Leg. Finance-House & Senate Finance Comte Files (1991-1992) 741

HOUSE COMMITTEE REPORT

(11)

Date Referred: April 5, 1991 FURTHER REFERRALS:

Date of Committee Action: 4/12/90

The FINANCE Committee considered: HB 143

HOUSE BILL NO. 143 MUNICIPAL LAND GRANT SELECTIONS

"An Act relating to general grant land selections; and providing for an effective date."

RECOMMENDATIONS: [✓] the same title
be replaced with CSHB 143 (FIN) [ ] a new title

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

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note HFC [ ] zero fiscal note(s) DCRA 3/15/91

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
		Mike Navarre NAVARRE		X	
JACKO		MARK Boyer BOYER		X	
Eileen P. Maclean MacLean		Kyllo Koponen KOPONEN		X	
Tay Brown BROWN		Bob Sharp Sharp	X		
		RANDE Phillips Phillips		✓	
		Vanora L Barnes BARNES		✓	

Mike Navarre Eileen P. Maclean
CHAIRMAN'S SIGNATURE MacLean

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 143

Revision Date: _____ Department Affected: Community & Regional Affairs

Title: "An Act..general grant land selections...." BRU: Local Government Assistance

Component: Local Government Support

Sponsor: Rep MacLean

Requestor: _____ **COMPONENT SERIAL NO.** 6 7 5

Expenditures/Revenues: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Remond Henderson, Director Remond Henderson Phone: 465-4708

Division: Administrative Services Date: 2/28/91

Approved by Commissioner: _____

Agency: Community & Regional Affairs Date: 2/28/91

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

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. CSHB 143 (FIN)

Revision Date: _____ Department Affected: Natural Resources

Title: An Act relating to General Grant land selections; and providing for date. BRU: Land & Water Management

Component: Land & Water Management

Sponsor: Representative MacLean

Requestor: HOUSE FINANCE COMMITTEE COMPONENT SERIAL NO. 41

Expenditures/Revenues: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Representative Mike Navarre, Co-Chair / Representative Eileen MacLean, Co-Chair Phone: 465-3706 / 465-3722

Division: _____ Date: April 12, 1991

Approved by Commissioner: _____

Agency: _____ Date: _____

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

Rev 10/90

CS FOR HOUSE BILL NO. 143 (FINANCE)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MACLEAN

A BILL

FOR AN ACT ENTITLED

"An Act relating to general grant land selections; and providing for an effective date."

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

*** Section 1.** AS 29.65.030(a) is amended to read:

(a) The general grant land entitlement of a municipality incorporated after July 1, 1978, that does not qualify for an entitlement under AS 29.65.010 or 29.65.020 is 10 percent of the maximum total acreage of vacant, unappropriated, unreserved land within the boundaries of the municipality between the date of its incorporation and two years after that date. [HOWEVER, A MUNICIPALITY MAY NOT RECEIVE AN ENTITLEMENT UNDER THIS SUBSECTION THAT EXCEEDS 20 ACRES PER PERSON RESIDING IN THE MUNICIPALITY ON THE DATE OF ITS INCORPORATION. FOR PURPOSES OF THIS SECTION THE POPULATION OF A MUNICIPALITY SHALL BE DETERMINED BY THE DEPARTMENT IN ACCORDANCE WITH AS 29.60.020 AND 29.60.150.]

*** Sec. 2.** AS 29.65.030(b) is amended to read:

(b) Within two years and six months after the date of incorporation of the municipality,

the director shall determine the entitlement of each municipality eligible to receive general grant land under (a) of this section and certify the entitlement to the municipality. **However, the governing body of a city may, by resolution, request the director to certify the entitlement to the city on an expeditious basis. The director shall determine and certify the entitlement within six months after receipt of the resolution.**

*** Sec. 3.** AS 29.65.040(c) is amended to read:

(c) Land may be selected or nominated for selection by a municipality to satisfy a general grant land entitlement under former AS 29.18.201 and 29.18.202 at any time before October 1, 1980. Land may be selected or nominated for selection by a municipality to satisfy a general grant land entitlement under AS 29.65.010 at any time before October 1, 1990. However, if a municipal selection or nomination or a part of a municipal selection or nomination is rejected by the director, the municipality may, not later than 90 days after receipt of the rejection **or final decision on an appeal filed under AS 29.65.050(d)**, select additional state land as necessary to satisfy its entitlement.

*** Sec. 4.** AS 29.65.050(c) is amended to read:

(c) The director shall approve **or disapprove** each selection for patent within nine months of its selection by a municipality**. Before a decision is issued the Department of Community and Regional Affairs shall review the selection and recommend approval or disapproval of it. The director may disapprove a selection only upon a finding that the public interest in retaining state ownership of the land outweighs the municipality's interest in obtaining the land. A** [, AND A] patent shall be issued to the municipality for land selected in satisfaction of a general grant land entitlement vested under AS 29.65.010 - 29.65.030 within three months after approval by the director of a plat of survey.

*** Sec. 5.** AS 29.65.050 is amended by adding a new subsection to read:

(d) Before disapproving a selection, the director shall notify the municipality in writing of the decision and set out reasons for it. The municipality may submit a written response within 30 days after receipt of the notice. Within 30 days after the period for responding has expired, the director shall affirm, modify, or reverse the decision and supply the municipality with written notice of that action. If the selection is disapproved, the municipality may file notice of an appeal with the director. The appeal shall be heard under procedures adopted by regulation of the Department of Natural Resources by a municipal land mediation committee composed of a

person appointed by the commissioner of natural resources, a person appointed by the commissioner of community and regional affairs, and an elected municipal official appointed by the governor. A decision on the appeal shall be submitted to the municipality in writing within 30 days after the notice of appeal was filed with the director. A municipality may appeal an adverse decision of the municipal land mediation committee to the superior court under AS 44.62.560 - 44.62.570.

* **Sec. 6.** AS 29.65.070 is amended by adding a new subsection to read:

(d) The commissioner of natural resources may not restrict the shape of a selection without considering municipal interests, considering the burden of survey costs to the municipality, and evaluating other alternatives to preserve access or uses of statewide concern. Restrictions imposed on the shape of a parcel that may be selected may be waived by the director if waiver is in the public interest.

* **Sec. 7.** AS 29.65.120 is amended to read:

Sec. 29.65.120. ADMINISTRATION. The commissioner of natural resources may**, after consultation with the Department of Community and Regional Affairs,** adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) necessary to carry out the purposes of this chapter.

* **Sec. 8.** AS 29.65 is amended by adding a new section to read:

Sec. 29.65.129. POLICY. Consistent with the best interest of the state, it is the policy of the state to provide a newly formed municipality with a general grant land entitlement that is no less than 10 percent of vacant, unappropriated, unreserved land located within its boundaries. It is the policy of the state to provide for expeditious transfer and patent of land to a municipality in fulfilling its entitlement.

* **Sec. 9.** Notwithstanding AS 29.65.030(b) as amended in sec. 2 of this Act, the director of lands may not certify an entitlement to a municipality until after January 2, 1994. Each entitlement for which certification is delayed under this section shall be certified by the director no later than January 1, 1996. The director shall by January 1, 1996, for each municipality incorporated after June 1, 1986, for which an entitlement was certified before the effective date of this section, redetermine and recertify the entitlement in accordance with AS 29.65.030(a), as amended in sec. 1 of this Act.

* **Sec. 10.** Section 1 of this Act is retroactive to June 2, 1986.

* **Sec. 11.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

No. 3

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill Version: Hb 143
(H) Publish Date: 3/15/91

Revision Date: 3-14-91 Department Affected: Fish and Game

Title: Municipal Land Grant Selections BRU: Habitat

Component: Habitat

Sponsor: Representative MacLean

Requestor: COMPONENT SERIAL NO. 4 8 6

Expenditures/Revenues: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: no impact on current year

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Frank Rue, Director Phone: 465-4105

Division: Division of Habitat Date: 3/14/91

Approved by Commissioner: CARL ROSIER by [signature] Date: 3/14/91

Agency: Department of Fish and Game

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

Rev 10/90

COMMITTEE COPY

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 143

Revision Date: 27-Feb-91
Department Affected: Natural Resources
Title: An Act relating to general grant land selections; and providing for date
BRU: Land & Water Management
Components: Land & Water Management
Sponsor: Rep. MacLean
Requestor: House Community and Regional Affairs
COMPONENT SERIAL NO. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	136.6	136.6	136.6			
TRAVEL	3.5	3.5	3.5			
CONTRACTUAL	7.5	7.5	7.5			
SUPPLIES	0.5	0.5	0.5			
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	148.1	148.1	148.1	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	148.1	148.1	148.1			
FEDERAL FUNDS						
OTHER						
TOTAL	148.1	148.1	148.1	0.0	0.0	0.0

POSITIONS:

FULL-TIME	3.0	3.0	3.0			
PART-TIME						
TEMPORARY						

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Dennis Daigger
Phone: 762-2680
Division: Land & Water Management
Date: 27-Feb-91

Approved by Commissioner: Harold Heinze (Cy for)
Date: 27-Feb-91
Agency: Department of Natural Resources

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

REV 10/90

Fiscal Note HB 143, continued.

Enactment of HB 143 will result in approximately 246,000 new municipal selection acres for the Northern Region Office of the Division of Land and Water to process, and approximately 125,000 new acres for the Southcentral Region Office to process.

100	Personal Services 1 NRO II (Fbx) 1 NRO I (Fbx) 1 NRO II (Anch.)	136.6
200	Travel (to visit affected communities and sites)	3.5
300	Contractual (required public notices in newspapers)	7.5
400	Supplies	.5

SECTIONAL ANALYSIS

CS FOR HB 143 (RESOURCES) GENERAL GRANT LAND SELECTIONS

"An Act relating to general grant land selections; and providing for an effective date"

Section 1:
Deletes the limitation on the size of a general grant land entitlement for a municipality based on population. Returns to the former "10 percent of vacant, unappropriated or unreserved land".

Section 2:
Permits the governing body of a city to request expeditious certification of its entitlement by resolution and requires the entitlement to be certified within six months after receipt of the resolution.

Section 3:
Adds a cross reference to the new appeal procedure added under section 5 of the bill.

Section 4:
Requires the director of the division of lands to disapprove a selection only upon a finding that the public interest in retaining state ownership of the land outweighs the municipality's interest in obtaining the land. The Department of Community and Regional Affairs is required to review each selection and recommend approval or disapproval of it to the director.

Section 5:
Before disapproving a selection, the director is required to notify the municipality. The municipality may submit a written response and, if the selection is disapproved, file notice of an appeal. The appeal will be heard by a municipal land mediation committee and the decision of that committee may be appealed by the municipality to the superior court.

Section 6:
When placing restrictions on the shape of a selection consideration must be given to the burden of survey costs on

the municipality, alternatives to preserve access, and other municipal interests.

Section 7:
Requires the commissioner of natural resources to consult with Department of Community and Regional Affairs prior to adopting regulations necessary to carry out the general grant land entitlement program.

Section 8: Adds a statement of policy to the general grant land entitlement program.

Section 9:
Amends the definition of "vacant, unappropriated, and unreserved land" to include land classified as wildlife habitat other than critical wildlife habitat for purposes of determining both the size of an entitlement and the land that may be selected in fulfillment of the entitlement.

Section 10:
Requires the director of lands to redetermine and recertify the entitlement of each municipality incorporated after June 1, 1986 in accordance with the new provisions of the bill. If the entitlement of a municipality is increased, land may be selected within one year after the recertification.

Section 11:
Makes two bill sections retroactive to June 2, 1986. These sections may have the effect of increasing entitlements for certain municipalities.

Section 12:
The bill has an immediate effective date.

Rep. MacLean
4/10/91

SPONSOR STATEMENT

CS FOR HB 143 (RESOURCES) GENERAL GRANT LAND SELECTIONS

The purpose of HB 143 is to restore equity in the General Grant Land Entitlement process, to return the emphasis of the program to its original intent of developing independent and strong local governments, and to temper the Department of Natural Resource's (DNR's) broad discretion in determining the process and procedure for transferring general grant land to municipalities.

The Mandatory Borough Act, enacted in 1963, created opportunities for municipalities to acquire state land for their local use. The intent was "to provide maximum local self-government". General grant land provides a means of creating a tax base, of generating revenues through land sales and leases, and a land base for community and public purposes.

The State Constitution was based on the premise that municipalities should be independent and self governing. Clearly, the intent is to provide for strong local governments. It can be argued that the state's best interest is best served by allowing local governments the opportunity to manage and develop their own land base, thereby developing local economies and strengthening the statewide economy.

However, DNR's report (entitled Municipal General Grant Land Entitlements, A State-Municipal Partnership) predetermines that it may not be in the best interests of the state that land in rural Alaska be managed and developed by local governments because the rural character of the state land "is often not well suited for development or other municipal purposes".

Because many areas in remote parts of Alaska are in the very initial stages of development, it is premature to make broad generalizations about the use or character of land in rural Alaska. Furthermore, subsistence is a major influence in the rural economy and therefore could result in large selections of land being held sacrosanct.

Finally, it is important for the legislature to evaluate the municipal entitlement statutes, to include language to provide

for liberal construction of the law, as provided for by the State Constitution and, to make changes which favor the original intent of this program.

POPULATION CAP

Section 1 removes the requirement that a municipality incorporated after July 1, 1978, not receive a general grant land entitlement that exceeds 20 acres per resident; and returns to the former "10 percent of vacant, unappropriated and unreserved land".

A per capita limit on municipal grant land was established at 20 acres, based on the Mat-Su Borough entitlement in 1978. At that time it was the highest per capita entitlement to any municipality.

DNR has suggested that the 20 acre cap is the most generous entitlement formula because it represents the highest per capita entitlement given to any municipality. While this may at first seem a fair and equitable justification, it is neither, given the very broad range of values of lands. Urban area lands are often worth three times the rural acreage. A more equitable distribution of land would be based on a 'value' determination, not a per capita determination which is discriminatory to sparsely populated areas. Since establishing values of lands is such a difficult, if not impossible effort in rural selections, it makes more sense to rely upon the historical 10 percent of available land formula.

It should be noted that had the Matanuska-Susitna Borough been restricted to the 20 acre cap based on the population on the date of incorporation. (which is the way current law reads), their entitlement would have been no more than 216, 680 acres, not the 355, 210 acre entitlement they received in 1978.

Legislative records for the 1978 legislation allude to a number of considerations that influenced final acreage determinations, but little, if no, information is available which describe the need to limit entitlements to municipalities using a population cap.

Finally, the population cap was put into effect in 1987, and only after urban areas organized leaving rural areas with

greater restrictions and less available land on which to base their future growth and development.

STATE INTEREST VS. MUNICIPALITY'S INTEREST

Section 4 of the bill requires that before the Division of Lands acts on a selection, the Department of Community and Regional Affairs must review the selection and recommend approval or disapproval. A selection may be disapproved only upon a finding that the public interest in retaining state ownership of the land outweighs the municipality's interest in obtaining the land. A decision to disapprove would be subject to a new appeal process which specifically evaluates state and municipal interests.

This process does not exclude DNR's usual practice of consulting with resource agencies to evaluate municipal land selections. It assures, however, that the agency established by the Constitution to advise and assist local governments is inherently involved in this process.

Most municipalities received entitlements as part of the 1978 statutes. At that time they played a greater role in determining their municipal land selections by influencing both legislative and regulatory provisions. For example, these municipalities negotiated a compromise in the 1978 legislation which required a municipality's consent for classification over 3,200 acres; established a joint planning process where DNR and municipalities jointly considered state and municipal interests; and which provided the state and municipalities to jointly determine what areas would be available for selection.

Through efforts to expedite the land disposal process, the provisions which required consent and joint planning were dropped and replaced with a one-year deadline for both the state and municipalities to determine selectable lands. There was no need for a special appeal process because DNR and municipalities were constrained by the one year period. That is, DNR had little time to decide state interests and new classifications within this one-year period had little potential to negatively affect these municipalities. As a result of dropping consent and joint planning, however, DNR was left with greater discretion and responsibility for making policy decisions with

little or no mechanism for oversight by the newer municipalities.

DNR exercises tremendous discretion in deciding the rules by which justifications are reviewed for municipal purposes and for evaluations of selections for state interest. Municipalities have little say in the award process, have no ability to work with DNR to jointly determine land classifications, and have no appeal process which evaluates these land selections for municipal interests.

MUNICIPAL LAND MEDIATION COMMITTEE / APPEAL PROCESS

Section 5 provides for a notification process to be made to municipalities and, for an appeal process by a municipal land mediation committee composed of a person appointed by the commissioner of DNR, an appointee by the commissioner of C&RA, and an elected municipal official. An adverse decision of the committee may be appealed to the superior court.

This section is necessary to insure that the municipalities' interests are protected in the land selection process. As stated above, the ability of new municipalities to influence the municipal land selection process has been greatly diminished. DNR exercises tremendous discretion in deciding the rules by which justifications are reviewed for municipal purposes and for evaluations of these selections for state interest. An appeal section should be included to insure the public interest is served. It should be noted that the public interest is served when municipal interest is considered.

Drafters of the early municipal entitlement program clearly intended for municipalities to play a role in the decision making process. This requirement will restore parity between the two philosophically differing agencies.

SIZE AND SHAPE OF PARCELS

Section 6 of the bill requires that the commissioner may not impose restrictions on the shape of a parcel and land selected by a municipality without considering the burden of survey costs to the municipality, and evaluating other alternatives to preserve access or uses of statewide concern.

DNR currently uses a 4:1 width to depth ratio as a standard policy for limiting the size of municipal land selections. The length of any parcel cannot be more than four times it width.

DNR has suggested a ratio of 4 to 1 because it is the same one they use for their mineral leasing program. It does not logically follow that a rule used for leased lands is one which should be used for lands which become the management responsibility of a municipality. It is cumbersome and unwieldy for efficient land selection processes and can quadruple the cost of surveying.

Furthermore, DNR has imposed this stipulation because "it would not serve the state's best interest to convey long narrow tracts that could block public access to adjacent state land and interfere with sound management". However, the state's interest in protecting public access could easily be granted by reserving easements on municipal land selections.

DNR has also stated that regulations require municipal selections to be compact and that they will implement a 4 to 1 ratio on the erroneous premise that rural land development should meet the same standards of compact development on urban land.

On the contrary, rural land selections, by definition, should have greater flexibility to meet changing and diverse needs of sparsely populated communities spread out over vast areas. Rural selections should not be restricted by the same guidelines used for urban selections.

DNR REGULATIONS

Section 7 requires the Commissioner of Natural Resources to consult with the Department of Community and Regional affairs prior to adopting regulations necessary to carry out the General Grant Land program.

DNR has developed elaborate regulations to carry out the municipal land entitlement program. Although these regulations deeply affect the municipal statutes (Title 29), the Department of Community and Regional Affairs has no vested authority in the promulgation of those regulations.

Fish and Game statutes for example have similar provisions in Title 16 which require DNR to consult ADF&G before adopting regulations which govern public use areas managed by DNR.

POLICY STATEMENT

Section 8 adds a statement of policy to the general grant land entitlement program.

The 1987 legislation included a reference that the entitlement for the Northwest Arctic Borough was a partial entitlment and that the governor would submit recommendations to the legislature for additional general grant land entitlements for the the Northwest Arctic and other newly formed municipalities, consistent with a general grant land entitlement policy.

The policy statement in HB 143 clarifies that the intent of the legislature is that no less than 10 percent of vacant, unappropriated, or unreserved land will be provided to newly formed municipalities; and that the transfer of such land will be prompt and efficient.

In addition, the state has 20 million acres of land still to select of its entitlement under the Statehood Act and it is important, as a policy matter, to encourage full and expeditious transfers of land. Because the municipal entitlement program was created as an incentive for borough formation and was based on a 10% formula, it is only reasonable to return to its original intent. This will still leave the state with 90% of its land base.

WILDLIFE HABITAT IN "VUU"

Section 9 expands the definition of "vacant, unappropriated and unreserved land" used to determine both the amount of land and the classes of land that a municipality may select, to include certain land classified wildlife habitat, other than critical wildlife habitat.

Using land classifications to define selectable land (vuu land) was put into place in 1979. Past municipalities had to select their land by 1980, so the use of land classifications had no

affect on the amount of their entitlement and little potential to impact which lands could be selected.

Newly formed municipalities, on the other hand, are detrimentally impacted by classifications which were imposed on millions of acres of land between 1978 and the present time. These classifications were developed with little or no regard to municipal interests and are based on broad, generalized resource information. There is no justifiable reason to restrict this entire category as a general rule.

There will be occasions where state and municipal interests may conflict. DNR will continue to exercise substantial discretion and will not be easily overturned when valid interests are shown. The discretion of any regulatory agency is great and could adequately protect the state concerns, even given the appeal committee's existence. Thus, there is no reason to automatically exclude wildlife habitat from consideration, particularly when the state is still left with 90% of its land base.

RECERTIFICATION OF ENTITLEMENTS

Section 10 requires Department of Natural Resources to recertify entitlements for municipalities incorporated after June 1, 1986 to determine final entitlement lands that may be selected as a result of this legislation.

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

Hickel Administration Position on HB 143

The Departments of Community and Regional Affairs, Natural Resources, and Fish and Game, support the concept of transferring state land to municipalities to help ensure local and statewide economic health. We believe the formation of additional boroughs should be encouraged. To that end we support the removal of the 20 acre per capita municipal land selection restriction (Section 1 of the bill) for new boroughs and boroughs whose entitlements have not yet been certified (Aleutians East, Lake and Peninsula, Denali). We do not, however, believe the cap should be retroactively removed.

The Hickel Administration municipal grant land entitlement policy assures that additional land will be made available to boroughs that are already formed, as well as new boroughs, above what has already been certified as their statutory entitlement, if a need for the additional land can be demonstrated.

We do not believe that wildlife habitat should become part of the vacant, unreserved, unappropriated land (VUU) from which basic statutory municipal selections can be made.

We believe that keeping some restrictions on the size and shape of parcels is in the public interest. Adjustments to the 4 to 1 ratio should be made on a case-by-case basis, to meet statewide and local needs.

The Department of Natural Resources is the state's land manager and has the expertise to approve or disapprove municipal land selections. The Department of Natural Resources will consult with the Departments of Fish and Game and Community and Regional affairs when determining whether a municipal land conveyance is in the best interest of the state.

Municipalities may appeal municipal selection decisions of the Director of Land and Water to the Commissioner of Natural Resources, according to the department's standard appeal process.

In line with this philosophy, the Departments recommend the following additions and deletions to HB 143:

1. Add a Section to the bill that requires the Governor to present a policy on municipal selection of state land to the first session of each Legislature. Included with the policy will be information about selections approved and disapproved to date.
2. In Section 1, make it clear that the cap is removed only for boroughs incorporated after July 1, 1987.
3. Delete sections 4,5,6,9,10, and 11.
4. Modify Section 2 to allow more time for certification and selection by municipalities or the state, if both parties agree.

MUNICIPAL GRANT LAND ENTITLEMENT POLICY

March 12, 1990

The Hickel Administration supports the transfer of state land to municipalities to help ensure local and statewide economic health. Accordingly, it is the policy of the State of Alaska that the basic municipal land entitlement shall not be less than 10% of the vacant, unappropriated, unreserved state land within the municipality's boundaries. It is also the policy of the State of Alaska that a municipality be granted additional land, above the municipal entitlement certified under AS 29.65.030 (b), when the municipality demonstrates that additional land is necessary for:

1. A public facility site;

2. Revenue production through sales or leases;

3. The overall economic vitality of the municipality;

4. Local public recreation;

5. Protection of locally unique or important cultural, traditional, archeological, or other public resources;

6. Other important local or statewide needs.

Municipalities may select additional land, above the amount certified under AS29.65.030 (b), from any land classification category, including wildlife habitat, but must demonstrate that the conveyance of land currently classified as non-VUU land is in the public interest. The size and shape of parcels selected by municipalities can be adjusted from the standard 4:1 ratio, as necessary, to meet statewide and local needs and concerns.

The Department of Natural Resources will consult with the Department of Community and Regional Affairs and the Department of Fish and Game when considering whether conveyance of a municipality's land selection is in the best interest of the state.

Municipalities may appeal municipal selection decisions of the Director of Land and Water to the Commissioner of Natural Resources, according to the department's standard appeal regulations.

In response to the House Committee on Community and Regional Affairs interest, particularly Representative Gail Phillips' questions on House Bill 143, the Departments' of Community and Regional Affairs, Fish and Game and Natural Resources are pleased to provide the following responses:

Question 1: Should wildlife habitat land be added to the land base that is selectable by a municipality?

The administration supports the selection of wildlife habitat or any other state land when a municipal entitlement is not adequate to meet the municipalities needs, and those needs outweigh the state's interest in retention of the land. Existing law allows such a transfer.

Question 2: Will land be added to the VUU land base by the addition of wildlife habitat lands?

The addition of wildlife habitat lands to the VUU land base would not add to the VUU land base for municipalities formed prior to 1986. For new municipalities formed after 1986 the base would be increased as shown on the attached chart. We have no figures available for areas in the unorganized borough.

Question 3: With regard to fairness among municipalities, how will existing municipalities be affected by HB 143 if enacted. If they are not affected by HB 143 as drafted, what would be the effect on these municipalities if HB 143 were applied to them?

As drafted HB143 does not affect existing municipalities created prior to 1986. The eleven boroughs established prior to that date had their entitlement established by statute. It is possible to retroactively add any cities or boroughs to this legislation if desired which would require DNR to recertify all entitlements not previously established by statute. See the attached chart for a conveyance summary.

Question 4: Should shape criteria be a part of municipal land entitlement selections? If not, what are the possible effects on state land and state land policy? If kept, what are the effects on land selections?

Shape criteria as currently used today generally involve a four to one ratio length to width. There is authority to waive this requirement in proposed DNR regulations when it can be proved to be in the best interest of all parties. Size and shape requirements have always been a part of a variety of land selection programs to include mining claims, state land selections, and homestead programs to name a few. Without these criteria a municipality could select a narrow strip of land along the banks of a river course. Such a strip would reduce the value of adjacent land and reduce access. Shape criteria tend to limit selections to useful parcels and to permit better land management patterns.

Deleting shape criteria for the selection process would restrict management opportunities

to the state and invites possible abuse.

Question 5: What agency within the executive branch is in charge of land policy? Would this change with HB 143?

DNR is the lead agency on land policy. Often agencies, such as DF&G or DCRA have occasional roles, usually through interagency coordination to facilitate reaching established goals.

HB 143's inclusion of DCRA in an appeal process would alter that by introducing an appeal board comprised of a DNR representative, a DCRA representative, and an elected municipal official appointed by the Governor. This would appear to alter the basic responsibility authority of state land management.

Municipal Entitlement Estimates for New Boroughs under SSHB 143

Borough	*Incorporation Date*	*Population*	*Total State Land*	*VUU Land* ****	*Present Entitlement*	*Entitlement W/O 20 Acre Cap*	*Entitlement W/ Wildlife Hab*
*Northwest Arctic**	6/2/86	6,696	2,669,552	131,402			
			2,854,382	2,854,382	133,920***	285,438	285,438
Aleutians East	10/23/87	2,091	1,122,016	76,334	7,633	7,633	35,000
Lake and Peninsula	4/24/89	1,800**	4,885,000	150,000	15,000	15,000	115,000
Denali	12/7/90	2,000**	2,898,000	494,000	40,000***	49,400	189,400

*The first acreage figures are for the original certification prior to 1987 law change
The second set is after passage of Chap. 34, SLA 87, which defined Resource Management land as VUU

**Estimates from DCRA

***Established by 20 acre cap

****VUU is defined as Statehood Act Sections 6(a) or 6(b) land that is unclassified or if classified is agricultural, grazing, material, public recreation, settlement or resource management (if classification effective on or after Sep 1, 1983). Further, land that has been set aside by statute for one or more particular uses or purposes is not VUU land.

CONVEYANCE SUMMARY:
UNIFIED HOME RULE MUNICIPALITIES AND BOROUGHS

CONVEYANCES BY AUTHORITY

Municipality	Incorp	38.05.347	AS 07	AS 29	38.05.810	38.05.320	Legislative	Other
Aleutians East Borough	Oct-87							
Bristol Bay Borough	Oct-62			2,672.7				
City & Borough of Juneau	Jul-70			4,279.6	11.4	852.9		
City & Borough of Sitka	Dec-71	1.8		2,276.4	6,237.7	194.5		0.6
Fairbanks North Star Borough	Jan-64			83,964.9	44.9			
Haines Borough	Jul-6			1,082.8				
Kenai Peninsula Borough	Jan-6			79,206.0	181.9			117.0
Ketchikan Gateway Borough	Sep-63			4,033.3				
Kodiak Island Borough	Sep-63			11,654.0	14.3			
& Peninsula Borough	Apr-89							
Matanuska-Susitna Borough	Jan-64		40.3	201,771.0	432.1			79.3
Municipality of Anchorage	Sep-75	391.1		12,883.7	5,897.1	1,328.5		1,256.4
North Slope Borough	Jul-72							
Northwest Arctic Borough	Jun-86							
	TOTALS	392.9	40.3	403,824.4	12,819.4	2,375.9	0.0	1,453.3

The state has conveyed land to municipalities under various authorities; AS 38.05.347, AS 07.05, AS 07.10, AS 29.18, AS 29.65, AS 38.05.315, AS 38.05.810 and AS 38.05.320.

The authority for many early conveyances is not always stated. Where the authority is unknown, the conveyance is included in the AS 29 column.

The figures in this table represents the actual amount of land conveyed to each individual municipality and do[illegible]ot reflect the entitlement. In most cases, howeve the municipality manages its full entitlement. Land cannot be conveyed to a municipality until a land survey is complete.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

☐ *P.O. BOX B*
JUNEAU, ALASKA 99811-2100
PHONE: (907) 465-4700

☐ *949 E. 36TH AVENUE, SUITE 400*
ANCHORAGE, ALASKA 99508-4302
PHONE: (907) 563-1073

February 28, 1991

POSITION PAPER

RE: House Bill 143

SPONSOR: Representative Eileen MacLean

Program Effects of the Bill

The bill provides changes which will affect the land entitlement of newly-formed municipalities. In 1987, the Alaska State Legislature made amendments to Alaska Statute 29.65 which provided Northwest Arctic Borough with a partial land entitlement. Furthermore, the 1987 statute requires a policy paper with recommendations on this borough's remaining entitlement as well as the entitlements of other newly-incorporated municipalities. Seven municipalities have incorporated since 1986 -- Aleutians East Borough, Denali Borough, Lake and Peninsula Borough, Northwest Arctic Borough, City of Atka, City of Coffman Cove, and City of False Pass. Areas with pending municipal incorporation proposals include City and Borough of Yakutat, City of Pilot Point, and City of Egegik.

Comments

The Department supports passage of House Bill 143. The adoption of this bill will provide fair and beneficial changes for newly-incorporated municipalities.

SECTION 1 and SECTION 9. The Department strongly supports Section 1 and Section 9 of the bill. Section 1 restores the formula for determining the amount of entitlements to the original 10 percent of vacant, unappropriated, unreserved (vuu) land by repealing the population cap. Section 9 includes wildlife habitat land classifications as vuu land.

Population cap. The Northwest Arctic Borough's partial land entitlement was determined by using the population cap method. This method was placed into statute in 1987 with the condition that the Governor shall submit a policy paper to the Legislature after evaluating the effects of area plans on municipal land entitlements.

The Department supports the repeal of the population cap which has been an ill-conceived method for determining land entitlements. DNR has stated in their municipal report titled, "Municipal Grant Land Entitlements" (January 1990), that a population cap is needed to dissuade formation of boroughs "for the sole purpose of obtaining large general land entitlements from the state". This reason reflects a misunderstanding of the reasons for borough formation. While land entitlement is an attractive feature of borough formation, it has never been the sole purpose, even with the newly-formed municipalities.

The population cap method also oversimplifies how land entitlements were originally determined and is not useful as an arbitrary yardstick for determining equity in land entitlements. The Department has done substantial research on the legislative history of this program and finds no basis for discriminating against a region simply because an abundance of state land exists within a region. Legislative records allude to a number of considerations that influenced final acreages, but little or no information is represented in the legislative record which describes the need to limit entitlements based on population. On the contrary, population seemed to play a more important role when there was insufficient land available, not when there was an abundance of land.

Classifications. To fully evaluate the consequences of area plan classifications on municipal land entitlements, a brief look at legislative history is helpful. In 1978, after 15 years of disputes between the state and municipalities, a piece of legislation was enacted which represented a compromise of interests. This legislation included a definition of selectable land based on the state classification system, a provision which required classifications to be approved by the affected municipality, and a section which required joint planning between the state and municipalities to ultimately decide what lands merited state retention. In 1979, the use of the classification system to define selectable land remained intact, but the consent and joint planning provisions were removed.

Years later, the tangible effect of these legislative changes for newly-incorporated municipalities was evident during the development of DNR's Northwest Area Plan. This rural land plan required a huge investment of time and energy by the Northwest Arctic Borough and provided an invaluable lesson for municipalities which have since incorporated.

Area plans for much of rural Alaska are done using broad resource information which is developed and evaluated at a scale not suitable for deciding whether a piece of land is best managed by a state or municipal government. Resource information is based on general rules for defining various land values and are not usually verified by on-the-ground field checks. Furthermore, Plan decisions are based on wide-ranging policy issues which evaluate the appropriateness of one state resource interest over another. The plans decide which lands should be retained by the state solely within the context of which lands should be disposed to private individuals through the state land disposal programs.

Finally, broad management units are designated with two or sometimes three classifications. These classifications are developed on the recommendation of various resource agencies with some public review. This planning process is highly commendable for its ability to break down great land masses into some approachable way of determining general management intent. However, it has become apparent that an analysis of state and municipal interests for 10 million acres of land would be cumbersome and time-consuming for resource agencies. Instead, the distinctions between state and municipal interests should be done after a municipality has selected its entitlement and a smaller land base can be evaluated.

It is now evident that the current state land planning process for rural areas is not well suited to comprehensively evaluate state lands for state and municipal interests and area plan classifications severely impact the municipal entitlements of the newly-formed municipalities. Specifically, between the 1979 amendments in the Municipal Entitlement Act and 1988, state land plans have recommended classifications for over 66 million acres of land with little consideration given to the impact of these classifications on municipal interests.

In 1987, the inclusion of the recreation classification in the definition of selectable land (vuu land) was seen as an expansion of the land base. If one reviews the land plans which affect the newly-formed municipalities -- Northwest Area Plan, Bristol Bay Area Plan, and Kuskokwim Area Plan -- one will find very little if any land classified as recreation which is not also classified as wildlife habitat.

The inclusion of wildlife habitat will provide a small but significant expansion of the land base within the Denali Borough, Aleutians East Borough, and Lake and Peninsula Borough. These three boroughs are similar in that they have a significant amount of land which is classified wildlife habitat and oil and gas, or wildlife habitat and mining.

Since the Northwest Arctic Borough was able to intervene in the implementation of broad classifications within their region, their remaining entitlement is more affected by the population cap than any changes to the definition of selectable land. The other newly-formed municipalities, however, are subject to land plans which are already in place. Plan amendments and reclassifications will be required before these municipalities can gain approval for their selections. It is important that the selection and approval deadlines consider the time and expense of amending these plans, particularly for the staff at the Department of Natural Resources and the Department of Fish and Game.

The inclusion of the wildlife habitat classification, then, provides some relief for the inequity which faces the newly-formed municipalities, although this relief is not overwhelming in any respect. Other options or remedies would require a complete revamp of the definition of selectable land, or a modification of the formula or cap method used to determine entitlements.

SECTION 2. This section merely allows a city to request a more expeditious determination of its entitlement. In 1987, the six-month deadline for DNR to determine entitlements was changed to two years and six months. City entitlements encompass a smaller area and it is reasonable that the land classifications within these smaller areas could be determined in a shorter time frame.

SECTIONS 3 through 5. These sections establish a mechanism for reviewing and appealing DNR's decisions for their consideration of state versus municipal interests. In 1978, the Legislature made changes to the municipal land entitlement program when conflicting or overlapping responsibilities between state and municipal government needed resolution. In order to expedite the state land disposals, these changes were repealed in 1979 and replaced with a one-year deadline for both the state and municipalities to resolve their overlapping interests.

With no municipal oversight in place, consideration needs to be given to the current circumstances of this program for newly-formed municipalities. No provisions currently exist in statute which provides a way to balance municipal and state concerns when determining the public interest. Furthermore, newly-formed municipalities face land decisions within one to four years after their incorporation, while past boroughs dealt with land decisions some 15 years after their incorporation. In the face of declining revenues, a simple mechanism which can be reasonably administered without excessive litigation would be preferred. These provisions provide this consideration.

SECTION 6. This section refers to a rule limiting the size of land selections which surfaced in DNR's draft regulations for the municipal land program. This rule was adopted from DNR's mineral leasing program. While having a criteria for determining the size of selection is not uncommon for a land management agency, most rules are based on an acreage limit rather than a length and width criteria and always allow some waiver of the rule to be applied. DNR's draft regulations do not.

SECTION 7. The Department supports this section of the bill. The Department of Natural Resources has held sessions with the Department where they have informed us of their position and actions on draft regulations. This section would ensure that future agency sessions will give the Department more meaning participation in the municipal land provisions promulgated by the Department of Natural Resources.

Edgar Blatchford, Commissioner

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400
FACSIMILE: (907) 586-2754

February 27, 1991

The Honorable Jerry Mackie, Chair
House Community and Regional Affairs Committee
P.O. Box V
Juneau, AK 99811

Dear Representative Mackie:

Subject: HB 143, relating to general grant land selections for municipalities.

Position: The Department of Natural Resources is unable to support this bill. It would increase the land entitlement of certain municipalities (those incorporated after July 1, 1978) by a large amount, whether or not a local need for additional land exists (as is required under current state policy). While we firmly support municipal land transfers as a basis for local government self-determination, the approach in this bill is contrary to existing state law and policy. If it is the Legislature's intent to place more state land under local control, the entire policy for state land needs to be changed.

Background: In 1978, after 15 years of disputes between municipalities and the state over interpretations of the existing law, a number of amendments to the municipal land entitlement law (AS 29.18) were enacted. The new version of the law granted unified home rule municipalities and all boroughs specific state land acreage entitlements, and specified important policies and procedures. In 1987, the law was again amended. Additions expanded the category of land eligible for selection by a municipality and, among other things, placed an upper limit on the amount of "vacant, unappropriated, unreserved" land a municipality could select. The law also specified that the new land entitlement for the Northwest Arctic Borough was a partial entitlement that could be increased on a recommendation by the Governor to the Legislature. The Governor then submitted his general grant land entitlement policy to the legislature.

This bill removes the current 20 acre per capita limit on the land entitlement of a new municipality, and eliminates the criteria for the shape of a land selection. The 20 acre per capita limit is approximately equal to the maximum per capita acreage any borough has received from the state since statehood. Removal of this per capita limit, combined with the inclusion of wildlife habitat land within the "vacant, unappropriated, unreserved" land category eligible for selections, will greatly increase the land entitlement for new boroughs. Shape criteria are important if public access to adjacent state land is to be protected and sound land management

policies are to be maintained.

Recommendations: The municipalities affected by this bill have not yet received any entitlement land. It seems logical to allow them to receive their existing land entitlement before determining that additional land is needed for municipal purposes. However, the department supports Section 2 of this bill. It allows municipalities that wish to receive their land early an opportunity to have their land entitlements certified within six months of incorporation. Currently, municipalities must wait two years for certification. We would be happy to work with the committee to improve other municipal land entitlement administrative procedures that present problems to municipalities.

Sincerely,

Harold C. Heinze

cc: Committee Members
Representative MacLean
Bruce Kendall, Legislative Liaison, Office of the Governor
Edgar Blatchford, Commissioner, Department of Community and Regional Affairs
Gary Gustafson, Director, Division of Land and Water

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM March 19, 1991

SUBJECT: General Grant Land Selections (HB 143)

TO: Representative Eileen MacLean

FROM: Tamara Brandt Cook
Director TBC

You have supplied me with a document labeled "Hickel Administration Position on HB 143" which contains the suggestion that removal of the 20 acre per person cap under Section 1 of the bill be limited to boroughs incorporated after July 1, 1987. You have informed me that, if this were done, the Northwest Arctic Borough would not qualify for any additional general grant land. You have asked whether this suggestion comports with legislative intent expressed in Section 11, Ch. 34, SLA 1987. That section provides

> The general grant land entitlement authorized for the Northwest Arctic Borough under AS 29.65.030(a), as amended in sec. 2 of this Act, is a partial entitlement for the borough. After completion of the Northwest Area Plan prepared under AS 38.04.065, the governor shall submit to the legislature recommendations for additional general grant land entitlements for the Northwest Arctic Borough consistent with the general grant land entitlement policy developed by the governor. The governor shall also submit recommendations for additional general grant land entitlements for other newly-formed municipalities consistent with the general grant land entitlement policy developed by the governor.

Clearly, the language of that section reflects an intent on the part of the legislature that additional general grant land be made available to the Northwest Arctic Borough. Since the change advocated in the position paper to HB 143 will have the effect of limiting the provision that makes additional land entitlements available so that it will not apply to the Northwest Arctic Borough, it appears that the legislative intent that the borough receive additional land will no longer be accomplished through HB 143 if this change is adopted. That intent could, of course, be accomplished through some other legislation in a different way.

You have also asked whether the change advocated in the position paper comports with the "Municipal Grant Land Entitlement Policy" dated March 12, 1990, a copy of which you supplied me with. The policy actually consists of two parts that are relevant to this issue. First, it is the stated to be policy that the basic municipal land entitlement shall not be less than 10% of the vacant, unappropriated, unreserved state land within the municipality's boundaries--an amount greater than the amount certified to the Northwest Arctic Borough under existing AS 29.65.030. However, the second part of the policy appears to modify the first by stating that a municipality be granted land in addition to that certified under AS 29.65.030(b) (presumably a reference to existing law) only upon demonstrated need for land for specific purposes. The policy contains no recommendation that the 20 acre per capita cap be removed for either new or existing municipalities. The relationship between the first part of the policy (that municipalities receive 10% of the land) and the second part (that they receive additional land only upon demonstrated need) is unclear. However, it may be that, under this policy, the governor will recommend additional land for the Northwest Arctic Borough (and, presumably others) only if the borough demonstrates the required need.

Because the position paper recommends retaining the provision removing the 20 acre per resident cap, it comports with the first prong of the "Municipal Grant Land Entitlement Policy". However, to the extent that the position paper advocates limiting application of a provision that would make additional land available without a demonstration of need, it comports with the second prong of the policy. This demonstrates the ambiguity inherent in the policy itself. Note, additionally, that nothing in the position paper will help implement the second prong of the policy - that of making some additional land available if need is demonstrated. It suggests no mechanism for that.

TBC:lmb
91-087.lmb

ALASKA MUNICIPAL LEAGUE

217 Second Street, Suite 200 ▫ Juneau, Alaska 99801 ▪ Tel (907) 586-1325, Fax (907) 463-5480

March 26, 1991

POSITION PAPER

HB 143 - Relating to general grant land selections

The Alaska Municipal League supports HB 143, relating to general grant land selections, in concept. Quoting from the AML 1991 Policy Statement:

> State Policies: The League supports state policies that encourage rather than discourage the formation of new municipalities. (Page 50)
>
> Conveyance and Land Use: d. The League urges a cooperative intergovernmental effort to expedite conveyances of lands not yet jointly agreed upon by considering municipal, state, and federal interests in lands affected by the land selection process. (Page 31)
>
> Land Entitlements: The League calls upon the Governor and the Alaska Department of Natural Resources to take appropriate action to correct the inequities and overcome any and all remaining obstacles to fulfilling land entitlements for all municipalities. (Page 33)

With declining state assistance to municipalities and increased responsibilities, there are increasing disincentives for areas of the state to incorporate. To the degree HB 143 increases the amount of state land available to municipalities to produce revenues through sales or leases and an expanded tax base and to aid in community expansion, the AML supports the legislation as an incentive to incorporation.

The AML supports increasing land entitlements to encourage municipalities to incorporate and to assist newly-formed municipalities produce revenues and provide for community development (Section 1). The population cap is arbitrary and has no relation to a municipality's need for land or land value. If the state is concerned about the amount or type of land to be conveyed in a given area, i.e. resource management, then perhaps some other mechanism or protection is needed to deal with specific cases.

MEMORANDUM

Date: March 28, 1991

TO: Marty Rutherford

FROM: Gordon Lewis

RE: HB 143

General philosophy as to state ownership and management of land within municipalities is the real issue. State ownership makes sense only where there is a mandate to retain ownership for a statewide public purpose. State ownership should be the rather than the rule inside municipalities. Every municipality should have the opportunity to own and manage as much land within its boundaries as it can handle. The state should identify areas such as historic sites, wildlife refuges, parks and natural resource. The state still retains the mineral and oil and gas rights to all the land it transfers. Revenues from these rights are where the state makes its money. Revenue from surface leases, permits and even material sales do not provide a significant cash flow. The state constitution establishes a strong role for local governments. The freedom to act without interference from the next higher level of government is an idea born out of the Alaska struggle to attain statehood and control over its resources. The issue is the same for the relationship between the state and the municipalities. The key question is whether a decision on land use in a municipality should be made in Juneau, Fairbanks or Anchorage, or at the local level. The more land the municipalities have the better they will be able to guide and pay for their own future.

The 4:1 ratio is a poor decision. It scatters parcels of state land and separates ownership of blocks of land. The state would be better off identifying specific site it really needs to retain, rather than relying on some haphazard pattern based on a geometry driven by another entities desires. Remember that for every linear mile two 66 foot wide section line easements are out there for access to state lands across other ownerships. Where the easement is not useable the state has the ability to buy, lease, trade or condemn land to get access. This nasty little checkerboard pattern of land ownership that results from the 4:1 ratio requirement exists in the western states. The states of Arizona, Utah and Washington are peppered with the checkerboard pattern as a result of land grants to the railroads. They spend lots of public money trying to consolidate these holdings to achieve effective management. Please don't let future Alaskans become victims of a poor decision made today.

In summary I support HB 143. I also encourage you to consider delete the 10% VUU limit and delete sub (c) of 29.65.030 (a) the definition of VUU.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

ALASKA MUNICIPAL LEAGUE

217 Second Street, Suite 200 ▪ Juneau, Alaska 99801 ▪ Tel (907) 586-1325, Fax (907) 463-5480

March 26, 1991

POSITION PAPER

HB 143 - Relating to general grant land selections

The Alaska Municipal League supports HB 143, relating to general grant land selections, in concept. Quoting from the AML 1991 Policy Statement:

> State Policies: The League supports state policies that encourage rather than discourage the formation of new municipalities. (Page 50)
>
> Conveyance and Land Use: d. The League urges a cooperative intergovernmental effort to expedite conveyances of lands not yet jointly agreed upon by considering municipal, state, and federal interests in lands affected by the land selection process. (Page 31)
>
> Land Entitlements: The League calls upon the Governor and the Alaska Department of Natural Resources to take appropriate action to correct the inequities and overcome any and all remaining obstacles to fulfilling land entitlements for all municipalities. (Page 33)

With declining state assistance to municipalities and increased responsibilities, there are increasing disincentives for areas of the state to incorporate. To the degree HB 143 increases the amount of state land available to municipalities to produce revenues through sales or leases and an expanded tax base and to aid in community expansion, the AML supports the legislation as an incentive to incorporation.

The AML supports increasing land entitlements to encourage municipalities to incorporate and to assist newly-formed municipalities produce revenues and provide for community development (Section 1). The population cap is arbitrary and has no relation to a municipality's need for land or land value. If the state is concerned about the amount or type of land to be conveyed in a given area, i.e. resource management, then perhaps some other mechanism or protection is needed to deal with specific cases.

The AML supports providing for a mechanism to expedite the certification process (Section 2). This is especially true when dealing with cities with smaller land areas.

Given the size of the state and local needs and knowledge, the AML supports an appeal mechanism (Section 3-5) to allow for additional local input when a selection is disapproved with findings. Additional input by the Department of Community and Regional Affairs may be appropriate and helpful for newly-formed municipalities with small staffs. The proposed amendments still provide for the state to deny a selection based on over-riding state interests.

The AML takes no position on restricting the shape of parcels to be selected (Section 6). Good land use planning at the state and local level support restricting the size and shape of parcels for good land development and management. Such criteria should be clearly spelled out in regulations to the degree possible.

Due to the Mental Health Lands Trust Litigation and the lack of direction and funding to the Department of Natural Resources, existing land entitlements are not available or have not been conveyed to municipalities. This has deterred community and economic development around the state. To the degree that a policy "to provide for the expeditious transfer and patent of land to a municipality in fulfilling its entitlement" will assist in making the land available, the AML supports such a policy (Section 8). However, the AML urges the administration and the legislature to resolve the mental health litigation in a quick and fair and equitable manner and to direct and adequately fund DNR to process municipal conveyances.

The AML supports the concepts in HB 143 to encourage incorporation, to provide good state and local land use development and management, and to provide for community and economic development.

Scott A. Burgess
Executive Director

MEMORANDUM

Date: March 28, 1991

TO: Marty Rutherford

FROM: Gordon Lewis

RE: HB 143

General philosophy as to state ownership and management of land within municipalities is the real issue. State ownership makes sense only where there is a mandate to retain ownership for a statewide public purpose. State ownership should be the rather than the rule inside municipalities. Every municipality should have the opportunity to own and manage as much land within its boundaries as it can handle. The state should identify areas such as historic sites, wildlife refuges, parks and natural resource. The state still retains the mineral and oil and gas rights to all the land it transfers. Revenues from these rights are where the state makes its money. Revenue from surface leases, permits and even material sales do not provide a significant cash flow. The state constitution establishes a strong role for local governments. The freedom to act without interference from the next higher level of government is an idea born out of the Alaska struggle to attain statehood and control over its resources. The issue is the same for the relationship between the state and the municipalities. The key question is whether a decision on land use in a municipality should be made in Juneau, Fairbanks or Anchorage, or at the local level. The more land the municipalities have the better they will be able to guide and pay for their own future.

The 4:1 ratio is a poor decision. It scatters parcels of state land and separates ownership of blocks of land. The state would be better off identifying specific site it really needs to retain, rather than relying on some haphazard pattern based on a geometry driven by another entities desires. Remember that for every linear mile two 66 foot wide section line easements are out there for access to state lands across other ownerships. Where the easement is not useable the state has the ability to buy, lease, trade or condemn land to get access. This nasty little checkerboard pattern of land ownership that results from the 4:1 ratio requirement exists in the western states. The states of Arizona, Utah and Washington are peppered with the checkerboard pattern as a result of land grants to the railroads. They spend lots of public money trying to consolidate these holdings to achieve effective management. Please don't let future Alaskans become victims of a poor decision made today.

In summary I support HB 143. I also encourage you to consider delete the 10% VUU limit and delete sub (c) of 29.65.030 (a) the definition of VUU.

CITY OF VALDEZ, ALASKA
GATEWAY TO THE INTERIOR

Office of the City Manager
April 2, 1991

Representative Cliff Davidson, Chairman
House Resources Committee
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Representative Davidson:

On March 27th David Dengel of my staff testified before your committee via teleconference. I would like to reiterate what Mr. Dengel stated concerning the City of Valdez's position regarding House Bill 143. The City of Valdez supports the passage of House Bill 143.

Section 4 of the bill as proposed will amend the Alaska Statute to require the Director of the Division of Land & Water Management for the Department of Natural Resources to approve or disapprove each selection for patent within nine months of selection by a municipality. The City of Valdez supports this change, in that it is important to all municipalities that lands be transferred from the state to local government as rapidly as possible. To this end the City of Valdez would like to recommend that the legislature make the transfer of these lands to municipalities a priority for the Department of Natural Resources.

According to the Department of Natural Resources it has been some time since land has been transferred to Municipalities through the Municipal Entitlement Land Program. This is due primarily to budget cuts according to the department.

The City of Valdez also supports Section 6 of the bill which would prohibit the Commissioner from placing restrictions on the shape of a parcel of land that may be selected by a municipality. This is important in that a number of instances, the existing regulation that requires the width and depth of a parcel not exceed a 4 to 1 ratio makes it impossible for lands to be selected, surveyed and transferred in an economical fashion.

The City of Valdez wholeheartedly endorses the policy that is set forth in Section 8 which states that it is the policy of the state to provide for expeditious transfer and patent of land to a municipality. To accomplish this policy the Department of Natural Resources needs sufficient funding and direction from the

P.O. BOX 307 • VALDEZ, ALASKA 99686
TELEPHONE (907) 835-4313 • TELEX 25-381 • TELECOPIER (907) 835-2992

legislature to fulfill this policy.

Finally, the City of Valdez would like to see that Section 9 of the bill is further amended to provide for allowing all State land within a municipality to be eligible for selection by that municipality unless it has been set aside by statute for one or more particular uses or purposes.

If you should have any questions concerning the City of Valdez's position on this bill, I would ask that you contact Dave Dengel, Director of Community Development. Mr. Dengel will be more than willing to discuss this bill with you or members of your staff.

Sincerely,

Doug Griffin
City Manager

cc: Senator Jalmar Kertulla
Senator Curt Menard
Representative Gene Kubina
Deputy Commissioner Mary Rutherford,
Department of Community and Regional Affairs
David Dengel, Director of Community Development

#51Davidson.A02

ALEUTIANS EAST BOROUGH

SERVING THE COMMUNITIES OF
■ KING COVE ■ SAND POINT ■ AKUTAN ■ COLD BAY ■ FALSE PASS ■ NELSON LAGOON

February 22, 1991

Representative Eileen MacLean
P.O. Box V
Juneau, Ak 99811

Re: HB 143

Dear Representative MacLean:

The Aleutians East Borough was formed in 1987. In the existing municipal land entitlement program, it is eligible to receive approximately 7,000 + acres. The program allows for possibly up to 40,000 acres based on the 20 acre per person category requirement. The Borough, because of land classification restrictions, obviously will receive considerably less.

In light of the land entitlements by those who incorporated in the '60's, the AEB is concerned about being treated fairly and equitably under this program. This is compounded by the fact that the State of Alaska settled a dispute with the University of Alaska and an important element of that settlement was the conveyance of some of the little State-owned property in any settlement within the Borough. Additionally, most lands that are available to the Borough, are not of comparable value to that of say the Mat-Su or Kenai Peninsula Borough under their municipal entitlement program. The Borough therefore views the changes as proposed in the HB 143 as a positive step in the right direction to assist not only this Borough with its land entitlement programs but also serve as needed changes which will serve as incentive for other areas to seriously consider a borough organization in the future.

The AEB therefore supports the concept of HB 143 and recommends its passage.

Sincerely,

Lamar J. Cotten
Borough Administrator

LJC:emn

P.O. BOX 349
SAND POINT, ALASKA 99661
(907) 383-2699

P.O. BOX 37
KING COVE, ALASKA 99612
(907) 497-2340

LAKE AND PENINSULA BOROUGH
P.O. Box 495
King Salmon, Alaska 99613

MEMORANDUM

To: Rena
From: Chow Taylor, Borough Manager
Date: February 22, 1991
Re: HB 143

The Lake and Peninsula Borough supports HB 143. By including wildlife habitat other than critical wildlife habitat in the definition of VUU lands the amount of lands selectable by this borough would be significantly increased.

In the Lake and Peninsula Borough, although DNR has not yet certified VUU lands, we believe we will be entitled to select only around 8,000-9,000 acres. If habitat lands were added, since there is a large amount of habitat land in the north end of the borough, we would be entitled to much more. I do believe, under this scenario you are right in removing the 20 acres per person cap.

In the event wildlife habitat is not added to the VUU definition, I would suggest language be added to increase the percentage of VUU lands a borough may select to at least seventy percent. In a borough which covers over 25,000 square miles, the amount of land available to us under current law is unreasonably small.

We also support the addition of Community and Regional Affairs as the first agency to review selections. That agency works extensively and closely with municipalities statewide and therefore has a better perspective as to what is reasonable and what is not. We also agree DCRA should be consulted as regulations are developed.

Thank you for the opportunity to comment.

SECOND SESSION OF THE ELEVENTH ANNUAL
NORTH AND NORTHWESTALASKA MAYOR CONFERENCE
KOTZEBUE, ALASKA
MARCH 19-20,1991

RESOLUTION NO. 91-91

A RESOLUTION OF THE NORTH-NORTHWEST MAYORS CONFERENCE URGING THE 1991 LEGISLATURE TO PASS HOUSE BILL NO. 143, "AN ACT RELATING TO GENERAL GRANT LAND SELECTION"

WHEREAS, the delegates to the Alaska Constitutional Convention thoughtfully remembered territorial governance, conferred autonomy, and provided for maximum self-government in the creation of municipalities with broad powers in Article X of the Alaska State Constitution, and

WHEREAS, by offering incentives to encourage municipal incorporations, the State of Alaska advances and promotes the goal of maximum local self-government contained in Article X, and

WHEREAS, since Alaska's first municipal land entitlement was created in 1962, one of the incentives has been the ability to select and receive state general grant lands within the boundaries of the local government to assist in providing... a means of creating or expanding a tax base,..a means to generate revenues through land sales or leases,..a land base for community expansions, and a land base for other public purposes, and

WHEREAS, the 1963 Mandatory Borough Act provided a formula for the amount of state land grant entitlements: (that) "an organized borough may select 10 percent of the vacant, unappropriated and unreserved state lands located within its boundaries within five years after the date of availability of state lands in the borough." , and

WHEREAS, the Mandatory Borough Act required the muncipalities to play a role in determining municipal land selections. However, over the years, all of the requirements have

been taken out of statutes and all of the responsibilities has been given to the Department of Natural Resources with little or no oversight, and

WHEREAS, this has resulted in disputes and numerous legislative solutions for many municipal entitlement claims, not once for some municipalities, but several times, and

WHEREAS, in the advent of amending the municipal entitlement statutes,AS 29.65.030, in 1987 (Chapter 34 SLA 1987), a 20 acre per capita restriction alterred the original municipal entitlement formula, and

WHEREAS, the purpose of HB 143 is to amend Alaska Statutes relating to general grant land sections to:..restore equity in the municipal entitlement process;.. to return the emphasis of the program to it original intent of developing independent and strong local governments;...and to temper the Department of Natural Resource's broad discretion in determining the processes and procedures for awarding general grant land to municipalities.

NOW THEREFORE BE IT RESOLVED, that the North-Northwest Mayors Conference urges the Alaska State Legislature to pass House Bill 143, in its entirety, as introduced into the first session of the seventeenth legislature,1991.

Passed and approved by the SECOND SESSION OF THE ELEVENTH ANNUAL NORTH AND NORTHWEST MAYOR'S CONFERENCE this_____day of_____,1991.

_____ _____

PRESIDENT SECRETARY

INTRODUCED:_____ VOTE: YES:_____

SECONDED BY:_____ NO_____

DENALI BOROUGH, ALASKA

RESOLUTION NO. 91-06

A RESOLUTION REGARDING THE BOROUGH'S SUPPORT OF HOUSE BILL 143.

WHEREAS, the Denali Borough was incorporated on December 7, 1990 as a Home Rule Borough, with mandatory land use planning powers and responsibilities; and

WHEREAS, the Department of Natural Resource's (DNR) 1985 Tanana Basin Area Plan, which imposes classifications on all state land within its scope, predates the organization of the last four boroughs including the Denali Borough, and represents a departmental, regulatory impediment to local land selections and ownership; and

WHEREAS, the Denali Borough Assembly has certain expectations of the state with respect to their timely and ultimate performance of land entitlement conveyances; and

WHEREAS, the Denali Borough Assembly believes that existing State law effectively discriminates against boroughs organized from the unorganized borough after 1985, particularly regarding transfer of state land to newly organized boroughs.

NOW THEREFORE BE IT RESOLVED by the Denali Borough Assembly that the assembly supports House Bill 143 in its entirety, and emphasizes more particularly Sections 10 and 11 concerning retroactivity to 1986, Section 1 concerning removal of the 20 acre cap and Section 9(c) concerning inclusion of wildlife habitat under VUU lands; and

BE IT FURTHER RESOLVED that the Denali Borough Assembly urges the legislature to completely and adequately fund DNR's municipal land entitlement program and staff, to enable DNR to fulfill its obligations in this respect.

PASSED and APPROVED by the DENALI BOROUGH ASSEMBLY this 24th day of March, 1991.

Mayor

ATTEST:

Scott Ruby
acting Borough Clerk

April 3, 1991

Representative Maclean;

I am following HB 143 with a reaffirmed belief that legislators in this state are working for the people. I wholeheartedly support the bill.

Much of rural Alaska offers little in the way of year-round employment, causing many rural residents to reluctantly relocate in or closer to urban centers. This reluctance fuels a desire to develop local resources that provide opportunities for local residents.

As a former elected official and current member of the Denali Borough Land and Planning Committee, I can attest to the frustration of the residents of the Denali Borough. The newly formed Denali Borough will soon be selecting land from municipal entitlement lands. It is the responsibility of the Denali Borough to acquire the maximum amount of land for self-determination in the public interest.

The classification of state land within Denali Borough boundaries severely inhibit the selection of appropriate development land. The Department of Natural Resources has historically classified land with a "broad brush" approach to management. This type of *non-management* reflects a "lock-up" mentality.

"...Classifications are based on the best information available at the scale appropriate to the planning effort, generally 1:250,000. *These classifications are broad and have not considered if the lands should be available for transfer to municipalities in the future...*"(Tanana Basin Area Plan, Nov.1990, p.4-20). [emphasis added.]

The Tanana Basin Area Plan is developed by the Department of Natural Resources in cooperation with other state and municipal agencies. It designates the uses that will occur on state lands within the Tanana Basin. If there is a question about how land should be classified, DNR has historically placed it in a category that makes it inaccessible until such time as a need to reconsider is *proven* to DNR's satisfaction. The expense incurred in developing a justification for DNR is cost inhibitive to most rural communities.

I have read with great concern and deep regret the Hickle Administration Position on HB 143. The Hickle/Coghill platform presented the appearance of supporting economic growth and development in the great State of Alaska. Yet, it is apparent that the Department of Natural Resources is writing the Hickle Administration Position.

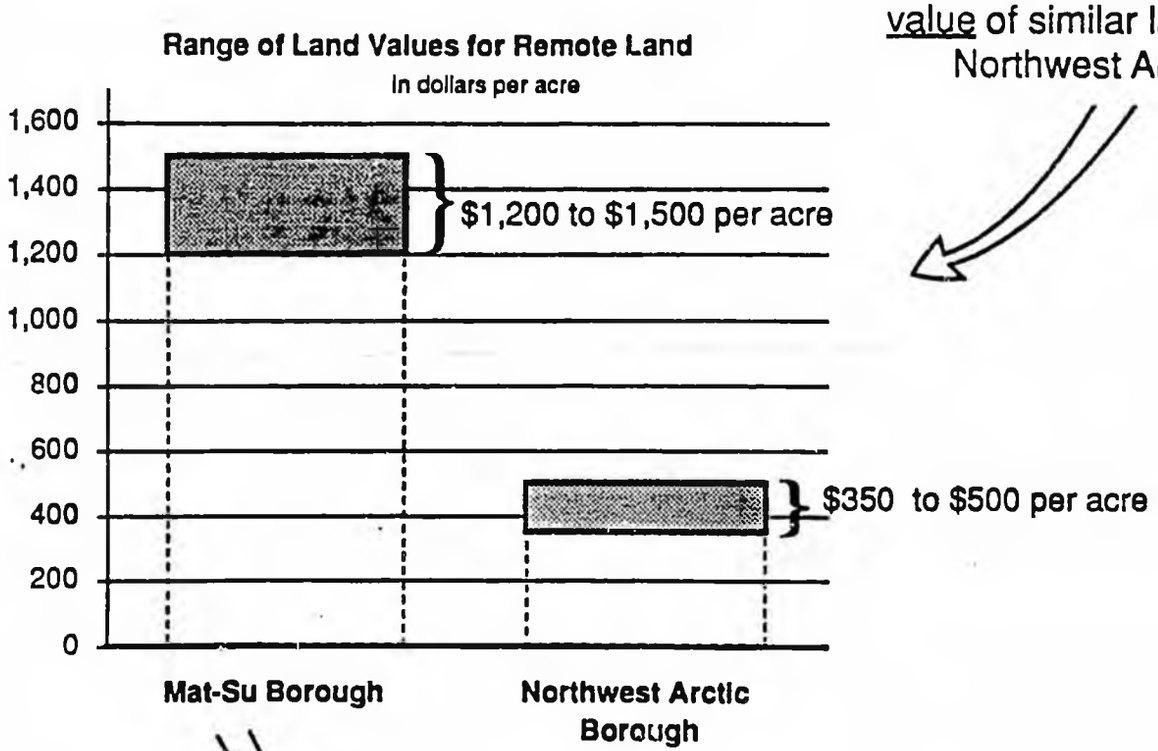
As stated by David Case in his testimony to the House Resources Committee on HB 143, "I think HB 143 is a much-needed remedy to a long, festering municipal land allocation problem in rural Alaska." I agree with Mr. Case. The problems vary from region to region and are complex and unique to rural Alaska.

Control of the land and resources is one of the reasons that communities organize. Rural communities are at the mercy of state agencies. They continually turn to legislators to correct problems created by discriminatory legislation and powerful departments of state. The passage of this bill would be a step in the right direction.

Respectfully,
G.W.(Jerry) Mueller
P.O.Box 40046
Clear, Alaska 99704

A Population Cap on Acreage is Not an Equitable Approach for Municipal Land Entitlements:

Remote land located in the Mat-Su Borough has about <u>three times the value</u> of similar land located in the Northwest Arctic Borough.



The Mat-Su Borough land entitlement of 355,210 acres was processed in 1978. At that time, the Borough population was 17,760 — the land entitlement represented 20 acres per capita. At an average value of $1,350 per acre, this equates to $27,000 per capita. A similar entitlement in the Northwest Arctic Borough would equate to $8,500 per capita.

Therefore, to receive an <u>equivalent value per capita</u> for its land entitlement, the Northwest Arctic Borough would have to receive three times the acreage per capita compared to the Mat-Su Borough, or approximately 60 acres per capita.

PLEASE MICROFILM TOP PAGE ONLY

DOCUMENTS WHICH HAVE NOT BEEN FILMED BUT ARE AVAILABLE IN THE ORIGINAL FILE INCLUDE:

→ Report by Dept. of Natural Resources
January 1990
"Municipal General Grant Land Entitlement"

HB144

HOUSE COMMITTEE REPORT

(H1)

Date Referred: March 11, 1991 FURTHER REFERRALS:

Date of Committee Action: 3/20/91

The FINANCE Committee considered: HB 144

HOUSE BILL NO. 144 LEGISLATIVE APPROVAL OF SUIT SETTLEMENTS

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

RECOMMENDATIONS:
be replaced with CSHB 144 (FIN)

[ ] the same title
[✓] a new title

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

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note Leg Aff. Agency

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

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

Mike Navarre E B MacLean
CHAIRMAN'S SIGNATURE

Navarre MacLean

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO: CSHB 144 (JUD)

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

COMPONENT SERIAL NO: 782

Expenditures/Revenues: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact.

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

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

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

CS FOR HOUSE BILL NO. 144 (FINANCE)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE FINANCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) by the attorney general without litigation;

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

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

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

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

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

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

this chapter.

Alaska State Legislature

HOUSE OF REPRESENTATIVES

REPRESENTATIVE FRAN ULMER

MEMORANDUM

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

FROM: Representative Fran Ulmer

SUBJ: HB 144

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

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

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

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

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

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

FU/bvh
Attachments

District 4B — Juneau
P.O. Box V • Juneau, Alaska 99811-3100 • (907) 465-4947

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

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 144 (Judiciary)

Page 1, line 2:

Delete ", and"

Insert ";"

Page 1, line 2, after "appropriation":

Insert "; and requiring reports of settlements"

Page 2, line 13:

Delete "a new section"

Insert "new sections"

Page 3, following line 11:

Insert a new section to read:

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

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

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

(2) by the attorney general without litigation;

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

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

general.

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

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM February 15, 1991

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

TO: Senator Sam Cotten

FROM: Pamela Finley
Assistant Revisor of Statutes

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

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

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

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

DISCUSSION.

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

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

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

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

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

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

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

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

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

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

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

III. Settlement Providing for Services or Property.

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

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

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

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

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

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

PF:lmb
91-046.lmb

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM March 11, 1991

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

TO: Representative Niilo Koponen

FROM: Pam Finley
Assistant Revisor

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

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

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

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

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

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

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

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM March 11, 1991

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

TO: Representative Niilo Koponen

FROM: Pam Finley Pam Finley
Assistant Revisor

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

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

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

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

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

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

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

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

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

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

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

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

PLF:pi
91-147.plm

MEMORANDUM

State of Alaska
Department of Law

TO: Shelby Stastny, Director
Office of Management and Budget

DATE: February 7, 1991

FILE NO.:

TEL. NO.: 465-3600

SUBJECT: FY91 Supplementals

A

See PARA. IV.

FROM: Charles E. Cole
Attorney General

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

I. Request: Oil and Gas Litigation

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

A. Accounting Information

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

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

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

4. $12,000.0.

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

B. Analysis Information

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