ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

2989 HSA SB 174 - SB 186

Detail Analysis Senate Bill 174

Under this bill, the Department of Labor will be required to closely scrutinize certified payrolls to assure that residents of an area, which has been designated as an area impacted by economic disaster, are given first preference for employment, where they are available and qualified, so that the economic effects of alleviating the disaster will be maximized. If resident labor is not available, the contractor will inform the department of the number of additional workers needed, the positions to be filled, and the efforts made at recruitment in the area. The department will investigate and, if it is determined that a good-faith effort has been made by the contractor, will authorize the recruitment of qualified and available workers from areas adjoining the area impacted by such economic disaster; then followed by residents of the region; and then by residents of the State at large. This expansion of auditing and investigative service will be significant and labor intensive.

Staffing would provide a technician in each regional office for full-time resident audits. The staffing would also provide a full-time investigator in each office to review audit results, make investigations of violations uncovered by the audits, and investigate complaints from sources outside the agency. The investigaters would have a travel budget which provides a quick reaction capability to remote job sites where a majority of the violations occur.

Assumptions:

Effective date of July 1, 1983
Inflation rate of 6 percent per annum
Equipment costs of $9,000 is a one-time item

Alaska State Legislature

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

TO: Senator J. Kerttula

FROM: Senator Joe Josephson

DATE: May 11, 1983

RE: SSSB 174 Preferential Hire

Dear Mr. President:

While support for the substance of SSSB 174 appears virtually unanimous among the public and the legislators, some concerns regarding the fiscal note have emerged.

The Department of Labor has asked for six (6) new employees to enforce the provisions of SSSB 174 should it become law. The Department of Labor has very conservatively estimated wage savings to Alaskans in excess of 3.4 million dollars from the level of enforcement this funding would permit. Given the very conservative nature of Department of Labor's estimates this equals a greater than ten to one return to the citizens of Alaska for each State dollar.

The Senate Finance Committee has already included funding for four of the positions requested by the SSSB 174 fiscal vote as a special Alaska Hire unit within the Department of Labor. I believe we can anticipate a more active enforcement of Alaska hire by the new administration. I believe this fact, combined with the craft by craft requirement of SSSB 174, justifies the addition of all the requested six employees.

I would request your guidance and assistance as to how to best formulate the fiscal note to clarify this situation, guarantee adequate funding of Alaska Hire enforcement, and promote the passage of this legislation.

Joe Josephson
Senator Joe Josephson

JPJ/dd/cme

cc: Senator Sackett
Commissioner Robinson
Peter McDowell, Director OMB

Alaska State Legislature

Official Business

Pouch
State Capitol
Juneau, Alaska 99811

TO: Senators Kerttula, Eliason, Mulcahy, Bennett, Sackett, and Rodey

FROM: Senator Josephson

DATE: May 5, 1983

RE: SS SB 174 Preferential Hire

Dear Colleague:

Over the past three weeks, I have received numerous letters, telephone calls and POM's concerning this legislation. You and I, and the people, want to strengthen the employment position of Alaskans in the face of outside employers using outside labor on local projects.

SB 174 was fashioned after an executive order approved in White v. Mass, Council of Constr. Emp., the United States Supreme court decision announced on February 28, 1983. The Court upheld a City of Boston executive order which required at least 50% bona fide resident hire on "any construction project funded in whole or in part by City funds, or funds which... the City expends or administers, and to which the city is signatory." The Court, in the face of a federal constitution Commerce Clause challenge, held that "the application of the mayor's executive order to the contracts in question did not violate the Commerce Clause...".

A recent Washington Supreme Court decision, has cast legal doubt about the validity of AS 36.10 as presently constituted. SB 174 takes advantage of the White decision and puts AS 36.10 in a form that should create a constitutionally permissible employment preference statute.

Subsection (a) addresses employment preference in municipalities only, thus falling well within the boundaries established in White, and avoiding the Commerce Clause challenge.

Subsection (b) addresses employment preference on construction projects partly or wholly funded by state money. This subsection requires that 95 per cent of all workers on such projects be Alaska residents. It also requires that each craft of workers be composed of 95% Alaskan residents. This craft by craft provision will insure that Alaskans will be offered jobs in all craft areas and prevent the importation of a particular craft of workers at the expense of Alaskan residents.

Joe Josephson

Senator Joe P. Josephson

Bill No. Sponsor Substitute for Senate Bill 174

Date May 4, 1983

Title "An Act relating to employment preferences for state residents; and providing for an effective date."

Contact: Judy Knight
465-2700

Bob Bacolas
465-4780

During the years when the Trans-Alaska Pipeline was being built, the department maintained an effective resident hire program, both within the construction of the pipeline and public construction contracts. A resident hire unit for enforcement of Title 36 was located within the Wage and Hour Administration, which was staffed with 12 employees, eight professional and four clerical support. Their activities were supportive of the activities of the three staff members assigned to public construction enforcement. Many newcomers finding it difficult to obtain oilfield work turned to traditional construction activities for employment. The resident requirements for "pipeline" employment were substantially more stringent than those for public construction. The result was that employers hiring for public construction and the Title 36 enforcement unit could rely on the activities of the "pipeline" enforcement unit for much of the legwork required to verify residency. It was a simple matter to check for the "resident card" required under Title 38.

In 1978 the Supreme Court in the matter of Hicklin v. Orbeck, overturned the residency aspect of Title 38. Subsequently, in the budget process all twelve "pipeline" positions were deleted and the entire staff was laid off. Consequently, since 1978 the department has not had any positions funded for enforcement of resident hire.

The Department recently completed a survey to determine the wages paid to nonresidents that should have been paid to residents on public construction. Based on this survey we projected the figures for the entire fiscal year ending June 30, 1983. To arrive at the dollar value of wages lost by displaced residents we used a 40 hour work week and a base level wage, plus benefits, for the lowest paid job class subject to our wage surveys. Therefore, the actual dollar value of wages lost to residents in FY 83 would be more than the figure estimated from certified payrolls.

Number of displaced residents:	3767
Estimated value of lost wages:	$3,394,160.00

The Department supports this legislation which addresses resident preference in light of recent court decisions. This bill, coupled with the necessary staff resources to enforce resident preference, will do much to increase employment opportunities for Alaskan residents.

Approved:

Tom Robinson
Commissioner

POSITION PAPER/Department of Labor


SB


175

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 175
Title: An Act relating to Non-Competitive Purchases
Sponsor: Bennett
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: General Services & Supply
BRU, Program or Subprogram(s) Affected: Purchasing

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL	0	0	0	0	0	0
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Robert J. Link Phone: 465-2250
Division: General Services & Supply Date: April 23, 1984

Approved by Commissioner: Lisa Rudd Date: 4/30/84
Agency: DEPARTMENT OF ADMINISTRATION

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

5/11D1/0423-03

Rev. 3-20-84
19/FORMS/FN

Sec. 37.05.230. Competitive bids. In the manner provided in this chapter and regulations established under it

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that (A) a bid shall be awarded to an Alaska bidder if the bid is not more than five per cent higher than the lowest nonresident bidder's; and (B) competitive bids need not be required (i) for contractual services where no competition exists; (ii) for sales involving fair trade items; (iii) when, in the judgment of the purchasing agent, food, clothing, or medical supplies, or materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state; (iv) where rates are fixed by law or ordinance; (v) for items traded in on like items; or (vi) for professional services;

(2) if the amount of the contractual services, purchase, or sale is estimated to exceed $5,000, sealed bids shall be solicited, when practicable, by publication in a newspaper calculated to reach prospective bidders and by posting notices in public places within the area where the work is to be performed or material furnished and in addition the department may also designate a trade journal for publication; the department shall also solicit bids by sending notices by mail to all active prospective bidders known to it and all bids shall be sealed when received, and shall be opened in public at the hour stated in the notice; the department may limit the solicitation of bids or negotiate directly if it finds that it is in the best interests of the state;

(3) a contractual service, purchase or sale where the known requirements are estimated to be less than $5,000 may be made either upon competitive bids in accordance with (2) of this section or in the open market, in the discretion of the department; but, so far as practicable, shall be based on at least three competitive bids and recorded as provided in AS 37.05.240; small purchases of less than $500 in the discretion of the department may be made on the open market, and may be by cash payment from petty cash accounts set aside for that purpose; the department shall determine the amount of the petty cash accounts needed by each state agency, and inspect the petty cash accounts at least once each year to determine that the total plus amounts of receipts for unreplenished disbursements is equal to the fixed sum of cash set aside; shortages in petty cash accounts are a personal liability of the responsible head of the agency to whom the account is set aside; the department shall make all necessary regulations governing use and replenishment of petty cash funds;

(4) the provisions of this section relative to competitive bids do not apply to contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; and these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may be awarded for periods of three years or less;

(5) an "Alaska bidder," for the purpose of bid awards under (1) (A) of this section, is a person who

(A) holds a current Alaska business license,

(B) submits a bid for goods or services under the name as appearing on the person's current Alaska business license,

(C) has maintained a place of business within the state for a period of six months immediately preceding the date of the bid;

(6) the competitive bid requirements of this section do not apply to air taxi services used by state employees when no formal contract is executed; the department affected shall pay the air taxi operator the tariff rates as published by the operator with the Air Transportation Commission for the type of aircraft required; the tariffs need not be uniform throughout the state and may reflect the diverse conditions of various areas of the state; the air taxi service used in each case shall be selected by the state employee who is to fly in the aircraft, or if more than one state employee is flying in the aircraft by the employee in charge; in all cases the air taxi operator shall have complied with AS 02.05 and other prequalifying regulations established by the department;

(7) the provisions of this section relative to an "Alaska bidder" do not apply to contracts estimated to exceed $5,000 of the Department of Transportation and Public Facilities which are authorized under AS 35.15 or AS 19.10;

(8) the provisions of this section relative to competitive bids do not apply to the purchase of products or services manufactured or provided by a sheltered workshop;

(9) the provisions of this section relative to competitive bids do not apply to the purchase of products or services provided by the correctional industries program established under AS 33.32;

(10) requests for and acceptance of bids or other proposals for professional services shall comply with AS 24.23 or AS 36.28. (§ 3 art IV ch 82 SLA 1955; am §§ 8 — 10, 23 ch 186 SLA 1957; am § 1 ch 77 SLA 1959; am § 1 ch 158 SLA 1962; am § 1 ch 82 SLA 1964; am §§ 1, 2 ch 92 SLA 1967; am § 1 ch 61 SLA 1970; am § 1 ch 92 SLA 1975; am §§ 1, 2 ch 194 SLA 1975; am Executive Order No. 39, § 11 (1977); am § 5 ch 53 SLA 1982; am §§ 6 — 8 ch 144 SLA 1982)

Revisor's notes. — In 1983, (1)(B) and (1)(C) of this section were renumbered as (1)(A) and (1)(B) respectively and reference to the repeal of former (1)(A) was deleted.

Cross references. — For preference for Alaska forest products, see AS 36.15.010; for preference for Alaska producers or dealers in making state purchases or awarding contracts for supplies, see AS 36.20.010.

Effect of amendments. — The first 1982 amendment added paragraph (9).

The second 1982 amendment in paragraph (2), substituted "$5,000" for "$2,500" near the beginning and inserted "limit the solicitation of bids or" near the end. The amendment also substituted "$5,000" for "$2,500" and "$500" for "$300" in paragraph (3) and added paragraph (10).

Legislative history reports. — For report on 1962 amendment, see 1962 House Journal, pages 591, 592.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M

May 14, 1984

SUBJECT: Sectional Analysis of SB 175

TO: Representative Mitch Abood
Chairman
House State Affairs Committee

FROM: Richard C. Folta
Legislative Counsel

The bill amends AS 37.05.230 by adding a new paragraph that the governor, assistants to the governor, lieutenant governor, legislators, judges in all courts, the head or deputy head of departments or divisions, chairman or members of commissions or boards, state employees, and elected or appointed municipal officers may not sell a product or provide a service to the state under the noncompetitive provisions of AS 37.05.230, i.e.

(1) contractual services where no competition exists

(2) sales including fair trade items

(3) certain professional services

(4) rates fixed by law or ordinance

(5) certain speciality items

(6) certain school bus contracts

(7) informal air taxi services

(8) certain Department of Transportation and Public Facilities industries services or products

RCF:ojb
J7/060

Position Paper

SB 175

The Department of Administration is opposed to this bill as written.

This bill would remove the exemption from competitive bidding for certain goods or services if the intended provider of those goods or services was a public official or a State employee. As written, it will probably result in the State avoiding doing business with affected firms.

The Department of Administration has no objections to the apparent intent of this bill. It is necessary to point out, however, that the bill may affect areas of AS 37.05.230 it was not intended to. These areas are subsection 3, concerning non-competitive purchases under $500, subsection 4, concerning school bus service, subsection 8, concerning sheltered workshops, and subsection 9, concerning Corrections industries.

There may also be potential conflict of interest situations arising from implementation of this legislation in that award of a competitive bid to a public official or certain State employees may be contrary to the common law we operate under.

It appears that the remedy as to which part of the statute is to be affected lies in changing the bill to read, *Section 1. AS 37.05.230, subsection 6, is amended . . .

The potential conflict of interest situations may be remedied by proposed ethics legislation.

Robert J. Link
Director
Division of General Services & Supply
Department of Administration

4-30-84
Date

Commissioner Lisa Rudd
Department of Administration

5/8/84
Date

5/11D1/0423-04/1

Sec. 37.05.230. Competitive bids. In the manner provided in this chapter and regulations established under it

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that (A) a bid shall be awarded to an Alaska bidder if the bid is not more than five per cent higher than the lowest nonresident bidder's; and (B) competitive bids need not be required (i) for contractual services where no competition exists; (ii) for sales involving fair trade items; (iii) when, in the judgment of the purchasing agent, food, clothing, or medical supplies, or materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state; (iv) where rates are fixed by law or ordinance; (v) for items traded in on like items; or (vi) for professional services;

(2) if the amount of the contractual service, purchase, or sale is estimated to exceed $5,000, sealed bids shall be solicited, when practicable, by publication in a newspaper calculated to reach prospective bidders and by posting notices in public places within the area where the work is to be performed or material furnished and in addition the department may also designate a trade journal for publication; the department shall also solicit bids by sending notices by mail to all active prospective bidders known to it and all bids shall be sealed when received, and shall be opened in public at the hour stated in the notice; the department may limit the solicitation of bids or negotiate directly if it finds that it is in the best interests of the state;

(3) a contractual service, purchase or sale where the known requirements are estimated to be less than $5,000 may be made either upon competitive bids in accordance with (2) of this section or in the open market, in the discretion of the department; but, so far as practicable, shall be based on at least three competitive bids and recorded as provided in AS 37.05.240; small purchases of less than $500 in the discretion of the department may be made on the open market, and may be by cash payment from petty cash accounts set aside for that purpose; the department shall determine the amount of the petty cash accounts needed by each state agency, and inspect the petty cash accounts at least once each year to determine that the total plus amounts of receipts for unreplenished disbursements is equal to the fixed sum of cash set aside; shortages in petty cash accounts are a personal liability of the responsible head of the agency to whom the account is set aside; the department shall make all necessary regulations governing use and replenishment of petty cash funds;

(4) the provisions of this section relative to competitive bids do not apply to contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; and these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may be awarded for periods of three years or less;

(5) an "Alaska bidder," for the purpose of bid awards under (1) (A) of this section, is a person who

(A) holds a current Alaska business license,

(B) submits a bid for goods or services under the name as appearing on the person's current Alaska business license,

(C) has maintained a place of business within the state for a period of six months immediately preceding the date of the bid;

(6) the competitive bid requirements of this section do not apply to air taxi services used by state employees when no formal contract is executed; the department affected shall pay the air taxi operator the tariff rates as published by the operator with the Air Transportation Commission for the type of aircraft required; the tariffs need not be uniform throughout the state and may reflect the diverse conditions of various areas of the state; the air taxi service used in each case shall be selected by the state employee who is to fly in the aircraft, or if more than one state employee is flying in the aircraft by the employee in charge; in all cases the air taxi operator shall have complied with AS 02.05 and other prequalifying regulations established by the department;

(7) the provisions of this section relative to an "Alaska bidder" do not apply to contracts estimated to exceed $5,000 of the Department of Transportation and Public Facilities which are authorized under AS 35.15 or AS 19.10;

(8) the provisions of this section relative to competitive bids do not apply to the purchase of products or services manufactured or provided by a sheltered workshop;

(9) the provisions of this section relative to competitive bids do not apply to the purchase of products or services provided by the correctional industries program established under AS 33.32;

(10) requests for and acceptance of bids or other proposals for professional services shall comply with AS 24.23 or AS 36.98. (§ 3 art IV ch 82 SLA 1955; am §§ 8 — 10, 23 ch 186 SLA 1957; am § 1 ch 77 SLA 1959; am § 1 ch 158 SLA 1962; am § 1 ch 82 SLA 1964; am §§ 1, 2 ch 92 SLA 1967; am § 1 ch 71 SLA 1970; am § 1 ch 92 SLA 1975; am §§ 1, 2 ch 194 SLA 1975; am Executive Order No. 39, § 11 (1977); am § 5 ch 53 SLA 1982; am §§ 6 — 8 ch 144 SLA 1982)

Revisor's notes. — In 1983, (1)(B) and (1)(C) of this section were renumbered as (1)(A) and (1)(B) respectively and reference to the repeal of former (1)(A) was deleted.

Cross references. — For preference for Alaska forest products, see AS 36.15.010; for preference for Alaska producers or dealers in making state purchases or awarding contracts for supplies, see AS 36.20.010.

Effect of amendments. — The first 1982 amendment added paragraph (9).

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Legislative history reports. — For report on 1962 amendment, see 1962 House Journal, pages 591, 592.

upon which a common law rule against legislator contracts could be constructed. Any voter could bring an action to void such contracts 13/ and we would likely support that result in the absence of a compelling contrary justification. 14/

It is therefore our conclusion that a contract between a state agency, 15/ on the one hand, and a legislator, a business owned or operated by a legislator, or a business in which the legislator is an officer, manager, or large stockholder, on the other hand, would be illegal under the common law. 16/

* * * *

The second legislator conflict situation concerns legislators (and some state officers and employees) who apply to re-

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13/ See AS 39.50.100.

14/ Were a legislator contractor the only possible source for particular goods or services, we might support an exception. Similarly, an exception might be justifiable if a legislator proposed to provide non-unique, "off-the-shelf" goods (e.g., office supplies, motor oil) where price would be virtually the only variable. Exceptions are not supportable where the transaction requires the exercise of judgment by an administrator or an extended period of performance by the legislator. See State v. Yoakum, quoted infra.

15/ A court might well go further and say that legislators may not, as private contractors, do business with any entities (state agencies, municipalities, nonprofit corporations) whose projects are financed with state funds.

16/ At this time, we offer no opinion on situations where the legislator is an employee of the contracting firm, or where a close relative of a legislator is an officer, manager, large stockholder or employee of the contracting firm.

SB 175 TITLE & SPONSOR SUMMARY 11:18 5/01/84 PAGE 1 OF 3

AMENDED TITLE:
AN ACT RELATING TO THE NONCOMPETITIVE PURCHASE OF A PRODUCT OR SERVICE FROM A PUBLIC OFFICIAL OR STATE EMPLOYEE

PRIME SPONSOR: BENNETT.
CO-SPONSORS:
CURRENT STATUS: 4/23/84 IN (H) STATE AFFAI

SB 175 SENATE ACTION 11:18 5/01/84 PAGE 2 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
03/11/83	01	0373	FIRST READING -- COMMITTEE REPORTS
04/12/83	02	0668	JUD -- DP05
04/19/84	03	2771	RLS -- OTHER05
			TAKEN UP IMMEDIATELY
04/19/84	04	2773	SECOND READING
04/19/84	05	2773	ADVANCED TO 3RD READING BY UNAN CONSENT
04/19/84	06	2773	THIRD READING
04/19/84	07	2773	PASSED BY DIV 16-00-04
04/19/84	08	2774	NOTICE OF RECONSIDERATION GIVEN
04/23/84	09	2796	RECONSIDERATION NOT TAKEN UP
****	**	**	*** *** ***

SB 175 HOUSE ACTION 11:18 5/01/84 PAGE 3 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
04/23/84	10	3420	FIRST READING -- COMMITTEE REPORTS
			STATE AFFAIRS
			RULES
****	**	**	*** *** ***

(3) compile statistics necessary for the budget and other statistics required by the governor. (§ 8 art III ch 82 SLA 1955; am § 5 ch 186 SLA 1957; am § 1 ch 11 SLA 1965)

Article 3. Uniform Purchasing.

Sec. 37.05.220. Purchasing agent. The Department of Administration is the purchasing agent for the state. The department shall

(1) purchase, rent, or otherwise provide for the furnishing of supplies, materials, equipment, or contractual services for all state agencies;

(2) have power to authorize an agency to purchase directly certain specified supplies, materials, equipment, or contractual services under conditions and procedures prescribed in AS 37.05.230;

(3) prescribe the manner in which supplies, materials, and equipment shall be purchased, delivered, stored, and distributed;

(4) prescribe the time, manner, authentication, and form of making requisitions for supplies, materials, equipment, and contractual services;

(5) fix standards of quality and quantity and develop standard specifications after consultation with the several state agencies, and approve or determine final specifications;

(6) have power to transfer to or between agencies or to sell or trade in supplies, materials, and equipment of agencies which are surplus, obsolete, or unused; and the department shall make proper adjustments in the accounts of the agencies concerned;

(7) prescribe the manner of inspecting deliveries of supplies, materials, and equipment and of making tests of samples submitted with bids and samples of deliveries to determine compliance with specifications;

(8) prescribe standard forms for bids and contracts for construction, purchases of supplies, and other purposes, which bids and contracts may contain provisions which the department considers necessary; but all contracts for construction shall require the filing of an acceptable performance bond and a penalty provision for failure to perform the contract according to its terms;

(9) provide for other matters which may be necessary to carry out the provisions of this chapter and the regulations adopted under it. (§ 1 art IV ch 82 SLA 1955; am §§ 6, 7 ch 186 SLA 1957; am § 1 ch 55 SLA 1960)

Sec. 37.05.230. Competitive bids. In the manner provided in this chapter and regulations established under it

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that (A) a bid shall be awarded to an Alaska bidder if the bid is not more than five per cent higher than the lowest nonresident bidder's; and (B) competitive bids need not be required (i) for contractual services where no competition exists; (ii) for sales involving fair trade items; (iii) when, in the judgment of the purchasing agent, food, clothing, or medical supplies, or materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state; (iv) where rates are fixed by law or ordinance; (v) for items traded in on like items; or (vi) for professional services;

(2) if the amount of the contractual services, purchase, or sale is estimated to exceed $5,000, sealed bids shall be solicited, when practicable, by publication in a newspaper calculated to reach prospective bidders and by posting notices in public places within the area where the work is to be performed or material furnished and in addition the department may also designate a trade journal for publication; the department shall also solicit bids by sending notices by mail to all active prospective bidders known to it and all bids shall be sealed when received, and shall be opened in public at the hour stated in the notice; the department may limit the solicitation of bids or negotiate directly if it finds that it is in the best interests of the state;

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(7) the provisions of this section relative to an "Alaska bidder" do not apply to contracts estimated to exceed $5,000 of the Department of Transportation and Public Facilities which are authorized under AS 35.15 or AS 19.10;

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(9) the provisions of this section relative to competitive bids do not apply to the purchase of products or services provided by the correctional industries program established under AS 33.32;

(10) requests for and acceptance of bids or other proposals for professional services shall comply with AS 24.23 or AS 36.98. (§ 3 art IV ch 82 SLA 1955; am §§ 8 — 10, 23 ch 186 SLA 1957; am § 1 ch 77 SLA 1959; am § 1 ch 158 SLA 1962; am § 1 ch 82 SLA 1964; am §§ 1, 2 ch 92 SLA 1967; am § 1 ch 61 SLA 1970; am § 1 ch 92 SLA 1975; am §§ 1, 2 ch 194 SLA 1975; am Executive Order No. 39, § 11 (1977); am § 5 ch 53 SLA 1982; am §§ 6 — 8 ch 144 SLA 1982)

Revisor's notes. — In 1983, (1)(B) and (1)(C) of this section were renumbered as (1)(A) and (1)(B) respectively and reference to the repeal of former (1)(A) was deleted.

Cross references. — For preference for Alaska forest products, see AS 36.15.010; for preference for Alaska producers or dealers in making state purchases or awarding contracts for supplies, see AS 36.20.010.

Effect of amendments. — The first 1982 amendment added paragraph (9).

The second 1982 amendment in paragraph (2), substituted "$5,000" for "$2,500" near the beginning and inserted "limit the solicitation of bids or" near the end. The amendment also substituted "$5,000" for "$2,500" and "$500" for "$300" in paragraph (3) and added paragraph (10).

Legislative history reports. — For report on 1962 amendment, see 1962 House Journal, pages 591, 592.

Opinions of Attorney General. — A policy of publishing regulations concerning bidding and letting of contracts in the Administrative Code is consistent with the Alaska Administrative Procedure Act, since these regulations are regulations in which an important portion of the public has a vital interest and since they are of great use to the portion of the public interested in dealing with contracting with the state. 1959 Op. Att'y Gen. No. 27.

The purpose of this chapter was not only to protect the state and the public purse from uneconomic contracts let because of failure to request competitive bids and because of possible favoritism, but was also to insure that contractors would be insured a certain amount of "fair play" in dealing with the state government and in competing with one another for state contracts. 1959 Op. Att'y Gen., No. 27.

As to the preparation and filing of regulations to be submitted to the secretary of state pertaining to the prequalification of contractors as a prerequisite for bidding on construction projects, see 1959 Op. Att'y Gen., No. 27.

The state cannot grant an exclusive lease or franchise without the necessity of calling for bids. 1962 Op. Att'y Gen., No. 4.

If an exclusive lease or franchise is in effect the state cannot extend the term thereof without calling for bids. 1962 Op. Att'y Gen., No. 4.

The commissioner of public works has the authority to grant a nonexclusive lease or franchise without calling for competitive bids. 1962 Op. Att'y Gen., No. 4.

NOTES TO DECISIONS

Notice requirements. — This section makes no requirement for notice by special delivery, registered or certified mail. State ex rel. Department of Admin. v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Amendments to bid invitations. — Using regular mail to send an amendment to an invitation for bids is a proper procedure for notifying known bidders. State ex rel. Department of Admin. v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Judicial review of agency actions of rejecting a bid for failing to return an amendment should extend only to whether there was a reasonable basis for the agency to decide that the bid in question was nonresponsive. State ex rel. Department of Admin. v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

The department had a reasonable basis to determine that a defect in a bid was material and that the bid was nonresponsive when the bidder failed to acknowledge receipt of amendments. State ex rel. Department of Admin. v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Joint ventures. — A joint venture qualifies as an Alaska bidder under this section even though only one of its venturers would individually qualify as an Alaska bidder. Irby-Northface v. Commonwealth Elec. Co., Sup. Ct. Op. No. 2664 (File Nos. 7632, 7649), P.2d (1983).

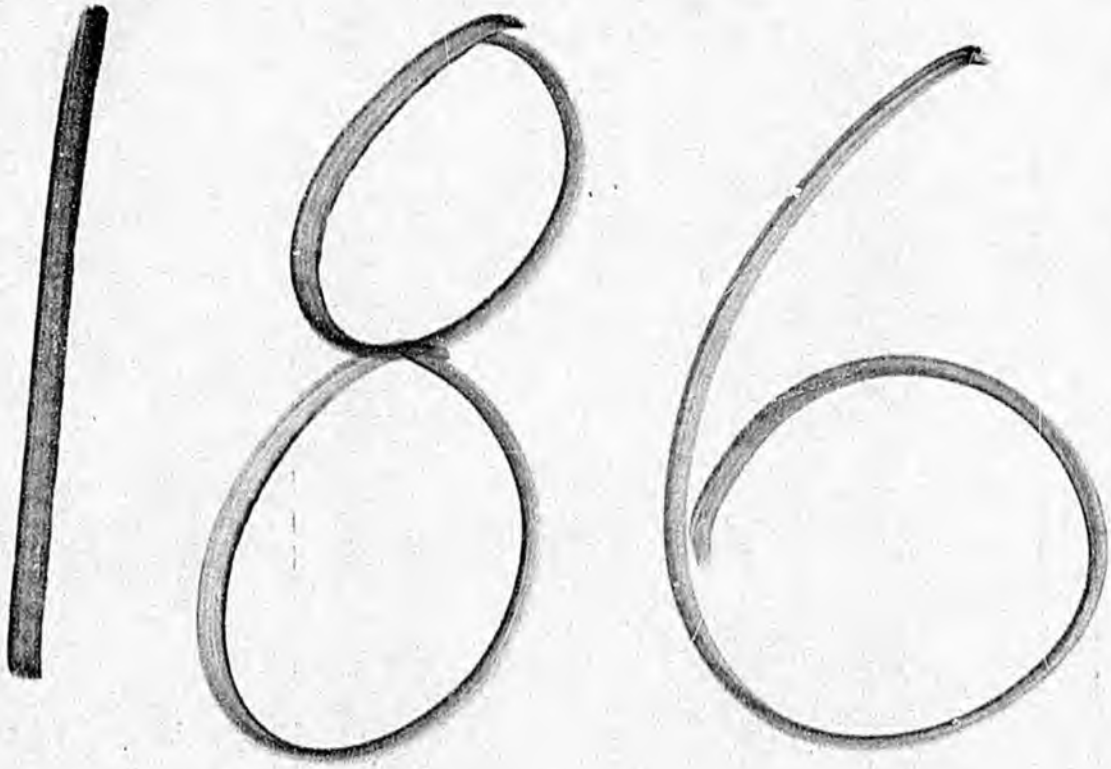
Collateral references. — Contract for personal services as within requirement of submission of bids as condition of public contract, 15 ALR3d 733.

Determination of amount involved in contract within statutory provision requiring public contracts involving sums exceeding specified amount to be let to lowest bidder, 53 ALR2d 496.

Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility, 81 ALR3d 979.

Sec. 37.05.231. Estimation of flying hours required. The state, when soliciting bids for air charter service, shall make available in writing to prospective bidders upon request an estimate of the flying hours required by each individual agency of the state which will take advantage of these services. (§ 1 ch 17 SLA 1967)


SB


186

SB 186

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

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

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

CONTROL BECAUSE MOST NAMED RECIPIENT GRANTS GO TO LOCALLY BASED ORGANIZATIONS WHO PROVIDE NEEDED SERVICES.
THERE IS NO FISCAL NOTE. THE ACT TAKES EFFECT IMMEDIATELY.

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

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

☐ POUCH B
JUNEAU, ALASKA 99811
PHONE: (907) 465-4700

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

May 22, 1984

POSITION PAPER

RE: SB 186 am
SPONSOR: Sackett & Ferguson

PROGRAM EFFECTS:

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

COMMENTS:

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

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

APPROVED: Emil Notti
Emil Notti, Commissioner

STATE OF ALASKA

Bill Sheffield, Governor

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

POUCH B
JUNEAU, ALASKA 99811
PHONE: (907) 465-4700

March 25, 1983

POSITION PAPER

RE: Senate Bill 186

SPONSOR: Senator Sackett

Program Effects

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

Comments

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

Mark Lewis
Commissioner

SB 186 TITLE & SPONSOR SUMMARY 12:05 5/22/84 PAGE 1 OF 3
AMENDED TITLE: SB 186AM
AN ACT RELATING TO NAMED RECIPIENT GRANTS; AND PROVIDING FOR AN EFFECTIVE DATE

PRIME SPONSOR: SACKETT.
CO-SPONSORS: FERGUSON.
CURRENT STATUS: 5/17/84 IN (H) STATE AFFAI

SB 186 SENATE ACTION 12:05 5/22/84 PAGE 2 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
03/18/83	01	0434	FIRST READING -- COMMITTEE REPORTS
03/30/83	02	0536	C&RA -- DP02, NR01
05/03/84	03	2901	FIN -- DP05 NR01
05/15/84	04	3094	RLS -- OTHER04
			TAKEN UP IMMEDIATELY
05/15/84	05	3094	SECOND READING
05/15/84	06	3094	ADVANCED TO 3RD READING BY UNAN CONSENT
05/16/84	10	3115	AM01 ADOPTED BY UNAN CONSENT
05/16/84	11	3116	AM02 ADOPTED BY UNAN CONSENT
05/16/84	12	0000	ADVANCED TO 3RD READING BY UNAN CONSENT
05/15/84	07	3095	THIRD READING
05/15/84	08	3095	POSTPONED UNTIL 05/16/84 BY UNAN CONSENT
05/16/84	09	3115	RETURNED TO 2ND READING BY UNAN CONSENT
05/16/84	13	3118	PASSED BY DIV 14-06-00
05/16/84	14	3119	EFFECTIVE DATE VOTE SAME AS PASSAGE
****	**	**	*** *** ***

SB 186 HOUSE ACTION 12:06 5/22/84 PAGE 3 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
05/17/84	15	3889	FIRST READING -- COMMITTEE REPORTS
			STATE AFFAIRS
			RULES
****	**	**	*** *** ***

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA STATE LEGISLATURE by and through the LEGISLATIVE BUDGET & AUDIT COMMITTEE of the ALASKA STATE LEGISLATURE; and REPRESENTATIVE JIM DUNCAN, CHAIRMAN; SENATOR GEORGE HOHMAN, VICE-CHAIRMAN; REPRESENTATIVE RUSS MEEKINS; SENATOR ARLIS STURGULEWSKI; REPRESENTATIVE PATRICK J. CARNEY and REPRESENTATIVE ROBERT BETTISWORTH,

Plaintiffs,

vs.

JAY S. HAMMOND, Governor of the State of Alaska, and WILLIAM R. HUDSON, Commissioner of the Department of Administration of the State of Alaska.

Defendants.

No. 1JU-80-1163 Civil

MEMORANDUM OF DECISION

Table of Contents

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INTRODUCTION

Presently before the court is the 77 count counterclaim of defendant challenging, on constitutional and statutory grounds, scores of appropriations made by the Twelfth Alaska Legislature. The defendants (hereinafter, "the Governor") have advanced several reasons why the appropriations are unlawful and have moved for summary judgment, while abandoning in excess of 40 particular counts. Plaintiffs (hereinafter, "the Legislature") have also moved for summary judgment, while conceding that three of the appropriations were unconstitutional (though not for the reasons advanced by the Governor). Although the cross motions for summary judgment discussed each appropriation separately, the court established five principal categories of infirmities alleged by the Governor, and requested that the parties submit further briefing which addressed these categories. [1/] After that briefing was completed, oral argument was heard.

Although it is necessary to address many appropriations individually, and while there are certain exceptions to the following generalizations, this court generally finds as follows:

1) Those appropriations challenged by the Governor as violative of the separation of powers doctrine do not violate that doctrine and thus are not invalid for that reason; [2/]

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1. To avoid the possibility that it incorrectly interpreted the Governor's case, the court requested that both sides "independently review the Governor's motion for summary judgment and determine that the court has correctly interpreted the legal theories proposed by the Governor and correctly enumerated which appropriations are challenged under each theory." Order Continuing Hearing Date and Requiring Further Briefing 7. Neither side has indicated disagreement with the categories noted by the court or with the determination of which appropriations should be considered under each of the categories.

2. Many appropriations are challenged for more than one reason. Thus, that an appropriation survives a separation of powers attack does not ensure its legality; it may fall for some other reason.

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

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

4) Those appropriations challenged by the governor because they provided direct aid to private educational institutions did not provide direct aid to private educational institutions are thus are not invalid for that reason;

5) The "appropriation" [3/] challenged by the governor as an invalid delegation of legislative powers to the executive branch was such an invalid delegation and thus it was improper.

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3. Actually, the item in question was a directive in the appropriation act that $5,267,248 be reduced from the total personal services line items for operating expenditures in the act, which reduction was to be "equitably allocated among the state agencies by the division of budget and management." § 50, ch. 120 SLA 1980 at 12-13. It amounted to a one percent reduction in all personal service line items.

I. SEPARATION OF POWERS

A. General Discussion

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

1) Burden of Proof

At the outset, and throughout discussion of these various challenges, it is critical to note and to remember that parts of the counterclaim seek to have declared unconstitutional acts of the Alaska Legislature. A party, even the Governor, who seeks a declaration that an act of the Legislature is unconstitutional bears a heavy burden. It is axiomatic that laws which have been validly enacted bear a presumption of constitutionality:

> The courts frequently reiterate that in the exercise of this authority [to determine whether legislative enactments are constitutional] they begin with a presumption in favor of validity, and that a court is not empowered to substitute its judgment for that of the legislature on matters of policy, nor to strike down a statute which is not manifestly unconstitutional even though the court may consider it unwise.

1 Sands, Sutherland Statutory Construction § 2.01, at 13 (4th ed.

1972) (emphasis added).

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

> No task in the adjudication of civil controversies is more grave than passing upon the constitutionality of legislation. The legislature possesses plenary power to make the laws, subject only to the limitations of our state and federal constitutions. We face our task bearing in mind that there is a strong presumption supporting the constitutionality of a legisla. e enactment, and the party asserting its u constitutionality bears the burden of c rcoming the presumption. [Citation.] Unc nstitutionality must appear beyond a reasonable doubt. New Times, Inc. v. Arizona Board of Regents, 519 P.2d 169 (1974).

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

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

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

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

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

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

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

It is not clear whether the Alaska Supreme Court would adopt such an extreme presumption in favor of the constitutionality of validly enacted legislation. It has not done so to date, which suggests that it might not. [4/] Nonetheless, it has reiterated in several decisions that validly enacted statutes enjoy a presumption of constitutional validity. Bonjour v. Bonjour, [illegible] P.2d 1233, 1237 (Alaska 1979), Larson v. State, 564 P.2d 365, 372 (Alaska 1977). Thus, if a statute may reasonably be construed to avoid unconstiutionality, the court must do so. Hoffmar v. State, 404 P.2d 644, 646 (Alaska 1965). If a narrow construction will avoid the constitutional infirmity "without doing violence to the manifest legislative intent," such a construction should be given. Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978); State v. Martin, 532 P.2d 316, 321 (Alaska 1975).

Whatever the precise formulation of the Governor's burden in this case, unless he can demonstrate that the

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4. Unfortunately for predictive purposes, the Alaska Supreme Court has not had the occasion to set out or discuss the proper standard in cases involving a challenge by the executive to the legislature. The cases discussed in this section involve either disputes between individuals or between the state and an individual. Considering that in the present dispute the party attacking the legislation, the Governor, has substantial constitutional powers which an individual disputant does not enjoy, the Alaska Supreme Court might be inclined to adopt the more rigorous test adopted by its sister courts in Wisconsin, Arizona, Montana, New Mexico (and elsewhere) as noted above. On the other hand, it did not do so in cases such as Bradner v. Hammond, 553 P.2d 1 (1976), although the court discussed in that case its "duty to reconcile, whenever possible, challenged legislation with the constitution by rendering a [harmonizing] construction . . . ." Id. at 7 n.22.

challenged legislation is clearly unconstitutional, it must stand.

2) Nature of the Power To Designate Grant Recipients

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

Thus, the legislative power is vested in the Legislature and the executive power in the Governor. But is the designation of grant recipients an exercise of the legislative power or of the executive power? There is no doubt that the Legislature may appropriate sums to an executive department for a stated purpose and permit or require the department to designate the recipient. May it also designate the recipient itself?

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

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

unproven (and is ultimately unpersuasive to this court), the Governor cannot sustain his heavy burden of showing that the appropriations in question are violative of the separation of powers doctrine.

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

The critical question, however, is whether the designation of grant recipients is a part of the appropriation power or part of the power to enforce the law. No one disputes the Governor's authority to enforce or execute the law. By the same token, no one should question the Legislature's authority to spend. Is naming grant recipients a part of the spending power or is it the execution of the law?

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

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

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

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

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

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

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

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

These authorities are certainly not dispositive,[5/] but they at least suggest that naming the grantee is a part of the appropriation power.

As noted above, the appropriation power is clearly

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5. It might be argued, for the Governor, that "object" connotes only the general objective, and not a specific recipient.

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

> Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or bridged, save by the Constitution itself, without disturbing the balance of this system and endangering the liberties of the people.

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

It is true that the Alaska Constitution gives the governor some substantial control over the "purse strings", the term used in Colbert. Most significantly, he has an item veto power over appropriations bills. Art. II, § 15. The history of article II, section 15 "indicates a desire by the delegates to create a strong executive branch with 'a strong control on the purse strings' of the state." Thomas v. Rosen, supra, 569 P.2d at 795, quoting 3 Proceedings of the Alaska Constitutional Convention 1740. But this control is defined in this and other specific constitutional provisions, [6] as Colbert notes. The governor's role regarding appropriations is limited to those specific constitutional limitations on the otherwise plenary power of the legislature.

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

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

> According to conventional approaches in constitutional construction, since the states were antecedent political entities exercising general powers of government and the United States is a federation created by them to serve specific, defined purposes, the Congress of the United States is understood to have only such powers as are affirmatively granted to it, expressly or by implication, whereas state legislatures have residual law-making powers subject only to such limitations as are affirmatively imposed by the state or federal constitutions.

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

3) Alaska Constitutional History

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

It is significant that the constitutional convention could have included a specific affirmative limitation on the Legislature's power to appropriate to a designated non-governmental recipient, but did not do so. Indeed, the delegates considered at least a partial ban on direct governmental grants to private institutions. Although the delegates did not directly discuss the issue of who might have had the authority to designate particular recipients, the context of their discussions suggest that they considered the question.

The matter came up in this way. The original version of what was to become article VII, section 1 of the constitution provided that "No money shall be paid from public funds for the direct benefit of any religious or other private institution." 6 Proceedings of the Constitutional Convention 68, Committee Proposal No. 7, § 1 lines 6-8. The convention received com-

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

> The Alaska Department of Health is quite concerned regarding the proposed articles in the Alaska Constitution which prohibit direct grants of public funds beneficial to religious and other private institutions.
>
> . . . .
>
> The inclusion of articles such as are proposed . . . would probably result in the closing of many hospitals throughout Alaska . . . .
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> . . . .
>
> For the above reasons, the Alaska Department of Health strongly recommends that these sections or parts of sections be struck from the proposed State Constitution and that no clause be inserted in the constitution which would restrict the legislature from appropriating monies to private and denominational institutions, if a public purpose was served thereby.

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

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

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

4) Pre-1955 Case Law

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

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

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

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

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

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

> These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.

Id. at 608 (emphasis added).

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

> Long before, it had been decided that public funds might under proper legislative authority be appropriated to aid private agencies performing services to the community which were public in nature. [Citations]. And from the beginning of state government it had been the policy and practice to accomplish public purposes indirectly by such means; and all Constitutions promulgated since the beginning had been performed unquestionably in full knowledge of this policy and practice, and in none was anything inserted or changed to interfere. . . .

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

large number of hospitals".[9] Id. None of these appropriations or disbursals had been successfully challenged. See also People ex rel. State Board v. Brady, 115 N.E. 204 (Ill. 1917).

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

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

In Johns Hopkins University v. Williams, 86 A.2d 892, 900 (Md. 1952), the court reviewed five decades of legislative appropriation to or authorization of bonds for private institutions which carried out public purposes. It declined to invalidate a procedure so firmly established.

It is true that the focus of most of these cases -- and the ones which follow in this section -- was on whether the appropriations were for a public purpose or whether they violated a constitutional prohibition against the giving or loaning of the credit of the state for any private corporation or

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9. It is not clear from the opinion whether the report referred to listed agencies aided for that year only, or over a longer period. In any event, the number of appropriations is impressive.

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

There is substantial case law following the constitutional convention which shows that the practice of appropriations to private entities continued, and that the courts continued to uphold it against constitutional challenges. E.g., United Community Services v. Omaha Nat'l Bank, 77 N.W.2d 576, 586-87 (Neb. 1956); Ezelle v. City of Paducah, 441 S.W.2d 162, 164 (Ky. 1969). Cf. Kentucky Region Eight Mehtal Health Board, Inc. v. Commonwealth, 507 S.W.2d 489, 490-91 (Ky. 1974) ("mere fact that corporations receive and administer grants of state funds does not mean that they are state agencies"); West v. Tennessee Housing Development Agency, 512 S.W.2d 275 (Tenn. 1974) (giving of state credit not prohibited if for public purpose); New Jersey Mortgage Finance Agency v. McCrane, 267 A.2d 24, 29 (N.J. 1970) (provisions against lending state's credit do not prohibit government from employing third person or private corporation to do any lawful act which government has the right to have done).

5) Conclusion

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

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

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

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

Second, there is no claim here that any of the enactment procedures were "dubious", much less any showing of dubious or in any way irregular enactment procedures.

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

powers doctrine.

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

B. The Challenged Appropriations

This court earlier grouped the appropriations challenged under the separation of powers doctrine into two categories: first, grants to specifically designated recipients who perform charitable or civic functions, and second, appropriations in which a specific agent has been designated to perform a governmental task, or, at least, appropriations in which the specifically designated recipient does not perform charitable or civic functions. While these categories are not absolute and their boundaries somewhat difficult to draw, they provide a framework for analyzing the challenged appropriations.

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

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

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

1) FAAC 18

The appropriation challenged in FAAC 18 reads as follows:

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

§ 225, ch. 50, SLA 1980 at p. 34.

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

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

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

2) FAAC 19

There is an unresolved factual dispute which precludes summary judgment disposition here. See discussion below at p. 50.

3) FAAC 25

The appropriation challenged in FAAC 25 reads as follows:

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

§ 286, ch. 50, SLA 1980 at p. 53.

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

4) FAAC 35

The appropriation challenged in FAAC 35 reads as follows:

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

public education and technical assistance statewide.

§ 286, ch. 50, SLA 1980 at p. 66.

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

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

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

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

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10. Now AS 37.05.316.

> act, or both, for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services, or both, in the same area. The department shall contract with the named recipient unless the Office of the Governor, with due regard for any local expertise or experience among those making proposals, determines that an award of the contract to a different party would better serve the public interest. If the contract is awarded to another party than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A contract shall be executed within 60 days after the effective date of the appropriation or allocation. The purchase of the goods or services, or both, shall be in accordance with AS 37.05.230(1)(C).

In accordance with the statute, a named grant recipient might not receive the grant. The department through which the grant is passed must request proposals from other qualified persons in the same area and may contract with one of these other qualified persons if it determines that this would better serve the public interest.

The Legislature argues that the existence of this statute "totally extinguishes [the Governor's] separation of powers complaint", since the Legislature is not selecting specific recipients but is merely "specifying the purpose and amount of an appropriation and making a recommendation to the executive agency regarding its preference for a grant recipient." The Legislature concludes that the final authority to select recipients rests with the Governor as a result of this delegation, and hence there is no violation of separation of

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powers. [11]

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

The Governor's argument that the statute is unconstitutional is ultimately unpersuasive. Given the flexibility of the equal protection analysis mandated by the Alaska Supreme

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11. The Legislature, while taking this position, is not particularly enamored of AS 37.05.315(d). It recites the legislative history of the statute showing that the original bill consisted of a single sentence authorizing the commissioner of revenue to disburse appropriations for grants made by the Legislature. The Governor opposed the bill and "a political impasse" resulted. It was broken by a compromise allegedly drafted by the attorney general's office with the Governor's approval: The Legislature's naming of a recipient would be only a recommendation, and the executive would retain final authority to select a different recipient after a bid process and upon a statement of written reasons.

Thus, the Legislature argues that while the statute is constitutional, it is not good policy. The Legislature identifies two problems with it: (1) "it delegates to the Governor the power to re-make decisions of the Legislature with respect to appropriations for grants", and (2) it incorporates procedures traditionally used by the executive to select contractors to assist it in carrying out the law, which is presumably inappropriate in regard to grant recipients who, the Legislature consisently argues, execute no laws.

The Legislature concludes:

> Thus, this essential separation of powers issue need not be decided by reference to the language of AS 37.05.315(d). That statute confuses rather than clarifies, and, as a practical matter, a decision on the separation of powers issue will determine the . . fate of the statute. The validity of AS 37.05.315(d) is not the constitutional issue before this court, it is merely a symptom of the dispute.

Leg. Mem. Opp. 16 .

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

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

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

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

5) FAAC 37

The appropriation challenged in FAAC 37 reads as follows:

> Department of Natural Resources
>
> Kuskokwim Native Association -- Agriculture $200,0
>
> Koyokon Development Corporation -- Agriculture $200,000
>
> It is the intent of the Legislature that the appropriations to the Kuskokwim Native Association and Koyokon Development Corporation be used for the purchase of D-6 bulldozers or their equivalent, and for land clearing and other expense relating to agriculture.

§ 286, ch. 50, SLA 1980 at p. 67.

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

6) FAAC 42

The appropriation challenged in FAAC 42 reads as follows:

> Fairbanks
> Fairbanks Development Authority $500,000

§ 286, ch. 50, SLA 1980 at p. 77.

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

As with the two previous appropriations, the Governor argues that a statute (here AS 44.33.020) authorizes a particular executive department to carry out the functions which the Legislature has here assigned to a non-governmental entity through a grant to that entity. It is not clear that the statute cited actually gives to the Department of Commerce and Economic Development the authority which the Governor claims it does. But assuming, arguendo, that the claim is correct, there is no showing that the Legislature is prohibited, as a matter of separation of powers, from appropriating money to be paid as a grant to a non-governmental entity to carry out those functions.

7) FAAC 44

The appropriation challenged in FAAC 44 reads as follows:

> Victory/Eureka Electric Line $300,000
>
> The appropriation for the Victory/Eureka Electric Line is to be paid to the NEA Mat-Su Electrical Association.

§ 286, ch. 50, SLA 1980 at p. 79.

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

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

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

B) FAAC 58, 66 and 67

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

C. Conclusion

Virtually all of the appropriations challenged as violative of the separation of powers doctrine thus are upheld by this court. That result follows from several propositions

established above:

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

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

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

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

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

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

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

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

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

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

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

> Courts cannot, however, parse every allocation of power under the separation doctrine. We are not the ideal arbiters of efficient administration in many instances because we are not constituted to choose and to apply optimal theories of political and organizational science applicable to the routine operation of the Government.

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

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

II. FAILURE TO STATE PUBLIC PURPOSE

A. General Discussion

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

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

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

A review of the appropriations involved makes it clear that there is no statement of purpose set out for each appropriation. The Legislature attempts to remedy this failure by arguing that when an appropriation is to a recipient that performs a narrow range of services, this designation of the recipient may be a sufficient statement of purpose. For example, a grant to Alaska Semi-Supportive Homes, Inc. is obviously for the purpose of supporting the functions performed by this organization, which are quite limited. Thus, the Legislature reasons, naming the recipient may be a sufficient statement of the purpose if the recipient performs a specific and limited function.

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

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

The Legislature makes several other arguments concerning this statutory requirement, none of which is persuasive. It notes that the Governor disbursed the funds in every case, arguing that he was able to ascertain "with precision" the purpose of the appropriation. First, that is bald speculation. Second, and more importantly, whether the Governor (or a court) could devine the Legislature's purpose or not, it remains that no purpose was stated. The Legislature questions the wisdom of abstract decisions in important constitutional areas. This argument is unpersuasive because a decision here is not constitutional at all, it is based on failure to comply with the statute. Moreover, it is not an abstract decision or one which seeks to set guidelines for future cases. It merely states that

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12. The Legislature attempts to make the argument turn on constitutional grounds, and then argues that the court should not render an abstract decision on a constitutional question. Its theory is that article IX, section 13 requires a statement of public purpose (separate and apart from the requirement of article IX, section 6 that public moneys be spent for a public purpose). It is unnecessary to reach this argument, for it is clear that the statute is violated and a court should not render a decision on constitutional grounds where a decision is possible on other grounds. Bonjour v. Bonjour, 592 P.2d 1233, 1237 (Alaska 1979); Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978).

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

B. The Challenged Appropriations

1) FAAC 6

The appropriation challenged in FAAC 6 reads in its entirety:

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

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

2) FAAC 12

The appropriation challenged in FAAC 12 reads in its entirety:

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

§ 107, ch. 30, SLA 1980 at p. 15.

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

3) FAAC 32

The appropriations challenged in FAAC 32 read in their entirety:

MBE Service Centers, Inc.	$198,600
Bering Sea Fisherman's Association grant	$226,000

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

(a) MBE Service Centers, Inc.

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

(b) Bering Sea Fisherman's Association

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

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

4) FAAC 42

The appropriation challenged in FAAC 42 provided as follows:

Fairbanks/Fairbanks Development Authority	$500,000

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

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

C. Judicial Remedy

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

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

concerned. AS 22.10.020(b).

It should be emphasized that this opinion contains no finding that any of the appropriations challenged are void because they were not for a public purpose. Thus, there is no claim that article IX, section 6 of the Constitution, set out above, was violated.[13] The only issue in this regard, on which this court finds in favor of the Governor, is that the challenged appropriations did not <u>specify</u> a public purpose as required by AS 24.30.030.

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13. Such a claim would be extremely difficult to sustain. Judicial deference to the legislature regarding the existence of a public purpose is extremely high. <u>See DeArmond v. Alaska State Development Corp.</u>, 376 P.2d 717 (Alaska 1962) (legislature's determination that appropriation is for a public purose must be upheld "unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact"). <u>See also Wright v. City of Palmer</u>, 468 P.2d 326 (Alaska 1970); <u>Walker v. Alaska State Mortgage Ass'n</u>, 416 P.2d 245 (Alaska 1966); <u>Suber v. Alaska State Bond Committee</u>, 414 P.2d 546 (Alaska 1966); and <u>Lien v. City of Ketchikan</u>, 383 P.2d 721 (Alaska 1963), all of which upheld legislative (state or local) enactments against attacks that claimed there was no public purpose for the enactments.

III. CONFINEMENT REQUIREMENT: CHANGES IN SUBSTANTIVE LAW

A. General Discussion

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

Article II, section 13 of the Alaska Constitution provides in relevant part:

> Every bill shall be confined to one subject when it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title.

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

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

Convention, Commentary on Legislative Article at 7.

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

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

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

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

The Legislature generally responds that the constitutional provision in question must be interpreted liberally so as to give the legislature the flexibility it needs in making

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

While it is relatively simple to set out the outlines of the dispute, this court has encountered extreme difficulty in uncovering the proper test to determine when an appropriation goes beyond what is permitted by the constitution. [14/] It is

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

> Just as the Governor may not use his item-veto power to usurp constitutional powers conferred on the legislature, neither can the legislature deprive the Governor of the constitutional powers conferred on him as the chief executive officer of the state by including in a general appropriation bill matters more properly enacted in separate legislation. The Governor's constitutional power to veto bills of general legislation cannot be abridged by the careful placement of such measures in a general appropriation bill, thereby forcing the Governor to choose between approving unacceptable substantive legislation or vetoing "items" of expenditure essential to the operation of government. The legislature cannot by location of a bill give it immunity from executive veto. Nor can it circumvent the Governor's veto power over substantive legislation by artfully drafting general law measures so that they appear to be true conditions or limitations on an item of appropriation. Otherwise, the legislature would be permitted to impair the constitutional responsibilities and functions of a co-equal branch of government in contravention of the separation of powers doctrine . . . .
>
> We are no more willing to allow the legislature to use its appropriation power to infringe on the Governor's constitutional right to veto matters of substantive legislation than we were to allow the Governor to encroach on the constitutional powers
(footnote continued on page 41)

Footnote 14 continued

> of the legislature. In order to avoid this result, we hold that, when the legislature inserts inappropriate provisions in a general appropriation bill, such provisions must be treated as "items" for purposes of the Governor's item veto power over general appropriation bills.
>
> The distinction between what constitutes a condition or limitation properly included in a general appropriation bill and what amounts to a provision which is essentially a matter of general legislation more appropriately dealt with in a separate enactment appears, on first consideration, to be difficult to draw. However, this need not be the case if the legislative and executive branches of the government adhere to the spirit of the constitution, each exercising its respective powers with due deference for the constitutional prerogatives of the other. [The Louisiana Constitution] directs the legislature to pass an "itemized" appropriation bill, essentially a budgetary schedule of distinct fiscal units. The Governor's corollary power to veto the "items" of expenditure included therein casts further light on what was contemplated for insertion in the general appropriation bill. These provisions were never intended to hamstring the legislature in its legitimate efforts to control the purse strings of government. On the other hand, legislative control cannot be exercised in such a manner as to encumber the general appropriation bill with veto-proof "logrolling measures," special interest provisions which could not succeed if separately enacted, or "riders," substantive pieces of legislation incorporated in a bill to insure passage without veto. It is not enough that a provision be related to the institution or agency to which funds are appropriated. Conditions and limitations properly included in an appropriation bill must exhibit such a connexity with money items of appropriation that they logically belong in a schedule of expenditures. We conclude, as did the trial judge, that the ultimate test is one of appropriateness.

With all due respect to the Supreme Court of Louisiana, the test of "appropriateness" is hardly self-defining. Nor does the language "such a connexity with money items of appropriation that they logically belong in a schedule of expenditures" provide much guidance. That opinion goes on to uphold some appropriations (footnote continued on page 42)

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

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

State ex rel. Meyer v. State Board of Equalization and Assessment. 176 N.W.2d 920 (Neb. 1970). Unfortunately, the present dispute involves 11 instances of claimed unconstitutional appropriations in this section alone. Thus, Part III of this opinion alone may be said to be comprised of 11 separate "cases".

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

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Footnote 14 continued

and to strike down others for reasons which are not clear and in a pattern which does not seem to be required by the "test" quoted above. See id. at 159-65.

15. In his dissent in Thomas v. Rosen, 569 P.2d 793, 799 (Alaska, 1977), Chief Justice Boochever noted: "While art. II, sec. 13 generally requires that bills containing appropriations be confined to appropriations, I believe that the legislature has the power to include qualifications or restrictions in an appropriation bill." The majority did not find it necessary to reach that issue, however. Id.

of very little value in interpreting the confinement requirement. Thus, the Legislature's attempt to argue that the confinement requirement should be read to allow the Legislature great freedom, because that is how the Alaska Supreme Court has interpreted the single subject rule, [16] is not persuasive.

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

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

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

> To be constitutional the language in an appropriation bill must be germane to the appropriations, must not conflict with existing law, and it must not extend beyond the life of the appropriations bill itself.

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

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16. In Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974), the court stated: "The constitutional provision should . . . be construed with considerable breadth. Otherwise statutes might be restricted unduly in scope and permissible subject matter, thereby multiplying and complicating the number of necessary enactments and their interrelationships." See also Short v. State, 600 P.2d 20, 23 (Alaska 1979) and cases cited at n.7 therein.

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

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

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

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program of expenditures.[17] It must not enact law or amend existing law.[18] It must not extend beyond the life of the appropriation.[19] Finally, the language must be germane,[20] that is, appropriate,[21] to an appropriations bill.

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

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

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

19. Biles, supra.

20. Id.

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

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

B. The Challenged Appropriations

1) FAAC 9

The appropriation challenged in FAAC 9 reads as follows:

> The sum of $20,000 is appropriated from the general fund to the Department of Health and Social Services for payment as a grant to the Upper Tanana Development Corporation as a minority hire study.

§ 96, ch. 50, SLA 1980 at p. 14.

As the Governor notes, the Department of Health and Social Services does not have the statutory authority to undertake minority hire studies. The powers of that department are set out in AS 44.29.020. Although they are broad, they do not either specifically or generally embrace that function. The Legislature undoubtedly could charge the department with that function, but it must do so through general law, by amending AS 44.29.020, and it may not accomplish such an amendment through an appropriation bill.

The Governor also correctly points out that the State Commission for Human Rights has been created by the Legislature, AS 18.80.010, and has been given the power to "study the problems of discrimination in all or specific fields of human relationships," AS 18.80.060(5). It would clearly have the power to conduct the minority hire study in question. It would also have the power, under the analysis of Part I, above, to receive an appropriation for a minority hire study and disburse it as a grant to the named grant recipient. It would have the power and the duty to administer the grant, to ensure that state law generally regarding the expenditures of public funds was complied with. But this court is unable to discern how the Department of Health and Social Services has any proper role in this field. Because the appropriation purports to confer on

program of expenditures.[17] It must not enact law or amend existing law.[18] It must not extend beyond the life of the appropriation.[19] Finally, the language must be germane,[20] that is, appropriate,[21] to an appropriations bill.

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

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

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

19. Biles, supra.

20. Id.

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

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

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

2) FAAC 18

The appropriation challenged in FAAC 18 reads as follows:

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

§ 225, ch. 50, SLA 1980 at p. 34.

The powers of the Legislative Council are set out at AS 24.20.060. They do not include the power to undertake the kind of detailed engineering studies which would be required to determine the feasibility of a major construction project. Rather, that duty has been assigned by the Legislature to the Department of Transportation and Public Facilities. AS 35.05.010. Because the appropriation purports to confer on the Legislative Council a power which it has not been given, it attempts to amend existing law. For this reason, the appropriation is invalid.

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

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

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

> Obtain a permit to perform the necessary reconnaissance surveys on Native and public lands within the proposed Yukon-Kuskokwim Crossing corridor. Perform a reconnaissance survey of the route corridor on ground. Secure aerial mapping photography of the route corridor suitable for preparing a photogrammetric map of the route corridor. Perform a reconnaissance hydrographic survey from the main channel of the Kuskokwim River and from the main charnel of the Yukon River to the respective dock sites.
>
> Prepare a photogrammetric map of the route corridor at a scale of 1" equals 400' and a contour interval of 10'. Prepare an aerial photo strip mosaic of the route corridor at a scale of 1" equals 2,000'.
>
> Locate the proposed Portage Road, docks, pipelines, yards, staging areas and buildings on the photogrammetric map. Locate gravel sources and problem soils along the route by aerial photo-analysis with sufficient test pits to verify local photo-indicators of gravel sources and problem soils. Set permanent bench marks near the proposed dock location, refer hydrographic surveys to these bench marks, and extrapolate river stages from the nearest USGS river gaging stations and/or National Weather Service hydrologic stations on the Yukon and the Kuskokwim River.
>
> Provide a preliminary estimate of construction quantities and costs for

> the road, docks, pipelines, yards, staging areas, building and equipment. Propose basic construction methods and material sources. Prepare a preliminary environmental assessment of the proposed Yukon-Kuskokwim Crossing, with particular references to probable impacts on fish and game. Prepare a preliminary social assessment of the proposed Yukon-Kuskokwim Crossing, with particular references to the probable influences on social conditions in Upper Kalskag and other Kuskokwim and Yukon villages and towns.
>
> Propose a schedule of legislative and administrative action, hearings, surveys, design, right-of-way acquisition and construction for the proposed Yukon-Kuskokwim Crossing.

Gov. Ex. 18a. The members of the joint venture contractor with the Legislative Council are registered civil engineers. Gov. Ex. 18b. It is evident from the exhibits that the functions being undertaken by the Legislative Council in this instance go far beyond the powers established in that body by AS 24.20.060.

The Legislature's second argument is that, under AS 35.10.015, the Legislature reviews an annual report required to be submitted by the Department of Transportation and Public Facilities, including its "estimates and recommended priorities". Under AS 35.10.180, the Legislature must approve, reject, or modify the department's proposed plans and policies. Thus, the Legislature argues, its commission of this study was "incidental to the carrying out of its legislative functions, which include closely reviewing DOT/PF's proposed projects prior to appropriating funds for these projects." This argument is unpersuasive. There is no showing in the record that this detailed construction study was ordered to assist the Legislature in reviewing any proposed project of DOT/PF. There is no showing that the DOT/PF annual report even proposed such a project. Finally, if the Legislature desires to have such a feasibility study prepared, it certainly may require that it be done. However,

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

3) FAAC 19

The appropriation challenged in FAAC 19 reads as follows:

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

§ 259, ch. 50, SLA 1980, p. 35.

There is an unresolved factual question concerning this appropriation which precludes disposition of it by summary judgment. The Legislature alleges in its Supplemental Memorandum in Opposition to Governor's Motion for Summary Judgment that this appropriation was requested by the Governor's office. Leg. Supp. Mem. 53. The Governor's response is unintelligible. He says first that the Legislature "provides no support for these assertions", then concedes that "this item was added by the legislature after the bill was introduced by the governor." The Governor then argues that "[a]n invalid appropriation is not made valid because the governor requested it." Gov. Reply 24. If it is the case that this appropriation was included in the appropriations bill at the request of the Governor, it would appear that the Governor is estopped from contesting its constitutionality. See Jamison v. Consolidated Utilities, Inc., 576 P.2d 97 (Alaska 1978). Because there is an unresolved issue of material fact, summary judgment appears inappropriate in regard to FAAC 19. Alaska Rule of Civil Procedure 56; Wickwire v. McFadden, 576 P.2d 986 (Alaska 1978).

4) FAAC 32

As noted above, there are two appropriations

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

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

Department of Commerce and Economic Development

Bering Sea Fisherman's Association grant	$226,000

§ 286, ch. 50, SLA 1980, p. 65.

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

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

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

5) FAAC 37

The appropriation challenged in FAAC 37 reads as follows:

> Department of Natural Resources
>
> Kuskokwim Native Association $200,000
> Koyokon Development Corp. $200,000
>
> It is the intent of the Legislature that the appropriations to the Kuskokwim Native Association and Koyokon Development Corporation be used for the purchase of D-6 bulldozers or their equivalent, and for land clearing and other expense relating to agriculture.

§ 286, ch. 50, SLA 1980, p. 67.

The Governor agrees that the Department of Natural Resources has the power under AS 03.05.010 to direct experimental

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

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

> The alternative to this type of precise detailing of appropriations for specific uses and purposes is an incredible volume of separate pieces of general legislation. Since this is, in the real world, virtually impossible, the Legislature's power to control the use of state funds would effectively be handed over to the executive branch, a concept rejected by the drafters of the Alaska Constitution. Further, it is absurd for the legislature to enact a permanent stautory program when it desires only to authorize disbursement of public funds to specific recipients for specific items or purposes on a one-time basis.

Leg. Supp. Memo. 59.

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

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

While the issue is close, it appears to this court that the language does go beyond the minimum necessary to explain how the money is to be spent. It takes over a portion of the administration of the program of expenditures. It does so by directing that money appropriated for agricultural development be expended to purchase a particular type of equipment. That type of determination is one properly made by the entity which is administering or executing the law. It seems "inappropriate to a schedule of expenditures". It probably ought not to be in an appropriations bill.

However, given the authorities set out above which establish that legislation enjoys a presumption of constitutionality, this court is reluctant to conclude that a particular appropriation is unconstitutional in what appears to be a close case. For that reason, and even though the appropriation challenged in FAAC 37 appears to cross the line, no such declaration will be made and the appropriation is upheld.

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

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

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

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

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

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

7) FAAC 57

The appropriation challenged in FAAC 57 reads as follows:

> Department of Revenue
>
> Child Support Enforcement $2,432,900
>
> The Department of Revenue will establish a sliding scale collection fee schedule for the non AFDC caseload based upon an individuals [sic] economic ability to pay. The amount of this general fund appropriation is to be reduced by the amount of those non AFDC case collection fee receipts.

§ 51, ch. 20, SLA 1980, p. 25.

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

requirements; it merely conditioned its appropriation to the agency on the agency complying with an existing statutory requirement.

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

8) FAAC 70

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

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

§ 51, ch. 120, SLA 1980, p. 50.

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

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

C. Judicial Remedy

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

IV. PRIVATE EDUCATIONAL INSTITUTIONS

A. Standing

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

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

> The motions challenge the standing of the respective parties to sue the other, and assert additional grounds for dismissal. The motions have been heard and the court is fully advised thereon. It is hereby ORDERED that the motions to dismiss are denied.

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

B. General Discussion

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

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

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

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

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