

SB

104

(FILE 5)

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 25, 1998

Honorable Terry Martin
Alaska State Legislature
State Capitol, Room 502
Juneau, AK 99801-1182

Re: Records Request HB 393/SB 288

Dear Representative Martin:

The Attorney General has asked me to respond to your request for Department of Law records relating to HB 393, the Alaska Stranded Gas Development Act. In that request, you state that "it is my understanding that your office has provided the Governor with an opinion that some aspects of the proposal in HB 393/SB 288 could or would be held unconstitutional." You then request copies of any such opinions, as well as any and all correspondence between the Department of Law and the Office of the Governor or any other state agency that relates to the bill.

The Department of Law has not provided the Governor or any other state agency an opinion that some aspects of the proposal in HB 393/SB 288 could or would be held unconstitutional. However, I understand that Legislative and Legal Services raised several constitutional issues in its analysis of the bill, as reflected in the memorandum from Tamara Brandt Cook of that office to Representative Mark Hodgins, dated March 11, 1998. The first question raised by Ms. Cook was whether one legislature has the power to bind future legislatures with respect to the exercise of the taxing power under art. IX of the Constitution of the State of Alaska. She concluded that one legislature cannot bind another under art. IX, and I concur. Although I did a considerable amount of research on this issue, I did not reduce my conclusion to a written opinion. However, I prepared a set of overhead slides summarizing my research, to explain the analysis to interested persons inside and outside state government. I have attached copies of those slides for your review. In addition, this research was summarized at pages 6 and 7 of the North Slope Gas Commercialization Team's Report to the Governor. I've attached copies of those pages as well.

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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RECEIVED
ALASKA DEPARTMENT OF REVENUE

MAR 27 1998

COMMISSIONER'S OFFICE

DOL_006078

Legislative Legal and Research Services raised the "surrender of the taxing power" question because the Governor's legislation contemplates development of a long-term contract that reflects the fiscal terms applicable to the sponsors of a stranded gas project. The legislation itself, however, is not unconstitutional under art. IX, because it does not purport to bind future legislatures. Instead, it merely authorizes the Commissioners of Revenue and Natural Resources to develop appropriate contract terms. Authorization to execute the contract will not be delegated to the executive branch until the legislature has had an opportunity to review the contract and ascertain whether its terms are in the public interest. Even if that authorization is given, the legislature may expressly provide that the contract's fiscal terms are * binding only so long as no future legislature decides to exercise the taxing power in a different way. In other words, the "surrender of the taxing power" issue may never arise. A concrete analysis of the issue must be left to the day the legislature decides whether, and if so under what terms, it will allow execution of a contract at all.

Another constitutional issue identified by Legislative Legal and Research Services is the viability of the bill's Alaska hire provisions. We are, of course, cognizant of the significant limitations on such provisions imposed by the state and federal constitutions. The Alaska hire language in the Governor's bill was carefully drafted to provide the strongest possible Alaska hire standards under present constitutional constraints.

The final constitutional issue identified by Legislative Legal and Research Services is the question whether the legislature's decision to authorize development of a contract, but withhold authorization to execute it, violates the separation of legislative and executive powers mandated by the Constitution of the State of Alaska. Assuming for the sake of argument that this split in the legislature's delegation of authority would infringe the constitutional prerogatives of the executive, Legislative Counsel has recognized that the executive may, as a matter of comity, acquiesce in the legislature's interest in additional oversight. The Governor has publicly expressed strong feelings that there must be broad public and political support for any new fiscal regime applicable to a North Slope gas project, and that a meaningful role for the legislature after a contract's terms have been developed is essential to secure that support.

I hope this letter adequately responds to the concerns you have raised in your letter. You should be aware that this Department cannot turn over all correspondence between it and the Office of the Governor and other state agencies that relate to the Governor's proposed legislation without obtaining from the Governor and the affected agencies a waiver of the deliberative process privilege, attorney client privilege, and other privileges that may apply to that correspondence. I have not sought to obtain a waiver of those privileges from the Governor or other agencies, and would advise them that waiving those privileges would be ill advised.

Nevertheless, I would be happy to discuss with you or your staff any of the constitutional issues mentioned above, or other issues relating to the bill, at your convenience. The

Honorable Terry Martin


March 25, 1997

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Governor's legislation obviously raises important public policy questions that should be discussed and debated fully before the legislature acts. If I can be of further assistance to you, please let me know. My direct line is (907) 269-5268. You can also reach me by E-mail at Jack_griffin@law.state.ak.us.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL


John P. Griffin
Assistant Attorney General

JPG:jfs
Enc.

cc: Bruce Botelho

DOL_006080

Section 1, Article IX of the Alaska Constitution states:

*state will own large part of
you to the other people*

Taxing Power. The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

Sec. 20 to Alaska Const. for related discussion

Section 4, Article IX of the Alaska Constitution states:

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

Issue: May the legislature pass a general law that empowers the executive to enter a contract setting the tax obligations of a participant in a particular industry for a definite period, such that, under Article I, § 10 of the U.S. Constitution, future legislatures cannot impair that contract, either by repeal or amendment of the general law, or by imposition of additional tax obligations under a new law?

Answer: No. Article IX, Section 4 empowers the legislature to establish exemptions only by general law; although the legislature may allow the executive to reflect those exemptions in a “contract,” that “contract,” like the general law upon which it is based, will be subject to an implied condition that future legislatures may amend or repeal it.

Reason: A contract that prohibits future legislatures from amending or repealing tax exemptions or from imposing new tax obligations upon an individual or corporation, is a surrender of the taxing power that is prohibited by Article IX, Section 1 of the Alaska Constitution. To the extent the legislature may “contract away” the taxing power, it may do so only by general law, which is to say that the “contract” is subject to repeal or modification by any future legislature.

“The principle asserted is, that one Legislature is competent to repeal any act which a former Legislature was competent to pass, and that one Legislature cannot abridge the powers of a succeeding Legislature.”

“The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding Legislature cannot undo it. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights...”

The Piqua Branch of the State Bank of Ohio v. Knoop, 14 L. Ed. at 983
(quoting *Fletcher v. Peck*, 6 Cranch 135).

“That acts of Parliament derogatory from the power of subsequent Legislatures are not binding. Because the Legislature being in truth the sovereign power, is always equal, always absolute; and it acknowledges no superior on earth, which the prior Legislature must have been if its ordinances could bind a subsequent Parliament.”

The Piqua Branch of the State Bank of Ohio v. Knoop, 14 L. Ed. at 989,
(Catron, J., dissenting, quoting Blackstone)

“And upon the same principle Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses which endeavor to tie up the hands of succeeding Legislatures. When you repeal the law itself, says he, you at the same time repeal the prohibitory clause which guards against repeal.”

The Piqua Branch of the State Bank of Ohio v. Knoop, 14 L. Ed. at 989)
(Catron, J., dissenting, quoting Blackstone)

We do not believe that any legislative body, sitting under a State Constitution, of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which in modern political societies, is absolutely necessary to the continued existence of every such society. . . . To hold, then, that any one of the annual Legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve.

Washington University v. Rouse, 19 L.Ed. 498
(Miller, J., dissenting)

“The right of a state government through its Legislature, when not restricted by constitutional provisions, by contract to limit its power of taxation, is a doctrine too firmly established to admit of discussion at this time.”

State v. Great Northern Railroad Co., 119 N.W. at 202 (Minn. 1908)

A provision that has come into increasing use in recent years is the clause stating that “the power of taxation shall never be surrendered, suspended, or contracted away.” This provision is the only provision dealing with taxation that is included in the Model State Constitution of the National Municipal League. Its object is to prevent the state from exempting, particularly by contract, individuals and corporations from taxation.

Constitutional Studies, Chapter IX at pp. 4-5

Arizona, California, Florida, Georgia, Kentucky, Maine, Minnesota, Missouri, New York, and Oklahoma are states with constitutions that include a clause stating that “The power of taxation shall never be surrendered, suspended, or contracted away.”

Constitutional Studies, Chapter IX at p. 4 n.11

The states of Arkansas, Louisiana, Idaho, Montana, North Dakota, Pennsylvania, Texas, Virginia, Washington, and South Dakota have the same provision, but limit its application to corporations.

Constitutional Studies, Chapter IX at p. 5 n.12

“The issue today is not one of conferring taxing power as such, but rather it is a question of under what conditions and in what circumstances should the state limit itself in the use of its taxing power. There are various cases in which states have limited or surrendered taxing authority over particular individuals, institutions, corporations, or industries in an effort to favor some particular class of people, use of property, or to induce investment or construction of a particular type or in a specific jurisdiction or locality.”

Constitutional Studies, Chapter IX at p. 9

[S]uch a provision does not prohibit tax exemptions; it serves another rather technical purpose in limiting the nature of exemptions granted by the legislature.

Constitutional Studies, Chapter IX at pp.10-11

[S]uch a provision does not prohibit tax exemptions; it serves another rather technical purpose in limiting the nature of exemptions granted by the legislature.

Constitutional Studies, Chapter IX at pp.10-11

Industrial Exemptions are a “violation of the first principles of a sound tax program.”

Constitutional Studies, Chapter IX at pp.11-12 n.26, citing Tax Exemptions (Tax Policy League, 1939).

“It is a settled principle of public law that one legislature cannot bind another and that the government of a state cannot contract away its police power.”

Constitutional Studies, Chapter IX at p. 15

“The power to tax is not considered inalienable, however. In granting exemptions, one legislature may bind another and there lose for the state its power to tax.”

Constitutional Studies, Chapter IX at p. 15

“The exemption may, under certain conditions, result in a contract relationship that legislatures may not abrogate without violating the federal constitutional guarantee against state legislation impairing the obligation of contracts.”

Constitutional Studies, Chapter IX at pp. 15-16

“To avoid such difficulties, a considerable number of states have constitutionally prohibited the surrendering or contracting away of the taxing power. It is deemed that with such a provision in the constitution, a state enactment intended to give contract status to a tax exemption would be void ab initio.”

Constitutional Studies, Chapter IX at p. 16

And, most importantly, “[a]ny general exemption act would be read as not capable of establishing a contracted exemption.”

Constitutional Studies, Chapter IX at p. 16

“Exemptions are to be narrowly construed. They are more likely to be considered contracts if contained in a corporate charter, or if they arise from a special rather than a general law.”

Constitutional Studies, Chapter IX at p. 16 n.31

PROPOSAL NO. 3

RESOLVED, that the following be agreed upon as part of the Alaska State Constitution.

1. The power of taxation shall never be surrendered, suspended, given or contracted away.

Constitutional Convention,
Referred to Committee on Finance,
November 15, 1955

“Mr. Cooper asked what consideration the committee had given tax incentives for Alaska.

At the request of the chairman, the secretary read the sections tentatively adopted which bear on this subject, and explained that the committee intended to make it possible for the legislature to grant tax incentives, while not specifying any in the constitution.”

**Constitutional Convention,
XI/Finance & Taxation/17,
December 3, 1955**

Section 1. The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein.

**Constitutional Convention Committee Proposal/9,
December 16, 1955**

(Sec. 1 Taxing Power)

The power to tax is never to be surrendered, but under terms that may be established by the legislature it may be suspended or temporarily contracted away. This could include industrial incentives, for example.

**Constitutional Convention Committee Proposal/9,
Commentary on the Article on Finance and Taxation,
December 16, 1955**

Section 1 is a rather routine statement that the power of taxation shall never be surrendered or contracted away. The reason for the division of the thought there and the addition of the words, "except as provided herein" is to remove doubt as to what we might mean later on down in the article by providing exceptions.

Minutes of the Alaska Constitutional Convention,
December 19, 1955

“Section 4 deals with exemptions from taxation, most of it is pretty standard. . . .

The exemption given to religious, charitable, cemetery, or educational purposes is pretty standard. These are the only ones we have attempted to spell out here. And then in the last paragraph of that section it provides that other exemptions may be provided by general law. This would allow for, among other things, for a granting of tax incentives to new industries.”

**Minutes of the Alaska Constitutional Convention,
December 19, 1955**

“Section 1 of this proposal has been altered slightly from the usual wording of a number of state constitutions and also the model state constitution in that which, as some of you perhaps might have noticed, generally reads, “The power of taxation shall never be surrendered, suspended or contracted away.”

Minutes of the Alaska Constitutional Convention, January 16, 1956

“The Committee felt that definitely the power of taxation should never be surrendered so we inserted a semicolon, but we did feel that there would possibly be occasion and good justification in the future for such things as allowing an industry-wide exemption to encourage new industry to come in and that is the reason for the particular wording there. That is later provided for under Section 4.”

Minutes of the Alaska Constitutional Convention, January 16, 1956

“In construing and interpreting contracts of this class, the courts are guided by a set of principles that have now become fundamental. . . .These in brief, are, chiefly

- [1] that taxation is the rule, and exemption the exception;**
- [2] the power of taxation is an essential attribute of sovereignty, necessary and vital to the very existence of the government;**

***State v. Great Northern Railroad Co.*, 119 N.W. at 202 (Minn. 1908)**

- [3] the whole community is interested in its maintenance unimpaired;
- [4] it is presumed never to have been surrendered; and
- [5] the intention to surrender it must be expressed in language so clear and free from ambiguity as to admit of no reasonable doubt.”

State v. Great Northern Railroad Co., 119 N.W. at 202 (Minn. 1908)

- [6] “An exemption never arises by implication;
- [7] it is always restricted to its lowest possible terms;
- [8] every doubt must be resolved in favor of the government and against the claimant.”

State v. Great Northern Railroad Co., 119 N.W. at 202 (Minn. 1908)

If the exemption clause of the charter was void in its irrevocable feature, it created no obligation, and hence its repeal impaired nothing. So long as the exemption remained in force and unrepealed, it was valid.

Phillips Exeter Academy v. Exeter, 27 A.2d at 578

[P]ublic agents have no power to bind the state or any of its subdivisions by an apparent authority in excess of their actual authority. The grantee of an exemption is chargeable with notice of the constitution and limitations of legislative power, and he may not in reasonable justice rely on the legislative assumption of power merely because the legislature assumes it or the executive department of government acts pursuant to it or the unofficial public do not question it.

Phillips Exeter Academy v. Exeter, 27 A.2d at 586

LEGAL SERVICES

**DIVISION OF LEGAL AND RESEARCH SERVICES
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STATE OF ALASKA**

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120 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 30, 1998

SUBJECT: Alaska Stranded Gas Act (CSHB 393(RES))

TO: Representative Scott Ogan
Attn: David Stanchiff

FROM: Richard A. Glover *RAG*
Legislative Counsel

Enclosed is the CS you requested.

AS 43.82.220 limits the scope of this bill to gas royalties only. A specific statement regarding this appears in AS 43.82.220(d), prohibiting modification of oil royalty under the provisions of the bill.

I would also like to bring to your attention that the bill as introduced does not seem to comply with Art. IX, sec. 1 of the state constitution which states:

The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

Under AS 43.82.210 of the bill, or as negotiated by the legislature as contemplated by the new AS 43.82.650, a contract may contain terms that substitute periodic payments in lieu of taxes. These contract terms will, I suppose, be expected to prevent the state from later changing the law and imposing those taxes as a result of the federal and state prohibitions on the impairment of contracts. (Art. I, sec. 15, Constitution of the State of Alaska) The problem is that this is exactly the kind of contract that is prohibited under Art. IX, sec. 1. While the state may certainly provide for a tax exemption, I do not think it is possible for the state to give up its power to repeal the exemption and impose the tax in the future. Any contract that has that effect will probably be void as against public policy.

If I may be of further assistance, please advise.

RAG:dr,gle
4S-202 jdr

Enclosure

DOL_002968

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LEGAL SERVICES

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MEMORANDUM

March 11, 1998

SUBJECT: Gas projects (CSHB 393(O&G))

TO: Representative Mark Hodgins, Chair
House Special Committee on Oil and Gas

FROM: Tamara Brandt Cook
Director *TBC*

Here is a draft committee substitute you requested of a bill originally introduced by the governor. I have some comments.

(1) The bill as introduced does not seem to comply with Art. IX, sec. 1 of the state constitution which states:

The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

Under AS 43.82.210 in the bill, a contract will contain terms that substitute periodic payments in lieu of taxes. These contract terms will, I suppose, be expected to prevent the state from later changing the law and imposing those taxes as a result of the federal and state prohibitions on the impairment of contracts. (Art. I, sec. 15, Constitution of the State of Alaska) The problem is that this is exactly the kind of contract that is prohibited under Art. IX, sec. 1. While the state may certainly provide for a tax exemption, I do not think it is possible for the state to give up its power to repeal the exemption and impose the tax in the future. Any contract that has that effect will probably be void as against public policy.

(2) AS 43.82.230(a) requires the commissioner of revenue to include in a contract a term requiring contracting with and employment of state residents, "within the constraints of law..." As a practical matter, there is little chance that such a term could ever be included. (Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), rev'd on other grounds, 437 U.S. 518 (1978)) To the extent that the change made in this CS to the definition of "Alaska resident" adds a durational residency requirement of one year or longer, it is likely to be constitutionally invalid.

(3) The requirement added in AS 43.82.435 of this CS that the authority to enter into a contract be authorized by the legislature may violate the separation of powers doctrine. While the legislature may enact standards for the exercise of an executive power, it may generally not reserve the power to approve or authorize a particular action. For example,

Representative Mark Hodgins
March 11, 1998
Page 2

former AS 37.05.280, requiring legislative approval of certain leases of state office space, was held to violate the principle of separation of powers. (Marine View Chapter Luncheon Tenants Association v. Alaska State Housing Authority, Superior Court, First Judicial District, 1JU-80-1037 Civ., Nov. 3, 1981) Currently the Procurement Code contains a similar lease approval requirement in AS 36.30.080, but at the time of the Code rewrite, a representative of the Attorney General's office testified that the provision was invalid. Likewise, the executive branch has, for many years, taken the position that the requirement for legislative approval of royalty oil contracts is unconstitutional (See Governor's transmittal letter for SB 164 dated April 22, 1995, Senate Journal, pages 1190-1191) Note, however, that while the executive branch has consistently, and, in my view, correctly, asserted that legislative approval provisions are unconstitutional, it has often conformed to them to accommodate the legislative desire for oversight.

(4) AS 43.82.400 uses the term "public revenue." I don't know what that means.

(5) The definition of "uneconomic or uncompetitive" added in paragraph 12 of AS 43.-82.900 in this CS is not useful. That phrase is not used in the bill at all except in the paragraph (11) of the same section. Taken together the net result of both the definitions is to define "stranded gas" as follows: (11) "stranded gas" means gas that is not being marketed due to prevailing cost or price conditions as determined by an economic analysis by the commissioner. Is that a good definition for your purpose? If so, I suggest you substitute it for paragraphs (11) and (12).

(6) In AS 43.82.510 added by this CS it is presumed that more than one municipality will be affected and so several members will be appointed to the group. What if only one municipality is affected?

(7) In AS 43.82.200(2)(A) and (B) are mutually exclusive. Does this make sense?

(8) AS 43.82.300 is unclear to me. Upon approval of an application, a commissioner can request certain information, but, if the information is not provided, the commissioner is prohibited from continuing to review the application. Hasn't the application already been approved? What, then, is left to review?

TBC:lmb
98-035.lmb

Enclosure

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fishing and trapping license and voter registration. In order to make those changes on page 15, line 5, an "and" would need to be added at the end of the line and strike the language on lines 8 and 9.

Number 1967

COMMISSIONER CONDON addressed the issue of gas to communities. He stated that requiring project sponsors to subsidize local gas consumption would increase the project costs and have a dependency of pushing project economics in the wrong direction. He stated that they are trying to increase the likelihood that the project is going to come into being. He stated that they are going to be requiring a reasonable provision of gas to communities and they need to figure out ways to reduce the uncertainty regarding the quantity of gas that the project is going to be required to deliver to local users. This is so that requiring Alaska deliveries is not a disincentive to the project.

Number 2016

COMMISSIONER CONDON stated that the third area is municipal revenue sharing. Clearly, the single step that both state and local governments can take to improve economics of this project is to relieve the project of the tax burden of a local property tax before the project goes into operation. He stated that the state and local governments will feel the largest negative impact from the project in terms of providing social services and the social disruption that occurs with a large project. He pointed out that the question is whether or not it is worth it. He stated that there is the question of how municipalities should share in the revenues generated by a fiscal contract. Whether municipal governments should be at the table, is a question that the legislature needs to address. He pointed out that the bill does not provide for that now and if it were made to include them, negotiations would be more cumbersome.

Number 2107

COMMISSIONER CONDON addressed the area of confidentiality, trade secrets would be held in confidence by the state. That information would be shared among the pertinent executive branch agencies and the legislature, but would be kept confidential as long as they truly were trade secrets. The memorandum and documents generated during the negotiation process would remain confidential during the negotiation process but would be entirely open and available for review once the review of the contract began. He stated that it is stated in AS 43.82.310(f).

Number 2171

COMMISSIONER CONDON addressed the issue of legislative approval of the contract. Formal legislative approval of any fiscal contract involving the taxation of stranded gas is important for both policy and legal reasons. The Governor strongly supports formal legislative approval and has pledged to require it even if a legislature enacts legislation without legislatively inserting that requirement. He stated that the bill did not include this requirement because he was advised against it due to technical constitutional reasons.

2/19/88

Number 2276

COMMISSIONER CONDON stated that the final issue is, can one legislature bind future legislatures with respect to the tax liability of a project. He stated that the Department of Law has concluded that it is not possible to bind future legislatures. He stated that it could be done with a properly written fiscal contract which raises the issue of if the legislature wants to test that authority. The considerations are what the legislature believes its power ought to be and what effect litigation would have on this project. He stated that he thought it would be wiser to avoid litigation and the exploration of the issue of what the extent of legislative power is.

Number 2372

CHAIRMAN HODGINS stated that he would like to have a presentation by the producers and that the majority of the work be done in this committee.

Number 2417

REPRESENTATIVE JOE RYAN stated that the bill requires a deep leap of faith on the part of the legislature. He stated that it is time to get to the serious negotiations of what the resources are worth to state of Alaska and how far Alaska is willing to go to sell the project. He stated that there has not been any testimony as to the potential of the project.

TAPE 98-11, SIDE B
Number 0033

REPRESENTATIVE RYAN stated that the commissioner of revenue through the bill is given a lot of power and he questioned if that was wise.

CHAIRMAN HODGINS stated that at a earlier meeting Dr. Pedro van Meurs' testified that he thought there was approximately \$150 billion worth of revenues. He stated that Dr. van Meurs would be back at a later date to answer those questions.

Number 0064

REPRESENTATIVE KEMPLIN asked that on page 7, line 5 "proximity of the project" if the definition could be nailed down better than as stated. He questioned if it was just within 10 miles or does it extend to a pipeline that goes out to Southcentral Alaska.

Number 0099

CHAIRMAN HODGINS stated that it is his hope that committee members will pick the bill apart and make sure that there are no unanswered questions. He stated that HB 393 will be held over for further consideration.

House SPECIAL COMMITTEE ON OIL & GAS Minute



Feb 26, 1998

HB 393 - DEVELOP STRANDED GAS RESOURCES

Number 1069

CHAIRMAN HODGINS announced the committee would hear HB 393 "An Act relating to contracts with the state establishing payments in lieu of other taxes by a qualified sponsor or qualified sponsor group for projects to develop stranded gas resources in the state; providing for the inclusion in such contracts of terms making certain adjustments regarding royalty value and the timing and notice of the state's right to take royalty in kind or in value from such projects; relating to the effect of such contracts on municipal taxation; and providing for an effective date." He stated that he asked his colleagues to present their concerns and suggestions regarding the bill.

Number 1080

REPRESENTATIVE TERRY MARTIN, stated that he has concerns about this issue. He referred to the history of the issue of financing a gas pipeline. He stated that he had voted against the bill that had initiated this because the legislature was giving too much up to the executive branch. He referred to Title 9 of the constitution that stated the power of taxation should never be surrendered. He stated that legislators should not force the economy one way or another. He stated that the free market should be allowed to work and the legislature should not be in the way.

Number 1282

REPRESENTATIVE MARTIN stated that as legislators they should look at what is being done with the gas. He stated that recycling of gas is producing more oil resulting in an estimated 2 billion barrels of excess oil received. He stated that if the pipeline is forced the oil will decrease because once gas is taken out the oil reserves will be depleted. He asked how much this will cost the state of Alaska in oil royalties.

Number 1401

REPRESENTATIVE MARTIN stated that the incentive programs should make the participants, "run like mad". He referred to Section 2, "The legislature further intends, however, that any fiscal terms agreed to in a contract under this Act in lieu of other taxes will fully and fairly compensate the people of the state of Alaska for the severance, production, and sale of natural resources belonging to the people" and "The value of the infrastructure that may be provided by the state to a project, including all the advantages of civilized society that may be provided by the state to the sponsors of a project." He stated that clause should cause any investor to not participate in the project. He stated that at the most investors would receive 3 percent of what they invested even with

3/12/98

Number 1509

REPRESENTATIVE OGAN referred to Ms. Cook's memo and asked if we are binding further legislatures from changing the terms of the contract.

Number 1559

COMMISSIONER CONDON replied that the answer to that question is unknown. At some point in time the legislature will have the option of saying that they want to bind a future legislature, once contested the answer will be known. There are differing views on how far the legislature can go in binding future legislatures.

Number 1650

REPRESENTATIVE OGAN asked that in order to avoid legislation, it would be prudent to make sure the law is not ambiguous.

Number 1669

COMMISSIONER CONDON replied that he agreed with that but in respect to this issue, litigation would be wanted to find out the extent of the legislature's authority.

Number 1689

REPRESENTATIVE OGAN referred to Article 9, Section 1, and asked if he could explain what is provided in the article.

Number 1735

COMMISSIONER CONDON replied that the question of binding future legislatures would not arise now but when dealing with a proposed contract.

CHAIRMAN HODGINS asked Representative Ryan to present his committee substitute.

Number 1783

REPRESENTATIVE RYAN stated that there were a number of changes that he requested that are not reflected in the draft. He stated that he would not ask the committee to introduce his committee substitute until it includes what he intended it to. He stated that he was going to talk with the legislative legal department.

Number 2366

REPRESENTATIVE ROKEBERG made a motion to adopt CS HB 393(O&G). 0-GH2006, version B, 3/11/98.

TAPE 98-24, SIDE A

Number 0006

CHAIRMAN HODGINS asked if there was an objection. Hearing none, CS HB 393(O&G) 0-GH2006, version B, 3/11/98 was adopted.

Number 0076

3/12/98

and stated that the legislature has taken the position that they will prevent the executive branch from acting unless there is specific legislative authorization. Any time the administration wants to build something with revenue bonds there needs to be specific legislative authority to do so. However, there is general authority to build roads etc. He stated that this bill would not give the administration the authority to do so, it gives the command to the administration to develop a proposal for legislative authorization. He stated that without legislative authorization there can not be a separation of power problem.

Number 1090

REPRESENTATIVE BRICE stated that he believed the legislature has been clear in its support of the gas line. He stated that HB 393 gives the administration the authority to break down the terms and negotiate the contract. He stated that he is hearing that Commissioner Condon wants more authority to negotiate fiscal terms and then come back to the legislature and ask for specific statute changes to meet those fiscal terms. He had hoped in the event that there was a contract, the legislature would either sign off through resolution or not. He stated that his confusion is that instead, the administration is going to come back with further changes to the state's fiscal system.

Number 1216

COMMISSIONER CONDON stated that what the bill would do is ask the legislature for the authority to enter into the contract. In order to do so a bill would have to be passed.

Number 1253

REPRESENTATIVE BRICE replied "The difference between HB 393 and HJR 12 in general terms, are two specific different animals." He stated that the administration asks for legislative approval submitted in House bill form, but to say that the legislature can not go into that contract and make changes is absolutely foreign. He stated that to say that the legislature will approve by resolution, the difference is in the discretion.

Number 1324

COMMISSIONER CONDON stated that if there is a contract they will have no discretion unless it is agreed to.

REPRESENTATIVE BRICE asked if he wanted a resolution.

COMMISSIONER CONDON replied that it in fact has to be done in the form of a bill.

Number 1357

REPRESENTATIVE ALAN KEMPLER stated that there would be further discussions of this. The notion of fiscal certainty has been reinforced enough to move forward with the project. He stated that the process is building a case for a long term commitment to the terms of the contract. He stated that he believed this to be a good approach.

2/6/03

MR. MARKS explained that once a contract was negotiated, preliminary findings would be submitted to the governor; if the governor chose to proceed, those findings would be given to the legislature and the public for a 30-day review period. After that, the commissioner of revenue would modify the contractual terms as appropriate, and if acceptable to the sponsor; a final contract would be submitted to the governor; the governor would transmit the contract to the legislature with the request for authorization to execute the contract; and the legislature would vote on it.

MR. MARKS addressed other provisions. Calling the property tax the bread and butter for municipalities, he explained that municipalities were concerned about their interests' not being represented in a negotiation. As part of the Act, therefore, a municipal advisory group was set up to participate in developing the contract terms. In addition, there are provisions in the Act for making gas available to communities; for local hire; and for dealing with confidential information provided by the sponsors.

Number 1208

MR. MARKS also pointed out that there was a question of the constitutionality of the Act as a whole, and whether this switching to a contract [basis] by one legislature is binding a future legislature. Noting that Article IX [Section 1] of the state constitution says that the power of taxation shall never be surrendered, suspended, or contracted away, Mr. Marks reported that it was the Department of Law' judgment that [the Act] was constitutional because it was simply putting fiscal terms into a contractual form. Certainly, he said, a future legislature would be able to add tax terms after the contract was in place, but the contract itself would be "a solemn pledge or a moral commitment by the state that once it agrees to this contract, it would not change it." Likening it to "a message to the future from one legislature to another," Mr. Marks said it was the administration's position that it wasn't airtight but was "a strong moral message."

Number 1101

MR. MARKS informed the committee that the Department of Revenue generally supports HB 16. He added that possibly the administration would submit some amendments, although he wasn't aware of what they would be.

Number 1070

MR. MARKS, in response to a question from Representative Rokeberg, said he'd only had [Version H] for about one-half hour and hadn't had time to study it.

REPRESENTATIVE ROKEBERG referred to [Section 1], the proposed amendments to AS 43.82.100 under the heading "Qualified project." He asked whether the new language in subparagraphs (A), (B), and (C) would affect the department's fiscal note.

MR. MARKS said he didn't believe so.

Number 1023

REPRESENTATIVE KERTTULA offered her understanding that part of the intent with the Act was to "try to get the gas going." She asked Mr. Marks whether the lack of an expiration date [in the

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ALASKA NORTH SLOPE GAS COMMERCIALIZATION TEAM

REPORT TO THE GOVERNOR

December 15, 1997

**Wilson L. Condon, Commissioner
Department of Revenue
John T. Shively, Commissioner
Department of Natural Resources
Bruce M. Botelho, Attorney General**

DOL_006081

PART I

FISCAL CERTAINTY

Fiscal certainty is an important element in risk reduction. The goal of the Fiscal Certainty working group was to analyze, develop and propose a statutory and contractual mechanism for providing fiscal certainty for an Alaska North Slope natural gas project.

I. CONSTITUTIONAL ISSUE RAISED BY THE USE OF A CONTRACT TO DEFINE TAX LIABILITY

The use of a contract to define tax liability raises the constitutional issue of whether a future legislature is prohibited under the U. S. Constitution from altering that liability. The relevant provision is Article I, Section 10 of the U.S. Constitution that says "No state shall . . . pass any . . . law impairing the obligation of contracts."

The Department of Law's position is that the state is constitutionally incapable, under Article IX, Section 1 of the Alaska Constitution, of entering into a contract that would prohibit a future legislature from exercising its power of taxation over a signer to the contract. Any contract purporting to set an individual's tax liability into the future would be subject to an implied term, if not an expressed one, reflecting this constitutional limitation.

Article I, Section 10 of the U.S. Constitution, the impairments of contracts clause, would not be violated by a subsequent legislative enactment changing a signer's tax obligation because no binding contractual obligation existed over the legislature's authority to pass new tax laws that apply to the signer. Therefore, the contract would not be impaired by the enactment of such a new law. The state may set by contract a person's tax liability, so long as it is understood that the contract does not limit the ability of a future legislature to revoke that contract and change that person's tax liability through the enactment of a general law. Viewed another way, Sections 1 and 4 of Article IX of the Alaska Constitution allow a contract to stand in the stead of a general law imposing a tax. This means that a future legislature may amend the tax liability imposed by the contract just as it may amend any general tax law.

There is a contrary interpretation of Article IX, Section 1 does not clearly state that the power of taxation may never be contracted away. Instead, it states "[t]his power shall not be suspended or contracted away, except as provided in this article." But nowhere else in Article IX is the suspension or contracting away of the taxing power explicitly discussed. The minutes of the Constitutional Convention reveal, however, that what the framers had in mind was the provision in Section 4 empowering the legislature to create tax exemptions by general law.

The framers' choice of language creates an ambiguity, if not an outright conflict, between Sections 1 and 4, because a general law tax exemption as a rule is not considered a "suspension" or a "contracting away" of the taxing power, but rather an exercise of it. This ambiguity leaves open the argument that the framers' intent was to allow the legislature to authorize by general law the state to enter into contracts exempting persons from certain taxes and that such contracts would be binding on future legislatures--i.e., future legislatures could not impose new or different tax obligations on the signatories to the contracts without running afoul of the Impairment of Contracts Clause of the U.S. Constitution.

A. Implications of the Department of Law's Position

A contract with the state does not provide potential project sponsors with absolute certainty regarding the fiscal regime that a stranded gas project will be subject to over its life. This may discourage some potential investors, or perhaps increase the rate of return that the project needs to attract investors to compensate for the increased risk associated with the legislature's unilateral power to alter fiscal terms applicable to the project.

If the Department of Law is correct, the most that potential project sponsors can expect is a solemn pledge--a moral commitment--by the state that once it agrees to the fiscal terms, it will not change them.

B. Implications of the Contrary Interpretation

If the contrary interpretation is correct, greater certainty for project sponsors could be possible. It is unlikely, however, that the sort of absolute certainty that potential investors might desire is achievable within any reasonable time frame relevant to a decision to invest in the project given the Department of Law's interpretation and the unlikelihood of an advisory opinion on the issue from the Alaska Supreme Court.

II. CONCLUSION

The fact that the contrary interpretation is not frivolous, and could prevail in future litigation, suggests that the administration should not endeavor to reflect the tax regime applicable to a gas project in a contract, and the legislature should not in any way ratify such a contract unless both are convinced that the contract's terms are in the state's best interests and both are willing to abide by those terms throughout the stipulated life of the contract.

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**Contractually Limiting the State's
Taxing Power:**

The Constitutional Framers' Intent

April 3, 2003

Contractually Limiting the State's Taxing Power

There are Three Parts to this Presentation

Part I. The purpose of the presentation

Part II. The case in support of constitutional authority for the State to suspend or temporarily contract away its taxing power as a means to encourage industry

Part III. Discussion of the argument that “grant[ing tax exemptions] by general law” under Article IX, Section 4 implies an ability for subsequent legislatures to amend that “law” and thereby unilaterally alter the terms of those exemptions

Contractually Limiting the State's Taxing Power

Part I. The Purpose of this Presentation

April 3, 2003

Contractually Limiting the State's Taxing Power

Purpose of this presentation

- To make a plausible case that the State has authority under its constitution to enter into “tax contracts” that are legally binding and enforceable
- Not to prove definitively that the State has such authority
 - Only the Alaska Supreme Court can provide a definitive answer
 - To get such an answer, the Alaska Stranded Gas Development Act (AS 43.82) specifically calls for front-end judicial review of any natural gas “tax contract” made under it

Contractually Limiting the State's Taxing Power

Part II. The Case in Support of Constitutional Authority for the State to Suspend or Temporarily Contract Away its Taxing Power as a Means to Encourage Industry

April 3, 2003

Contractually Limiting the State's Taxing Power

Introduction: Where We Are Today

Alaska State Constitution, Article IX, Section 1 provides:

“The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.”

Contractually Limiting the State's Taxing Power

What does Article IX, Section 1 mean?

“The power of taxation shall never be surrendered.”

- “Surrender” means –
 - “To relinquish possession or control of [something] to another because of demand or compulsion.”
 - “To give [something] up in favor of another.”
 - “To give up or abandon [something without another getting it].”
- This prohibition against “surrender” of the taxing power is absolute

Contractually Limiting the State's Taxing Power

What does Article IX, Section 1 mean?

“The power of taxation shall never be surrendered. This power shall not be suspended or contracted away[.]”

- If the second sentence stopped here, the prohibition against “suspend[ing] or contract[ing] away” the taxation power would be as absolute and unqualified as the one against “surrender[ing]” that power

Contractually Limiting the State's Taxing Power

What does Article IX, Section 1 mean?

“The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.” (emphasis added)

- The “except” clause means that the taxation power can be suspended or contracted away if it is done “as provided in” Article IX
- The only condition on suspending or contracting away the taxation power is that it must be done “as provided in this article”
- But where “in this article” is it “provided” for the State to suspend or contract away the taxation power???
- After taking the trouble to include this “except” clause, did the Framers then intend it to be a dead letter?

Contractually Limiting the State's Taxing Power

Part II-A. The Direct Evidence of the Framers' Intent from the Proceedings of the 1955-56 Constitutional Convention

April 3, 2003

Contractually Limiting the State's Taxing Power

How We Got Where We Are Today

Where the Framers began

“The power of taxation shall never be surrendered, suspended or contracted away.”

Contractually Limiting the State's Taxing Power

How do we know this is where the Framers began?

- Article IX was drafted by the Committee on Finance and Taxation, chaired by Delegate Leslie Nerland
- In presenting his Committee's proposed Article IX to the Convention in Second Reading on January 16, 1956, Delegate Nerland said:

“Section 1 of this proposal has been altered slightly from the usual wording of a number of state constitutions and also the model state constitution in that which, as some of you perhaps might have noticed, generally reads, ‘The power of taxation shall never be surrendered, suspended or contracted away.’ ”
(emphasis added)

Contractually Limiting the State's Taxing Power

How We Got Where We Are Today

Where the Framers began:

“The power of taxation shall never be surrendered, suspended or contracted away.”

What the Committee on Finance and Taxation proposed:

“The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein.”

Contractually Limiting the State's Taxing Power

There are 3 explanations of the Committee's changes

- The Committee's own *Commentary* on its proposed Article IX (12/16/1955)
- A summary of the Committee's proposed Article IX, made to the Convention by Committee Secretary Barrie White when Article IX was in First Reading (12/19/1955)
- An explanation of the Committee's proposed Article IX, given to the Convention by Committee Chair Leslie Nerland when Article IX was in Second Reading (1/16/1956)

Contractually Limiting the State's Taxing Power

Model Constitution

The power of taxation shall never be surrendered, suspended or contracted away.

Proposal by Committee on Finance and Taxation

[Sec. 1.] The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein.

[Sec. 4.] The real and personal property of the state and of its political subdivisions shall be exempt from taxation under such conditions and with such exceptions as the legislature may direct. All or any portion of property used exclusively for non-profit religious, charitable, cemetery, or educational purposes as defined by law, is exempt from taxation.

Other exemptions of like or different kind may be granted by general law; and until otherwise provided by law, all exemptions from taxation validly granted are retained. [emphasis added]

Committee's Commentary

"[Sec. 1. Taxing Power.] The power to tax is never to be surrendered, but under terms that may be established by the legislature, it may be suspended or temporarily contracted away. This could include industrial incentives, for example.

"[Sec. 4. Exemptions from Taxation.] All property owned by the state and its subdivisions is exempt from taxation unless the legislature directs otherwise. An exception from tax immunity might be appropriate if a government engaged in what is normally a private business, such as operating a ski resort, a moving picture theater, or a swimming pool.

"The second sentence of this section is intended to exempt from taxation that part of the property of religious, charitable, cemetery, or educational organizations which is actually used for these purposes, as the legislature may direct. But their property used for other purposes would be taxable, for example, an office building owned by a college as part of its endowment.

"The legislature is authorized to make further tax exemptions to encourage, among other purposes, new industry, and all valid current exemptions are continued." (emphasis added)

Contractually Limiting the State's Taxing Power

Model Constitution

The power of taxation shall never be surrendered, suspended or contracted away.

Proposal by Committee on Finance and Taxation

[Sec. 1.] The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein.

[Sec. 4.] The real and personal property of the state and of its political subdivisions shall be exempt from taxation under such conditions and with such exceptions as the legislature may direct. All or any portion of property used exclusively for non-profit religious, charitable, cemetery, or educational purposes as defined by law, is exempt from taxation.

Other exemptions of like or different kind may be granted by general law; and until otherwise provided by law, all exemptions from taxation validly granted are retained. [emphasis added]

Delegate White's Summary in First Reading

"Section 1 is a rather routine statement that the power of taxation shall never be surrendered or contracted away. The reason for the division of thought there and the addition of the words, 'except as provided herein' is to remove doubt as to what we might mean later on down in the article by providing exceptions. ...

"Section 4 deals with exemptions from taxation, most of it is pretty standard. The reason in the first sentence for the words, 'with such exceptions as the legislature may direct' in referring to taxation of real and personal properties of the state and of its political subdivisions, is to leave to future legislatures the decision as to whether normally business enterprises of the state or political subdivision should or should not be taxable. The exemption given to religious, charitable, cemetery, or educational purposes is pretty standard. These are the only ones we have attempted to spell out here. And then in the last paragraph of that section it provides that other exemptions may be provided by general law. This would allow for, among other things, for a granting of tax incentives to new industries." (emphasis added)

Contractually Limiting the State's Taxing Power

Model Constitution

The power of taxation shall never be surrendered, suspended or contracted away.

Proposal by Committee on Finance and Taxation

[Sec. 1.] The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein.

[Sec. 4.] The real and personal property of the state and of its political subdivisions shall be exempt from taxation under such conditions and with such exceptions as the legislature may direct. All or any portion of property used exclusively for non-profit religious, charitable, cemetery, or educational purposes as defined by law, is exempt from taxation.

Other exemptions of like or different kind may be granted by general law; and until otherwise provided by law, all exemptions from taxation validly granted are retained. [emphasis added]

Delegate Nerland's Explanation in Second Reading

"Section 1 of this proposal has been altered slightly from the usual wording of a number of state constitutions and also the model state constitution in that which, as some of you perhaps might have noticed, generally reads, 'The power of taxation shall never be surrendered, suspended or contracted away.' The Committee felt that definitely the power of taxation should never be surrendered so we inserted a semicolon, but we did feel that there would possibly be occasion and good justification in the future for such things as allowing an industry-wide exemption to encourage new industry to come in and that is the reason for the particular wording there. That is provided for under Section 4. ...

"Section 4, the thought was to exempt the state [and! its political subdivisions from taxation under such provisions and such exceptions as the legislature may direct. There are certain conditions under which these properties might be subject to taxation, and the more or less standard phrase of all or any portion probably used exclusively for non-profit, charitable, cemetery, or educational purposes as defined by law is exempt from taxation and this is the provision that allows for some exemption or inducement to industries or similar things." (emphasis added)

Contractually Limiting the State's Taxing Power

All 3 explanations confirm the following key points

- The language “except as provided herein” in Section 1 was understood by the Framers to refer to the provision in Section 4 authorizing the legislature to grant “like or different” tax exemptions by general law
- The Finance & Taxation Committee’s express purpose in linking the “like or different” tax-exemption authority in Section 4 to the exception to the general principles in Section 1 was to allow the attraction and encouragement of new industries in Alaska

Contractually Limiting the State's Taxing Power

The Convention did not alter the Committee's intent.

This is proved by 4 facts:

- There was no Floor amendment to either Section 1 or the "like or different" tax-exemption provision in Section 4

Contractually Limiting the State's Taxing Power

The Convention did not alter the Committee's intent

- There was no disagreement or debate on the Floor about the link between the exception clause in Section 1 and the provision in Section 4 for "like or different" tax exemptions

- The only Floor discussion at all on these two provisions was this colloquy during Second Reading (1/16/1956):

KILCHER: Thank you. Then in Section 1, a similar question, in the second line, the power "shall never be suspended or contracted." Could you consider that the power of taxation – could you consider that taxes could be suspended, taxes applying to farms as a part of an integral industry?

NERLAND: I would suspect that if all farms in the Territory were so included, that perhaps they could be.

KILCHER: Yes, that's what I had in mind. Thank you.

Contractually Limiting the State's Taxing Power

The Convention did not alter the Committee's intent

- All textual changes between the Committee's proposed Article IX and the final version adopted by the Convention were made by the Committee on Style and Drafting
 - The Style & Drafting Committee had “no authority to change the sense or purpose of any proposal referred to it” – Rule 16(c) of the Convention's Permanent Rules, adopted 11/14/1955
 - Style & Drafting Committee changes were made in consultation with at least 1 representative of each committee offering a proposed Article – *see* Convention Minutes of 1/9/1956, statement by Delegate Sundborg, Chair of the Style & Drafting Committee

Contractually Limiting the State's Taxing Power

The Convention did not alter the Committee's intent

4. The Style & Drafting Committee's changes were non-substantive

Proposal by Finance & Taxation Committee

[Sec. 1. Taxing Power.] The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein.

[Sec. 4. Exemptions from Taxation.] The real and personal property of the state and of its political subdivisions shall be exempt from taxation under such conditions and with such exceptions as the legislature may direct. All or any portion of property used exclusively for non-profit religious, charitable, cemetery, or educational purposes as defined by law, is exempt from taxation.

Other exemptions of like or different kind may be granted by general law; and until otherwise provided by law, all exemptions from taxation validly granted are retained. [emphasis added]

Revision by Style & Drafting Committee

[Sec. 1. Taxing Power.] The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

[Sec. 4. Exemptions.] The real and personal property of the state or its political subdivisions shall be exempt from taxation under conditions and exceptions which may be provided by law. All, or any portion of, property used exclusively for non-profit religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law. All valid existing exemptions shall be retained until otherwise provided by law. [emphasis added]

Contractually Limiting the State's Taxing Power

The conclusions to be drawn from the Convention

- The Convention adopted without change the Finance & Taxation Committee's intended link between the exception language in Section 1 and the "like or different" tax-exemption language in Section 4
- The intent and purpose of this link, as expressed by and on behalf of the Finance & Taxation Committee, are therefore also the intent and purpose of the Constitutional Convention as a whole

Contractually Limiting the State's Taxing Power

The conclusions to be drawn from the Convention

3. The correct reading of Section 1 in conjunction with Section 4 is something like this:

“The power of taxation shall never be surrendered, but the Legislature may – to attract or encourage industry in Alaska (or, under the Kilcher-Nerland colloquy, to maintain or enhance an existing industry) – enact a general law establishing the terms under which this power may be suspended or temporarily contracted away through tax exemptions of like or different kind from the ones listed in Section 4.”

Cf. “The power to tax is never to be surrendered, but under terms that may be established [“by general law”] by the legislature, it may be suspended or temporarily contracted away. This could include industrial incentives, for example.” – Finance & Taxation Committee’s *Commentary* on Article IX, Section 1

Contractually Limiting the State's Taxing Power

The conclusions to be drawn from the Convention

4. It is likely that the State is constitutionally authorized to enter into a binding "tax contract" under the Alaska Stranded Gas Development Act (AS 43.82)
 - AS 43.82 is a "general law" by which the Legislature has exercised its constitutional authority to establish by general law the terms for the State's taxing power to be "suspended or contracted away" temporarily in order to attract or encourage industry in Alaska
 - Development of stranded natural gas is clearly within the scope of "industry" that the Framers intended these provisions to help
 - The reduction in fiscal risk that a "tax contract" under AS 43.82 provides is of material benefit to a Gas Project even if the financial obligations under that contract are equivalent to those under the existing tax statutes

Contractually Limiting the State's Taxing Power

Part II-B. Indirect Evidence of the Framers' Intent

Contractually Limiting the State's Taxing Power

When the Convention met, Alaska already had a contract-based system of tax incentives

1. Alaska Property Tax Act of 1949 -- chapter 10, SLA 1949
 - Imposed a 1% (10 mill) tax on the value of all taxable property
 - § 6(h)(1) authorized Tax Commissioner to exempt “new industry” and “new industrial enterprises” from up to half the tax for up to 10 years
 - § 6(h)(3): “All exemptions granted hereunder shall be negotiated and consummated prior to the initial commencement of [industrial] production by the applicant.” (emphasis added)
 - Emphasized words imply case-by-case bargaining, resulting effectively in individual tax-exemption contracts but without explicitly saying so

Contractually Limiting the State's Taxing Power

When the Convention met, Alaska already had a contract-based system of tax incentives

2. Contractual nature of Alaska Property Tax Act exemptions was made explicit under chapter 32, SLA 1953

- § 1(b) authorized local taxing jurisdictions, on their own without the Tax Commissioner, to provide “new industry” the same tax exemptions (i.e., up to half the tax for up to 10 years) as under the 1949 Property Tax Act
- § 2: “The governing body ... of the [local] taxing unit shall ... grant the exemptions ... permitted herein ... by appropriate ordinance or resolution, which ordinance or resolution shall constitute a contract between the [local] taxing unit, and the owner of the property” (emphasis added)
- § 3: “All exemptions granted ... under ... Section 6, Chapter 10, Session Laws of Alaska 1949 shall ... apply to all taxes levied and assessed by the [local] taxing units ... as fully as though they had been granted or made under the provisions of this Act” (emphasis added), which includes the “provision” about tax exemptions being contracts with the taxpayer

Contractually Limiting the State's Taxing Power

When the Convention met, Alaska already had a contract-based system of tax incentives

- Overlapping membership between the 1949 and 1953 Legislatures and the Constitutional Convention
 - Members of the 1949 Legislature who were Convention delegates
 - Senate (5 of 16): Barr, Collins, McCutcheon, Peratrovich and (Victor) Rivers
 - House (3 of 24): Egan, Nolan and Taylor
 - Members of the 1953 Legislature who were Convention delegates
 - Senate (1 of 16): Egan
 - House (1 of 24): Coghill

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

- Exemptions it authorized (apply to local as well as territorial taxes):
 - “industrial development income” was exempt from income tax for first 10 years (§ 1(a)); business property was exempt from property taxes for first 5 – 10 years, depending on amount invested (§ 1(b)); business was from all “license fees, excises or other taxes” for first 10 years (§ 1(c)); dividends/profit distributions of “industrial development income” were exempt from income tax for first 15 years (§ 3(a)); capital gains from sale of shares in exempt-business were exempt from income tax for first 10 years (§ 3(c)); payments made/received in qualifying liquidations of exempt-businesses were exempt from income tax for transferors and transferees owning 80% or more of the business (§ 4)

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

2. § 5(a): “Any natural or artificial person who has established or proposes to establish in Alaska an eligible business, may apply to the Board [administering the tax-exemption program] for the benefits of this Act. The grants of tax exemption under this Act shall be considered in the nature of a contract between the grantee and the Territory of Alaska. The Board may include in grants of tax exemption hereunder such terms and conditions as in its judgment will further the purposes of industrial development of this Act.” (emphasis added)

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

3. It's unlikely the 1957 Legislature would have knowingly enacted legislation inconsistent with the new Constitution
 - Convention's intent would have been known to the 1957 Legislature
 - Membership overlap between Convention and 1957 Legislature
 - Senate (5 of 16): Barr, McNees, Nolan, Peratrovich and V. Rivers
 - House (10 of 24): Awes, Buckalew, Coghill, E.A. Fischer, V. Fischer, Gray, Metcalf, Riley, Sweeney and Taylor
 - Inconsistent legislation could have caused confusion/concern in Congress, possibly jeopardizing Statehood (the Statehood Act was not passed until mid 1958)

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

4. Given the likely intent to be consistent with the new Constitution, the Act provides an almost contemporaneous illustration of how key provisions of Sections 1 and 4 of Article IX would work in practice

4A. The taxing power was “contracted away”

- i. Each exemption under 1957 Act was a true contract with taxpayer
 - Declaration in § 5(a) that all exemptions were contracts
 - Authorization in § 5(a) for Board to negotiate additional terms and conditions of the exemption reinforces its nature as a contract
 - Authorization in § 1(f) for Board to grant “partial exemption[s]” further reinforces the contractual nature of the exemptions
- ii. Each exemption was “temporary” – i.e., limited to a fixed term

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

4B. Tax “exemptions of like or different kind”

- In Article IX, Section 4 the phrase of “like or different kind” refers to the sentence immediately before it, which exempts only certain listed “property” from tax (i.e., from property taxes)
- 1957 Act exempts property, business income, dividends and distributions, and capital gains – not only from property taxes, but also from income taxes, “license fees, excises [and] other taxes”

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

4C. The 1957 Act was a “general law”

- It applied statewide, instead of to a named community or town
- It applied to qualifying new industries categorically, instead of to any named businesses or proprietors

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

4D. Tax exemptions “granted by general law”

- i. The Act was not self-executing in terms of “grant[ing]” exemptions
 - § 5(a) specifically stated that “grants of tax exemption under [note: not “by”] this Act shall be considered in the nature of a contract between the grantee and the Territory” (emphasis added)
 - Various sections of the Act declared without qualification that certain property, income, payments and activities were exempt from various kinds of taxes, but the Board under 2nd ¶ of § 2(c) and § 2(d)(7) had discretion to refuse to grant an exemption anyway
 - Exemptions were “granted” by the Board acting under the Act
 - People “appl[ied] to the Board for the benefits of this Act” instead of filing with the Board a notice or claim to those benefits; *see* § 5(a)
 - Board could “grant a partial exemption” under § 1(f) (emphasis added)

April 3, 2003

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

5. The key elements of the 1957 Act are also in the Stranded Gas Development Act (AS 43.82)
 - Each Act is a “general law” authorizing grants of individualized tax exemptions
 - The tax exemptions granted under each Act are contractual in nature
 - Negotiation of specific terms and conditions reflecting a grantee's particular circumstances is explicitly authorized under each Act
 - The actual “grant” of an exemption under each Act is made by a person or board exercising authority conferred by that Act

Contractually Limiting the State's Taxing Power

The 1957 Legislature enacted a new system of contract-based tax incentives – Alaska Industrial Incentive Act (chapter 129, SLA 1957)

6. Historical footnote – 2 Alaska Supreme Court cases involve a tax exemption granted under the 1957 Act: *Union Oil Co. of California v. State, Dept. of Revenue*, 677 P.2d 1256 (Alaska 1984) and *Union Oil Co. of California v. State*, 804 P.2d 62 (Alaska 1990)
 - Both cases were litigated over the interpretation of the exemption
 - From the absence of any mention in either case about the validity of the exemption, it appears the Court and the parties all took it for granted that the exemption was valid and was duly authorized under the Constitution
 - Note: the “grandfather” provision in the last sentence in Article IX, Section 4 would not apply to validate Union Oil’s tax exemption because it had not been granted when the Constitution took effect

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**Part III. Discussion of the Counter-Argument
that the Phrase “grant[ing tax exemptions] by
general law” in Article IX, Section 4 Implies an
Ability for Subsequent Legislatures to Amend
that “law” and thereby Unilaterally Alter the
Terms of Those Exemptions**

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What is the substance of this counter-argument?

- Granted: The exception clause in Article IX, Section 1 refers to the “like or different” tax-exemptions sentence in Section 4
- But Section 4 says “Other exemptions of like or different kind may be granted by general law” and says nothing about contracts
- Therefore, the exemptions and similar tax incentives under Section 4 can only be “granted” (i.e., conferred upon the individual recipient) “by general law” -- not by contracts
 - The State lacks authority under Article IX, Section 4 to enter into a binding tax contract granting an incentive by fixing the fiscal terms for a project
- Establishment of a fiscal regime by “general law” cannot bind the State
 - It is inherent in the legislative power that one legislature cannot prevent a subsequent one from altering a law that the former passes

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The counter-argument has at least 2 problems

- It runs against the plain meaning of Section 1 and the Framers' express intent
 - Section 1's "except as" clause clearly implies the taxing power can be "contracted away"
 - The Framers explicitly said it was their intent that the taxing power could be temporarily "contracted away"
 - e.g., "The power to tax is never to be surrendered, but under terms that may be established by the legislature, it may be suspended or temporarily contracted away." – Finance & Taxation Committee's *Commentary* (emphasis added)
 - The counter-argument asserts that this power can only be exercised through "grant[s] by general law[s]" instead of contracts, which is in conflict with the Framers' clear intent to allow it by contract

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The counter-argument has at least 2 problems

2. It applies the phrase “by general law” in Section 4 to the wrong part of the linked provisions in Sections 1 and 4
 - A. It would have been most unwise to allow the State to temporarily “contract away” the taxing power only by a “general law”
 - A “contract” by its very nature is something private that pertains to and governs only the individual parties to it; in contrast, a “general law” by its very nature treats all persons or an entire group of persons without distinction among them, instead of on an individual basis
 - To create any contracts at all with individuals, a “general law” would have to constitute a generic, take-it-or-leave-it standing offer to the public at large, so that a contract would arise anytime time someone accepts that offer
 - A contract under such a generic standing offer by “general law” would arise without negotiation between the State and the accepting party to reflect the particular situation of that party or its project

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The counter-argument has at least 2 problems

2. It applies the phrase "by general law" in Section 4 to the wrong part of the linked provisions in Sections 1 and 4 (cont.)

B. The correct application of "by general law" is to apply it to the means by which a general legal framework is established within which tax "contracts" with individuals can then be made

- It makes much more sense to use a "general law" to create a framework for negotiating tax "contracts" that reflect the actual circumstances of a person or project, than to create contracts directly by a generic standing offer under a "general law" without negotiation
- See how naturally, in this application, the term "by general law" fits within the Framers' intent for Section 1's "except as" clause:

"The power to tax is never to be surrendered, but under terms that may be established by the legislature ["by general law"], it may be suspended or temporarily contracted away." – Finance & Taxation Committee's *Commentary*

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The counter-argument has at least 2 problems

Possible 3rd problem with it

Assume: Counter-argument is correct and contractual tax exemptions, if allowed at all under Article IX, Section 4, must be “granted [direct-ly] by general law” through something like a take-it-or-leave-it stand-ing offer to the public

Then: Alaska Industrial Incentive Act of 1957 would have become un-constitutional when the Constitution took effect at Statehood. Why?

- Because the Board “granted” (or denied) the exemptions under 1957 Act, not the Act directly; and they were “contractual in nature”
- The 1957 Act conflicted with Article IX, Section 4 as read under counter-argument's interpretation, and hence would have been unconstitutional

Union Oil cases (1984 & 1990) never even hint that the tax exemption might be invalid because that underlying statute was unconstitutional₄₄

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Recap

April 3, 2003

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Contractually Limiting the State's Taxing Power

Constitutional authority for tax contracts

- The plain meaning of the clause “except as provided in this article” in Section 1 of Article IX implies that the taxing power can be “suspended or contracted away”
- The Framers expressly stated their intent to allow the taxing power to be “temporarily contracted away” as “industrial incentives, for example”

Contractually Limiting the State's Taxing Power

How “by general law” in Section 4 fits into “contract[ing] away” the taxing power under Section 1

- The Framers understood and intended the phrase “except as provided in this article” in Section 1 to be a cross-reference to “Other exemptions of like or different kind may be granted by general law” in Section 4
- The most natural application of “by general law” within the Framers’ express intent for Section 1 is, “The power to tax is never to be surrendered, but under terms that may be established [“by general law”] by the legislature, it may be suspended or temporarily contracted away.”

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How “by general law” in Section 4 fits into “contract[ing] away” the taxing power under Section 1 (cont.)

- Thus “general law” “establishe[s]” the “terms” under which contracts may be made that temporarily “contract away” the taxing power, but does not create the actual contracts themselves (unless the legislature chooses to do so by establishing a generic, take-it-or-leave-it standing offer to the public)
- The Alaska Stranded Gas Development Act (AS 43.82) is an example of a “general law” establishing general “terms” to “contract[]away” the taxing power temporarily – its operation resembles that of territorial industrial-incentive tax-exemption statutes already on the books when the Convention met, as well as that of the law enacted by the 1957 Legislature (15 of 40 legislators had been Convention delegates)
- The State therefore has the necessary constitutional authority to be able to enter into any contract it makes pursuant to AS 43.82