from using the process described in article XIII, section 1 of the Alaska Constitution to change the Alaska Constitution. Based on review of the preliminary opinion in Bess and the briefing of the parties under consideration by the Court, the current status of the law would appear to be that the legislature retains the power to validly adopt a resolution similar to SJR 101 (20th Leg. 1st Spec. Sess.) proposing an amendment to the Alaska Constitution establishing a priority for subsistence uses of fish and game.

JLB:jn

House Judiciary
Committee Meeting

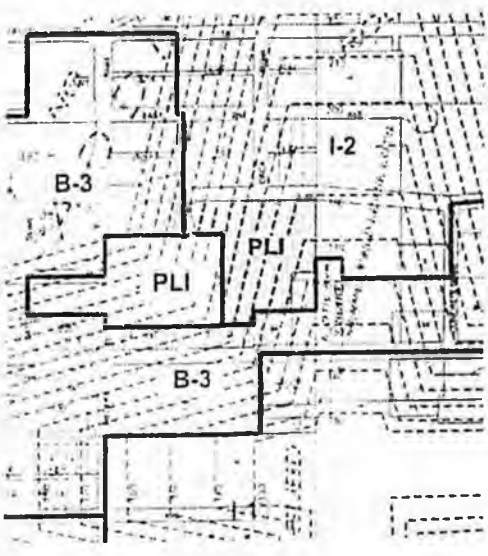
Anchorage Jail & Inebriate Transfer Station

Municipality of Anchorage
Public Safety Program

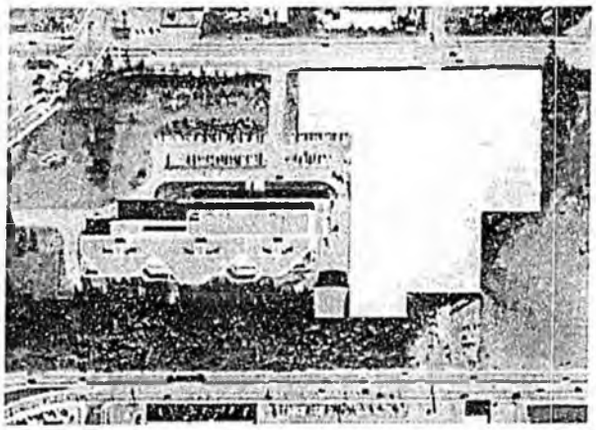
ECI/Hyer, Inc. Architects
HDR

January 5, 1999

Vicinity



Site Zoning



Site

GENERAL LOCATION:

East of Cook Inlet Pretrail Facility, east of Nelchina Street between 3rd and 5th Avenues.

LEGAL LOCATION:

East Addition - S 1/2 NW 1/4, Section 17, T 13N, R 3W, Seward Meridian - Tract C, Block 28F.

Tax ID #003-072-57.

Grid 50807

SITE SIZE:

220,000	Square Feet
5.05	Acres

CURRENT ZONING:

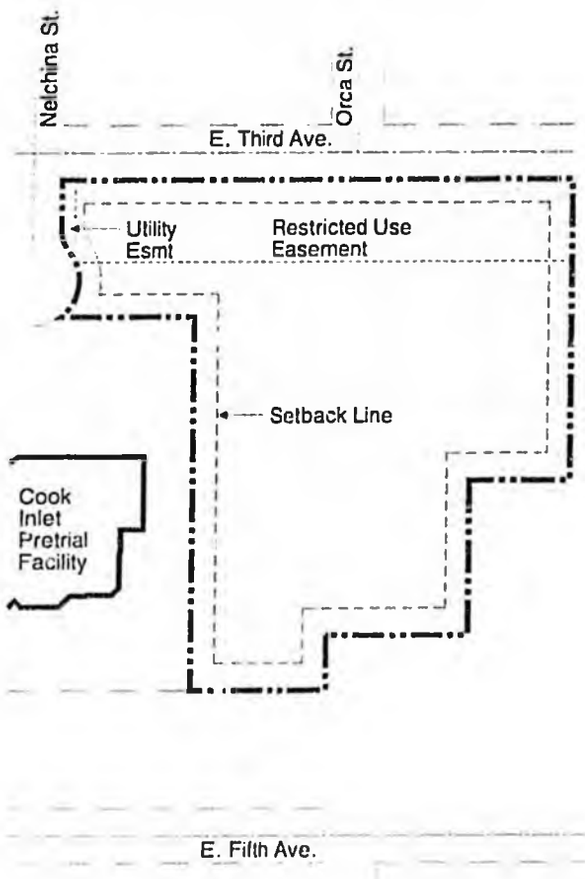
PLI

ADJACENT ZONING:

PLI	West
B3	West and South
I-2	East and North

SITE ACCESS OPTIONS (Vehicular):

East Third Avenue



0 25 50 100 200' N

Setbacks shown are based on PLI zoning requirements

Anchorage Jail Project Schedule

	1998			1999											2000					2001						
	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	AUG	SEP	OCT	NOV	DEC	JAN	FEB
Finance Activity Process	Execute Plan of Finance and MOA Internal Finance																										
	◆ Interim Financing					◆ Approve Revenue Bonds							◆ Sell Bonds														
	◆ Approve DOC Agreements • Construction • Lease • Prisoner Care																										
DPW Site Preparation & Facility Replacement	Metro Station Environmental															Metro Station Salvage Contract											
	● Underground Storage Tank Removal									◆ Salvage Contract Award										● Salvage Complete Site Available							
	● Stockpiled Soils Removed																										
	Kleop Master Plan and Design Build RFP									Design / Construct Building																	
								◆ Bond Approval						◆ Design/Build Contract Award													
	Master Site Plan Approval ●					Design/Build Documents Complete ●				● Bond Election										● Construction Complete							
Replacement Jail Design and Construction	Secure Site					Prepare Jail Contract Bid Documents										Bid and Contract Award				General Construction Contract							
	◆ Site Selection Approval									Preliminary UDC Approval ●										● Final UDC Approval							
						◆ Design RFP Award								● Geotech Advisory Comm. Approval						● Design Complete							
	Project Mgmt RFP Award ◆																										
	● Geotech Advisory Comm. Informational Presentation					● P&ZC Rezoning		◆ Rezone Approval																			
																				● P&ZC Conditional Use Permit							
																				◆ Award Construction Contract							

● Project Milestone
◆ Assembly Action

● Substantial Completion
● Facility Start-Up

Occupancy of Jail

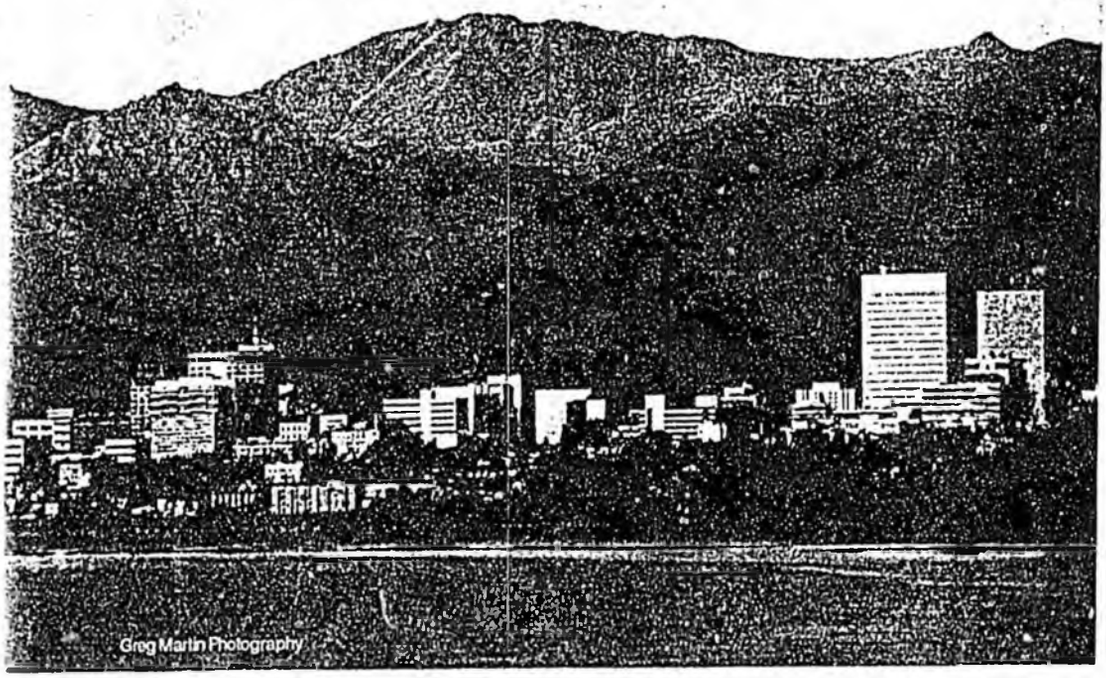
January 5, 1999

ANCHORAGE JAIL UPDATE

House Judiciary Committee Meeting

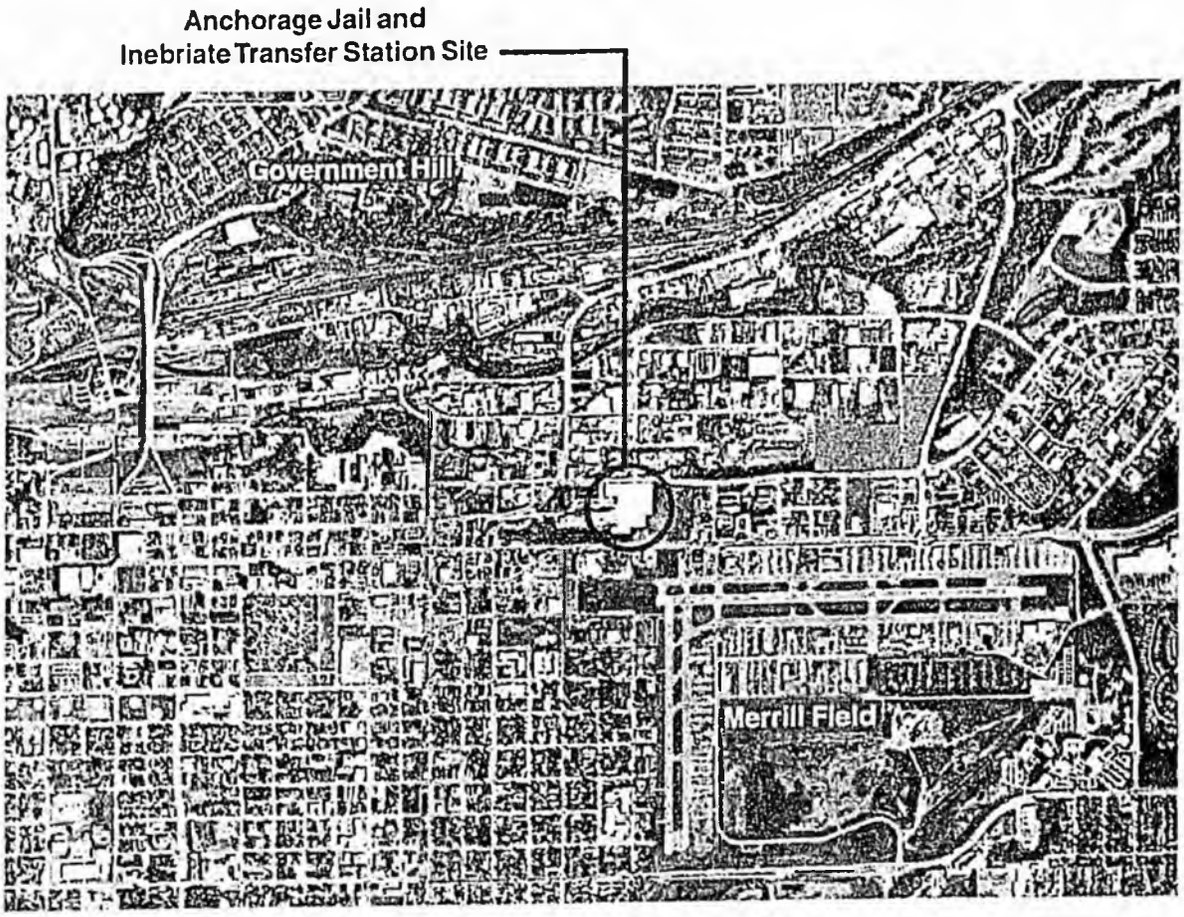
Anchorage Jail & Inebriate Transfer Station

Municipality of Anchorage
Public Safety Program

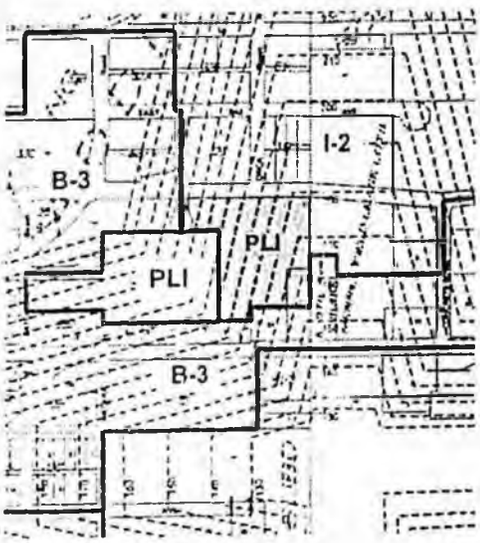


ECI/Hyer, Inc. Architects
HDR

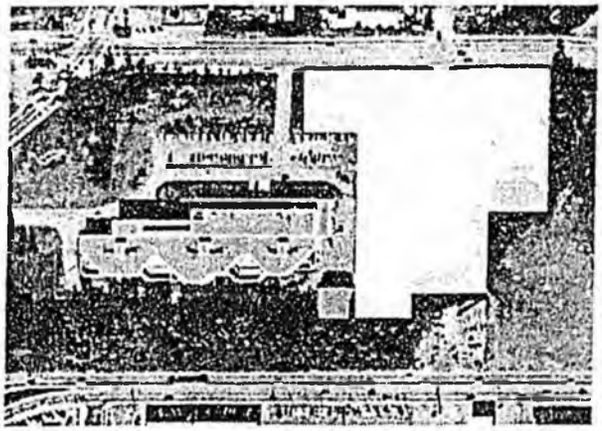
January 5, 1999



Vicinity



Site Zoning



Site

GENERAL LOCATION:

East of Cook Inlet Pretrail Facility, east of Nelchina Street between 3rd and 5th Avenues.

LEGAL LOCATION:

East Addition - S 1/2 NW 1/4, Section 17, T 13N, R 3W, Seward Meridian - Tract C, Block 28F.

Tax ID #003-072-57.

Grid 50807

SITE SIZE:

220,000	Square Feet
5.05	Acres

CURRENT ZONING:

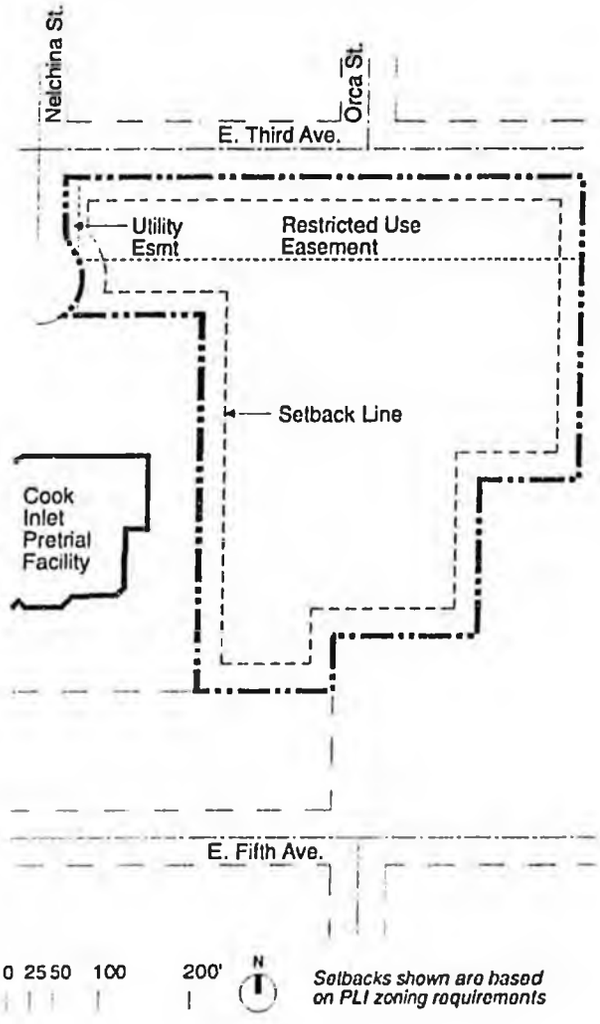
PLI

ADJACENT ZONING:

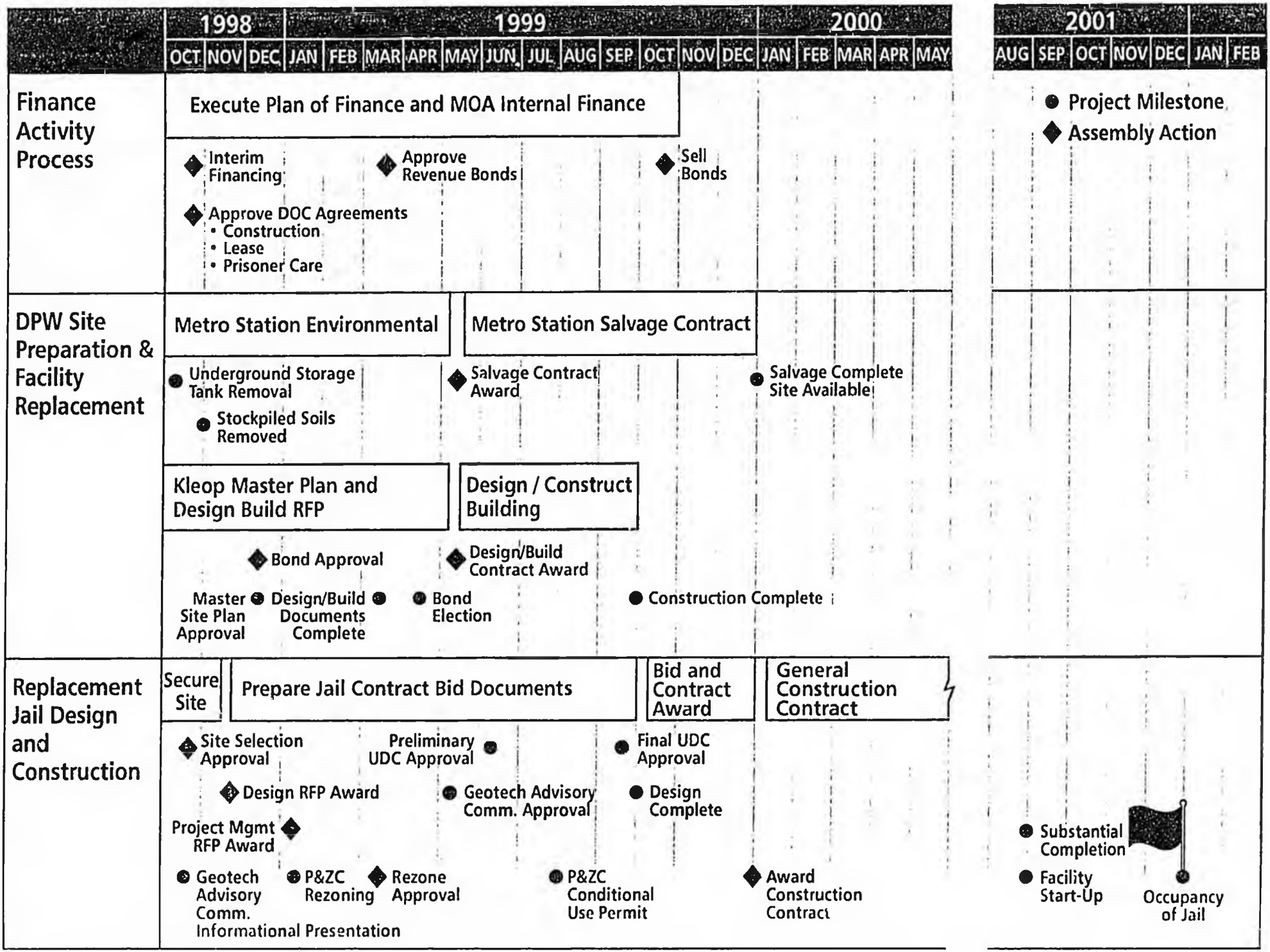
PLI	West
B3	West and South
I-2	East and North

SITE ACCESS OPTIONS (Vehicular):

East Third Avenue



Anchorage Jail Project Schedule



January 5, 1999

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-2105

MEMORANDUM December 28, 1998

SUBJECT: Constitutionality of subsistence constitutional amendment in light of Bess v. Ulmer (Work Order No. 21-LS0192)

TO: Representative Joseph Green, Chair
House Judiciary Committee

FROM: George Utermohle
Legislative Counsel

You have asked whether, in light of the Preliminary Opinion and Order issued by the Alaska Supreme Court in Bess v. Ulmer (Supreme Court No. S-08811, S-08812, S-08821, dated September 22, 1998), the legislature could propose a subsistence amendment to the Alaska Constitution that was similar to SJR 101/HJR 101 (Twentieth Alaska State Legislature), as introduced by the Governor.

BACKGROUND. In the Bess decision, the Alaska Supreme Court found that the Alaska Constitution may be changed by amendment or by revision. A constitutional amendment may be proposed by vote of two-thirds of the legislature and take effect after approval by a majority of the voters. Article XIII, section 1, Constitution of the State of Alaska. A constitutional amendment may also be proposed by a constitutional convention and take effect after ratification by the voters. Article XIII, section 4, Constitution of the State of Alaska. A constitutional revision may only be proposed by a constitutional convention and take effect after ratification by the voters. Article XIII, section 4, Constitution of the State of Alaska.

The Alaska Supreme Court was not able to precisely identify the difference between a constitutional amendment and a constitutional revision except to say that "changes that are 'few and simple and independent' can be considered amendments, whereas 'sweeping change' requires the revision process." Id. at 2 (citations omitted).

In considering whether the proposed constitutional amendment relating to prisoners' rights[1/]

[1/] Legislative Resolve 59, Twentieth Alaska State Legislature, proposed to amend Article I of the Alaska Constitution by adding a new section to read:

Section 25. Rights of Prisoners. Notwithstanding any other provision of this constitution, the rights and protections, and the extent of those rights and protections,

(continued...)

was an amendment or a revision, the court took note of the fact that the proposed amendment "actually or potentially affected" numerous provisions of the Alaska Constitution. Id. at 4. In the court's view, the proposed amendment affected 12 sections within article I of the Alaska Constitution. However, the mere number of sections affected was not wholly determinative of whether the proposed constitutional change constituted a revision. Instead, the court looked not only at the number of sections affected but also the scope of the changes. The court concluded that the proposed change was actually a revision because the proposed change "would eliminate the independent force and effect of so many provisions of the Alaska Constitution with respect to the rights of prisoners that it is beyond the limits of the amendatory process of article XIII, section 1 [of the Alaska Constitution]." Id. at 5.

In reviewing the proposed constitutional amendment relating to marriage, the Supreme Court found that the first sentence of the proposed change constituted an amendment that was validly within the amendatory power of the legislature.[2/] The change was not so expansive as to exceed the permissible scope of an amendment. Id. at 6. Also, the proposed change was "simple to express and understand," related "to only one subject," and did not "substantially affect numerous other sections of the constitution." Id. The Supreme Court struck the second sentence of the marriage amendment on grounds that the sentence was surplusage. Id. at 6-7. It is not clear from the court's opinion whether the second sentence was deleted for any reason related to the issue of amendments and revisions.

The Supreme Court also reviewed a proposed constitutional amendment that changed the procedure for redistricting of the Alaska Legislature. Even though the proposed amendment expressly made substantive changes to nine sections of article VI, the court found that the proposal was indeed an amendment for purposes of the Alaska Constitution and thus was within the amendatory power of the legislature. Though the change proposed by the amendment "is an important one, it is simple to express and understand. It is complete within itself, relates to only one subject, and does not substantially affect numerous other sections of the constitution." Id. at 7.

DISCUSSION. The court's Preliminary Opinion and Order suggests that the legislature may not have the power to propose certain constitutional amendments on subsistence, such as

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[1/](...continued)
afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections, and the extent of those rights and protections, afforded under the Constitution of the United States to prisoners convicted of crimes.

[2/] Legislative Resolve 71, Twentieth Alaska State Legislature, proposed an amendment to article I of the Alaska Constitution by adding a new section to read:

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.

SJR 101/HJR 101 which were proposed by the Governor during 1998.[3/] For purposes of the amendment revision analysis, the critical element of SJR 101/HJR 101 is the fact that the proposed amendment changes the "equal access" provisions of the Alaska Constitution because it provides for restrictions on access to the subsistence user group. Such an amendment may be found to be a constitutional revision and not an amendment, due to the number of constitutional provisions that are directly affected by the amendment. A subsistence constitutional amendment that established subsistence as the preferred use of fish and game without limiting access to the subsistence user group is less likely to be considered a revision because the direct effects on other provisions of the constitution probably would not be substantial.

The Bess court alluded to both quantitative and qualitative factors in determining whether a particular proposed constitutional change was truly an amendment or a revision. The number of other articles and sections of the constitution that are affected by a proposed amendment is an important factor to be considered. It does not seem to be particularly relevant to the analysis whether a proposed constitutional change expressly sets out each section to be amended or is drafted so as to implicitly change other provisions of the constitution. The courts will examine a proposed constitutional change to determine its substantive effect on other sections of the constitution to ascertain the quantitative effects of the proposed change. See, McFadden v. Jordan, 196 P.2d 787, 799 (Cal. 1948). One important issue that the Alaska Supreme Court did not address was how to distinguish between a substantive change to the effect or purpose of another section of the constitution (which would suggest that the change is a revision) and a variance between the effect or purpose of two provisions that can be harmonized without requiring significant change to either provision (which would suggest that the proposed change is an amendment).

The subsistence amendment proposed by SJR 101/HJR 101 implicates numerous provisions of the Alaska Constitution -- most notably: common use section, art. VIII, sec. 3; no exclusive right of fishery clause, art. VIII, sec. 15; uniform application section, art. VIII, sec. 17; equal rights clause, art. I, sec. 1; due process clause, art. I, sec. 7. A competent advocate may well demonstrate that additional sections of the constitution, such as freedom of religion section, art. I, sec. 4, and disclaimer and agreement section, art. XII, sec. 12, are affected by the proposed subsistence amendment.[4/]

[3/] SJR 101/HJR 101, Twentieth Alaska State Legislature proposed that a new section be added to article VIII to read:

Section 19. Subsistence. The legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses in the taking of fish and wildlife and other renewable natural resources based on place of residence.

[4/] The rural subsistence preference that was struck down in the McDowell case is very similar to the kind of preference that is to be authorized by SJR 101/HJR 101. McDowell v. State, 785 P.2d 1 (Alaska 1989). The rural subsistence preference was found to be violative of the equal access provisions of the Alaska Constitution: art. VIII, sec. 3

(continued...)

As the qualitative nature of the changes to be made by a proposed amendment becomes more important and has more substantial effects on other constitutional sections, the greater is the risk that the proposed amendment is actually a revision. If the effect of the proposed amendment is so "far reaching" as to "eliminate the independent force and effect of many provisions of the Alaska Constitution" (Id. at 5), then the amendment is also likely to be a revision.[5/]

On the other hand, if the proposed amendment "is simple to express and understand[,] is complete within itself, relates to only one subject, and does not substantially affect numerous other sections of the constitution" (Id. at 7), it is an appropriate use of the amendatory power of the legislature.

The court's Preliminary Opinion and Order is insufficient to tell us with any confidence whether a proposed subsistence amendment, such as SJR 101/HJR 101, "substantially affects" too many other provisions of the constitution; whether the proposed subsistence

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[4/](...continued)
(common use), art. VIII, sec. 15 (no exclusive right of fishery), and art. VIII, sec. 17 (uniform application). The rural subsistence preference was also challenged as violating art. I, sec. 1 (equal protection) and art. I, sec. 7 (due process) of the Alaska Constitution. The decision in the McDowell case did not address the equal protection and due process issues because the rural preference was already found to be unconstitutional under the equal access provisions of the constitution. However, one justice who did consider the issue did find that the rural preference violated equal protection under art. I, sec. 1 of the Alaska Constitution. Id. at 12 - 13 (Justice Moore, concurring opinion).

The commercial fisheries limited entry program (AS 16.43) places a restriction on equal access to the commercial fisheries of the state. The nature of the limitation on access to commercial fishing is analogous to the limitation on access to the subsistence user group sought to be authorized by SJR 101/HJR 101. In a series of federal and state cases, limited entry into the commercial fisheries was found to be violative of art. VIII, sec. 3 (common use) and art. I, sec. 1 (equal protection) of the Alaska Constitution. It was not until a constitutional amendment authorizing limited entry was passed by the voters that those constitutional provisions were overcome and limited entry became a reality. State v. Ostrosky, 667 P.2d 1184, 1188 - 90 (Alaska 1983).

[5/] One factor considered significant by the California Supreme Court is whether the proposed constitutional change makes "far reaching changes in the nature of [the] basic governmental plan . . ." Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990); quoting Amador Valley Joint Union High School District v. State Board of Equalization, 583 P.2d 1281, ___ (Cal. 1978). If a proposed change altered the allocation of powers among the branches of government such as providing that the interpretation of certain provisions of the state constitution were to be controlled by decisions of the United States Supreme Court, then the change was found to be a revision. In such cases, even a simple amendment may amount to a revision.

amendment is so far reaching as to amount to a constitutional revision; whether the proposed subsistence amendment is simply expressed and simple to understand; whether the proposed subsistence amendment is complete in itself; or whether the proposed subsistence amendment relates to only one subject. The court's consideration and application of these factors to the proposed prisoners' rights, marriage, and redistricting constitutional amendments were too conclusory to be helpful guides in analyzing whether SJR 101/HJR 101 was within the scope of the legislature's amendatory power.

The Department of Law, in its own review of SJR 101/HJR 101 after the preliminary Bess decision was issued, acknowledged that the cursory nature of the court's preliminary opinion precluded a definitive analysis of the issue. Memorandum to Bruce M. Botelho, Attorney General, from James L. Baldwin, Assistant Attorney General, dated October 7, 1998, footnote 1. But in spite of the cursory guidance given by the court, the memorandum concluded that "[b]ased on review of the preliminary opinion in Bess, and the briefing of the parties under consideration by the Court, the current status of the law would appear to be that the legislature retains the power to validly adopt a resolution similar to SJR 101 (20th Leg. 1st Spec. Sess.) proposing an amendment to the Alaska Constitution establishing a priority for subsistence uses of fish and game." Id. at 5. The optimism of the memorandum that the legislature may still retain the power to adopt a subsistence amendment such as SJR 101/HJR 101 is not wholly unreasonable but seems premature in light of the limited guidance provided by the court at this time. Even if each of the factors considered by the court in its analysis of the amendment/revision issue are viewed from the perspective that is most favorable to the power of the legislature to propose a subsistence constitutional amendment such as SJR 101/HJR 101, there remains a substantial risk that the court would find SJR 101/HJR 101 to be a revision and thus outside the scope of the legislature's amendatory powers.

The court has stated that it will provide a subsequent opinion at some later time. It can only be hoped that the court will amplify upon its decision and set out meaningful standards for determining which changes to the constitution are amendments and which are revisions.

CONCLUSION. The Preliminary Opinion and Order of the Alaska Supreme Court in Bess v. Ulmer casts doubt upon the extent of the power of the legislature to propose changes to the Alaska Constitution. The court's preliminary opinion failed to enunciate adequate standards to identify which proposed constitutional changes constitute amendments and which constitute revisions. In light of the Bess case, the mere fact that a subsistence constitutional amendment, such as SJR 101/HJR 101, expressly or implicitly affects several provisions of the constitution in a potentially significant and substantial manner is cause for concern as to the power of the legislature to propose such an amendment. Any attempt by the legislature to propose such a subsistence constitutional amendment would clearly be subject to legal challenge on the ground that it constitutes a constitutional revision. The probable outcome of such a challenge cannot be known with any assurance. There is a risk that a subsistence constitutional amendment, such as SJR 101/HJR 101, is beyond the authority of the legislature to propose and present to the voters for approval. However, the risk is not necessarily so great as to preclude the legislature from proposing a subsistence

constitutional amendment with a reasonable expectation the amendment would survive review by the Alaska Supreme Court.

A more definite assessment of the risks of proposing a specific subsistence constitutional amendment, or any other amendment, must await further guidance from the Alaska Supreme Court. But I suspect that, because of the many fine distinctions that must be drawn as part of the amendment/revision analysis, a definite conclusion as to whether a subsistence amendment is possible will not be known until a subsistence amendment is actually proposed by the legislature and reviewed and passed upon by the court. "Each situation involving the question of amendment, as contrasted with revision, of the Constitution must, . . ., be resolved upon its own facts." McFadden v. Jordan, 196 P.2d 787, 798 (Cal. 1948).

If I may be of further assistance, please advise.

GU:jdr
98-336.jdr

Anch DAILY NEWS DEC 1 '98 METRO

Delta Junction considers new vote on Greely prison

The Associated Press

FAIRBANKS — A plan that would create a medium-security private prison at Fort Greely could come up for another public vote in December.

The Delta Junction City Council wants more public input before making a final decision on the project.

The prison proposal would place an 800-bed prison at the Army base, which is being downsized by the Pentagon.

Allvest Inc., the Anchorage-based halfway house company that proposed the prison project, would like to have the facility up and running by January 2000.

City clerk Pam Ellis said the council may talk today about scheduling an election, although the matter was not on its meeting agenda.

Delta Junction residents have voted once on the project. An advisory vote on the prison passed 640-396 in January. But council members are talking about a second election, saying residents have had more than a year to digest the issue.

City Council member John Sloan said the accelerated pace fueling the last election didn't leave a great deal of time for discussion. Until just a few days before the vote, Allvest was pushing for a December 1998 opening for the

Please see Page B-2, PRISON

PRISON: Delta Junction weighs new vote

Continued from Page B-1

new prison.

"The council is committed to getting as much information as possible," Sloan told the Fairbanks Daily News-Miner. "At one time, I think, there was not that much information out there. I think it's going to be a better vote this time."

Not everyone, however, is thrilled with the idea of scheduling another election. Some residents are circulating a pro-prison petition to let the council know the proposal still has strong community support and should not be delayed.

Gail McBride, who started the petition drive, said supporters fell silent after the vote last year, thinking the matter was decided. While the project has lagged, she said, other some other Alaska communities, including Palmer, have stepped forward to compete for the prison.

"We want to say this is a serious matter," McBride said. "It's important at this point that they stay aggressive and not become passive about it."

A new election does have the support of prison opponents, who feel last year's results were tainted by confusion and vague last-minute promises.

K.L. Kirk, a member of Concerned Citizens for Delta Junction, which opposes the project, said residents did not have enough time to evaluate the issue before going to the polls. In the past year, he said, more facts about the proposal have emerged, and Kirk believes the public is better informed.

Court move could cloud rural rights

Prisoner-rights decision tied to subsistence issue

By ROBERT KOWALSKI
Daily News Juneau Bureau

JUNEAU — An unprecedented decision by the Alaska Supreme Court this fall on the issue of prisoner rights is adding a new hurdle to the state's efforts to solve a seemingly unrelated problem: its dilemma over management of subsistence hunting and fishing.

The court in September removed from the November election ballot a proposed constitutional amendment limiting prisoners' rights. The justices ruled the measure was so broad it was a constitutional "revision," rather than an amendment, and such a change can occur only through a constitutional convention rather than a vote.

It was the first time the court had made such a distinction in Alaska, legal experts say. The Legislature put the prisoners' rights amendment on the ballot.

Now, some state lawmakers who oppose a plan to amend the Alaska Constitution to give rural residents the first rights to subsistence use of fish and wildlife are seizing on the court's preliminary decision in the prisoners' rights case.

The ruling, they say, means that even if the Legislature wanted to change the constitution on subsistence — something lawmakers refused to do despite months of debate this year — it may no longer have the authority.

"It very likely could be that anything you do to solve this subsistence issue would require a constitutional convention to change our constitution," said Rep. Joe Green, an Anchorage Republican and chairman of the House Judiciary Committee.

Please see Page C-3, SUBSISTENCE

But Green, who will be House majority leader when the Legislature reconvenes next year, added, "We could have a difference of opinion among learned lawyers."

The court's decision came as a surprise to many in the legal community.

"In our wildest imagination, we never thought that the Alaska Supreme Court would adopt the amendment-revision dichotomy," said former Alaska Attorney General Charlie Cole, who was a member of the task force Gov. Tony Knowles appointed last year to study the subsistence question.

The task force recommended amending the state constitution to grant rural residents a subsistence hunting and fishing priority.

Supporters of such a subsistence amendment say the impact of the high court's prisoners' rights ruling on the subsistence question won't be known until the court issues its full opinion in the case. No one is willing to hazard a guess when that will be.

The Alaska attorney general's office has concluded the Supreme Court's preliminary decision in Bess vs. Ulmer, the prisoners' rights case, doesn't necessarily prevent the Legislature from passing a subsistence amendment.

"I'm confident that it's not a clear case of the subsistence amendment only being able to be proposed by a constitutional convention," said Jim Baldwin, an assistant attorney general who studied the Bess ruling.

Heather Kendall-Miller, an Anchorage Native rights lawyer, agreed.

Because the state constitution doesn't specifically address subsistence rights, a subsistence amendment wouldn't necessarily be viewed by the court as being so far-reaching that it constitutes a "revision," she said.

But George Utermohle, a lawyer with the Legislative Affairs Agency, said the court decision clouds the issue for the Legislature.

Regardless, Gov. Tony Knowles plans to ask the Legislature again next year to approve a subsistence amendment, said his spokesman, Bob King.

Knowles had vowed to do

SUBSISTENCE:

Continued from Page C-1

Legislators see link to court decision on prisoners' rights move

so after the Legislature failed to approve the amendment in two special sessions this year. Other possible parts of the solution, such as changes to state law, are still being discussed, King said.

Rep. Ethan Berkowitz, an Anchorage Democrat who supports a subsistence amendment, doesn't think the Supreme Court's decision on prisoners' rights should stand in the way of a subsistence fix.

He said amendment opponents are grasping at straws by citing the ruling.

"It seems to me there's a big distinction between prisoners' rights, which had universal constitutional implications, and subsistence," Berkowitz said.

At the least, questions the Supreme Court raised about what is and isn't a constitutional amendment have made the already muddled subsistence problem even more murky, lawmakers and interests on both sides subsistence issue agree.

"It's going to have an impact, whether it's based in law or emotion," Berkowitz said.

The dilemma the state faces centers on a conflict between its constitution's guarantee of equal access to Alaska resources and a federal requirement that rural residents have first rights to subsistence fish and wildlife.

That rural priority is required by the Alaska National Interest Lands Conservation Act.

The issue is emotionally charged and has been bitterly fought. It cuts across a wide swath of differing interests, from those of commercial and sport fishing to the nutritional and cultural uses of fish and game by Alaska Natives.

It's also been framed as a power struggle between Alaska and Washington, D.C.

Earlier this year, the state was working on the assumption that it had until Dec. 1 to resolve the conflict or lose management of subsistence fishing to the federal government.

Then, last month, Congress threw the issue up in the air again when it agreed to postpone the federal takeover deadline until next October.

That angered Alaska Natives and some, like Cole, who had told the Legislature in no uncertain terms that it must act this year because the deadline wouldn't change again. Congress had extended the moratorium three prior times.

The Supreme Court's prisoners' rights decision now is adding yet another layer of uncertainty.

The decision actually stemmed from a dispute that had nothing to do directly with hunting, fishing or prisoners' rights.

It grew out of a challenge lawyers filed against another measure on the November election ballot, an amendment banning same-sex marriage in Alaska.

The court let the same-sex marriage amendment remain on the ballot, and voters approved it. But the decision removed the prisoners' rights measure from the election.

The ruling is being discussed now as the Legislature is about to begin a new session in January.

Rep. Green has scheduled a hearing of the Judiciary Committee for the first week of January to study the subsistence implications of the prisoners' rights ruling.

But some think Congress' decision to postpone federal takeover again and U.S. Interior Secretary Bruce Babbitt's willingness to accept the new moratorium may be bigger factors next year in the subsistence debate.

Cole wonders if there's still any real impetus for the Legislature to act.

"I believe that it will be very, very difficult to resolve this issue in the next legislative session," Cole said. "Those in the Legislature who opposed the task force proposal will claim that they were correct in their contention that another moratorium could be obtained."

Kendall-Miller predicted that without the threat of a solid deadline, the new Legislature won't approve a subsistence amendment.

"The (Interior) secretary had promised numerous times that the third moratorium was the last. He betrayed the Native community," she said. "That was the hammer that was hanging over the Legislature."

The real battleground now, Kendall-Miller said, will likely be in Congress. She predicted there will be efforts made to change the federal requirements for a rural subsistence priority.

"Where to now is to maintain the integrity of ANILCA," she said.

❑ Reporter Robert Kowalski can be reached at rkowalski@adn.com.

LEGAL SERVICES

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MEMORANDUM September 25, 1998

SUBJECT: Subsistence constitutional amendment in light of Bess v. Ulmer (Work Order No. 21-LS0079)

TO: Representative Eldon Mulder

FROM: George Utermohle
Legislative Counsel

You have asked whether, in light of the Preliminary Opinion and Order issued by the Alaska Supreme Court in Bess v. Ulmer (Supreme Court No. S-08811, S-08812, S-08821, dated September 22, 1998), the legislature could propose an amendment to the Alaska Constitution to provide for a subsistence preference.

BACKGROUND. In the Bess decision, the Alaska Supreme Court found that the Alaska Constitution may be changed by amendment or by revision. A constitutional amendment may be proposed by vote of two-thirds of the legislature and take effect after approval by a majority of the voters. Article XIII, section 1, Constitution of the State of Alaska. A constitutional amendment may also be proposed by a constitutional convention and take effect after ratification by the voters. Article XIII, section 4, Constitution of the State of Alaska. A constitutional revision may only be proposed by a constitutional convention and take effect after ratification by the voters. Article XIII, section 4, Constitution of the State of Alaska.

The Alaska Supreme Court was not able to precisely identify the difference between a constitutional amendment and a constitutional revision except to say that "changes that are 'few and simple and independent' can be considered amendments, whereas 'sweeping change' requires the revision process." Id. at 2 (citations omitted).

In considering whether a proposed constitutional amendment relating to prisoners' rights[1] was an amendment or a revision, the court took note of the fact that the proposed amendment

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[1] Legislative Resolve 59, Twentieth Alaska State Legislature, proposed to amend Article I of the Alaska Constitution by adding a new section to read:

Section 25. Rights of Prisoners. Notwithstanding any other provision of this constitution, the rights and protections, and the extent of those rights and protections, afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections, and the extent of those rights and protections, afforded under the Constitution of the United States to prisoners convicted of crimes.

"actually or potentially affected" numerous provisions of the Alaska Constitution. In the court's view, the proposed amendment affected 12 sections of the Alaska Constitution. However, the mere number of sections affected was not wholly determinative of whether the proposed amendment constituted a revision. Instead, the court looked not only at the number of sections affected but also the scope of the changes. The court concluded that the proposed amendment was actually a revision because the amendment "would eliminate the independent force and effect of so many provisions of the Alaska Constitution with respect to the rights of prisoners that it is beyond the limits of the amendatory process of article XIII, section 1 [of the Alaska Constitution]." Id. at 5.

In reviewing a proposed constitutional amendment relating to marriage, the Supreme Court found that the first sentence of the proposed change constituted an amendment that was validly within the amendatory power of the legislature.[2/] The change was not so broad in scope as to exceed the permissible scope of an amendment. Id. at 6. Also, the proposed change was "simple to express and understand," related "to only one subject," and did not "substantially affect numerous other sections of the constitution." Id.

The Supreme Court also reviewed a proposed constitutional amendment that changed the procedure for apportionment of House and Senate districts of the Alaska Legislature. The court found that the proposed amendment was indeed an amendment for purposes of the Alaska Constitution and thus was within the amendatory power of the legislature. Though the change proposed by the amendment "is an important one, it is simple to express and understand. It is complete within itself, relates to only one subject, and does not substantially affect numerous other sections of the constitution." Id. at 7.

DISCUSSION. The court's Preliminary Opinion and Order suggests that the legislature may not have the power to propose a constitutional amendment on subsistence, such as those proposed by the governor in recent years.[3/] Such amendments may be found to be constitutional revisions and not amendments. The proposed subsistence amendments offered

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[2/] Legislative Resolve 71, Twentieth Alaska State Legislature, proposed an amendment to article I of the Alaska Constitution by adding a new section to read:

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.

The Supreme Court struck the second sentence of this amendment on grounds that were not related to the issue of amendments or revisions. Id. at 6-7.

[3/] HJR 101, Twentieth Alaska State Legislature, is an example of the proposed amendments that are at issue here. HJR 101 was introduced at the request of the governor and proposed that a new section be added to article VIII to read:

Section 19. Subsistence. The legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses in the taking of fish and wildlife and other renewable natural resources based on place of residence.

by the governor implicated numerous provisions of the Alaska Constitution -- most notably: common use section, article VIII, section 3; no exclusive right of fishery clause, article VIII, section 15; uniform application section, article VIII, section 17; equal rights clause, article I, section 1; due process clause, article I, section 7. A zealous advocate may well find additional sections of the constitution that are affected by the proposed subsistence amendment.

The number of other articles and sections of the constitution that are affected by a proposed amendment seems to be an important factor to be considered in determining whether an amendment is, in actuality, a revision, but other factors are also considered. The nature of the effect of the change on those other constitutional sections must be substantial. The change to be made by the proposed amendment must be important. Also, if the effect of the proposed amendment is "far reaching" as to "eliminate the independent force and effect of many provisions of the Alaska Constitution" (Id. at 5), then the amendment is likely to exceed the power of the legislature to propose amendments to the constitution.

On the other hand, if the proposed amendment "is simple to express and understand[,] is complete within itself, relates to only one subject, and does not substantially affect numerous other sections of the constitution" (Id. at 7), it is an appropriate use of the amendatory power of the legislature.

The court's Preliminary Opinion and Order is insufficient to tell us with any certainty whether a proposed subsistence amendment "substantially affects" too many other provisions of the constitution; whether the proposed subsistence amendment is so far reaching as to amount to a constitutional revision; whether the proposed subsistence amendment is simply expressed and simple to understand; whether the proposed subsistence amendment is complete in itself; or whether the proposed subsistence amendment relates to only one subject. The court's consideration and application of these factors to the proposed prisoners' rights, marriage, and reapportionment constitutional amendments were too conclusory to be helpful guides in analyzing whether a proposed subsistence amendment was within the scope of the legislature's amendatory power.

The court has stated that it will provide a subsequent opinion at some later time. It can only be hoped that the court will amplify upon its decision and set out meaningful standards for determining what kinds of changes the legislature may validly propose to the Alaska Constitution.

CONCLUSION. The Preliminary Opinion and Order of the Alaska Supreme Court in Bess v. Ulmer casts doubt upon the power of the legislature to propose changes to the Alaska Constitution because the court failed to enunciate standards to identify which constitutional changes constitute amendments and which constitute revisions. In light of the Bess case, the mere fact that a subsistence constitutional amendment, such as those proposed by the governor, affects several provisions of the constitution is cause for concern as to the power of the legislature to propose such an amendment. Any attempt by the legislature to propose such a subsistence constitutional amendment would clearly be subject to legal challenge on

the ground that it constitutes a constitutional revision. The probable outcome of such a challenge cannot be known with any assurance but there is a risk that such a constitutional amendment is beyond the authority of the legislature to propose and present to the voters for approval.

A more definite assessment of the risks of proposing a subsistence constitutional amendment, or any other amendment, must await further guidance from the Alaska Supreme Court.

If I may be of further assistance, please advise.

GU:pl
98-161.plm

In the Supreme Court of the State of Alaska

Howard Bess, et al.. Elizabeth Dodd, et al., and The Alaska State Legislature,	)	
Appellants.	)	Supreme Court Nos. S-08811, S-08812, S-08821
v.	)	
Fran Ulmer and State of Alaska,	)	**Preliminary Opinion and Order**
Appellees.	)	Date of Order: **9/22/98**

Trial Court Case # **3AN-98-07776 CI**
3AN-98-07972 CI
3AN-98-08114 CI

Before: Matthews. Chief Justice, Compton. Eastaugh, Fabe, and Bryner. Justices.

DISCUSSION

1. Challenged in this case are three ballot propositions to amend the Alaska Constitution which by legislative resolve are to be placed before the voters in the November 1998 general election. The superior court granted summary judgment in favor of the State defendants and the Legislative Council and entered final judgment on September 8, 1998. Because of the immediate need to decide what the general election ballot shall contain we granted expedited consideration. For the reasons set forth below we conclude that (1) Legislative Resolve No. 59 (relating to prisoners' rights) may not appear on the ballot. (2) Legislative Resolve No. 71 (limiting marriage) may appear on the ballot. but the second sentence of the proposed amendment should be deleted. and (3) Legislative Resolve No. 74 (relating to reapportionment) may appear on the ballot.

2. The Alaska Constitution recognizes two types of constitutional change. The constitution may be amended or it may be revised.

a. Amendment. There are two methods of amendment. The method relevant here is by legislative proposition which is passed by two-thirds of the members of each legislative house and adopted by a majority of the voters. Alaska Const. art. XIII, § 1 A constitutional convention may also propose amendments. These become effective if they are ratified by the voters. Alaska Const. art. XIII, § 4.

b. Revision. There is one method of revision. The constitution may be revised only by a constitutional convention ratified by the voters. Alaska Const. art. XIII. § 4.

3. All three ballot propositions are challenged on the ground that they are inappropriate as amendments under article XIII, section 1 of the Alaska Constitution. Appellants argue that the changes the propositions seek to accomplish can only be effected, if at all, by the constitutional process of revision.

4. Case law is evidently unanimous in support of the view that there is a distinction of substance between the concepts of amendment and revision and that some proposed constitutional changes can only be accomplished by revision. McFadden v. Jordan, 196 P.2d 787 (Cal. 1948); Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958). The proceedings of the Alaska Constitutional Convention indicate that the framers of our constitution were in accord with this view. 2 Proceedings of the Alaska Constitutional Convention 1247. 1251. 1275 (January 5, 1956).

5. The line between changes which are permissible as amendments and those which must necessarily be revisions cannot be drawn with precision. In general. changes which are "few and simple and independent" can be considered amendments. whereas "sweeping change" requires the revision process. See Alabama v. Manley, 441 So. 2d 864. 879 (Ala. 1983); Jackman v. Bodine 205 A.2d 713. 725 (N.J. 1964). both quoting sections from Judge John A. Jameson. A Treatise on

Constitutional Conventions (4th ed.1887). McFadden is instructive on the distinction between amendment and revision. We quote it at some length because it was decided by a distinguished court only a few years before the Alaska Constitution was written. Quoting from an earlier case, the McFadden court discussed revisions made by a convention in which "the entire sovereignty of the people is represented . . . ." Id. at 789.

> The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States. . . . The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicated the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

Id. The court held that the measure in question was so "far reaching and multifarious" that it was revisory rather than amendatory in nature. Id. at 788. The court listed numerous sections of the constitution which the measure in question would affect. Id. at 794-96. This review demonstrated

> the wide and diverse range of subject matters proposed to be voted upon, and the revisional effect which it would necessarily have on our basic plan of government. The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested . . . .

Id. at 796-97. In Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), the court opined that amendment as distinct from revision authority "includes only the power to amend any section in such a manner that such amendment if approved would be complete within itself, relate to one subject and not

substantially affect any other section or articles of the Constitution or require further amendments to the Constitution to accomplish its purpose." Id. at 831.

6. The above authorities are quoted merely to suggest factors that should be considered in determining whether a proposed constitutional change is amendatory or revisory. In making such a determination, respect for the legislature and the electoral process requires that courts should decline to order a measure removed from the ballot except in clear cases. See Meiners v. Bering Strait Sch. Dist., 687 P.2d 287 (Alaska 1984).

7. Legislative Resolve No. 59. This measure proposes to amend the Alaska Constitution by adding a new section to article I providing as follows:

> Rights of Prisoners. Notwithstanding any other provision of this constitution, the rights and protections, and the extent of those rights and protections, afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections, and the extent of those rights and protections, afforded under the Constitution of the United States to prisoners convicted of crimes.

All provisions of the Alaska Constitution granting prisoners' rights not granted under the federal constitution are superceded or amended by this measure. Numerous provisions of the Alaska Constitution are either actually or potentially affected. Changed or potentially changed would be such constitutional guarantees as the right of all persons to equal rights, art. I, § 1; freedom of religion, art. I, § 4; freedom of speech, art. I, § 5; the right to petition government, art. I, § 6; the right to due process of law, art. I, § 7; protections from double jeopardy and self-incrimination, art. I, § 9; the right to counsel, art. I, § 11; protection from excessive bail, excessive fines and cruel and unusual punishment, art. I, § 12; the rights which flow from the principle of reformation, art. I, § 12;

the privilege of habeas corpus. art. I, § 13; protection from unreasonable searches and seizures, art. I. § 14: and the right to privacy, art. I, § 22.

8. Legislative Resolve No. 59 is similar in character to the ballot measure involved in Raven v Deukmejian, 801 P.2d 1077 (Cal. 1990). The measure in that case provided in part that the California Constitution "shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . . ." Id. at 1086. The California Supreme Court concluded that this measure "would be so far reaching as to amount to a constitutional revision . . . ." Id. We reach the same conclusion in this case. Legislative Resolve No. 59 would eliminate the independent force and effect of so many provisions of the Alaska Constitution with respect to the rights of prisoners that it is beyond the limits of the amendatory process of article XIII, section 1.

9. Legislative Resolve No. 71. This measure would amend article I of the Alaska Constitution by adding a new section to read:

> Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.

The appellees contend that the meaning of this measure is that only marriages between one man and one woman may be given official status and recognition. Appellants contend that it has broader implications. They argue that the first sentence necessarily amends the Alaska Constitution in three respects: changing the equal rights clause, art. I, § 1: the civil rights clause, art. I, § 3; and the privacy section, art. I, § 22. They contend that the second sentence divests the judiciary of the power to interpret the constitution. Further, they argue that the second sentence "permits the criminaliza-

tion of homosexual relationships. . ." and may modify the free exercise of religion clause of article I, section 4 "because some religions . . . perform same sex marriages today."

10. In our view the first sentence of the resolve is not so broad in scope that it is impermissible as an amendment. It potentially affects the meaning of the equal rights clause contained in article I, section 1. Article I, section 3 is not affected, for it does not specify sexual preference as a suspect classification. Further, it is unclear whether the right to privacy is affected, for the first sentence is concerned with recognition of marriage as an official relationship, not with private relationships. Moreover, the content of the sentence is simple to express and understand. It relates to only one subject and does not substantially affect numerous other sections of the constitution.

11. More problematical are two aspects of the second sentence of the measure. The appellants argue that the second sentence may be interpreted to permit the prosecution of individuals because they are involved in marriage-like relationships which are not officially sanctioned, and may tend to inhibit, because of this risk, religiously sanctioned marriage ceremonies. The appellees counter that the second sentence is superfluous. They argue that it is intended to say no more than that other provisions of the Alaska Constitution must be harmonized with the first sentence. Appellees suggest that this court could make it clear that the proposed amendment is not intended to interfere with or criminalize private or religiously recognized same-sex partnerships by issuing an interpretation to that effect in this case. At oral argument the appellees acknowledged that this court has the power to order the deletion of the second sentence, but questioned the need for this action since the sentence is merely surplusage. We believe that there is such a need. We do not believe that language which is surplusage should be part of the constitution. Of special concern is

the possibility that the sentence in question might be construed at some future time in an unintended fashion which could seriously interfere with important rights. As decades pass, the legislative history of the resolve may fade from memory. Further, court decisions lack the permanency of constitutional language and may be overruled. The objective of the second sentence -- harmonization of other provisions of the constitution with the meaning of the first sentence -- will be achieved in any event, for a specific amendment controls other more general provisions with which it might conflict. State v. Ostrosky, 667 P.2d 1184, 1190 (Alaska 1983); Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1264 (Alaska 1988). Impelled by these considerations we believe that deletion of the second sentence is appropriate.

12. Legislative Resolve No. 74. This measure would amend article VI of the Alaska Constitution concerning the apportionment of House and Senate districts. Currently reapportionment is a function performed by the Governor. Under the proposed amendment the function would be performed by a board consisting of five members, two appointed by the Governor, one appointed by the presiding officer of the Senate, one by the presiding officer of the House of Representatives, and one by the Chief Justice of the Supreme Court. It is our view that this resolve reflects an appropriate exercise of the amendatory power. While the change is an important one, it is simple to express and understand. It is complete within itself, relates to only one subject, and does not substantially affect numerous other sections of the constitution.

13. The appellants also argue that the three ballot propositions should be considered in the aggregate to be beyond the constitutional amendatory process. We reject this argument, for the measures lack substantial relationship to each other and are proposed for separate and independent approval. See Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958).

14. In addition to the point that the measures are beyond the amendatory process, the parties raise two other process-related issues which are appropriate for decision prior to the election. These are whether the propositions violate a constitutional one-subject requirement and whether the Lieutenant Governor's summary is fair and impartial. The Legislative Council also objects to the summary as not fair and impartial. We have examined these claims and find them to be without merit. However, the final sentence of the summary regarding marriage must be deleted in conformity with our decision regarding that measure.

15. Appellants' remaining claims are inappropriate for a pre-election challenge.

ORDER

1. Legislative Resolve No. 59 shall not be placed on the ballot.

2. The second sentence of the amendment proposed by Legislative Resolve No. 71 shall not be placed on the ballot. To conform with this change the last sentence of the Lieutenant Governor's summary shall be deleted.

3. Legislative Resolve No. 74 shall be placed on the ballot.

4. An opinion will follow.

Entered at the direction of the court.

Acting Clerk of the Appellate Courts

Adam L. Petersen

Adam L. Petersen

COMPTON, Justice, dissenting, in part.

The court concludes that the words "amend" and "revise," as used in article XIII of the Alaska Constitution, indeed have a different meaning. I agree. It also concludes that the proposed changes to the constitution relating to prisoners and the definition of marriage are, in whole or in part, "revisions" to the constitution and hence cannot be placed on the ballot by legislative action; only a constitutional convention can act to place these issues before the voters. I also agree. However, the court concludes that the proposed change relating to the manner by which reapportionment is accomplished is merely an "amendment." By any measure this seems unsupportable; it is particularly so in light of the court's conclusions with respect to constitutional "revisions" regarding prisoners and the definition of marriage. Therefore, I dissent from the court's conclusion regarding this issue.

The Alaska Constitution provides for a chief executive with strong powers, one of which is the power to shape the composition of the reapportionment board. Effectively, this is the power to shape the composition of the legislature itself. Indeed, Alaska's is probably the only state constitution that grants its chief executive such broad power over reapportionment. The chief executive's constitutional powers, including the power over reapportionment, were among the most debated, if not the most debated, issues at Alaska's Constitutional Convention. To now permit this issue to be brought before the voters through legislative action as a constitutional "amendment" ignores the importance which the Constitutional Convention gave to this issue, and the pervasive effect the transfer of so much constitutional power from the chief executive to the legislature will have on the manner by which voters are grouped together to elect legislators. Moreover, not only will the "amendment" divest the chief executive of much of the constitutional power that office has

held since statehood, and invest the legislature with a constitutional power heretofore unknown to it, but also it will bring the judiciary into the reapportionment process in a manner which is potentially highly political. The fact that the very persons whose interests are the most directly affected by this "amendment" are the persons who have brought the issue to the voters by the least restrictive, least impartial, and most politically sensitive process, should not be ignored.

The proposed constitutional "revision" regarding prisoners affects a narrow class of persons comparatively few in number. Yet because it implicates numerous state constitutional provisions, and divests prisoners of state constitutional protections, we conclude that it is a constitutional "revision" that cannot be brought before the voters as a constitutional "amendment" initiated by legislative action.[1] On the other hand, we conclude that the proposed change regarding reapportionment, which fundamentally redistributes among all three branches of government constitutional power previously held by the chief executive alone, impacts all voters within the state, and restructures the manner by which the voters are grouped together to elect their legislators, is a mere constitutional "amendment" undeserving of the politically impartial deliberation inherent in the constitutional convention process. The irony is remarkable.

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[1] In concluding that Legislative Resolve No. 74 is an "amendment" and not a "revision," the court observes that "[w]hile the change is an important one, it is simple to express and understand. It is complete within itself, relates to only one subject, and does not substantially affect numerous sections of the constitution." Except for the "does not substantially affect" phrase, which relates to the numerous constitutional provisions that will be affected, what could be more easily expressed and understood than that the rights of prisoners under the Alaska Constitution shall be limited to those afforded by the Constitution of the United States?