

ALASKA LEGISLATURE

2674

HOUSE and SENATE FINANCE COMMITTEE FILES, 2003-2004

1 services, and agreements with federal officials under which the federal government
2 will assume responsibility for coverage of some individuals or some services for some
3 individuals through such federal programs as the Indian Health Service or Medicare
4 but may not include the development of a preferred drug list.

5 (c) If cost containment measures authorized under (b) of this section are
6 insufficient to reduce the anticipated program costs for a fiscal year to the amount
7 allocated in the state budget for the program for that fiscal year, the department may,
8 to the extent authorized under federal law and the state's constitution, deny any or all
9 optional services listed in AS 47.07.030(b) - (d) to a person eligible for services under
10 AS 47.07.020 or deny program eligibility to a person who is eligible for the medical
11 assistance program under the optional coverage provisions of AS 47.07.020(b) - (i).
12 However, the department may not, under this subsection,

13 (1) eliminate program participation of a person who is eligible for
14 coverage under AS 47.07.020(a);

15 (2) deny coverage of a service described in AS 47.07.030(a) for a
16 person who is eligible for the medical assistance program under AS 47.07.020; or

17 (3) develop a preferred drug list.

18 * Sec. 4. AS 47.07.035 is repealed.

19 * Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to
20 read:

21 APPLICABILITY. AS 47.07.036, enacted by sec. 3 of this Act, applies only to
22 eligibility determinations made and medical services performed on or after July 1, 2003.

23 * Sec. 6. This Act takes effect July 1, 2003.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 1, 2003

SUBJECT: Preferred Drug List
(House CS for SB 109(FIN); draft version "D")

TO: Representative Bill Williams
Attn: Randy

FROM: Terri Lauterbach
Legislative Counsel *TLauterbach*

Enclosed is the work draft you requested for SB 109. Your staff said I had leeway to place the requested language where it goes best while fulfilling your intent, so the purpose of this memo is to point out where the new language appears.

The intent language relating to "preferred drug list" appears in sec. 1(a) of the draft, following "AS 47.07."

The substantive language relating to "preferred drug list" appears in sec. 3 of the draft, at the end of AS 47.07.036(b) and again at the end of AS 47.07.036(c).

I know that "preferred drug list" is sort of a term of art in the health care field, but I am not certain that it has only one meaning. Unless you have assurances from the Department of Health and Social Services that there is only one possible meaning, it would be a good idea to put in a definition so as to avoid potential litigation over what is and is not a "preferred drug list." Manufacturers might try to relate it to rebate programs (which are required under federal law). The department might try to relate it to utilization review (which is authorized in the bill). Consumers might have another idea what a "preferred drug list" means.

If I may be of further assistance, please advise.

TML:mdr
03-098.mdr

Enclosure

LEGAL SERVICES

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MEMORANDUM

April 15, 2003

SUBJECT: Cost containment in Medicaid (HB 153) and (SB 109)

TO: Representative Eric Croft

FROM: Terri Lauterbach
Legislative Counsel



You have asked for a memorandum concerning whether the wide latitude allowed to the executive branch to implement cuts in Medicaid services or Medicaid eligibility under HB 153 (companion to SB 109) may violate the state's constitution by excessively delegating the legislature's law-making power to the executive branch. You also wonder whether your two amendments (23-GH1124\A.1 and A.2) might improve the chances of the legislation surviving an "excessive delegation" challenge.

In my opinion, there is a definite possibility that a court could find that excessive (unconstitutional) law-making latitude is given to the executive branch under part of HB 153/SB 109 because there are not enough statutory standards or administrative safeguards built into AS 47.07.036(c) by which the executive branch will determine how to cut Medicaid services or eligibility when costs are anticipated to exceed Medicaid appropriations and other cost containment measures have not resulted in enough cost savings. Your two amendments may help, but there are other amendments that might also help.

DISCUSSION

Under current law in AS 47.07.035, the executive branch is supposed to eliminate funding for various optional service categories and various optionally eligible groups when it finds that the Medicaid budget won't cover everything and everybody the statutes say are supposed to be covered (either because of intentional short-funding or because estimates of anticipated Medicaid use wind up being inaccurate).¹ The list of what is

¹ The state must cover certain services that the federal government has called "mandatory"; these are referred to in AS 47.07.030(a). The legislature has added some services that the federal government has called "optional"; these services are, for the most part, in AS 47.07.030(b). In addition there are "mandatory" groups of people who must be covered AS 47.07.020(a), and the legislature has added "optional" groups of people under AS 47.07.020(b).

Representative Eric Croft

April 15, 2003

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supposed to be cut under AS 47.07.035 starts with optional services and would cause elimination of whole groups of people only if Medicaid appropriations are still insufficient after all optional services have been eliminated.

HB 153/SB 109 would deal differently with under-funded Medicaid situations. These bills repeal AS 47.07.035 (the legislature's assessment of what should be cut when funds are insufficient) and directs the executive branch to implement "cost containment measures" when Medicaid expenditures are higher than the legislature's allocation for Medicaid.

The bills don't really define what "cost containment measures" are, so they are presumably anything that cuts Medicaid outlays. The primary limitation I see in the bills is in sec. 3. AS 47.07.036(b) says the executive branch is supposed to implement cost containment measures that do **not** eliminate program eligibility or services before it eliminates program eligibility or services. There are a few examples of what steps these might be: changes in provider payment rates, pre-certification requirements, and agreements with the federal government. But, the list is not exhaustive, only illustrative, and it is unclear what else might be a "cost containment measure" that the executive branch might use. Also, presumably, the executive branch has always and will always pursue these kinds of cost containment even without a legislative direction to do so.

The most problematic part of the bills is AS 47.07.036(c) on page 3 of the bills. This provision says that the executive branch can cut optional services or optional people when Medicaid is under-funded. There is no legislative standard for which services or which people should be cut before other services or other people should be cut. There isn't even any legislative guidance as to whether the executive branch should cut a service for all people or whether the cuts should be on a case-by-case basis. In other words, the language would seem to me to allow the executive branch to deny dental services for Joe Smith, eyeglasses for Mary Jones, chiropractic care for Jerry Olson, and prescriptions for Sally White, while still providing these services to other individuals.²

There is a legislative intent section in the bill that says the cuts by the executive branch "should be those that best reflect the needs and interests of the eligible recipients and the coverage options available under AS 47.07." However, I doubt that a court would see this statement as an instructive legislative standard. The "needs" and "interests" of the eligible recipients are already reflected by the fact that the recipients seek medical care and by the fact that their health care providers prescribe such care. In what way could the

² The executive branch may or may not have testified as to whether case-by-case denials are contemplated. All I can address is the actual language of the statute. Even if the current administrators do not intend to make ad hoc decisions, only the language of the statute itself could affect whether future administrators would feel bound to follow the same intent.

executive branch make any cuts at all in services or eligibility and still reflect the "needs" and "interests" of the eligible recipients?

The bill also says, in the last sentence of AS 47.07.036(c), that the department cannot cut a service or group of people considered to be mandatory under federal law. (Those are the references to "AS 47.07.020(a)" and "AS 47.07.030(a)" on page 3, lines 10 - 13.) However, since those are mandatory services and people under federal law, the executive branch would have to maintain those services anyway, so a court is unlikely to find this limitation to be much of a legislative standard.

The question, then, is whether there is so much discretion given in AS 47.07.036(c) that a court could find the grant of discretion to be unconstitutionally excessive, giving away too much of the legislative branch's power to make the laws.

Alaska Supreme Court cases say that the court will use a "sliding-scale" approach in analyzing the validity of a delegation of authority to an administrative agency.³ That means that, as the scope of the discretion granted to the executive branch increases, so does the amount of specificity the legislature must provide for exercising the discretion. Under this approach, the court, in 1987, struck down a statute (since amended) that gave the Governor the power to reduce appropriations when anticipated revenues appeared inadequate to meet appropriation levels for the state budget,⁴ but the court, in 1996, upheld the legislature's delegated authority to DNR to regulate in the field of coal leases on state land.⁵ In the 1987 appropriations case, the court considered the power to make reductions in the state budget to be a "sweeping power" over a large area with no legislative guidance or limitation. In the 1996 DNR case, the court found coal leasing on state lands to be a "narrow area or field" and also found that there were a number of legislative standards and safeguards pertaining to DNR's exercise of discretion over the leasing.

In my opinion, AS 47.07.036(c) falls closer to the 1987 case where the Alaska Supreme Court struck down the discretion given to the executive branch than to the 1996 case where the court upheld the discretion given.

Like the 1987 case, AS 47.07.036(c) involves situations when the legislature's budget turns out to be insufficient for the program being funded. Like the 1987 case, when there were many options for cutting many programs in various amounts, there are quite a few options under AS 47.07.036(c) for making various sizes of cuts in various parts of the

³ State v. Fairbanks N. Star Borough, 736 P.2d 1140 (Alaska 1987).

⁴ Ibid.

⁵ Usibelli Coal Mine, Inc. v. State of Alaska, DNR, 921 P.2d 1134 (Alaska 1996).

Medicaid program.⁶ Like the 1987 case, there is arguably very little, if any, legislative guidance on how the executive branch should cut the services and program eligibility in the situation of Medicaid under-funding. In these bills, only the Medicaid budget is involved, rather than the whole state budget as in the 1987 case. However, testimony in legislative hearings has indicated that the Medicaid budget and the increases in Medicaid budget have been very large, so this is likely to be viewed as discretion involving millions of dollars, not an insignificant amount.

Given the amount of money potentially affected, the number of people potentially affected, and the lack of legislative guidelines for the executive branch's discretion to implement "cost containment" in the form of service cuts and eligibility cuts it is my opinion that an Alaska court could easily find AS 47.07.036(c) to be an excessive delegation of legislative power.

The first amendment I have drafted for you (A.1) would not directly affect a court's weighing of whether the discretion granted is excessive or not, but would implement a 60-day waiting period before the executive branch could cut a service or group of people from Medicaid coverage. The amendment would also require the DHSS to review whether a person whose coverage might be cut might qualify for continued coverage under an alternate provision.⁷ This notice period would allow a person to reschedule needed care so that it could be obtained before the cost containment cut, or to switch to care from a different kind of provider, such as receiving services from a medical doctor or physical therapist rather than from a chiropractor (if chiropractic care were going to be cut). The 60-day notice period would also give the legislature the opportunity, if it so chose, to pass a law prohibiting the particular cost containment measure intended to be implemented.

Your second amendment (A.2) would more directly affect the discretion granted to the executive branch. That amendment would require DHSS to annually provide a list of the services and groups of people that it would intend to cut if the legislature appropriated less Medicaid money for the next fiscal year than was needed (and other cost containment measures were inadequate). This amendment would eliminate the apparent discretion in AS 47.07.036(c) to make ad hoc cuts; only whole categories of services or people could be cut. This amendment would also give the legislature a whole legislative session to respond to the proposed list, either by enacting a law or by increasing Medicaid funding for the next fiscal year. The amendment would also require that DHSS's list be adopted by regulation, thus ensuring a chance for public notice and public testimony.

⁶ AS 47.07.035 currently lists 24 different "optional" service categories and 8 optionally eligible groups of people. There are thousands of people and health care providers potentially affected.

⁷ For instance, a person might qualify under more than one optionally-eligible grouping, only one of which is being contemplated for "cost containment" cutting.

Representative Eric Croft
April 15, 2003
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Another amendment that might help AS 47.07.036(c) to withstand a court challenge would be an amendment that prohibits ad hoc decision-making and requires DHSS to either cut all of one type of service to all Medicaid recipients or to cut all people optionally eligible under a certain category (without requiring DHSS to come up with a priority list, as your A.2 would require). This limitation, combined with at least 60 days' notice of the intended cut and a requirement to adopt at least an emergency regulation that implements the cut, could greatly lessen the chance of successful court challenge to AS 47.07.036(c), based on excessive delegation of discretion.

If this memorandum is not clear or if I can be of further assistance on amendments or other matters, please feel free to let me know.

TML:lmb\med\mdr
03-152.lmb

FRANK H. MURKOWSKI
GOVERNOR
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

SB109

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March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill to provide greater flexibility to the Department of Health and Social Services to implement cost containment strategies for the Medicaid program.

Under current law, if funds appropriated to the Medicaid program are insufficient for a given fiscal year, the department is directed to eliminate optional Medicaid services based on a priority list that is woefully out-of-date. The existing list is not an effective management tool and if used, would needlessly result in the denial of necessary and cost-effective services to Alaskans in need of health care.

The proposed bill would replace this obsolescent language with authority for the department to undertake cost containment based on three key principles.

First, the department must pursue all other reasonable cost containment measures before eliminating any eligibility groups or services.

Second, the department should aggressively pursue strategies to maximize federal financial participation in the Medicaid program.

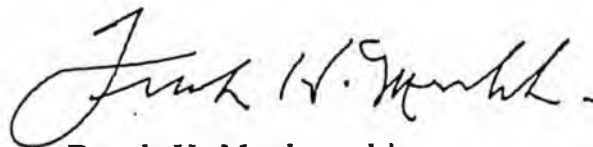
Third, cost containment decisions should be made in a manner that best reflect the needs and interests of eligible Medicaid recipients.

The Honorable Gene Merriault
March 5, 2003
Page 2

The imperative of slowing the growth of state funding for Medicaid while at the same time maintaining health care coverage for needy Alaskans is an issue that can no longer be avoided. Passage of this legislation will give the department additional tools to meet this challenge.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script, reading "Frank H. Murkowski". The signature is written in dark ink and is positioned above the printed name and title.

Frank H. Murkowski
Governor

re SB109

Bartlett Regional Hospital

3260 Hospital Drive • Juneau, Alaska 99801 • Telephone 907-586-2611

April 28, 2003

Honorable Frank Murkowski
Governor, State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Murkowski:

I am writing about my serious concerns regarding regulatory efforts to impose prior authorization and restrictive drug formularies for state funded health programs in Alaska.

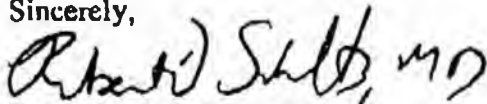
I deal with people who suffer from mental illness every day. I know from this experience that they cannot be adequately served by government mandates that restrict their access to medications. To restrict access to medicines in any way puts those patients at risk and makes their treatment much more costly in the long run.

Prior authorization won't work for patients and they only serve to frustrate physicians who are trying to find the best treatment for their patients. The hassles associated with asking physicians to jump through bureaucratic hoops before they use the best available medicine limits their ability to find the appropriate treatment for their patients.

There is no specific consideration for exempting prescriptions for mental health drugs – especially atypical anti-psychotic medications. Special consideration should be given to ensure that new medicines are available so that we may provide the best treatment for our patients.

I can appreciate the state's need to find ways to cut costs in these hard budget times. However, balancing the budget on the backs of patients will only cost the state more in the long run.

Sincerely,



Robert D. Schults, MD

cc Senator Lyda Green, Co-Chair, Senate Finance Committee
Senator Gary Wilken, Co-Chair, Senate Finance Committee
Representative John Harris, Co-Chair, House Finance Committee
Representative Bill Williams, Co-Chair, House Finance Committee
Joel Gilbertson, Commissioner, Department of Health and Social Services

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
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April 17, 2003

Honorable Bill Williams
Co-Chairman
House Finance Committee
Alaska State Capitol; Rm. 511
Juneau, AK 99801

Dear Representative Williams,

The Department of Health and Social Services respectfully requests that Senate Bill 109, "An Act repealing the statute that sets priorities for the Department of Health and Social Services to apply to administration of the medical assistance program when there are insufficient funds allocated in the state budget for that program; authorizing the department to make cost containment decisions that may include decisions about eligibility of persons and availability of services under the medical assistance program; and providing for an effective date," be scheduled for a hearing in House Finance.

This bill will provide greater flexibility to the Department of Health and Social Services to implement cost containment strategies for the Medicaid program.

Under current law, if insufficient funds are allocated to fully-fund the Medicaid program, the department is directed to eliminate optional Medicaid services based on a priority list that is out-of-date. The existing list is not an effective management tool and, if used, would needlessly result in the denial of necessary and cost-effective services to Alaskans in need of health care.

The proposed bill would replace this obsolescent language with broad general authority for the department to undertake cost containment based on three key principles.

First, the department must pursue all other reasonable cost containment measures before eliminating any eligibility groups or services.

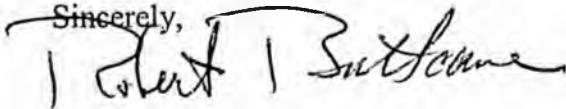
Second, the department should aggressively pursue strategies to maximize federal financial participation in the Medicaid program.

Third, cost containment decisions should be made in a manner that best reflect the needs and interests of eligible Medicaid recipients.

The Senate considered this bill and passed it without amending it. A copy of the fiscal note and a copy of the Governor's transmittal letter are attached.

Your favorable consideration of this request would be appreciated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert Buttane".

Robert Buttane
Acting Assistant to the Commissioner

Cc: Representative Pete Kott
Speaker of the House

Mike Tibbles, Legislative Director
Office of the Governor

John Gaisford, Director
Division of Medical Assistance

SEATTLE & THE NORTHWEST

Stevenson family files \$10 million claim

By STEVE MILETICH
IN REPORTER

Claiming gross negligence and reckless actions, the family of a retired Seattle fire captain who was fatally stabbed in a random attack last month filed \$10 million in claims against the city, King County and the state yesterday.

The family alleges that all three governments should have known the mentally ill transient accused in the killing posed an extreme danger to others and shouldn't have

been allowed on the streets.

Family members said nothing will bring back Stanley Stevenson, 64, of Kent, but the money they seek reflects the harm that resulted from his death and might prompt public officials to act more responsibly.

"My dad worked for the fire department for so many years and took so much pride in the city, the county and the state," said Susan Plucker, 39, one of Stevenson's five daughters.

"We were all raised to have the deepest respect for our governments," Plucker add-

ed. "Now we are filing these claims because each of these governments failed in their basic duty, their duty to protect us all."

Stevenson was stabbed Aug. 24 while walking to his car in the International District with his wife, Rosalie, and a daughter, Jeanne Baker, 43, after a Mariners game.

The incident sparked a public outcry when it was disclosed the transient charged with the stabbing, Dan Van Ho, had been

See STABBING, Page B2

Stabbing: Lawsuit to be filed if claim isn't settled

From Page B1

released from jail 11 days before the attack despite a recommendation that he be confined under civil commitment laws.

The city had custody of Ho through a theft charge, the county had kept him housed in the King County Jail and the state had evaluated him at Western State Hospital.

The governments have 60 days to respond to the claims, which were brought by Rosaie Stevenson, the estate of Stanley Stevenson and Jeanne Baker. If they aren't settled, the family said it will file a lawsuit.

The claims contain general allegations of negligent and reckless actions, but don't list specific actions by individuals or attempt to divide responsibility.

Representatives of the city, county and state declined comment, saying they haven't studied the claims.

King County Executive Ron Sims formed a task force after the slaying to study reforms and possible recommendations to the state Legislature.

Rebecca Roe, one of the attorneys representing the family, said officials at "all levels" did nothing to keep Ho confined even though they recognized that he was mentally ill and becoming increasingly dangerous.

Another family attorney, Jenny Durkan, said public officials feel terrible about what happened.

But Durkan noted the irony that Seattle authorities jail panhandlers for sitting on the sidewalk, but allow those found to be dangerous

and mentally disabled to roam free.

She said Ho, 30, had a long history of mental illness, criminal conduct and hospitalizations, and was repeatedly "cycled" through the system.

In a written statement, Stevenson's family said they hope the legal action will bring out the entire truth of what happened, hold people accountable and make sure "this nightmare never happens to another family."

Ho was released from the King County Jail after a psychiatrist at Western State found him to be mentally incompetent to stand trial on a misdemeanor charge of stealing a bicycle. The psychiatrist also recommended commitment under civil laws because of his assaultive behavior at the hospital and inability to care for himself.

But neither city prosecutors nor a Seattle Municipal Court judge who saw the report alerted authorities who had the power to seek Ho's confinement.

King County jail staff didn't get the report until after Stevenson was killed.

Western State sent Ho back to the jail, although some officials suggest the hospital staff could have sought Ho's confinement. Hospital

officials have said the municipal court had jurisdiction over Ho.

Ho has been charged with first-degree murder, but was deemed incompetent to stand trial and returned to Western State for treatment.

The claims seek \$10 million each from the city, county and state, but the family is actually seeking a net sum of \$10 million for their joint actions, said Mark Leemon, another family attorney.

How damages would be divided would depend on a determination of the culpability of each, Leemon said.

The filing of the claims was announced at a news conference where Stevenson's

widow spoke for the first time publicly about the case.

"I would like to say Stanley loved his life and he was full of life and we're going to miss him terribly," Rosalie Stevenson said as the room first fell silent and then dissolved into the muffled sobs of her family.

"He would want us to do this," she said.

The psychiatrist
also recommended
commitment under civil
laws because of his
assaultive behavior at the
hospital and inability to
care for himself.

■ P-I reporter Steve Miletich can be reached at 206-448-8042 or stevemiletich@seattle-pi.com

Alaska State Medical Association

4107 Laurel Street • Anchorage, Alaska 99508 • (907) 562-0304 • (907) 561-2063 (fax)

04/23/2003

Honorable Frank Murkowski
State of Alaska
Governor
PO Box 11004
Juneau, AK 99811

Re: Preferred Drug Lists

Dear Governor Murkowski:

Imbedded in the budget language for FY 2004 is a statement that concerns the intent to add a "preferred drug list" to the Medicaid program. ASMA opposes such back door attempts to add a "drug formulary" to Medicaid.

It is ASMA's understanding that such preferred drug lists are constructed in theory to be evidenced based and to include therapeutically equivalent drugs. However, in reality, such lists used in other states only include the cheapest drugs. No weight is given to efficacy.

Of course, it is common for such approaches to allow a physician to prescribe a drug not on the "preferred drug list", but with prior authorization. This mechanism serves only to interfere with the patient/physician relationship, add to the physician's "hassle factor", and add to the physician's cost in operating her/his practice.

Physicians and their patients need to be able to decide upon the appropriate course of treatment. It is inappropriate to interfere with that mechanism.

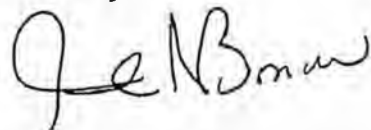
Doctors are very cognizant of the Medicaid budget stresses as well as the State's overall budgetary challenges. It is ASMA's belief that this cognizance results in physicians being very cost conscious when it comes to developing treatment plans. However, physicians cannot legally nor ethically put cost before efficacy of treatment.

Given Alaska's relative shortage of physicians (critical shortages in some specialties), physicians' experience with the "hassle factors" inherent in the Medicare program, the interference in the patient/physician relationship, along with rate of physicians' compensation; ASMA is concerned that access to care will become a problem for Medicaid beneficiaries in Alaska. Obviously, care for Medicaid beneficiaries could switch to the costly confines of the hospital emergency rooms.

ASMA understands that the other cost saving solutions have been provided by various groups, including the Psychiatric community and PhRMA. ASMA urges you to carefully evaluate all alternatives before establishing a preferred drug list with the shortfalls described above.

ASMA fears that Alaska's physicians will negatively perceive the institution of a "preferred drug list" (established and controlled by a vendor outside of Alaska) as a re-do of the Oxycontin policy instituted in April of 2002, and react similarly but with exponentially greater ill will towards the Medicaid program.

Sincerely,



By: Jeanne Bonar, MD, President
For: Alaska State Medical Association

①

Cc: Joel Gilbertson, Commissioner Department of Health and Social Services
Bob Labbe, Deputy Commissioner Department of Health and Social Services
Senator Gene Therriault, President of the Senate
Representative Pete Kott, Speaker of the House
Senator Lyda Green, Senate Finance Co-Chair
Senator Gary Wilken, Senate Finance Co-Chair
Representative John Harris, Senate Finance Co-Chair
Representative Bill Williams, Senate Finance Co-Chair

DHSS SUMMARY OF FY04 BUDGET CHANGES

<u>Category/Item/Description</u>	<u>Funds</u>
<ul style="list-style-type: none"> * To avoid costs in the future separate the psychiatric rate for acute care hospitals from the other hospital rates. 	\$0.0
<ul style="list-style-type: none"> * Exclude home office costs from facility rates for hospitals/nursing homes. 	(\$0.2)
<ul style="list-style-type: none"> * Require all Nursing Home beds to be Medicare certified, reimburse long-term care at minimum of 85% occupancy, and pay lower Resident Psychiatric Treatment Center rates while awaiting placement. 	(\$0.1)
<ul style="list-style-type: none"> * Change hospital length of stay for all admissions but childbirth to three days, redefine admission criteria for under 21 inpatient psychiatric, and review durable medical equipment for possible savings thru contracting or changing policies. 	(\$1.4)
<ul style="list-style-type: none"> * Reduce physician payment schedule, but still keep higher than Medicare. 	(\$0.8)
<ul style="list-style-type: none"> * Increase co-payments to maximum possible. 	(\$0.3)
<ul style="list-style-type: none"> * Enhance Fraud and abuse activities and increase enforcement of waiver services. 	(\$1.1)
<ul style="list-style-type: none"> * Adopt a Preferred Drug List & expand prior authorization on Drugs 	(\$1.4)
<ul style="list-style-type: none"> * Establish a preferred drug list for the Medicaid program in Alaska that will allow patients clinically effective drugs at a lower cost. 	(\$0.7)
<ul style="list-style-type: none"> * Hire a contractor to identify those drugs that can receive rebates. 	(\$0.1)
<ul style="list-style-type: none"> * Expand prior authorization of prescription drugs and only pay up-front to the pharmacists what the Medicaid share is when clients have other coverage. 	(\$0.6)
<ul style="list-style-type: none"> * Decrease Medicaid payments to pharmacists 	(\$4.3)
<ul style="list-style-type: none"> * Reduce Pharmacy dispensing fee paid by Medicaid to \$2 per prescription. Pharmacists will still get paid for dispensing prescriptions, just at reduced amount, more in line with other states. 	(\$0.9)
<ul style="list-style-type: none"> * Decrease percent of the Average Wholesale Price (AWP) of prescription and generic drugs to AWP minus ten. This will put Alaska's Medicaid reimbursement in line with other states. 	(\$3.4)
<ul style="list-style-type: none"> ● Freeze Medicaid Income eligibility for clients in Nursing Homes & Home Care 	(\$0.2)
<ul style="list-style-type: none"> * Clients in Nursing Homes and those that receive Home Care services that earn 1600.00 per month or less will continue to receive services. The income standard will not raise each year but will be frozen at the current level 	
<ul style="list-style-type: none"> ● Freeze Medicaid Income eligibility for pregnant women at current levels. 	\$0.0
<ul style="list-style-type: none"> * Currently pregnant women are eligible for Medicaid at 200% of poverty level. Change the statute so that the actual income (\$22,160 for a one person family) is frozen. 	
<ul style="list-style-type: none"> ● Freeze Denali KidCare Income eligibility at 2003 levels. 	\$0.0

ALASKA PSYCHIATRIC ASSOCIATION

A District Branch of the American Psychiatric Association

P.O. Box 231147, Anchorage, AK 99523-1147
(907) 566-7800 E-mail: Schaugard@gci.net

David R. Samson, M.D., FAPA
President

405-3799

4/28/2003

Denise Hawks, M.D., Ph.D.
Treasurer

Mark Samson, M.D.
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Verner Stillner, M.D., FAPA
Counselor/Ethics Chair

Alexander von Hafften, M.D.
Deputy Representative

Honorable Frank Murkowski
Governor, State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Murkowski:

I am writing about my serious concerns regarding legislation that would establish restrictive drug formularies for state funded health programs in Alaska. Proposals to control access through preferred drug lists, prior authorization or other cost-saving measures would only serve to frustrate patients and place an additional administrative burden on providers.

Severe mental illness affects one in five families in Alaska. It can take months or years to successfully manage a patient's disease. Without full access to medications, especially newer atypical anti-psychotics, the clients we serve everyday will become more of a burden on the state through increased hospitalizations and more emergency room visits. This in the long run drives up the overall costs of healthcare for the state.

As you know, the majority of medications prescribed under the state's Medicaid plan are to treat mental illness. However, providers need as much latitude as possible, especially when prescribing for these complex conditions. Restricting access through prior authorization will not result in cost savings and could result in dire consequences for patients.

Please fight efforts to limit access to all medications, and ensure that, in the least, mental health drugs are exempted from regulatory efforts to impose prior authorization on state funded drug programs.

Sincerely,



DAVID SAMSON, M.D.
A.P.A.



April 24, 2003

By Hand Delivery

Representative John Harris
Co-Chair
House Finance Committee
Alaska State Capitol, Room 507
Juneau, Alaska

Representative Bill Williams
Co-Chair
House Finance Committee
Alaska State Capitol, Room 515
Juneau, Alaska

JUNEAU

230 South Franklin #206
Juneau, AK 99801
(907) 586-1627
FAX (907) 586-1066

Re: **SB 109: Medicaid Cost Containment**

Dear Representatives Harris and Williams:

I would like to offer comment on SB 109, which addresses Medicaid Cost Containment measures. Similar comments were made verbally before the Senate HESS committee. We are very aware of the need to restrain state spending in all areas. However, we do have some concerns regarding this bill.

Medicaid provides the primary health care for many Alaskans with disabilities. Some Alaskans receive Medicaid through so-called "mandatory" eligibility categories, i.e., people that the federal law requires the State to cover in order to participate in the Medicaid program. Federal law also allows "optional" eligibility categories, i.e., a state may decide to offer Medicaid to certain categories of its citizens who are not otherwise eligible under one of the mandatory eligibility categories. AS 47.07.020(b) lists the "optional" eligibility categories that the Alaska Legislature, in exercise of its legislative power under Article VII, Sections 4 and 5 of the Alaska Constitution, has seen fit to provide.

An important optional eligibility category of Alaskans who receive Medicaid are those eligible under Alaska's Adult Public Assistance program. AS 47.07.020(b)(4). These are poor people who due to age, blindness or other disability, receive a small amount of income (generally under \$12,000 per year), such as from a pension, annuity, private disability policy payment, or Social Security disability insurance, but who are ineligible for SSI due to the very low SSI income thresholds.¹ The only way that many disabled Alaskans receive Medicaid is through

MEMBER OF THE
NATIONAL
ASSOCIATION OF
PROTECTION &
ADVOCACY
SYSTEMS

¹ The current SSI income eligibility thresholds are approximately \$572 per month for an individual, and \$849 per month for a couple. This means that a person who has earned or unearned income above these thresholds is ineligible for SSI (and the Medicaid that goes with it). Many working Alaskans who become disabled will receive SSDI higher than \$572/mo, and thus are ineligible for Medicaid is through

their eligibility for APA. Medicaid is life-giving for some Alaskans who need medications to live (such as transplant recipients, persons with seizure disorders, diabetes, and others who take regular prescription medications to live). Medicare does not cover prescription medications.

Medicaid also mandates that certain medical services must be provided or covered under the plan, so-called "mandatory" coverage. Medicaid also allows for the offering of optional coverage under Medicaid. AS 47.07.030(b) sets forth the optional services and supports that the Alaska Legislature has chosen to provide to our citizens beyond the mandatory coverage.

Existing Alaska law provides that, during periods of insufficient funding, in general optional services shall be reduced or eliminated before denying coverage to optional groups. See AS 47.07.035. SB 109, if passed, would repeal AS 47.07.035, and create a new AS 47.07.036 (Cost containment measures authorized), that essentially delegates to the Commissioner of the Department of Health and Social Services the power of deciding which optional groups and which optional services could be reduced, and in what priority, during periods of funding insufficiency. In this way, the power of setting priorities is shifted from the legislative to the executive branch.

We take no position on the bill. There are at least three legal restraints on the exercise of the Commissioner's discretion if SB 109 is passed in its current form, which are at least procedural if not substantive. First, any decision to delete or eliminate an optional group or optional coverage would in effect be a modification of Alaska's State Medicaid Plan. There are existing federal regulations that govern how a State Medicaid Plan may be changed; generally, significant changes must be approved by the Center for Medicare and Medicaid Services (formerly known as HCFA, the Health Care Finance Administration), after notice-and-comment rulemaking in the state. Second, any systemic change in the Medicaid program would in our view require compliance with the Alaska Administrative Procedures Act. Third, basic Medicaid law requires that Medicaid services must be sufficient in amount, duration and scope to achieve their intended purpose. There may be other legal as well as practical constraints that may affect how the Commissioner might exercise the power that is delegated under SB 109.

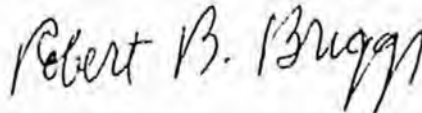
We cannot say that the current list of priorities in AS 47.07.035 is the wisest order. An ideal order in which to deny optional Medicaid services and eligibility categories is not easy to formulate. However, it appears that the new AS 47.07.036(c) conveys virtually no objective criteria or standards by which the executive branch is to exercise the legislative power of deciding how to reduce services and alter optional eligibility categories. The Alaska Supreme Court has found such broad delegations of legislative authority unconstitutional. "The essential inquiry is whether the specified guidance 'sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'" State v. Fairbanks North Star Borough, 736 P.2d 1140, 1143 (Alaska 1987)²(ruling appropriations statute unconstitutional).

² A copy of the decision is provided with this letter.

Rep. John Harris and Rep. Bill Williams, co-chairs, House Finance Committee
Re: SB 109: Medicaid cost containment
April 24, 2003
Page 3

We realize of difficulty of managing the Medicaid program and the difficult decisions that the Commissioner faces. We have confidence in the current Commissioner's expertise and openness to input by affected individuals, and trust that we may never have to question the constitutionality of a decision made under the proposed AS 47.07.036, but we do want you to be aware of our concerns. If we can assist further on this, please have staff call me at 907-586-1627.

Very truly yours,



Robert B. Briggs, staff attorney

Cc: Joel Gilbertson, Commissioner, DHSS
Dave Fleurant, exec. dir., DLC-Anchorage

H

Supreme Court of Alaska.

STATE of Alaska, William Sheffield, Governor of
the State of Alaska, Marshall
Lind, Commissioner of Education, Eleanor Andrews,
Commissioner of
Administration, Emil Notti, Commissioner of
Community & Regional Affairs, Loren
Lounsbury, Commissioner of Commerce &
Economic Development, Milton Barker,
Acting Commissioner of Revenue, all in their official
capacities, Appellants,
Cross-Appellees,
v.
FAIRBANKS NORTH STAR BOROUGH and
Fairbanks North Star Borough School District,
Appellees, Cross-Appellants.

Nos. S-2122, 2141.

May 6, 1987.


Borough and borough school district brought suit challenging constitutionality of Executive Budget Act section pursuant to which governors withheld or reduced appropriations to state agencies in view of anticipated revenue shortfalls. The Superior Court, Fourth Judicial District, James Blair, J., found statute unconstitutional delegation of legislative authority, and State appealed. The Supreme Court, affirmed on opinion of Superior Court, and held that: (1) statute was unconstitutional delegation of legislative power, and (2) decision would be given retroactive effect.

Affirmed and remanded.

West Headnotes

[1] **Constitutional Law**  62(13)
92k62(13) Most Cited Cases

Executive Budget Act section allowing governor to withhold or reduce appropriations to state agency when anticipated revenues appear inadequate to meet appropriation levels was an unconstitutional delegation of legislative power; statute authorized exercise of sweeping power over entire budget with no guidance or limitation. AS 37.07.080(g)(2).

[1] **Courts**  100(1)
106k100(1) Most Cited Cases

Decision striking down as unconstitutional Executive

Budget Act section allowing governor to withhold or reduce appropriations to state agency when anticipated revenues appeared inadequate to meet appropriation levels would be given retroactive effect. AS 37.07.080(g)(2).

*1140 Robert M. Maynard, Asst. Atty. Gen., Grace Berg Schaible, Atty. Gen., Juneau, for appellants/cross-appellees.

Mark Andrews, Asst. Borough Atty., Gordon W. Duval, Staff Atty., Paul H. Cragan, Borough Atty., Fairbanks, for appellees/cross-appellants.

Before BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

[1][2] The judgment is affirmed on the opinion of the superior court, attached as appendix, except as noted hereafter. The traditional rule that judicial decisions should apply retroactively governs this case as the resolution of the issue presented was foreshadowed by prior opinions of the state attorney general, there has been no irremediable reliance on the statute in question, and inequity would result if only the appellees were to receive the benefit of this ruling. See Commercial Fisheries Entry Commission v. Bvayuk, 684 P.2d 114, 117 (Alaska 1984).

Accordingly, we remand this case to the superior court with instructions to modify its judgment to allow for total retroactivity.

*1141 AFFIRMED on the merits, REMANDED as to effect.

RABINOWITZ, C.J., not participating.

APPENDIX

FAIRBANKS NORTH STAR BOROUGH, and
FAIRBANKS NORTH STAR BOROUGH
SCHOOL DISTRICT,
Plaintiffs,
vs.
STATE OF ALASKA, WILLIAM SHEFFIELD,
Governor of the State of Alaska, MARSHALL
LIND, Commissioner of Education, ELEANOR
ANDREWS, Commissioner of
Administration, EMIL NOTTI, Commissioner of

Community & Regional Affairs, LOREN LOUNSBURY, Commissioner of Commerce & Economic Development, MILTON BARKER, Acting Commissioner of Revenue, all in their official capacities, Defendants.

Case No. 4FA-86-2528 Ci.

IN THE SUPERIOR COURT FOR THE STATE OF
ALASKA FOURTH JUDICIAL DISTRICT
OPINION

This case comes before the court on the State's motion for summary judgment and the Borough's cross-motion. The motions require the court to resolve questions of constitutional and statutory interpretation. The facts are undisputed.

In December of 1985, Governor Sheffield submitted his proposed budget for fiscal year 1987 (FY87) to the legislature. His proposal was based on the Department of Revenue's December revenue forecast, which predicted that \$2718.9 million in unrestricted funds would be available for FY87.

On March 12, 1986, the Department issued a new forecast, which projected a drop in revenue of \$641.3 million. The decline was due to sharply reduced oil prices. Revenues derived from oil comprise approximately eighty-five percent of the State's income.

The budget passed by the legislature in early June of 1986 was approximately \$400 million less than that submitted by the Governor in December. The Governor then exercised his veto power to further reduce appropriations to within \$40 million of the June revenue projection. The budget was approved with item vetoes on June 9, 1986.

On July 16, 1986, the Department of Revenue issued the June forecast, which projected a further decline of \$857.2 million, for a total projected deficit of \$897.2 million. At about the same time, the final accounting for FY86 was completed. Funds which remained unspent under the 1986 appropriations--the unrestricted surplus--totalled \$17.3 million. That amount lapsed back into the general fund.

To cope with the substantial projected deficit, the Governor decided to act without recalling the legislature for a special session. He announced that he would restrict the obligation of revenues set aside by appropriation for FY87. On August 22, 1986, he issued Administrative Order No. 90, which stated that he had determined it to be in the State's best interest to withhold expenditure authority for certain appropriations. [FN1] His purpose was to avoid

deficit spending which is prohibited by Article IX, sec. 8 of the Alaska Constitution.

FN1. On December 8, 1986, Governor Cowper issued Administrative Order No. 91 for the same purpose and under the same authority cited in Administrative Order No. 90. Governor Cowper made a ten percent actual cut in expenditures for school debt retirement.

Under Administrative Order No. 90, expenditure authority for different classes of appropriations was restricted by different percentages. Some appropriations were unrestricted. Appropriations which were intended to provide funds for municipalities were restricted ten percent; the ten percent restriction on those appropriations is at issue in this case. [FN2] Expenditures of *1142 appropriations for State agencies were limited by fifteen percent and those for capital projects sixty-five percent. The restrictions totalled approximately \$450 million.

FN2. Those appropriations included amounts set aside for municipal grants, school bond debt reimbursement, State shared revenue, municipal assistance, day care assistance, public school foundation account, tuition for military schools, education of youth in detention, grants for community schools and transportation.

The Governor based his authority to issue Administrative Order 90 on Article III, secs. 1 & 24 of the Alaska Constitution [FN3] and AS 37.07.080(f) and (g). [FN4] The central question in this case is whether AS 37.07.080(g)(2) is constitutional.

FN3. Art. III, sec. 1 provides that:
The executive power of the State is vested in the governor.

Art. III, sec. 24 provides that:
Each principal department shall be under the supervision of the governor.

FN4. AS 37.07.080(f) and (g) provide as follows:
(f) The office shall report quarterly to the

governor and the legislature on the operations of each state agency, relating actual accomplishments to those planned and modifying, if necessary, the operations plan of any agency for the balance of the fiscal year.

(g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that (1) the planned expenditures can no longer be made due to factors outside the control of the state which make the expenditure factually impossible; or

(2) estimated receipts and surpluses will be insufficient to provide for appropriations.

AS 37.07.080(g)(2), a provision of the Executive Budget Act, provides that:

(g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that

....

(2) estimated receipts and surpluses will be insufficient to provide for appropriations.

"Appropriation," for the purposes of the Executive Budget Act, is defined to mean "a maximum amount available for expenditure by a State agency for a stated purpose set out in an appropriation act." AS 37.07.120(3).

The Borough has argued that AS 37.07.080(g)(2) is unconstitutional for two reasons: first, because it delegates power over appropriations, a power which can only be exercised by the legislature in accord with the procedures mandated by Article II of the Alaska Constitution; second, because the statute lacks standards to guide the exercise of administrative discretion. In either case, the Borough argues that the statute violates the principle of separation of powers.

The doctrine of separation of powers is implicit in the Alaska Constitution. As Justice Brandeis said, the doctrine was adopted

not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160, 242-243 (1926). The question then is whether AS 37.07.080(g)(2) permits the

arbitrary exercise of power.

On its face, AS 37.07.080(g)(2) purports to endow the Governor with discretion to reduce appropriations--in effect, to amend the budget--when anticipated revenues appear inadequate to meet appropriation levels. The State contends that the legislature intended only to delegate discretion over expenditures in such a situation. This interpretation would comport with prior decisions which have held that the legislature may delegate discretion to the executive to spend or not spend appropriated funds. The existence of such discretion is a question of legislative intent, as manifested by the language and legislative history of the statute. Ellis v. City of Valdez, 686 P.2d 700, 705 (Alaska 1984).

This court is under a duty to construe a statute to avoid constitutional infirmity where possible. However, it cannot go so far as to redraft defective legislation. State v. Campbell, 536 P.2d 105, 110-111 (Alaska 1975). The limiting construction suggested by the State cannot save this statute. AS 37.07.080 fails because it authorizes the exercise of sweeping power over the entire budget with no guidance or *1143 limitation. The statute is thus an unconstitutional delegation of legislative power.

The Alaska court has never applied the delegation doctrine to a statute of comparable breadth. This is not a case where the legislature has delegated broad authority to an agency with expertise to regulate a narrowly defined field. See Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 588 (Alaska 1960). Nor is this a case where the Act's purpose and standards are explicit and detailed. See Walker v. Alaska State Mortgage Association, 416 P.2d 247 (Alaska 1966). Indeed, the legislature has declined to provide even the general limitations and policy statements which were sufficient to guide administrative discretion involved in making loans to promote economic development. De Armond v. Alaska State Development Corporation, 376 P.2d 717, 723 (Alaska 1962). Surely a delegation of authority over the entire budget deserves no less.

The delegation doctrine was developed in the federal courts; therefore, it may be useful to assess this statute under the standard articulated in a recent federal case, Synar v. United States, 626 F.Supp. 1374, 1383-89 (D.D.C.1986). In Synar, the court found that a limited delegation of power over appropriations was not an unconstitutional delegation of legislative power. In that court's view, the constitutionality of a delegation is determined on the basis of the scope of the power delegated and the

specificity of the standards to govern its exercise. "When the scope increases to immense proportions ... the standards must be correspondingly more precise." *Id.* at 1386. The essential inquiry is whether the specified guidance "sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Id.* at 1387 quoting *Yakus v. United States*, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834, 849 (1944).

The statute at issue in *Synar* permitted administrators to affect spending levels over a specified range of federal programs and only to a limited degree. *Id.* at 1386. The Act provided explicit direction as to the procedures to be followed and established basic assumptions, definitions and criteria to guide the administrators. *Id.* at 1387-89. The court held that Congress had provided an adequate "intelligible principle to guide and confine administrative decision making." *Id.* at 1389.

The detailed direction described in *Synar* stands in sharp contrast to the statute at issue here. The legislature has articulated no principles, intelligible or otherwise, to guide the executive. Under AS 37.07.080(g)(2), the governor decides when projected revenues are inadequate to meet appropriations. [FN5] Once he makes that determination, he may or may not assume authority under the statute. If he decides to act, he has total discretion as to which appropriations to cut and to what extent. The statute does not expressly require him to limit his cuts to the extent of the shortfall nor does it provide for adjustment of the cuts to the actual revenues received.

FN5. Before the Governor can take any action under AS 37.05.159, the statute creating a reserve for emergency operating expenses, he must make an express finding that there is an "imminent danger" that the State will be unable to meet its operating budget expenses. AS 37.05.159(b)(1). AS 37.07.080(g)(2) does not explicitly require a similar finding.

Most importantly, the executive is provided with no policy guidance as to how the cuts should be distributed. The State conceded at oral argument that the statute would permit the Governor to cut the entire budget for a particular department or project. Indeed, nothing in the statute would prevent him from effectively vetoing a project where his veto had

previously been overridden. An appropriation could be eliminated entirely, cut in half or left untouched. In short, the effect of an exercise of authority under AS 37.07.080(g)(2) is no more predictable than the identity and priorities of our next governor.

This memorandum is not intended to impugn the motives or good faith of Governors Sheffield and Cowper. Both have interpreted the grant of authority under AS 37.07.080(g)(2) narrowly and have acted in accord with that narrow interpretation. *1144 However, the issue in this case is not what has been done under the statute; rather it is what can be done. As one court has said,

[W]e find nothing in [the statute] whatsoever to indicate that the legislature was granting the authority to be exercised only in the circumstances and under the conditions which respondent says it has imposed on itself. As we read the section, the grant is absolute and totally devoid of restraints, direction or rules. Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted.

State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 926, 932 (1961). The limited exercise of authority undertaken in Administrative Orders 90 and 91 cannot save a statute which amounts to legislative abdication.

Nevertheless, the actions taken by the governors are relevant to the final issue in the case: the effect of this decision holding that AS 37.07.080(g)(2) is an unconstitutional delegation of legislative power. The State contends that this ruling should be given only prospective effect.

The Supreme Court has identified four conditions indicating the propriety of non-retroactive treatment in civil cases: 1. the holding is one of first impression ... and was not foreshadowed in earlier decisions; 2. there has been justifiable reliance on an alternative interpretation of the law; 3. the purpose and intended effect of the holding is best accomplished by prospective application; 4. undue hardship would result from retroactive application. *Plumley v. Hale*, 594 P.2d 497, 503 (Alaska 1979) (citations omitted).

In this case, the factors listed above favor partial prospective application of the holding in this case. The decision is one of first impression which was not clearly foreshadowed in prior Alaska cases applying the delegation doctrine. The governors acted reasonably in justifiable reliance on the statute when they issued the Administrative Orders; it is probable

that the legislature and the public have relied on those Orders as well. In addition, retroactive application would not further the purpose of this ruling. This court does not hold that the legislature could not draft a statute which would permit the executive to exercise limited authority to control expenditures as Governors Cowper and Sheffield have done. Rather this court holds that the legislature unconstitutionally delegated legislative authority when it enacted AS 37.07.080(g)(2) without providing any meaningful guidance.

END OF DOCUMENT

In the final analysis, the determination of the effect of this decision must be guided primarily by equitable considerations: what is necessary, what is fair, and what is workable. *Id.* at 504, n. 28 (citation omitted). The court is aware that the governor, the legislature and the public are now attempting to cope with the effects of diminished revenues. Stability is an important factor in making that adjustment. Total invalidation of Administrative Orders 90 and 91 now would only inject additional uncertainty into an already difficult calculation. The court notes that others in positions similar to plaintiffs have elected not to join this suit. As a practical matter then, it would be unduly burdensome, indeed unnecessary, to require the legislature to reconsider the entire \$450 million deficit that the Administrative Orders served to remedy. The court therefore holds that this decision applies only prospectively except as to the plaintiffs in the case at bar. Whether plaintiffs ultimately obtain funding depends, of course, on legislative action or inaction.

SUMMARY

1. AS 37.07.080(g)(2) is unconstitutional.
2. Insofar as they are applicable to plaintiffs Fairbanks North Star Borough and Fairbanks North Star Borough School District, Administrative Orders Nos. 90 and 91 are set aside.
3. In light of the foregoing, it is unnecessary for the court to reach the other issues raised in plaintiffs' complaint.

*1145 DATED at Fairbanks, Alaska this 6th day of April 1987.

/s/ James R. Blair

JAMES R. BLAIR

Superior Court Judge

Alaska State Medical Association

4107 Laurel Street • Anchorage, Alaska 99508 • (907) 562-0304 • (907) 561-2063 (fax)

04/23/2003

Honorable Frank Murkowski
State of Alaska
Governor
PO Box 11004
Juneau AK 99811

Re: Preferred Drug Lists

Dear Governor Murkowski:

Imbedded in the budget language for FY 2004 is a statement that conveys the intent to add a "preferred drug list" to the Medicaid program. ASMA opposes such back door attempts to add a "drug formulary" to Medicaid.

It is ASMA's understanding that such preferred drug lists are constructed in theory to be evidenced based and to include therapeutically equivalent drugs. However, in reality, such lists used in other states only include the cheapest drugs. No weight is given to efficacy.

Of course, it is common for such approaches to allow a physician to prescribe a drug not on the "preferred drug list", but with prior authorization. This mechanism serves only to interfere with the patient/physician relationship, add to the physician's "hassle factor", and add to the physician's cost in operating her/his practice.

Physicians and their patients need to be able to decide upon the appropriate course of treatment. It is inappropriate to interfere with that mechanism.

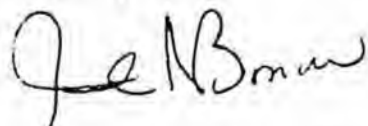
Doctors are very cognizant of the Medicaid budget stresses as well as the State's overall budgetary challenges. It is ASMA's belief that this cognizance results in physicians being very cost conscious when it comes to developing treatment plans. However, physicians cannot legally nor ethically put cost before efficacy of treatment.

Given Alaska's relative shortage of physicians (critical shortages in some specialties), physicians' experience with the "hassle factors" inherent in the Medicare program, the interference in the patient/physician relationship, along with rate of physicians' compensation; ASMA is concerned that access to care will become a problem for Medicaid beneficiaries in Alaska. Obviously, care for Medicaid beneficiaries could switch to the costly confines of the hospital emergency rooms.

ASMA understands that the other cost saving solutions have been provided by various groups, including the Psychiatric community and PhRMA. ASMA urges you to carefully evaluate all alternatives before establishing a preferred drug list with the shortfalls described above.

ASMA fears that Alaska's physicians will negatively perceive the institution of a "preferred drug list" (established and controlled by a vendor outside of Alaska) as a re-do of the Oxycontin policy instituted in April of 2002, and react similarly but with exponentially greater ill will towards the Medicaid program.

Sincerely,



By: Jeanne Bonar, MD, President
For: Alaska State Medical Association

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT
 APR 04 2003
 SENATE FINANCE
 COMMITTEE

DATE: 3/28/03

FURTHER:

DATE TURNED
 IN TO OFFICE: 4 April 2003

Finance Committee considered

SENATE BILL NO. 109

SB 109 MEDICAID COST CONTAINMENT & PRIORITY LIST

"An Act repealing the statute that sets priorities for the Department of Health and Social Services to apply to administration of the medical assistance program when there are insufficient funds allocated in the state budget for that program; authorizing the department to make cost containment decisions that may include decisions about eligibility of persons and availability of services under the medical assistance program; and providing for an effective date."

and recommends:

be replaced with _____ CS _____ (_____)

adopt previous _____ CS _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to _____ Committee

Senate Bill:

same title

new title

House Bill:

same title

technical title

new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
H&SS	3/4/03		✓	# 1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>L. Brewer</i>	✓			
<i>Ben Steens</i>	✓			
<i>Madison Taylor</i>	✓			
<i>Robert [unclear]</i>			✓	
COCHAIR: <i>Lynne Green</i>	✓			
COCHAIR: <i>Tom Withers</i>	✓			

APR 04 2003

SENATE FINANCE COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 109
 (S) Publish Date: 3/6/03
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):
 Title MEDICAID PRIORITIES WHEN FUNDS INSUFFICIENT

BRU Medical Assistance
 Component Medicaid Services

Sponsor RULES
 Requester GOVERNOR

Component No. 2077

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES (0)						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost:

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Under current law, if insufficient funds are allocated to fully-fund the Medicaid program, the department is directed to eliminate optional Medicaid services based on a priority list that is woefully out-of-date. The existing list is not an effective management tool and, if used, would needlessly result in the denial of necessary and cost-effective services to Alaskans in need of health care.

The proposed bill would replace this obsolescent language with broad general authority for the department to undertake cost containment based on three key principles.

Prepared by: Virginia Stonkus
 Division Medical Assistance
 Approved by: Joel S. Gilbertson, Commissioner
 Agency Department of Health and Social Services

Phone 465-1166
 Date/Time 03/03/2003
 Date 03/04/2003

COMMITTEE COPY

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. SB 109

ANALYSIS CONTINUATION

First, the department must pursue all other reasonable cost containment measures before eliminating any eligibility groups or services.

Second, the department should aggressively pursue strategies to maximize federal financial participation in the Medicaid program.

Third, cost containment decisions should be made in a manner that best reflect the needs and interests of eligible Medicaid recipients.

The imperative of slowing the growth of state funding for Medicaid while at the same time maintaining health care coverage for needy Alaskans is an issue that can no longer be avoided. Passage of this legislation will give the department some of the tools that it needs to meet this challenge.

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

P.O. Box 110001
JUNEAU, ALASKA 99811-0001
(907) 465-3500
FAX (907) 465-3532
WWW.GOV.STATE.AK.US

March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill to provide greater flexibility to the Department of Health and Social Services to implement cost containment strategies for the Medicaid program.

Under current law, if funds appropriated to the Medicaid program are insufficient for a given fiscal year, the department is directed to eliminate optional Medicaid services based on a priority list that is woefully out-of-date. The existing list is not an effective management tool and if used, would needlessly result in the denial of necessary and cost-effective services to Alaskans in need of health care.

The proposed bill would replace this obsolescent language with authority for the department to undertake cost containment based on three key principles.

First, the department must pursue all other reasonable cost containment measures before eliminating any eligibility groups or services.

Second, the department should aggressively pursue strategies to maximize federal financial participation in the Medicaid program.

Third, cost containment decisions should be made in a manner that best reflect the needs and interests of eligible Medicaid recipients.

The Honorable Gene Merriault

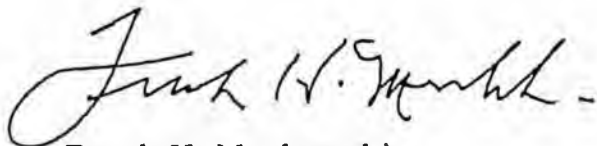
March 5, 2003

Page 2

The imperative of slowing the growth of state funding for Medicaid while at the same time maintaining health care coverage for needy Alaskans is an issue that can no longer be avoided. Passage of this legislation will give the department additional tools to meet this challenge.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script, reading "Frank H. Murkowski". The signature is written in dark ink and is positioned above the printed name and title.

Frank H. Murkowski
Governor

SENATE COMMITTEE REPORT First Committee of Referral

DATE: 3/6/03

FURTHER: Finance

Date of 5-Day Notice: 3-20-03
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 3.26.03

Health, Education and Social Services Committee considered

SENATE BILL NO. 109

SB 109 MEDICAID COST CONTAINMENT & PRIORITY LIST

"An Act repealing the statute that sets priorities for the Department of Health and Social Services to apply to administration of the medical assistance program when there are insufficient funds allocated in the state budget for that program; authorizing the department to make cost containment decisions that may include decisions about eligibility of persons and availability of services under the medical assistance program; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
HSS	3/03		X	1

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

- APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	No REC	AMEND
<i>Greg Wilken</i> Wilken	✓			
<i>Betty Davis</i> Davis			✓	
<i>Luba Green</i> Green	✓			
<i>Paul Gross</i> Gross			✓	
<i>Phil Dyson</i> *Dyson				
CHAIR:				

SB

110

SFIN

FILE

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education & Early Development
State of Alaska

SB

109

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT
 APR 04 2003
 SENATE FINANCE
 COMMITTEE

DATE: 3/28/03

FURTHER:

DATE TURNED
 IN TO OFFICE: 4 April 2003

Finance Committee considered SENATE BILL NO. 109

SB 109 MEDICAID COST CONTAINMENT & PRIORITY LIST

"An Act repealing the statute that sets priorities for the Department of Health and Social Services to apply to administration of the medical assistance program when there are insufficient funds allocated in the state budget for that program; authorizing the department to make cost containment decisions that may include decisions about eligibility of persons and availability of services under the medical assistance program; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
H#SS	3/4/03		✓	# 1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
COCHAIR: <i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			

APR 04 2003

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 109
 (S) Publish Date: 3/6/03
 Dept. Affected: Health & Social Services

SENATE FINANCE
COMMITTEE

Revision Date/Time (Note if correction):

Title MEDICAID PRIORITIES WHEN FUNDS
INSUFFICIENT

BRU Medical Assistance
 Component Medicaid Services

Sponsor RULES

Requester GOVERNOR

Component No. 2077

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES (0)						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Under current law, if insufficient funds are allocated to fully-fund the Medicaid program, the department is directed to eliminate optional Medicaid services based on a priority list that is woefully out-of-date. The existing list is not an effective management tool and, if used, would needlessly result in the denial of necessary and cost-effective services to Alaskans in need of health care.

The proposed bill would replace this obsolescent language with broad general authority for the department to undertake cost containment based on three key principles.

Prepared by: Virginia Stonkus
 Division: Medical Assistance
 Approved by: Joel S. Gilbertson, Commissioner
 Agency: Department of Health and Social Services

Phone 465-1166
 Date/Time 03/03/2003
 Date 03/04/2003

COMMITTEE COPY

FISCAL NOTE
FN # 1

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. SB 109

ANALYSIS CONTINUATION

First, the department must pursue all other reasonable cost containment measures before eliminating any eligibility groups or services.

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The imperative of slowing the growth of state funding for Medicaid while at the same time maintaining health care coverage for needy Alaskans is an issue that can no longer be avoided. Passage of this legislation will give the department some of the tools that it needs to meet this challenge.

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March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill to provide greater flexibility to the Department of Health and Social Services to implement cost containment strategies for the Medicaid program.

Under current law, if funds appropriated to the Medicaid program are insufficient for a given fiscal year, the department is directed to eliminate optional Medicaid services based on a priority list that is woefully out-of-date. The existing list is not an effective management tool and if used, would needlessly result in the denial of necessary and cost-effective services to Alaskans in need of health care.

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The Honorable Gene Merriault

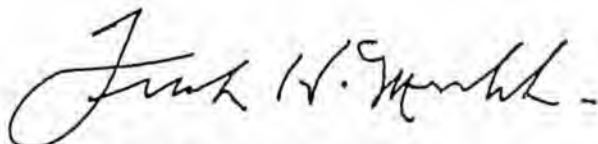
March 5, 2003

Page 2

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I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script, reading "Frank H. Murkowski". The signature is written in dark ink and is positioned above the printed name and title.

Frank H. Murkowski
Governor

SENATE COMMITTEE REPORT First Committee of Referral

DATE: 3/6/03

FURTHER: Finance

Date of 5-Day Notice: 3-20-03
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 3.26.03

Health, Education and Social Services Committee considered

SENATE BILL NO. 109

SB 109 MEDICAID COST CONTAINMENT & PRIORITY LIST

"An Act repealing the statute that sets priorities for the Department of Health and Social Services to apply to administration of the medical assistance program when there are insufficient funds allocated in the state budget for that program; authorizing the department to make cost containment decisions that may include decisions about eligibility of persons and availability of services under the medical assistance program; and providing for an effective date."

and recommends:

be replaced with _____ CS _____ (_____)

adopt previous _____ CS _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to _____ Committee

Senate Bill:

same title

new title

House Bill:

same title

technical title

new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
HSS	3/03		X	1

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Greg Wilken</i> Wilken	✓			
<i>Bettye Davis</i> Davis			✓	
<i>Luke Green</i> Green	✓			
<i>Frank Gress</i> Gress			✓	
<i>Frank Dyson</i> *Dyson				
CHAIR:				

SB

110

SFIN

FILE

SB 110

was referred to the
Senate Finance
Committee

No hearing was held
on this bill

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

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March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill which clarifies local school district programs for under-school-age students.

Pursuant to existing statutes, a district may enroll a four year old child, referred to as an "under school age student." The intent of this bill is to prohibit districts from constructing curriculums that offer two years of kindergarten as a standard program. Early entry of four year olds into the school system should be a rare event and reserved for the truly exceptional child.

This bill would remove a school district's ability to offer early entry as standard practice to access the foundation formula and provide state funded pre-school programs. Currently, districts can enroll four year olds and then enroll them again as a kindergarten student in the next school year. This action effectively provides a child with two years of kindergarten with very little in the way of extra expense to the district. The result to the state is an additional year of per pupil funding equating to approximately \$3.9 million.

Enrolling four year olds as the current statute provides should be retained. However, early enrolled children should be expected to advance through to the next grade level or grade level equivalent.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in black ink that reads "Frank H. Murkowski".

Frank H. Murkowski
Governor

SB

111

SFIN

FILE

SB 111

was referred to the
Senate Finance
Committee

No hearing was held
on this bill

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

P.O. Box 110001
JUNEAU, ALASKA 99811-0001
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WWW.GOV.STATE.AK.US

March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the submission of certified payroll records by contractors and subcontractors performing work on public construction projects.

Currently, under AS 36.05.040, contractors and subcontractors performing work on public construction contracts are required to file certified payroll records each Friday with the Department of Labor and Workforce Development. The Department of Labor and Workforce Development recognizes that many contracting agencies require contractors and subcontractors to file payroll records with them as well. This bill would reduce the double filing requirement on contractors and their subcontractors to file certified payroll records.

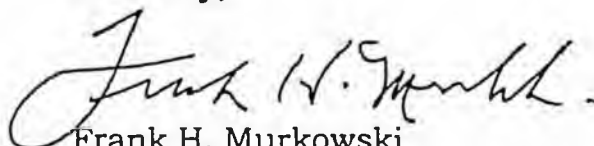
In lieu of filing certified payroll records with the Department of Labor and Workforce Development, each contractor and subcontractor would be required to file a Notice of Intent to Pay Prevailing Wages with the Department of Labor and Workforce Development along with a \$100 fee. The Notice of Intent to Pay Prevailing Wages would provide identifying information about the project, the name of the contractor or subcontractor, and a statement that the contractor or subcontractor will comply with the Little Davis Bacon Act. Furthermore, when the contractor or subcontractor completes its work on the public construction project, an Affidavit of Wages Paid stating that the contractor or subcontractor has completed work on the project and has complied with the requirements of the Little Davis Bacon Act will be required.

The Honorable Gene Therriault
March 5, 2003
Page 2

Eliminating this weekly filing requirement with the Department of Labor and Workforce Development and requiring the new fees would be an administrative savings to the department as well as generating an annual revenue of \$1.15 million.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank H. Murkowski". The signature is written in a cursive style with a large initial "F".

Frank H. Murkowski
Governor

SB

112

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT
 MAY 18 2003
 SENATE FINANCE
 COMMITTEE

DATE: 4/25/03

FURTHER:

DATE TURNED IN TO OFFICE: 18 May 2003

Finance Committee considered

SENATE BILL NO. 112

SB 112 INCREASE MOTOR FUEL TAX

"An Act increasing the motor fuel tax and repealing the special tax rates on blended fuels; and providing for an effective date."

and recommends:

- be replaced with _____ CS SB 112 (FIN)
- adopt previous _____ CS CS forthcoming . (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
		fiscal note(s) forthcoming		
		Revenue: 0		
		Admin: ?		

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>				
COCHAIR: <i>[Signature]</i>			✓	

FISCAL NOTE

REPORTED OUT
MAY 18 2003
SENATE FINANCE
COMMITTEE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSSB 112
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
Title Increasing the motor fuel tax... BRU Finance
Component Finance
Sponsor _____
Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
1002 Federal Receipts						
1033 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
This bill provides a mechanism for government agencies to use a credit card for fuel purchases without paying the motor fuel tax. There is not expected to be additional cost to the state's credit-card procurement program.

Prepared by: Dan Spencer, Director Phone 465-5655
Division Administrative Services Date/Time 5/18/03 2:00 PM
Approved by: Kevin Jardell, Assistant Commissioner Date 5/18/2003
Agency Department of Administration

MAY 18 2003

SENATE FINANCE
COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSSB112(FIN)
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
Title Highway motor fuel tax BRU Revenue Operations
Component Tax Division
Sponsor Senate Rules Committee
Requester Senate Finance Committee Component No. 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation would simplify the process for state motor fuel excise tax refunds on credit card purchases by federal, state and municipal agencies.

Prepared by: Larry Persily, Deputy Commissioner Phone 465-5469
Division Department of Revenue Date/Time 5/18/03 2:20 PM
Approved by: Larry Persily, Deputy Commissioner Date 5/18/2003
Agency Department of Revenue

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Adopted 5/18/03

WORK DRAFT

WORK DRAFT

WORK DRAFT

23-GS1118\W
Kurtz
5/17/03

CS FOR SENATE BILL NO. 112()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to tax refunds for government agency purchases of fuel; and providing**
2 **for an effective date."**

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

4 *** Section 1. AS 43.40.035 is amended by adding a new subsection to read:**

5 (c) For fuel sold to federal, state, and local government agencies for official
6 use and purchased with a government credit card, the credit card issuer may apply for
7 a refund of any motor fuel tax assessed on the purchase if the tax is not billed by the
8 credit card issuer to the government agency making the purchase.

9 *** Sec. 2. AS 43.40.050 is amended by adding a new subsection to read:**

10 (d) A credit card issuer who claims a refund under AS 43.40.035 shall present
11 the refund claim to the department on a form prescribed by the department together
12 with documentation of the claim required by the department.

13 *** Sec. 3. This Act takes effect immediately under AS 01.10.070(c).**



Alaska State Senate

Senate Finance Committee

Official Business

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

FAX COVER SHEET

DATE: 18 May 2003 TIME: 1:30 pm

TO: Legal Services

NUMBER OF PAGES, INCLUDING COVER SHEET: 1

FROM: MINDY ROWLAND
SENATE FINANCE COMMITTEE SECRETARY
PHONE: 465-4935
FAX: 465-2187

NOTES: Final Please
CS SB 112 (FIN)
23-GS1118\W
Kurtz
5/17/03
no changes

*

Also: fiscal note(s)

Thx
Mindy

forthcoming:

Revenue ϕ

*

Admin ?

*

LEGAL SERVICES

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 6, 2003

SUBJECT: Motor Fuel Tax and the Alaska Railroad Corporation
(CSSB 112(TRA), amendment U.1)

TO: Senator John Cowdery
Attn: Richard Schmitz

FROM: Kathryn L. Kurtz *KLK*
Legislative Counsel

Enclosed is the amendment you requested, replacing the motor fuel tax on the Alaska Railroad Corporation with a dividend payable to the state by the Alaska Railroad Corporation, if application of the motor fuel tax to the Alaska Railroad Corporation is held to be in violation of 49 U.S.C. 11501(b)(4).

I am not sure that the contingent language will fare any better in court than direct application of the tax to the railroad, since the dividend would correspond exactly to the tax. Also, 45 U.S.C. 1207(a)(5) specifies that the revenue generated by the railroad shall be retained and managed by the railroad for railroad purposes. A tax, for purposes of the Alaska Railroad Transfer Act, would likely be construed as a business expense.

KLK:lmb
03-171.lmb

Enclosure

AMENDMENT

OFFERED IN THE SENATE
TO: CSSB 112(TRA)

BY SENATOR COWDERY

1 Page 1, line 2, following "Railroad":

2 Insert ", or alternatively providing for payment to the state of an annual dividend
3 as if the Railroad were subject to that tax"

4

5 Page 1, following line 4:

6 Insert new bill sections to read:

7 **"* Section 1.** AS 42.40.530 is amended to read:

8 **Sec. 42.40.530. Revenue.** (a) Except as provided in (b) of this section,
9 revenue [REVENUE] generated by or appropriated to the corporation shall be
10 retained and managed by the corporation for railroad and related purposes in
11 accordance with 45 U.S.C. 1207(a)(5) (Alaska Railroad Transfer Act of 1982).

12 *** Sec. 2.** AS 42.40.530 is amended by adding a new subsection to read:

13 (b) The corporation shall pay an annual dividend to the state equal to the
14 amount of tax that would be due under AS 43.40.010 if the corporation were subject to
15 that tax."

16

17 Page 1, line 5:

18 Delete "Section 1"

19 Insert "Sec. 3"

20

21 Renumber the following bill sections accordingly.

22

23 Page 4, following line 26:

1 Insert a new bill section to read:

2 *** Sec. 7.** AS 43.40.030(a) is amended to read:

3 (a) Except as specified in AS 43.40.010(j), a person [, OTHER THAN THE
4 ALASKA RAILROAD CORPORATION,] who uses motor fuel to operate an internal
5 combustion engine is entitled to a refund of 18 cents a gallon if

6 (1) the tax on the motor fuel has been paid;

7 (2) the motor fuel is not aviation fuel, or motor fuel used in or on
8 watercraft; and

9 (3) the internal combustion engine is not used in or in conjunction with
10 a motor vehicle licensed to be operated on public ways."

11

12 Renumber the following bill sections accordingly.

13

14 Page 6, following line 11:

15 Insert new bill sections to read:

16 *** Sec. 11.** AS 43.40.100(2) is amended to read:

17 (2) "motor fuel" means fuel used in an engine for the propulsion of a
18 motor vehicle or aircraft, and fuel used in and on watercraft for any purpose, or in a
19 stationary engine, machine, or mechanical contrivance that is run by an internal
20 combustion motor; "motor fuel" does not include

21 (A) fuel consigned to foreign countries;

22 (B) fuel sold for use in jet propulsion aircraft operating in
23 flights

24 (i) to foreign countries; or

25 (ii) that continue from foreign countries, unless
26 exemption of the motor fuel from taxation is disallowed because of the
27 refiner's failure to comply with the provisions of a voluntary agreement
28 under AS 43.40.092 in conjunction with expansion of refinery capacity;

29 (C) fuel used in stationary power plants operating as public
30 utility plants and generating electrical energy for sale to the general public;

31 (D) fuel used by nonprofit power associations or corporations

1 for generating electric energy for resale;

2 (E) fuel used by charitable institutions;

3 (F) fuel sold or transferred between qualified dealers;

4 (G) fuel sold to federal, state, and local government agencies
5 for official use; [FOR THE PURPOSES OF THIS SUBPARAGRAPH, THE
6 ALASKA RAILROAD CORPORATION (AS 42.40) IS NOT A FEDERAL,
7 STATE, OR LOCAL GOVERNMENT AGENCY];

8 (H) fuel used in stationary power plants that generate electrical
9 energy for private residential consumption;

10 (I) fuel used to heat private or commercial buildings or
11 facilities;

12 (J) fuel used for other nontaxable purposes as prescribed by
13 regulations adopted by the department;

14 (K) fuel used in stationary power plants of 100 kilowatts or less
15 that generate electrical power for commercial enterprises not for resale; or

16 (L) residual fuel oil used in and on watercraft if the residual
17 fuel oil is sold or transferred in the state or consumed by a user; for purposes of
18 this subparagraph, "residual fuel oil" means the heavy refined hydrocarbon
19 known as number 6 fuel oil that is the residue from crude oil after refined
20 petroleum products have been extracted by the refining process and that may
21 be consumed or used only when sufficient heat is provided to the oil to reduce
22 its viscosity rated by kinetic unit and to give it fluid properties sufficient for
23 pumping and combustion;

24 * Sec. 12. AS 42.40.910(d) is repealed.

25 * Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to
26 read:

27 SEVERABILITY CLAUSE. Under AS 01.10.030, if secs. 3, 6, or 10 of this Act are
28 held by a court to contravene 49 U.S.C. 11501(b)(4), barring taxes that discriminate against a
29 rail carrier providing transportation subject to the jurisdiction of the Surface Transportation
30 Board, the relevant provisions of secs. 3, 6, and 10 of this Act are severable from the
31 remainder of this Act.

1 * Sec. 14. The uncodified law of the State of Alaska is amended by adding a new section to
2 read:

3 CONDITIONAL EFFECT. Sections 1, 2, 7, 11, and 12 of this Act take effect only if
4 AS 43.40.100(2)(G) as it relates to the Alaska Railroad Corporation, AS 42.40.910(d), or the
5 provision of AS 43.40.030(a) that denies a tax refund to the Alaska Railroad Corporation is
6 held by a court to contravene 49 U.S.C. 11501(b)(4), barring taxes that discriminate against a
7 rail carrier providing transportation subject to the jurisdiction of the Surface Transportation
8 Board.

9 * Sec. 15. If, under sec. 14 of this Act, secs. 1, 2, 7, 11, and 12 of this Act take effect, they
10 take effect on the later of (1) the date a court enters a final judgment that the amendment
11 made to AS 43.40.100(2)(G) by sec. 10 of this Act making motor fuel used by the Alaska
12 Railroad Corporation taxable for purposes of AS 43.40.010, AS 42.40.910(d), or the provision
13 of AS 43.40.030(a) that denies a tax refund to the Alaska Railroad Corporation contravenes
14 49 U.S.C. 11501(b)(4), barring taxes that discriminate against a rail carrier providing
15 transportation subject to the jurisdiction of the Surface Transportation Board, or (2) the
16 expiration of any time for appeal of that judgment, or entry of a final order on the appeal that
17 AS 43.40.100(2)(G), as amended by sec. 10 of this Act, AS 42.40.910(d), or the provision of
18 AS 43.40.030(a) that denies a tax refund to the Alaska Railroad Corporation violates 49
19 U.S.C. 11501(b)(4). The attorney general shall promptly notify the lieutenant governor and
20 the revisor of statutes of a judgment described in this section."

21

22 Renumber the following bill section accordingly.

23

24 Page 6, line 12:

25 Delete "This"

26 Insert "Except as provided in sec. 15 of this Act, this"

REASONS AGAINST TAXING ALASKA'S STATE RAILROAD

BACKGROUND

Governor Murkowski sponsored SB 112 as part of his 2004 budget package to increase the motor fuel tax from 8 cents to 20 cents per gallon. The Senate Transportation committee substitute subjects the Alaska Railroad Corporation (ARRC) to the motor fuels tax by making ARRC the only federal, state or local governmental entity not exempted from the bill's operation. CSSB112 (TRA) will cost the Railroad more than \$1.2 million each year and could open the door to additional tax proposals on the Railroad, which is tax-exempt as a state-owned corporation.

The tax proposed in CSSB 112 violates federal law and may also violate the pledge the State made to ARRC's lenders and creditors in the Alaska Railroad Corporation Act not to do anything that would impair ARRC's ability to pay its debts. CSSB 112 will also jeopardize ARRC's ability to provide safe, economical, and efficient transportation to residents, businesses, visitors and military installations in the state and foster and promote the long-term economic growth and development of the state. Besides being poor public policy, it violates common sense for the State to tax itself to "raise revenue."

ARRC ARGUMENTS

DISCRIMINATION

1) CSSB 112 (TRA) illegally discriminates against railroads in violation of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) which is codified at 49 U.S.C. sec. 11501(b)(4) because the bill will require ARRC to pay a substantially higher fuel tax (\$.20/gal) than that paid by barges/ships (\$.05/gal) and aircraft (\$.032/gal). Congress adopted this statute for the express purpose of protecting the financial stability of the railroad industry by shielding railroads from discriminatory taxation that put them at a competitive disadvantage to other modes of transportation. There have been several court decisions from other jurisdictions that have held that states may not impose a fuel tax on railroad that is greater than that imposed on other modes of transportation.

2) CSSB 112 also discriminates against ARRC because the fuel taxes collected under AS 43.40.010 are dedicated to the construction and maintenance of airports, highways, and port facilities whereas ARRC pays all of the costs to construct and maintain its roadbed. **Thus, ARRC will be at a direct competitive disadvantage because, unlike trucking, barge/ship and airline companies, ARRC will have to pay the tax and also pay to build and maintain its tracks.** The AG's office and the Legislature's own Legal Services office have both issued legal opinions stating that the proposed fuel tax against ARRC will likely violate the 4-R Act.

Provided by the Alaska Railroad Corporation

DEDICATED FUND: ARTA

The Federal Alaska Railroad Transfer Act (ARTA) may have an impact on the State's ability to tax ARRC. ARTA specifically provides that after transfer of the Railroad to the State, "revenues generated by the State-owned railroad shall be retained and managed by the State-owned railroad for railroad and related purposes." 45 U.S.C. sec. 1207(a)(5). This constitutes a federally mandated dedication of revenue which is binding on the State as a condition subsequent to the railroad transfer and is comparable to the quasi-trust imposed on school and university lands transferred to the State. 1984 Inf. Alaska Att'y Gen. Op. (366-565-84). The intent of Congress in requiring the dedication of railroad revenue was to prevent the piecemeal dismantling of an important transportation asset, the continued existence of which is vital to state and federal interests. 45 U.S.C. sec. 1201(3); 1982 U.S. Code Cong. and Adm. News at 4-30. This section of ARTA therefore prevents the Legislature from confiscating ARRC's funds and using them for a nonrailroad purpose.

OTHER STATE-OWNED RAILROADS

To our knowledge, other states do not impose a fuel tax on their state-owned railroads. (There are 18 state-owned passenger railroads and at least two state-owned freight railroads)

FEDERAL TAX EXEMPTION

State-owned railroads are exempted from paying the federal 4.3-cent railroad diesel fuel tax. In fact, Congress is considering eliminating the federal tax for private railroads as well...since the tax robs railroads of needed capital for track and roadbed maintenance and construction.

FINANCIAL IMPACT

- ARRC is a capital-intensive operation and simply cannot afford to pay \$1.2 million per year with its unpredictable year-to-year earnings. The Railroad spends nearly \$25 million per year on maintenance activities related to its track, roads, and facilities. This tax will directly impact the ability of the Railroad to remain a self-sustaining economic development enterprise that reinvests all earnings back into its infrastructure.
- ARRC is facing a difficult financial future – costs continue to rise (benefits, insurance, etc.) while revenues remain static.
- 2003 budget projects \$1.1 million net income, if no federal reimbursements are taken into consideration.
- This tax directly translates into less capital rehabilitation of the Railroad
 - Reduces funds available for our internally-funded capital program
 - Reduces funds available to match federal monies received (over 9% match required)
 - ARRC still battling significant deferred maintenance issue – this would exacerbate situation

FEDERAL FUNDS LOSS

ARRC net earnings are the only source of federal match funds (no state match funds provided). ARRC has a 9% Federal Transit Administration match. A state tax of \$1 million could cause the ARRC to lose \$10 million in FTA funds.

MIXED MESSAGES

ARRC uniquely gets no state funds compared to other state railroads. This, on top of a state decision to tax ARRC would send a strong message to Washington to D.C. that Alaska is not supportive of its state-owned railroad. Why should the federal government support the Alaska Railroad through federal grants when the state is sending a different message?

IMPACT TO BONDING AND FINANCING CAPABILITIES

Taxing the railroad could impact ARRC's ability to secure financing for its ongoing capital and operating needs ARRC lenders may view the state's attempt to amend the Alaska Railroad Corporation Act to tax ARRC as an alteration of ARRC's right to be exempt from state and local taxation. This could lead to more expensive financing costs and may be construed as a violation of the pledge the state made to lenders in ARRC's statute, AS 42.40.675, that it would not do anything to impair ARRC's ability to repay its debts.

PANDORA'S BOX

Taxing the Railroad's fuel opens the door to other tax proposals on the Railroad...a huge policy change.

STATE OF ALASKA

DEPARTMENT OF LAW

COMMERCIAL SECTION

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110300
DIMOND COURT HOUSE, 5TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2539

May 1, 2003

The Honorable Gene Therriault
Senate Transportation Committee
State Capitol, Room 111
Juneau, AK 99801-1182

Re: CSSR 112 (TRA)
Taxing the Alaska Railroad
Our file: 023-96-0114

Dear Senator Therriault:

During the April 4th hearing on SB 112, language proposing to subject the Alaska Railroad to the motor fuel tax at the highway rate of \$.20/gallon was presented for discussion. In response, the Alaska Railroad cited a provision of federal law that purports to prevent tax discrimination in relation to railroads subject to federal jurisdiction: 49 U.S.C. § 11501. At the April 24th hearing in Senate Transportation, Senator Therriault requested an opinion with respect to 49 U.S.C. § 11501 from the Department of Law.

I. BACKGROUND

The language in 49 U.S.C. § 11501 was originally enacted in 1976 as part of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act").¹ 49 U.S.C. § 11501(b)(4) prohibits a state from imposing a tax "that discriminates against a rail carrier" subject to federal Surface Transportation Board jurisdiction. The Alaska Railroad is subject to federal Surface Transportation Board jurisdiction by virtue of the Alaska Railroad Transfer Act. 45 U.S.C. § 1207(a)(1).

¹ In 1995, the 4-R Act was re-enacted and re-codified as part of the Interstate Commerce Commission Termination Act of 1995, 109 Stat. 803.

The Ninth Circuit explained the intention of Congress in enacting this tax discrimination provision in *Atchison, Topeka and Santa Fe Railway Co. v. Arizona*, 78 F.3d 438 (9th Cir.), *cert. denied*, 519 U.S. 1029 (1996):

Moreover, the purpose of the 4-R Act was not to grant railroads preferential treatment. . . . Rather, in adopting the 4-R Act, Congress' purpose was to remedy discrimination against the railroads and place them on an even playing field with other state taxpayers.

Id. at 442.² The court went on to quote from legislative history regarding the bill that eventually evolved into the 4-R Act:

The proposal in no way alters the freedom of the State to tax its' taxpayers as in its discretion it deems best, so long as such carriers are *accorded equal tax treatment with other taxpayers.*

Id. Accordingly, it is clear that the 4-R Act does not prohibit state taxation of railroads. All that is prohibited is discriminatory taxation.

The *Atchison* court went on to hold that in order to determine whether the state's taxing scheme was discriminatory the tax treatment of all other "commercial and industrial taxpayers subject to the tax" must be examined. *Id.* On the facts of that case, the court determined that most other commercial and industrial taxpayers paid the same tax at the same rate, therefore there was no discrimination. *Id.* at 443-44.

Other states' fuel excise taxes have been challenged under the 4-R Act. Minnesota, for instance, sought to impose a \$.17/gallon fuel tax on railroads, which was the same rate as that imposed on the trucking and marine industry, but more than the rate imposed on the aviation industry. *See Burlington Northern Railroad Co. v. Triplett*, 682 F. Supp. 443 (D. Minn. 1988). There, the court found discrimination on two grounds. First, even though the tax rate for the trucking industry was the same, the court found that the revenues raised from the trucking industry were dedicated to repair and maintenance of roadbeds used by trucks. But none of the revenue raised from the railroad industry defrayed the costs of railroad bed maintenance and repair. Thus the trucks had a "distinct

² According to the U.S. Supreme Court, Congress determined in 1976 that railroads were overtaxed by at least \$50 million each year. *Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S. Ct. 1855, 1858 (1987).

competitive advantage.” *Id.* at 445.³ Second, the court found discrimination against the railroad industry by virtue of the lower rate paid by the aviation industry.

Courts have differed with respect to what the appropriate comparison class should be for evaluating discrimination. As noted above, the Ninth Circuit in *Atchison* compared the railroad’s treatment with “all other commercial and industrial taxpayers” subject to the tax. *Atchison*, 78 F.3d at 441. The *Atchison* court rejected a narrower comparison class of the railroad’s major competitors.

The Ninth Circuit view, however, was recently rejected by the Eighth Circuit, which held that the tax treatment of only the railroad’s direct competitors should be considered when evaluating discrimination. See *Burlington Northern, Santa Fe railway Co. v. Lohman*, 193 F.3d 984 (8th Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). In that case, only barges and trucks were held to be the railroad’s direct competitors and thus part of the comparison class. Since barges and trucks were exempt from the tax that the railroad was supposed to pay, the tax was struck down. *Id.* at 986.⁴

Thus, there appears to be a split in the federal circuit courts as to what the appropriate comparison class is for evaluating discrimination. Until that split is resolved by the U.S. Supreme Court (or the Ninth Circuit reverses itself), the broader view of the Ninth Circuit controls such disputes in Alaska. Thus, whether discrimination exists likely depends on the nature of the treatment of all other commercial and industrial motor fuel taxpayers.

³ This reasoning was recently rejected, however, by the Minnesota Supreme Court. See *Burlington Northern Railroad Co. v. Commissioner of Revenue*, 606 N.W.2d 54, 60-61 (Minn. 2000).

⁴ The Eighth Circuit view was recently applied by the Minnesota Supreme Court in *Burlington Northern Railroad Co. v. Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000). There the court found a 6.5% sales tax on railroad fuel (which equated to a rate that varied between \$.026/gallon to \$.042/gallon) to be not discriminatory when compared to the \$.20/gallon tax paid by the railroad’s primary competitors, motor carriers. *Id.* at 61. The court appeared less concerned about differentials between the railroad rate and the aviation rate, which varied between \$.005/gallon and \$.05/gallon. *Id.* n.7.

II. DISCUSSION

CSSB 112 (TRA) proposes to remove the Alaska Railroad from the government exemption from motor fuel tax set forth in AS 43.40.100(2)(G). This would in turn subject the Alaska Railroad to the general motor fuel tax rate set forth in AS 43.40.010. For purposes of the 4-R Act, the question then becomes the extent to which all other commercial and industrial taxpayers are subject to this tax at this rate.

Alaska Statute 43.40.010 sets different rates for different uses of motor fuel. CSSB 112 (TRA) proposes to raise the general motor fuel tax rate from \$.08/gallon to \$.20/gallon. The bill leaves the remaining rates unchanged. Aviation gasoline is taxed at a rate of \$.047/gallon. Marine motor fuel is taxed at the rate of \$.05/gallon. Jet fuel is taxed at a rate of \$.032/gallon. Off-road motor fuel is taxed at an after-refund rate of \$.02/gallon. AS 43.40.030(a).

The Department of Revenue advises that there are industrial and commercial motor fuel consumers in each category of motor fuel tax. Unfortunately, however, the Department of Revenue advises that it is impossible to tell the extent to which industrial users pay the tax as opposed to individual users. But it is clear that different industries pay at different rates, the lowest rate being the off-road rate of \$.02/gallon.

Applying the holding of the Ninth Circuit in the *Atchison* case to the state's motor fuel tax scheme, there is no question that the state can subject the Alaska Railroad to motor fuel taxes. The question is at what rate. The aviation and marine industries, as well as any industry that uses off-road vehicles, are granted preferential tax rates by AS 43.40. Subjecting the Alaska Railroad to the higher non-preferential rate would probably constitute discriminatory treatment under the Ninth Circuit's interpretation of the 4-R Act. 49 U.S.C. § 11501(b)(4). Nevertheless, under *Atchison*, we see no reason why the Alaska Railroad could not be subject to motor fuel tax at the off-road rate, the lowest rate in the motor fuel scheme.

That being said, if the Eighth Circuit view in *Burlington Northern* were to be applied in Alaska, the analysis would turn not on what rate all other commercial and industrial entities were paying, but rather what rate the Alaska Railroad's direct competitors were paying. Critical to this analysis would be the extent to which the Alaska Railroad directly competes with the marine, aviation and off-road industries. Full evaluation of this issue would require additional facts that are not presently before us. If, however, it could be demonstrated that the Alaska Railroad's only direct competitor was

The Honorable Gene Therriault, Senator
Alaska State Legislature
Our file: 023-96-0114

May 1, 2003
Page 5

the trucking industry, then an argument could be made that taxing the Alaska Railroad at the same rate as the trucking industry is not discriminatory. But this argument's chances of prevailing in a legal challenge are far from certain.⁵ It would require the Ninth Circuit to abandon its holding in *Atchison* or be reversed by the U.S. Supreme Court.


III. CONCLUSION

There is no legal prohibition against subjecting the Alaska Railroad to the motor fuel tax. If, however, the rate is more than the lowest rate other commercial and industrial taxpayers are paying the legislation could be vulnerable to a legal challenge. The litigation risk associated with such a legal challenge likely increases the higher the rate is set above the lowest rate.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:


Michael A. Barnhill
Assistant Attorney General

MAB:ame

cc: Senate Finance Committee

⁵ We have not researched the power of the Alaska Railroad to seek legal remedy against the State of Alaska in the courts.

FRANK H. MURKOWSKI
GOVERNOR

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March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under Authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill that would increase the state's highway motor fuel tax rate from 8 cents a gallon to 20 cents a gallon and repeal the special rate for gasohol.

In order for Alaska's economy to grow and diversify, we must expand and improve our transportation infrastructure. To do this, we must adequately fund highway construction and maintenance activities. Currently, Alaska spends nearly \$50 million per year in general funds to match our federal highway capital program and nearly \$60 million dollars per year on maintenance.

At the current eight cents per gallon, Alaska's highway motor fuel tax rate is now the lowest in the nation. Even after the proposed increase, thirty-eight states would have higher rates, and Alaska's fuel tax would be at the 20 cent national average. In fact, had the tax rate been indexed for inflation when it was initiated in 1961, it would be nearly 2½ times the rate proposed in the bill.

Under existing law, revenue from the motor fuel tax used on roads and highways is deposited in a highway fuel tax account in the general fund. This fund is available for maintenance and construction of highway projects and ferries.

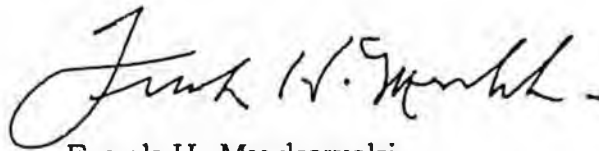
The Honorable Gene Therriault
March 5, 2003
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This bill also deletes AS 43.40.010(a)(4) and AS 43.40.010(b)(4), which provides a special tax rate for blended fuel. Working with industry and private citizens, Alaska no longer requires the use of oxygenated fuels to meet air quality standards. However, the U.S. Environmental Protection Agency requires that the state be able to rapidly re-impose a requirement for the use of oxy fuels should air quality deteriorate. This legislation will not impact the state's ability to do so.

This proposal represents a modest, user-pays approach to expanding and improving our state's transportation infrastructure.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script, reading "Frank H. Murkowski". The signature is written in dark ink and is positioned above the printed name and title.

Frank H. Murkowski
Governor

SENATE COMMITTEE REPORT First Committee of Referral

DATE: 3/6/03

FURTHER: Finance

Date of 5-Day Notice: 3/6/03
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 4/25/03

Transportation Committee considered SENATE BILL NO. 112

SB 112 INCREASE MOTOR FUEL TAX

"An Act increasing the motor fuel tax and repealing the special tax rates on blended fuels; and providing for an effective date."

and recommends:

- be replaced with _____ CS SB 112 (TRA)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

- Senate Bill:**
 same title
 new title
- House Bill:**
 same title
 technical title
 new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
...
...

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DEC	3/3		<input checked="" type="checkbox"/>	2
REV	3/3	<input checked="" type="checkbox"/>		1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:		DO PASS	DO NOT PASS	NO REC	AMEND
Olson	<i>Arnold Olson</i>		<input checked="" type="checkbox"/>		
Therriault	<i>Chris Therriault</i>			<input checked="" type="checkbox"/>	
Lincoln	<i>Deanna Lincoln</i>		<input checked="" type="checkbox"/>		
Wagner	<i>Thomas H. Wagner</i>			<input checked="" type="checkbox"/>	
Cowdery	CHAIR: <i>John J. Cowdery</i>	<input checked="" type="checkbox"/>			

SENATE FINANCE COMMITTEE

SIGN-IN

SB 112-INCREASE MOTOR FUEL TAX

NAME: LANDA BAILY Subject/Bill No: SB112

Co./Dept./Title: Revenue Phone: 2302

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: Robynn Wilson () Subject/Bill No: SB112

Co./Dept./Title: Revenue Phone: Anch 410

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: Mike Barnhill Subject/Bill No: SB112

Co./Dept./Title: Law Phone: 4118

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: Dendy Lindskog Subject/Bill No: SB 112

Co./Dept./Title: Alaska Railroad Phone: 240-9571

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

John Binkley, chairman of Arrc Board, will testify on tele conference. 05/07/03

AM

NAME: John MacKinnon Subject/Bill No: SB112

Co./Dept./Title: DBT/PT Phone: 321 2047

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

