

ALASKA LEGISLATURE COMMITTEE FILE# 1985-1986 86/2

14.14 HCRA HB 139 - HB 159

1 established above:

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

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

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

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

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

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

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

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

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

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

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

23 Courts cannot, however,
24 parse every allocation of power
25 under the separation doctrine.
26 We are not the ideal arbiters
27 of efficient administration in
28 many instances because we are
29 not constituted to choose and
30 to apply optimal theories of
31 political and organizational
32 science applicable to the routine
operation of the Government.

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

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

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1 II. FAILURE TO STATE PUBLIC PURPOSE

2 A. General Discussion

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

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

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

21 A review of the appropriations involved makes it clear
22 that there is no statement of purpose set out for each appropri-
23 ation. The Legislature attempts to remedy this failure by
24 arguing that when an appropriation is to a recipient that per-
25 forms a narrow range of services, this designation of the recip-
26 ient may be a sufficient statement of purpose. For example, a
27 grant to Alaska Semi-Supportive Homes, Inc. is obviously for the
28 purpose of supporting the functions performed by this organiza-
29 tion, which are quite limited. Thus, the Legislature reasons,
30 naming the recipient may be a sufficient statement of the purpose
31 if the recipient performs a specific and limited function.

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

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

12 The Legislature makes several other arguments concern-
13 ing this statutory requirement, none of which is persuasive. It
14 notes that the Governor disbursed the funds in every case,
15 arguing that he was able to ascertain "with precision" the
16 purpose of the appropriation. First, that is bald speculation.
17 Second, and more importantly, whether the Governor (or a court)
18 could divine the Legislature's purpose or not, it remains that
19 no purpose was stated. The Legislature questions the wisdom of
20 abstract decisions in important constitutional areas. This
21 argument is unpersuasive because a decision here is not con-
22 stitutional at all, ^{12/} it is based on failure to comply with the
23 statute. Moreover, it is not an abstract decision or one which
24 seeks to set guidelines for future cases. It merely states that
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27 12. The Legislature attempts to make the argument turn on
28 constitutional grounds, and then argues that the court should
29 not render an abstract decision on a constitutional question.
30 Its theory is that article IX, section 13 requires a statement
31 of public purpose (separate and apart from the requirement of
32 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).

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

8 B. The Challenged Appropriations

9 1) FAAC 6

10 The appropriation challenged in FAAC 6 reads in
11 its entirety:

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

16 § 73, ch. 50, SLA 1980 at pp. 10-11. No statement of purpose is
17 included. It is possible to speculate, probably with a high
18 degree of confidence, that the purpose of the appropriation is
19 to support the activities of the grantee in carrying out its
20 functions: providing "support services" to adults. But later
21 judicial speculation is not tantamount to a specific legislative
22 statement of purpose. The appropriation violates AS 24.30.030.

23 2) FAAC 12

24 The appropriation challenged in FAAC 12 reads in
25 its entirety:

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

29 § 107, ch. 50, SLA 1980 at p. 15.

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

1 3) FAAC 32

2 The appropriations challenged in FMC 32 read in
3 their entirety:

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

6 § 286, ch. 50, SLA 1980 at p.65. Because these are separate
7 appropriations, they will be discussed individually.

8 (a) MBE Service Centers, Inc.

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

21 (b) Bering Sea Fisherman's Association

22 The Bering Sea Fisherman's Association is
23 apparently involved in fisheries development in western Alaska.
24 Gov. Ex. 32h (Art. III). The grant was used to fund a program
25 of providing up-to-date information and services to commercial
26 fishermen in the region to encourage broader participation and
27 economic development of the herring fishery. Gov. Exs. 32g and
28 32j. The appropriation does not specify that this is the
29 purpose of the grant, and it is not at all apparent that this
30 is the only type of function performed by the Bering Sea Fish-
31 erman's Association. Accordingly, it is not apparent that a
32 grant to this organization must necessarily have been for that

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

4 4) FAAC 42

5 The appropriation challenged in FAAC 42 provided
6 as follows:

7 Fairbanks/Fairbanks Development
8 Authority \$500,000

9 § 286, ch. 50 SLA 1980 at p. 77. The appropriation contains no
10 statement of its purpose. On its face it violates AS 24.30.030.

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

19 C. Judicial Remedy

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

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

1 concerned. AS 22.10.020(b).

2 It should be emphasized that this opinion contains no
3 finding that any of the appropriations challenged are void be-
4 cause they were not for a public purpose. Thus, there is no
5 claim that article IX, section 6 of the Constitution, set out
6 above, was v. ated. ^{13/} The only issue in this regard, on which
7 this court fin in favor of the Governor, is that the challenged
8 appropriations did not specify a public purpose as required by
9 AS 24.30.030.

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26 13. Such a claim would be extremely difficult to sustain.
27 Judicial deference to the legislature regarding the existence of
28 a public purpose is extremely high. See DeArmond v. Alaska State
29 Development Corp., 376 P.2d 717 (Alaska 1962) (legislature's
30 determination that appropriation is for a public purpose must be
31 upheld "unless it clearly appears that such finding is arbitrary
32 and without any reasonable basis in fact"). See also Wright v.
City of Palmer, 468 P.2d 326 (Alaska 1970); Walker v. Alaska
State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966); Suber v.
Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966); and
Lien v. City of Ketchikan, 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.

1 III. CONFINEMENT REQUIREMENT: CHANGES IN SUBSTANTIVE LAW

2 A. General Discussion

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

7 Article II, section 13 of the Alaska Constitution pro-
8 vides in relevant part:

9 Every bill shall be confined to one
10 subject when it is an appropriation bill
11 or one codifying, revising, or rearranging
12 existing laws. Bills for appropriations
13 shall be confined to appropriations. The
14 subject of each bill shall be expressed
15 in the title.

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

27 Various courts have noted the evil inherent in the
28 practice. Flanders v. Morris, 558 P.2d 769, 772 (Wash. 1977)
29 ("It is obvious why a legislator would hesitate to hold up the
30 funding of the entire state government in order to prevent the
31 enactment of a certain provision, even though he would have
32 voted against it if it had been presented as independent legis-
lation"); Sellers v. Frohmler, 24 P.2d 666, 669 (Ariz. 1933).
As the Governor notes, these considerations motivated the
framers of the Alaska Constitution. Alaska Constitutional

1 Convention, Commentary on Legislative Article at 7.

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

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

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

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

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

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

5 While it is relatively simple to set out the outlines
6 of the dispute, this court has encountered extreme difficulty
7 in uncovering the proper test to determine when an appropriation
8 goes beyond what is permitted by the constitution. ^{14/} It is
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10 14. A good example of how relatively easy it is to define
11 the problem and how difficult it is to answer it may be seen
12 from this excerpt from Henry v. Edwards, 346 So. 2d 153, 157-58
(La. 1977):

13 Just as the Governor may not use
14 his item-veto power to usurp constitu-
15 tional powers conferred on the legis-
16 lature, neither can the legislature
17 deprive the Governor of the constitutional
18 powers conferred on him as the chief
19 executive officer of the state by
20 including in a general appropriation
21 bill matters more properly enacted in
22 separate legislation. The Governor's
23 constitutional power to veto bills of
24 general legislation cannot be abridged
25 by the careful placement of such measures
26 in a general appropriation bill, thereby
27 forcing the Governor to choose between
28 approving unacceptable substantive
29 legislation or vetoing "items" of
30 expenditure essential to the operation
31 of government. The legislature cannot
32 by location of a bill give it immunity
from executive veto. Nor can it circum-
vent 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 con-
travention of the separation of powers
doctrine

30 We are no more willing to allow the
31 legislature to use its appropriation power
32 to infringe on the Governor's constitutional
right to veto matters of substantive legis-
lation than we were to allow the Governor
to encroach on the constitutional powers
(footnote continued on page 41)

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Footnote 14 continued

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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.

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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.

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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)

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

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

10 State ex rei. Meyer v. State Board of Equalization and Assess-
11 ment. 176 N.W.2d 920 (Neb. 1970). Unfortunately, the present
12 dispute involves 11 instances of claimed unconstitutional ap-
13 propriations in this section alone. Thus, Part III of this
14 opinion alone may be said to be comprised of 11 separate "cases".

15 The Alaska Supreme Court has not yet decided a case
16 raising a claim that particular legislation violates the con-
17 stitutional requirement that bills for appropriations be confined
18 to appropriations. ^{15/} There are cases construing the single
19 subject rule, which is also found in article II, section 13,
20 e.g., Short v. State, 600 P.2d 20 (Alaska 1979). However, be-
21 cause of the distinction between appropriation bills and other
22 bills, the Alaska cases construing the single subject rule are

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26 Footnote 14 continued

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

30 15. In his dissent in Thomas v. Rosen, 569 P.2d 793, 799
31 (Alaska, 1977), Chief Justice Boochever noted: "While art. II,
32 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.

1 of very little value in interpreting the confinement requirement.
2 Thus, the Legislature's attempt to argue that the confinement
3 requirement should be read to allow the Legislature great free-
4 dom, because that is how the Alaska Supreme Court has interpreted
5 the single subject rule, ^{16/} is not persuasive.

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

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

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

22 To be constitutional the language in
23 an appropriation bill must be germane
24 to the appropriations, must not con-
25 flict with existing law, and it must
not extend beyond the life of the
appropriations bill itself.

26 403 A.2d at 1343. While it is superficially attractive, the
27 test does not go far enough. Under it, the Legislature (or

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29 16. In Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974),
30 the court stated: "The constitutional provision should . . .
31 be construed with considerable breadth. Otherwise statutes
32 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.

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

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

23 The problem needs to be approached from the proper
24 perspective. The constitution commands that "[b]ills for ap-
25 propriations shall be confined to appropriations." The language
26 is limiting, literally confining. It restricts the Legislature.
27 The test to be used by the court must approach from the same
28 perspective -- because appropriations bills must be limited to
29 appropriations, the qualifying language must be the minimum
30 necessary to explain the Legislature's intent regarding how the
31 money appropriated is to be spent. It must not administer the
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1 program of expenditures. ^{17/} It must not enact law or amend
2 existing law. ^{18/} It must not extend beyond the life of the
3 appropriation. ^{19/} Finally, the language must be germane, ^{20/}
4 that is, appropriate, ^{21/} to an appropriations bill.

5 This court entertains no illusions that this test may
6 easily or mechanically be applied. Every instance where
7 language is challenged in an appropriations bill is a new case
8 which must be examined separately. Courts applying what appear
9 to be similar tests to apparently similar facts reach opposite
10 conclusions. Compare Welden v. Ray, 229 N.W.2d 706, 710 (Iowa
11 1975) with Henry v. Edwards, 346 So. 2d 153, 159-65 (La. 1977).
12 This formulation is synthesized from several cases, and attempts
13 to give fair meaning to the Alaska Constitution without unfairly
14 restricting the Legislature's spending power. ^{22/} It must now be
15 applied to the challenged appropriations.

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

26 18. Biles v. Dept. of Public Welfare, supra, 403 A.2d at
27 1343 (as to amending law); Flanders v. Morris, supra, 558 P.2d
at 772.

28 19. Biles, supra.

29 20. Id.

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

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

1 B. The Challenged Appropriations

2 1) FAAC 9

3 The appropriation challenged in FAAC 9 reads as
4 follows:

5 The sum of \$20,000 is
6 appropriated from the general
7 fund to the Department of Health
8 and Social Services for payment
9 as a grant to the Upper Tanana
10 Development Corporation as a
11 minority hire study.

12 § 96, ch. 50, SLA 1930 at p. 14.

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

22 The Governor also correctly points out that the
23 State Commission for Human Rights has been created by the Legis-
24 lature, AS 18.80.010, and has been given the power to "study the
25 problems of discrimination in all or specific fields of human
26 relationships," AS 18.80.060(5). It would clearly have the
27 power to conduct the minority hire study in question. It would
28 also have the power, under the analysis of Part I, above, to
29 receive an appropriation for a minority hire study and disburse
30 it as a grant to the named grant recipient. It would have the
31 power and the duty to administer the grant, to ensure that state
32 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 its proper role in
this field. Because the appropriation purpose is to confer on

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

4 2) FAAC 18

5 The appropriation challenged in FAAC 18 reads as
6 follows:

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

10 § 225, ch. 50, SLA 1980 at p. 34.

11 The powers of the Legislative Council are set out
12 at AS 24.20.060. They do not include the power to undertake the
13 kind of detailed engineering studies which would be required to
14 determine the feasibility of a major construction project.
15 Rather, that duty has been assigned by the Legislature to the
16 Department of Transportation and Public Facilities. AS
17 35.05.010. Because the appropriation purports to confer on
18 the Legislative Council a power which it has not been given, it
19 attempts to amend existing law. For this reason, the appropri-
20 ation is invalid.

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

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

1 The Legislature's reading of this statute appears overly broad.
2 This matter does not involve a request by a committee for
3 assistance in researching or drafting a bill. Nor does it
4 involve a request from an individual legislator for "spot
5 research". Rather, it involves a contract in the amount of
6 \$175,000 between the Legislative Affairs Agency and a joint
7 venture to perform a highly detailed construction plan. Even a
8 brief review of the contract which was executed shows how dif-
9 ferent this detailed feasibility study was from the type of
10 function set out in AS 24.20.060(4)(A). Among other things,
11 the contractor was to

12 Obtain a permit to perform
13 the necessary reconnaissance surveys
14 on Native and public lands within
15 the proposed Yukon-Kuskokwim Crossing
16 corridor. Perform a reconnaissance
17 survey of the route corridor on ground.
18 Secure aerial mapping photography of
19 the route corridor suitable for pre-
paring a photogrammetric map of the
route corridor. Perform a reconnaissance
hydrographic survey from the main channel
of the Kuskokwim River and from the main
channel of the Yukon River to the
respective dock sites.

20 Prepare a photogrammetric map of
21 the route corridor at a scale of 1"
22 equals 400' and a contour interval
23 of 10'. Prepare an aerial photo strip
24 mosaic of the route corridor at a scale
25 of 1" equals 2,000'.

26 Locate the proposed Portage Road,
27 docks, pipelines, yards, staging areas
28 and buildings on the photogrammetric
29 map. Locate gravel sources and problem
30 soils along the route by aerial photo-
31 analysis with sufficient test pits to
32 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

1 the road, docks, pipelines, yards,
2 staging areas, building and equipment.
3 Propose basic construction methods and
4 material sources. Prepare a preliminary
5 environmental assessment of the proposed
6 Yukon-Kuskokwim Crossing, with
7 particular references to probable
8 impacts on fish and game. Prepare
9 a preliminary social assessment of
10 the proposed Yukon-Kuskokwim Crossing,
11 with particular references to the
12 probable influences on social con-
13 ditions in Upper Kalskag and other
14 Kuskokwim and Yukon villages and
15 towns.

16 Propose a schedule of legislative
17 and administrative action, hearings,
18 surveys, design, right-of-way acquisition
19 and construction for the proposed Yukon-
20 Kuskokwim Crossing.

21 Gov. Ex. 18a. The members of the joint venture contractor with
22 the Legislative Council are registered civil engineers. Gov.

23 Ex. 18b. It is evident from the exhibits that the functions
24 being undertaken by the Legislative Council in this instance go
25 far beyond the powers established in that body by AS 24.20.060.

26 The Legislature's second argument is that, under
27 AS 35.10.015, the Legislature reviews an annual report required
28 to be submitted by the Department of Transportation and Public
29 Facilities, including its "estimates and recommended priorities".
30 Under AS 35.10.180, the Legislature must approve, reject, or
31 modify the department's proposed plans and policies. Thus, the
32 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 appropri-
ating funds for those 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,

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

4 3) FAAC 19

5 The appropriation challenged in FAAC 19 reads as
6 follows:

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

11 § 259, ch. 50, SLA 1980, p. 35.

12 There is an unresolved factual question concern-
13 ing this appropriation which precludes disposition of it by
14 summary judgment. The Legislature alleges in its Supplemental
15 Memorandum in Opposition to Governor's Motion for Summary Judg-
16 ment that this appropriation was requested by the Governor's
17 office. Leg. Supp. Mem. 53. The Governor's response is un-
18 intelligible. He says first that the Legislature "provides no
19 support for these assertions", then concedes that "this item was
20 added by the legislature after the bill was introduced by the
21 governor." The Governor then argues that "[a]n invalid ap-
22 propriation is not made valid because the governor requested it."
23 Gov. Reply 24. If it is the case that this appropriation was
24 included in the appropriations bill at the request of the
25 Governor, it would appear that the Governor is estopped from
26 contesting its constitutionality. See Jamison v. Consolidated
27 Utilities, Inc., 576 P.2d 97 (Alaska 1978). Because there is
28 an unresolved issue of material fact, summary judgment appears
29 inappropriate in regard to FAAC 19. Alaska Rule of Civil Pro-
30 cedure 56; Wickwire v. McFadden, 576 P.2d 986 (Alaska 1978).

31 4) FAAC 32

32 As noted above, there are two appropriations

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

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

11 Department of Commerce and Economic Development

12 Bering Sea Fisherman's
13 Association grant \$226,000

14 § 286, ch. 50, SLA 1980, p. 65.

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

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

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

20 5) FAAC 37

21 The appropriation challenged in FAAC 37 reads as
22 follows:

23 Department of Natural Resources

24 Kuskokwim Native Association \$200,000
25 Koyokon Development Corp. \$200,000

26 It is the intent of the Legislature
27 that the appropriations to the Kuskokwim
28 Native Association and Koyokon Develop-
29 ment Corporation be used for the purchase
of D-6 bulldozers or their equivalent,
and for land clearing and other expense
relating to agriculture.

30 § 286, ch. 50, SLA 1980, p. 67.

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

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

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

17 The alternative to this type
18 of precise detailing of ap-
19 propriations for specific uses
20 and purposes is an incredible
21 volume of separate pieces of
22 general legislation. Since this
23 is, in the real world, virtually
24 impossible, the Legislature's
25 power to control the use of state
26 funds would effectively be handed
27 over to the executive branch, a
28 concept rejected by the drafters
29 of the Alaska Constitution. Further,
30 it is absurd for the legislature to
31 enact a permanent statutory program
32 when it desires only to authorize
disbursement of public funds to
specific recipients for specific
items or purposes on a one-time
basis.

28 Leg. Supp. Memo. 59.

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

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

5 While the issue is close, it appears to this
6 court that the language does go beyond the minimum necessary to
7 explain how the money is to be spent. It takes over a portion
8 of the administration of the program of expenditures. It does
9 so by directing that money appropriated for agricultural develop-
10 ment be expended to purchase a particular type of equipment.
11 That type of determination is one properly made by the entity
12 which is administering or executing the law. It seems "inap-
13 propriate to a schedule of expenditures". It probably ought not
14 to be in an appropriations bill.

15 However, given the authorities set out above which
16 establish that legislation enjoys a presumption of constitution-
17 ality, this court is reluctant to conclude that a particular
18 appropriation is unconstitutional in what appears to be a close
19 case. For that reason, and even though the appropriation chal-
20 lenged in FAAC 37 appears to cross the line, no such declaration
21 will be made and the appropriation is upheld.

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

23 The appropriations challenged by the Governor in
24 these four counts of his counterclaim are highly detailed ap-
25 propriations to the Department of Transportation and Public
26 Facilities for rural airport improvements in the scores of
27 villages in Alaska. (The Governor says 33 rural airports are
28 affected, and the Legislature notes there are 38 airports af-
29 fected. These figures are accurate as to one or the other of the
30 specific improvements mandated, but they are inaccurate as to the
31 total number of airports affected. For example, 77 village air-
32 ports were to receive air-to-ground radios under the

1 appropriation. The total number of different village airports
2 affected was probably well over 100.) Approximately \$35,000,000
3 was appropriated for rural airport runway improvements; almost
4 \$5,000,000 was appropriated for rural airport lighting improve-
5 ments; almost \$3,000,000 for rural airport navigational aids;
6 and approximately \$2,000,000 was appropriated for rural airport
7 terminal storage buildings. The appropriations are highly
8 detailed, filling eight pages in the Session Laws of Alaska,
9 § 286, ch. 50, SLA 1980, pp. 79-87, but, much more significantly,
10 they refer to and incorporate by reference much longer and
11 extremely detailed studies concerning rural airport improvement.
12 In addition, the appropriations established minimum standards
13 for runway size, directed the Department of Transportation and
14 Public Facilities to identify villages where expansion of the
15 runway would involve the acquisition of land from the village
16 under the Alaska Native Land Claims Settlement Act and submit a
17 list of these projects to the Legislative Budget and Audit Com-
18 mittee, established extremely detailed standards for improvement
19 to airport lighting (by incorporating descriptions and standards
20 found in DOT/PF documents and FAA documents), established the
21 size and general lay-out of airport terminal storage buildings,
22 et cetera.

Rural Airport Improvement Appropriations

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

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

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

13 7) FAAC 57

14 The appropriation challenged in FAAC 57 reads as
15 follows:

16 Department of Revenue

17 Child Support Enforcement \$2,432,900

18 The Department of Revenue will
19 establish a sliding scale col-
20 lection fee schedule for the
21 non AFDC caseload based upon an
22 individuals [sic] economic ability
23 to pay. The amount of this general
24 fund appropriation is to be reduced
25 by the amount of those non AFDC case
26 collection fee receipts.

27 § 51, ch. 20, SLA 1980, p. 25.

28 The Governor objects to the language requiring
29 the Department of Revenue to establish a sliding scale collection
30 fee schedule. He argues that such a requirement may not con-
31 stitutionally be inserted into an appropriations bill. The
32 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 statutory

1 requirements; it merely conditioned its appropriation to the
2 agency on the agency complying with an existing statutory re-
3 quirement.

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

16 8) FAAC 70

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

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

21 § 51, ch. 120, SLA 1980, p. 50.

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

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

3 C. Judicial Remedy

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

1 IV. PRIVATE EDUCATIONAL INSTITUTIONS

2 A. Standing

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

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

17 The motions challenge the standing of
18 the respective parties to sue the other,
19 and assert additional grounds for dis-
20 missal. The motions have been heard and
the court is fully advised thereon. It
is hereby ORDERED that the motions to
dismiss are denied.

21 Order Denying Motions to Dismiss, October 5, 1981. Because the
22 issue of standing was fully briefed and considered by the
23 predecessor court, and because the parties make no new arguments
24 and allege no new facts concerning standing, this court will not
25 reconsider Judge Stewart's earlier ruling. It is the law of
26 this case, and ought not to be changed except upon a specific
27 showing that it is erroneous. Stepanov v. Gavrilovich, 594 P.2d
28 30, 36 (Alaska 1979). While it is within this court's power to
29 reconsider, the power "is not to be used lightly." Id. No show-
30 ing has been made as to why it should be exercised here. Thus,
31 the Governor has standing to challenge these appropriations.
32

1 B. General Discussion

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

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

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

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

30 The history of the Alaska Constitutional Convention
31 is helpful in this regard. Delegate Armstrong, speaking for
32 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

1 of funds in other educational matters." 2 Proceedings of the
3 Alaska Constitutional Convention 1514. Delegate Armstrong then
4 made reference to special cases where children in homes or
5 hospitals or other private institutions would not be prohibited
6 from receiving aid under the section. Id. at 1514-15. The
7 thrust of these comments seems to be that aid to a private
8 organization or institution is not prohibited, even if it carries
9 out some educational assistance, as long as it is not primarily
10 an educational institution.

11 It is also important to keep in mind, as noted above
12 at 3-4, that a showing of unconstitutionality must be "manifest"
13 to overcome the presumption of validity to which validly enacted
14 statutes are entitled.

14 C. The Challenged Appropriations

15 1) FAAC 11

16 The appropriation challenged in FAAC 11 reads
17 as follows:

18 The sum of \$100,000 is appropriated
19 from the general fund to the municipal
20 grant account for payment as a grant
21 to the Municipality of Anchorage for
22 a grant to the Alaska Black Leader-
23 ship Conference for community-based
24 education enrichment.

25 § 106, ch. 50, SLA 1980 at p. 4. The grant was to finance a six
26 week summer program for 200 minority students: Leg. Ex. 11 C.

27 The Alaska Black Leadership Conference is
28 not properly described as an educational institution, as the
29 constitution uses that phrase. While the organization under-
30 takes some educational activities, the evidence submitted by the
31 parties suggests that it may accurately be described as an
32 umbrella organization for several groups which seeks the advance-
ment, in several spheres, of Alaska's black citizens. Its
purposes include "promoting and stimultating cohesiveness within
the Black Community." Gov. Ex. 11a. Member organizations

1 2) FAAC 25

2 The appropriation challenged in FAAC 25 reads
3 as follows:

4 Fairbanks North Star Borough
5 Association for Education
6 of Young Children \$20,000
7 For child care equipment

8 § 286, ch. 50, SLA 1980 at p. 53.

9 The Fairbanks Association for the Education
10 of Young Children is a private non-profit organization comprised
11 of nine day care and pre-school organizations in the Fairbanks
12 area. Leg. Ex. 25C. Its goal is "to provide information and
13 support for young children". Gov. Ex. 25a. It sought, and
14 obtained in the challenged appropriation, \$15,000 for play
15 equipment and \$5,000 for audio-visual equipment, to be used by
16 its various member organizations. Leg. Ex. 25C.

17 As with the previous appropriation to the
18 Alaska Black Leadership Conference, the issue is whether the
19 Fairbanks Association for the Education of Young Children is a
20 private educational institution. This question is substantially
21 closer than that involving the Alaska Black Leadership Conference
22 in the preceding appropriation.

23 Supporting the Governor is the fact that the
24 name of the association suggests that it is organized primarily
25 for educational purposes. Additionally, a letter to Represent-
26 tive Brian Rogers from the vice president of the organization,
27 Gov. Ex. 25a, suggests that education is the primary purpose of
28 the Fairbanks Association for the Education of Young Children.
29 For example, it refers to the goal of development of "physical
30 and cognitive skills" of children, refers to the "teacher/child
31 ratio" in its day care centers, and refers to the fact that the
32 day care centers provide care for both preschool and "young
school age children".

1 The Legislature argues that the primary
2 function of the Fairbanks Association for the Education of Young
3 Children is to provide, through its member day care centers,
4 child care to pre-school children. The Legislature contends that
5 "FAEYC is a non-profit organization whose goal is to provide
6 information and support for affiliate day care centers." Leg.
7 Ex. 25A. The grant was used to purchase play equipment and
8 audio-visual equipment for child care centers affiliated with
9 FAEYC.

10 The Legislature seeks to distinguish day care
11 centers or child care centers from "private educational institu-
12 tions" in two ways. First, the former are regulated by the
13 Department of Health and Social Services. See 7 AAC 50.120-775.
14 Second, expenses for child care are tax deductible to parents,
15 and, under the Internal Revenue Code, are considered employment
16 related expenses, while private school tuition is not a deduct-
17 ible expense. Thus, the Legislature argues, day care may be
18 distinguished from education. The Legislature also relies upon
19 a lower court decision from Ohio which held that a day care center
20 is not included within the term "educational use" in a zoning
21 ordinance which provided that permitted uses in a residential
22 district include "educational use, public library or museum."
23 Staker v. Brown, 324 N.E.2d 793, 795 (Ohio Com. Pl. 1974). The
24 Legislature concludes that "any educational benefits conferred
25 on children in day care centers is secondary to their basic
26 function which is to allow parents to participate in the work
27 force."

28 A further argument advanced by the Legis-
29 lature is based on the existence of AS 44.33.240-257, which
30 authorizes the Department of Commerce and Economic Development to
31 make loans which directly benefit child care facilities. If aid
32 to private day care centers constitutes prohibit a public benefit

1 to "private educational institutions", the Legislature argues,
2 AS 44.33.240 et seq. must be unconstitutional also.

3 As noted above, this issue is closer than the
4 one raised by the grant of the Alaska Black Leadership Con-
5 ference. On balance, the arguments of the Legislature are more
6 persuasive. As noted in the opinion of the Alaska Supreme Court
7 in Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979),
8 the purpose of article VII, section 1 was "to support and protect
9 a strong system of public schools." Id. at 129. It seems
10 likely that these appropriations would not frustrate that
11 purpose. The majority of the children to be benefited by the
12 appropriation at issue here are not school age children, and
13 those who are of school age are not diverted from the public
14 schools by FAEYC. There is presumably no or little competition
15 from the public school system for these dollars. Indeed, it
16 might well be argued that expenditure of these funds enhances
17 the public school system, in helping to insure that children who
18 begin formal schooling will have had benefits provided to them
19 during their pre-school years. Moreover, the statement by
20 Delegate Armstrong, quoted above at 60, to the effect that the
21 section was not intended to "prohibit the use of funds in other
22 educational matters", 2 Proceedings of the Alaska Constitutional
23 Convention 1514, suggests that the appropriation is valid.

24 Under all of these circumstances, and
25 remembering the heavy burden that is faced by one who challenges
26 the constitutionality of a validly enacted statute, this court
27 concludes that the Fairbanks Association for the Education of
28 Young Children was not a "private educational institution" as
29 that term is used in the Alaska Constitution. For that reason,
30 the appropriation is not prohibited by article VII, section 1 of
31 that document.

32
//////////

1 V. UNCONSTITUTIONAL DELEGATION OF POWER

2 The Governor challenges one item in one of the ap-
3 propriation acts in question on the theory that it is an un-
4 constitutional delegation of power. In § 50, ch. 120, SLA 1980
5 at p. 65, the Legislature provided:

6 The sum of \$5,267,248 shall be reduced
7 from the total of the personal services
8 line items contained in the appropriations
9 made by this Act for operating expenditures
10 for the fiscal year beginning July 1, 1980,
11 and ending June 30, 1981. The total reduction
shall be from general fund appropriations
and reductions shall be equitably allocated
among the state agencies by the division of
budget and management, Office of the Governor.

12 The Legislature's delegation of the power to decide how the
13 reduction should specifically be allocated among state agencies
14 is challenged by the Governor as an invalid delegation of
15 legislative authority to the Governor. ^{23/}

16 The Legislature argues that "[a] delegation of dis-
17 cretion to the executive branch of government is constitutional

18
19 23. In his Memorandum in support of Summary Judgment, at
20 p. 64, the Governor states: "This item was vetoed by the
21 governor. However, the court has ruled that this veto was
22 improperly exercised. Mem. decision motion for partial judgment
23 on pleadings, February 26, 1982." This court has reviewed the
24 Memorandum of Decision of February 26, 1982, and can find no
25 indication in the memorandum that the court ruled that the
26 Governor's item veto power was improperly exercised regarding
27 this item. That Memorandum of Decision was issued by The
28 Honorable Thomas E. Schulz, to whom this case was assigned for
a brief period following Judge Stewart's retirement. Therefore,
this court also reviewed Judge Stewart's Memorandum of Decision
of December 2, 1981, upon which Judge Schulz's Partial Judgment
was based, and could not find any indication that Judge Stewart
had ruled that the Governor's veto was improperly exercised in
regard to this item in that document, either. Therefore, the
Governor's statement that "the court has ruled that this veto was
improperly exercised" appears to be incorrect.

29 Technically, the matter may be moot. However, under
30 the "public interest" exception to the mootness doctrine, In Re
31 G.M.B., 483 P.2d 1006, 1008, (Alaska, 1971), it is appropriate
32 to resolve this matter. That is, this dispute is likely a re-
curring one, and its nature is such that the mootness doctrine,
if applied, would effectively preclude review of the issue.

1 where the Legislature provides sufficient standards for the
2 exercise of that discretion." The Legislature notes that the
3 approach it took was an alternative to merely reducing all
4 personal services line items by one percent, which it clearly
5 had the power to do, and that the Governor was given "specific
6 criteria sufficiently definite to pass constitutional muster,"
7 that is, the direction that the reductions be "equitably al-
8 located" among the state agencies.

9 In DeArmond v. Alaska State Development Corp., 376 P.2d
10 717 (Alaska 1972), the Supreme Court cited with approval a
11 treatise to the effect that "a legislature may delegate its non-
12 legislative functions and confer discretion in the administration
13 of the law, but may not delegate purely legislative powers in the
14 absence of constitutional authorization." Id. at 723 n.16, citing
15 16 CJS Constitutional Law § 133 (1956). The Legislature has, in
16 this case, argued often and persuasively that the spending power
17 is a legislative power, and only a legislative power (with the
18 Governor playing a limited constitutional role through the
19 exercise of the veto). Thus, unless the Legislature can point
20 to a specific constitutional authorization to delegate away part
21 of that power, the item in question must be an invalid delegation.

22 The Legislature points to no such constitutional pro-
23 vision. It argues at length that this case is distinguishable
24 from a case cited by the Governor, but that argument misses the
25 mark. The case in question, State of New Mexico, ex rel.
26 Holmes v. State Board of Finance, 367 P.2d 929 (N.M. 1961), held
27 invalid a statute delegating discretion to an executive agency
28 to apportion reductions in appropriations. The Legislature
29 attempts to distinguish Holmes on the grounds that the reductions
30 there were non-mandatory, non-specific, and there was no
31 direction as to which type of appropriations should be reduced.
32 This exercise of distinguishing Holmes overlooks the Governor's

1 central argument that the power in question here, the spending
2 power, cannot be delegated at all -- even if standards for the
3 exercise of the power are set out with great particularity by
4 the legislature.

5 Even assuming that the Legislature could show that
6 this power may be delegated, it is questionable whether the
7 standards set out in the act in question are specifically
8 definite. An almost identical provision in a general ap-
9 propriation bill in 1963 was the subject of an attorney general
10 opinion in this state. The provision in question read as
11 follows:

12 The total amount appropriated from the
13 general fund by section 6 of this Act
14 is reduced by the amount of \$900,000.
15 The apportionment of this reduction
16 shall be made by the Governor from among
17 the sums appropriated to the departments
18 of the executive branch.

19 c 7, CSHB 31 (1963). This provision specified exactly the
20 amount to be reduced, directed the Governor to make the re-
21 duction, and said that the reduction should be apportioned
22 among the executive departments. The only difference between i
23 and the item in the instant case is that it did not decree an
24 "equitable" allocation (though that might be inferred from the
25 use of the word "apportionment"), and it was not restricted to
26 personal services items. This almost identical provision was,
27 in the opinion of the attorney general, unconstitutional, for
28 the reason that it was an improper delegation of legislative
29 power to the executive. The opinion relied to some extent on
30 Holmes, supra, and noted that Holmes "was based on the more
31 specific grounds, also applicable to CSHB No. 34, that there
32 was a lack of sufficient standards to guide the [executive] in
its determinations." 1963 Opn. Atty. Gen. No. 9, April 9, 1963
at 3. This court agrees that a second basis for striking down
the item in question would be a lack of sufficient standards to

L SHEFFIELD
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

143139

January 28, 1985

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the administration of certain grants passed by the legislature.

The bill was requested by the Department of Administration to provide specific authority to establish a separate method of administering certain grants to municipalities under AS 37.05.315, named recipients under AS 37.05.316, and to unincorporated communities under AS 37.05.317. Under current procedures, all grants are administered by the Department of Administration in the same manner as professional services contracts. The nature of a grant is more often akin to a unilateral contract than a bilateral contract. This difference warrants the adoption of a body of administrative law that sets out the ground rules under which the grants will be expended. Certainly, this distinction between a grant and a contract can only be implemented if the department has the power to provide for adequate safeguards to assure that grantees and the state operate in the public interest.

This bill reverses the provisions of AS 37.05.318, to permit the creation of safeguards through the adoption of administrative regulations. Under existing law, the adoption of regulations to interpret and make specific the grant statutes is prohibited. I know that many members of the legislature are becoming increasingly alarmed at the

lack of responsiveness of grantees to expeditiously accomplish the intent of the legislature. This bill offers an opportunity for a change that will result in the speedy accomplishment of legislatively assigned purposes of grant appropriations.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill Sheffield".

Bill Sheffield
Governor

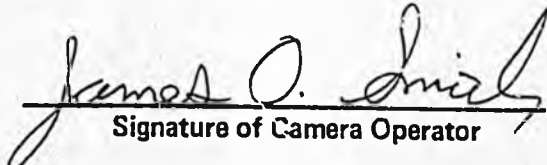


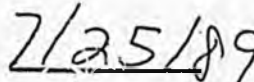
RECORDS



CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.


Signature of Camera Operator


Date

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907.465.3800

LEGISLATIVE AFFAIRS AGENCY
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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

*House Community & Regional Affairs
Committee*

2/15/85

STATE OF ALASKA

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

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

949 E. 36TH AVENUE, SUITE 400
ANCHORAGE, ALASKA 99508
PHONE: (507) 563-1073

February 11, 1985

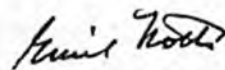
POSITION PAPER

RE: HB 158

SPONSORS: Rules Committee by Request of the Governor

The Department supports HB 158 which would automatically exempt public officials of small communities (less than 1000 population) from conflict of interest reporting requirements, unless local citizens voted to make those requirements applicable. Currently the relevant statutes apply to all communities unless an exemption is approved by voters of the municipality. The old procedures would still apply to larger municipalities.

Existing conflict of interest reporting requirements can create an undue hardship for small communities with a limited pool of qualified potential leaders and have limited value for those communities. Moreover, in most small communities, potential conflicts of interest by local officials are generally well known. In any case, local residents would always have the option to reinstate the reporting requirements. Passage of the bill would greatly simplify procedures for officials of small communities while maintaining the spirit and intent of the conflict of interest reporting requirements.



Emil Notti, Commissioner

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 158
 Title: Exempt certain municipalities from conflict of interest requirements

Sponsor: Rules Committee/Governor
 Requestor: _____
 Date of Request: 2/6/85

FISCAL DETAIL

Agency Affected: Community & Regional Affairs
 Program Category Affected: Community Development

BRU, Program or Subprogram(s) Affected:
BRU: Local Government Assistance
Training & Development

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-		

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE						
----------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Tom Lane, Planning Supervisor
 Division: Municipal & Regional Assistance

Phone: 465-4750
 Date: 2/6/85

Approved by Commissioner: *Luise West*
 Agency: Community & Regional Affairs

Date: 2/11/85

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

Introduced: 2/1/85
Referred: Community & Regional
Affairs, Judiciary and Finance

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE HOUSE

2

HOUSE BILL NO. 158

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act exempting certain municipalities from con-
7 flict of interest requirements imposed by law; and
8 providing for an effective date."

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

10 * Section 1. AS 39.50.145 is amended to read:

11 Sec. 39.50.145. PARTICIPATION BY MUNICIPALITIES. This chapter
12 does not apply to a municipality with a population of 1,000 or less.
13 Any other [A] municipality may exempt its municipal officers or candi-
14 dates for municipal office from the requirements of this chapter if a
15 majority of the voters voting on the question at any regular election,
16 as defined by AS 29.78.010(14), or a special municipality-wide elec-
17 tion, vote to exempt its municipal officers or candidates from the
18 requirements of this chapter. The question of exemption from the
19 requirements of this chapter may be submitted by the city council or
20 borough assembly by ordinance or by initiative ordinance. Municipal
21 officers or candidates for municipal office of a municipality with a
22 population of 1,000 or less are covered by this chapter if a majority
23 of the voters voting on the question at a regular election, as defined
24 by AS 29.78.010(14), or a special municipality-wide election, vote to
25 make the requirements of this chapter apply to its municipal officers.
26 For the purpose of this section, population must be determined in the
27 same manner as provided in AS 15.13.010.

28 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
29 10.070(c).

BILL SHEFFIELD
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 1, 1985

RECEIVED
1985 FEB 13 P 3:45
OFFICE OF ADMINISTRATION
COMMISSIONER

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill exempting certain municipalities from the reporting requirements of the conflict-of-interests laws of the state (AS 39.50). This bill was requested by the Alaska Public Offices Commission in an effort to simplify the conflict-of-interests reporting requirements for small municipalities. Often the smaller municipalities are unable to attract candidates for municipal office because the reporting requirements are too burdensome for would-be candidates. The exemption provided by this bill would permit a municipality to adopt conflict-of-interests procedures which are tailored to local circumstances.

The population limit set in the bill was chosen so that most of the smaller municipalities could benefit. Perhaps the legislature will determine that a smaller population limit would better serve the public interest. I am not set on a particular size limitation. I am only concerned that the smaller municipalities be given a chance to attract the best qualified citizens to serve in municipal office.

Sincerely,

A handwritten signature in cursive script that reads "Bill Sheffield".

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

Page 1 of 2

REQUEST

Bill/Resolution No.: HB 158
 Title: Exempting Certain Municipalities from Conflict of Interest
 Sponsor: _____
 Requestor: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Administration
 Program Category Affected: Independent Operations
 BRU, Program or Subprogram(s) Affected: Alaska Public Offices Commission

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		4.7	4.7	4.7	4.7	4.7
200 TRAVEL		1.0	1.1	1.1	1.1	1.1
300 CONTRACTUAL		3.7				
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		9.4	5.8	5.8	5.8	5.8
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		9.4	5.8	5.8	5.8	5.8
FEDERAL FUNDS						
OTHER						
TOTAL		9.4	5.8	5.8	5.8	5.8

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Jane Barosa Patricia Pittman Phone: 276-4176
 Division: Alaska Public Offices Commission Date: 12/18/84

Approved by Commissioner: Lisa Rudd Date: 12-28-84
 Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
 Legislative Finance
 Legislative Sponsor
 Requestor

House Bill
 Fiscal Note Analysis
 Prepared by Division of Alaska Public Offices Commission
 Department of Administration
 December 18, 1984

Bill: Exempting Certain Municipalities from Conflict of Interest

This fiscal note reflects costs for the initial year revision of the statute and Manual of Instructions, distribution of public information on the change, and audit support for larger municipalities.

<u>Categories</u>	<u>FY 86</u>
(100) Personnel	
Clerk 1V, Range 9A	4.7
Extend seasonal clerk/auditor position for two months to provide audit support to larger municipalities	
(200) Travel	1.0
Provide one annual auditing and information seminar to city clerks in Juneau and Fairbanks	
(300) Contractual	
Printing	1.4
Revise the statute and Manual of Instructions	
Advertisements	.6
Semiannual advertisements in four regional newspapers on the changes in the Law and the regional information seminars	
Professional Services	
37 hours typing for Manual and statute revisions	1.7
	3.7
TOTAL	9.4

February 15, 1985

Jane Barcott
Associate Coordinator
Alaska Public Offices Commission

HB 158 Comments

The Alaska Public Offices Commission recommended this proposed language to the Governor and supports HB 158. The Conflict of Interest Law, AS 39.50, was passed as a citizen initiative in 1975. Currently, 104 cities and boroughs are subject to the Law. Seventy nine cities have populations of less than 1,000.

The statute has two aspects: financial disclosure and "prohibited acts." The primary purpose of the Law is financial disclosure. In small communities, financial interests are widely known. As such, the disclosure requirements serve little public purpose, are poorly understood, and compliance is minimally monitored. The Commission believe the state's interest would be better served by recognizing that the financial disclosure provisions are not appropriate to many localities and by concentrating compliance efforts in communities where disclosure provides the public with information not readily available through other sources.

We surveyed city clerks in January. One question related to exemption of small communities from AS 39.50 unless the area voted otherwise. Of the 46 clerks who responded, 15 indicated they believed their community would support this proposal, 4 replied negatively, and 26 responded they did not know. When asked if such communities should be able to vote to be subject to the Law, 24 answered affirmatively, 3 negatively, and 18 that they did not know.

The provision allowing small communities to vote to require compliance is meant to provide a safeguard for those localities where local citizens believe the requirements of AS 39.50 are suitable.



RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

7/25/89
Date

HB

159

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY
LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HC+RA	2-21-85	3:00 P.M.
	2-20-85	3:00 P.M.
	2-18-85	3:00 P.M.

COMMITTEE REPORT

HOUSE

TRANSPORTATION

(7)

FURTHER: FINANCE

2/1/85

Date: _____

The Committee on COMMUNITY & REGIONAL AFFAIRS has had HB 159

"An Act relating to utilities and encroachments in state airports, public facilities, and highways; and providing for an effective date."

under consideration and recommends:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for HB 159 (CRA) same title
 new title
- and recommends it do pass
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation Zero Fiscal Note Attached
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

[Signature]
[Signature]
[Signature]
[Signature]

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Vote for HB 159
Vote for HB 159
Vote for HB 159

[Signature]

 CHAIRMAN

1 IN THE HOUSE

BY THE COMMUNITY AND REGIONAL
AFFAIRS COMMITTEE

2 CS FOR HOUSE BILL NO. 159 (C&RA)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to utilities and encroachments in
7 state airports, public facilities, and highways; and
8 providing for an effective date."

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

10 * Section 1. AS 02.15 is amended by adding new sections to article 2 to
11 read:

12 Sec. 02.15.102. USE OF AIRPORTS FOR UTILITIES. A utility facil-
13 ity may be constructed, placed, or maintained across, along, over,
14 under, or within a state airport only in accordance with regulations
15 adopted or procedures prescribed by the department and only if au-
16 thorized by a written permit issued by the department.

17 Sec. 02.15.104. RELOCATION OF UTILITY FACILITIES INCIDENT TO
18 AIRPORT PROJECTS. (a) If, incident to the construction of an airport
19 project, the department determines and orders that a utility facility
20 located across, along, over, under, or within a state airport must be
21 changed, relocated, or removed, the utility owning or maintaining the
22 facility shall change, relocate, or remove it in accordance with the
23 order, within a reasonable time set by the department in the order.

24 (b) If the utility facility is not changed, relocated, or re-
25 moved in accordance with the order, any permit authorizing the facil-
26 ity issued by the department under AS 02.15.102 becomes invalid and
27 the facility will be considered an unauthorized encroachment subject
28 to the provisions of AS 02.15.114.

29 (c) The cost of change, relocation, or removal, as defined in

1 AS 02.15.260, ordered under (a) of this section is to be paid as
2 follows:

3 (1) by the department as a cost of airport construction,
4 provided that the utility facility is properly installed in accordance
5 with a permit, or in the absence of a permit, was installed before the
6 effective date of this Act in the proper location in accordance with
7 department regulations;

8 (2) by the utility in all other cases.

9 Sec. 02.15.106. ENCROACHMENT PERMITS. An encroachment may be
10 constructed, placed, changed, or maintained across or within an air-
11 port, but only in accordance with regulations or procedures adopted by
12 the department. An encroachment may not be constructed, placed, main-
13 tained, or changed until it is authorized by a written permit issued
14 by the department, unless the department provides otherwise by regula-
15 tion.

16 Sec. 02.15.108. RELOCATION OR REMOVAL OF ENCROACHMENT. If,
17 incidental to the construction or maintenance of a state airport the
18 department determines and orders that an encroachment previously
19 authorized by written permit must be changed, relocated, or removed,
20 the owner of the encroachment shall change, relocate, or remove it
21 within a reasonable time set by the department in the order. The cost
22 of the change, relocation, or removal shall be paid as provided in
23 AS 02.15.104(c). If the owner does not change, relocate, or remove an
24 encroachment within the time set by the department, the encroachment
25 will be considered an unauthorized encroachment subject to the pro-
26 visions of AS 02.15.114.

27 Sec. 02.15.110. UNAUTHORIZED ENCROACHMENTS. If an unauthorized
28 encroachment exists in, on, under, or over a state airport the depart-
29 ment may require the removal of the encroachment, at the expense of

1 the owner, in the manner provided in AS 02.15.112 - 02.15.114.

2 Sec. 02.15.112. NOTICE OF REMOVAL OF UNAUTHORIZED ENCROACHMENT.

3 Notice shall be given the owner, occupant, or person in possession of
4 an unauthorized encroachment, or to another person causing or per-
5 mitting the encroachment to exist, by serving upon any of them a
6 notice demanding the removal of the encroachment within a time limit
7 set by the department. The notice shall describe the encroachment
8 with reasonable certainty as to its character and location. Service
9 of the notice may be made by certified mail.

10 Sec. 02.15.114. REMOVAL AT OWNER'S EXPENSE AFTER NONCOMPLIANCE;
11 REMOVAL EXPENSE. After a failure of the owner of an unauthorized
12 encroachment to comply with a notice or order of the department under
13 AS 02.15.104, 02.15.108. or 02.15.112, the department may remove the
14 encroachment, or cause it to be removed. The owner of the unauthor-
15 ized encroachment shall pay to the department

16 (1) the expense of the removal of the encroachment;

17 (2) all costs and expenses paid by the state as a result of
18 a claim or claims filed against the state by third parties for damages
19 due to delays because the encroachment was not changed, removed, or
20 relocated according to the order of the department; and

21 (3) costs and expense of suit.

22 * Sec. 2. AS 02.15.260 is amended by adding new paragraphs to read:

23 (15) "cost of change, relocation, or removal" means the
24 entire cost incurred by the utility properly attributed to the change,
25 relocation, or removal of a facility, less the costs for improvements
26 or upgrading over and above the cost of a functionally equal facility;
27 if a facility is to be relocated and replaced with new equipment,
28 there shall also be subtracted from the entire cost the salvage value
29 derived from the old facility;

1 (16) "encroachment" includes a tower, pole, poleline, pipe,
2 pipeline, driveway, private road, fence, billboard, stand or building,
3 or structure or object of any kind that is or has been placed in, on,
4 under, or over a portion of an airport;

5 (17) "utility" includes a corporation, company, individual,
6 or association of individuals, or a lessee, trustee, or court-appointed
7 receiver, that owns, operates, manages, or controls a line, plant,
8 pipeline, or system for furnishing, producing, generating, transmitting,
9 or distributing power, electricity, communications, telecommu-
10 nications, water, gas, oil, petroleum products, coal or other mineral
11 slurry, steam, heat, light, chemicals, air, sewage, drainage not
12 connected with airport drainage, irrigation, or similar products
13 including publicly owned fire and police signal systems and street
14 lighting systems that directly or indirectly serve the public or a
15 segment of the public; "utility" also includes a corporation, company,
16 individual, or association of individuals, or a lessee, trustee, or
17 court-appointed receiver that owns, operates, manages, or controls a
18 system for furnishing transportation of goods or persons by means of a
19 railway, tramway, cableway, conveyor, flume, canal, tunnel, pipeline,
20 or a similar means;

21 (18) "utility facility" includes poles, plants, lines,
22 trenches, bridges, utilidors, tunnels, pipelines, and any other system
23 for furnishing, producing, generating, transmitting, or distributing
24 power, electricity, communications, telecommunications, water, gas,
25 oil, petroleum products, coal or other mineral slurry, steam, heat,
26 light, chemicals, air, sewage, drainage not connected with an airport
27 drainage system, irrigation, or another substance; "utility facility"
28 also includes a system for furnishing transportation of goods or
29 persons by means of a railway, tramway, cableway, conveyor, flume,

1 canal, tunnel, pipeline, or a similar means.

2 * Sec. 3. AS 19.25.200 is amended to read:

3 Sec. 19.25.200. ENCROACHMENT PERMITS. An encroachment may be
4 constructed, placed, changed, or maintained across or along a highway,
5 but only in accordance with regulations adopted by the department. An
6 [NO] encroachment may not be constructed, placed, maintained, or
7 changed until it is [DULY] authorized by a written permit issued by
8 the department, unless the department provides otherwise by regula-
9 tion.

10 * Sec. 4. AS 19.45.001(12) is repealed and reenacted to read:

11 (12) "utility" includes a corporation, company, individual,
12 or association of individuals, or a lessee, trustee, or court-appoint-
13 ed receiver, that owns, operates, manages, or controls a line, plant,
14 pipeline, or system for furnishing, producing, generating, transmit-
15 ting, or distributing power, electricity, communications, telecommu-
16 nications, water, gas, oil, petroleum products, coal or other mineral
17 slurry, steam, heat, light, chemicals, air, sewage, drainage not
18 connected with highway drainage, irrigation, or similar products
19 including publicly owned fire and police signal systems and street
20 lighting systems that directly or indirectly serve the public or a
21 segment of the public; "utility" also includes a corporation, company,
22 individual, or association of individuals, or a lessee, trustee, or
23 court-appointed receiver that owns, operates, manages, or controls a
24 system for furnishing transportation of goods or persons by means of a
25 railway, tramway, cableway, conveyor, flume, canal, tunnel, pipeline,
26 or a similar means;

27 * Sec. 5. AS 19.45.001 is amended by adding a new paragraph to read:

28 (14) "utility facility" includes poles, plants, lines,
29 trenches, bridges, utilidors, tunnels, pipelines, and any other system

1 for furnishing, producing, generating, transmitting, or distributing
2 power, electricity, communications, telecommunications, water, gas,
3 oil, petroleum products, coal or other mineral slurry, steam, heat,
4 light, chemicals, air, sewage, drainage not connected with a highway
5 drainage system, irrigation, or another substance; "utility facility"
6 also includes a system for furnishing transportation of goods or
7 persons by means of railway, tramway, cableway, conveyor, flume,
8 canal, tunnel, pipeline, or a similar means.

9 * Sec. 6. AS 35.10 is amended by adding new sections to read:

10 ARTICLE 6. UTILITIES AND ENCROACHMENTS IN PUBLIC FACILITIES.

11 Sec. 35.10.210. USE OF PUBLIC FACILITIES FOR UTILITIES. A
12 utility facility may be constructed, placed, or maintained across,
13 along, over, under, or within a state public facility only in accor-
14 dance with regulations adopted or procedures prescribed by the depart-
15 ment and only if authorized by a written permit issued by the depart-
16 ment.

17 Sec. 35.10.220. RELOCATION OF UTILITY FACILITIES INCIDENT TO
18 PUBLIC FACILITY PROJECTS. (a) If, incident to the construction of a
19 public facility project, the department determines and orders that a
20 utility facility located across, along, over, under, or within a state
21 public facility must be changed, relocated, or removed, the utility
22 owning or maintaining the facility shall change, relocate, or remove
23 it in accordance with the order, within a reasonable time set by the
24 department in the order.

25 (b) If the utility facility is not changed, relocated, or re-
26 moved in accordance with the order, a permit authorizing the utility
27 issued by the department under AS 35.10.210 becomes invalid and the
28 facility will be considered an unauthorized encroachment subject to
29 the provisions of AS 35.10.270.

1 (c) The cost of change, relocation, or removal, as defined in
2 AS 35.25.020, ordered under (a) of this section is to be paid as
3 follows:

4 (1) by the department as a cost of public facility con-
5 struction, provided that the utility facility is properly installed in
6 accordance with a permit, or in the absence of a permit, was installed
7 before the effective date of this Act in the proper location in accor-
8 dance with department regulations;

9 (2) by the utility in all other cases.

10 Sec. 35.10.230. ENCROACHMENT PERMITS. An encroachment may be
11 constructed, placed, changed, or maintained across or within a public
12 facility, but only in accordance with regulations or procedures adopt-
13 ed by the department. An encroachment may not be constructed, placed,
14 maintained, or changed until it is authorized by a written permit
15 issued by the department, unless the department provides otherwise by
16 regulation.

17 Sec. 35.10.240. RELOCATION OR REMOVAL OF ENCROACHMENT. If,
18 incidental to the construction or maintenance of a state public facil-
19 ity, the department determines and orders that an encroachment pre-
20 viously authorized by written permit must be changed, relocated, or
21 removed, the owner of the encroachment shall change, relocate, or
22 remove it within a reasonable time set by the department in the order.
23 The cost of the change, relocation, or removal shall be paid as pro-
24 vided in AS 35.10.220(c). If the owner does not change, relocate, or
25 remove an encroachment within the time set by the department, the
26 encroachment will be considered an unauthorized encroachment and
27 subject to the provisions of AS 35.10.270.

28 Sec. 35.10.250. UNAUTHORIZED ENCROACHMENTS. If an unauthorized
29 encroachment exists in, on, under, or over a state public facility,

1 the department may require the removal of the encroachment, at the
2 expense of the owner, in the manner provided in AS 35.10.260 -
3 35.10.270.

4 Sec. 35.10.260. NOTICE OF REMOVAL OF UNAUTHORIZED ENCROACHMENT.
5 Notice shall be given the owner, occupant, or person in possession of
6 an unauthorized encroachment, or to another person causing or per-
7 mitting the encroachment to exist, by serving upon any of them a
8 notice demanding the removal of the encroachment within a time limit
9 set by the department. The notice shall describe the encroachment
10 with reasonable certainty as to its character and location. Service
11 of the notice may be made by certified mail.

12 Sec. 35.10.270. REMOVAL AFTER NONCOMPLIANCE; REMOVAL EXPENSE.
13 After a failure of the owner of an unauthorized encroachment to comply
14 with the notice or order of the department under AS 35.10.220, 35.10.-
15 240, or 35.10.260, the department may remove the encroachment, or
16 cause it to be removed. The owner of the unauthorized encroachment
17 shall pay to the department

18 (1) the expense of the removal of the encroachment;

19 (2) all costs and expenses paid by the state as a result of
20 a claim or claims filed against the state by third parties for damages
21 due to delays because the encroachment was not changed, removed, or
22 relocated according to the order of the department; and

23 (3) costs and expense of suit.

24 * Sec. 7. AS 35.25.020 is repealed and reenacted to read:

25 Sec. 35.25.020. DEFINITIONS. In this title, unless the context
26 requires otherwise,

27 (1) "construction" or a derivative of the term "construc-
28 tion" means construction, reconstruction, alteration, improvement, or
29 major repair;

1 (2) "cost of change, relocation, or removal" means the
2 entire cost incurred by the utility properly attributed to the change,
3 relocation, or removal of a facility, less any costs for improvements
4 or upgrading over and above the cost of a functionally equal facility;
5 if a facility is to be relocated and replaced with new equipment,
6 there shall also be subtracted from the entire cost any salvage value
7 derived from the old facility;

8 (3) "department" means the Department of Transportation and
9 Public Facilities;

10 (4) "encroachment" includes a tower, pole, poleline, pipe,
11 pipeline, driveway, private road, fence, billboard, stand or building,
12 or a structure or object of any kind that is or has been placed in,
13 on, under, or over a portion of a public facility;

14 (5) "maintenance" means the preservation of each type of
15 facility as nearly as possible in its original condition as con-
16 structed, or as improved;

17 (6) "public building" means a building owned or controlled
18 and held by the state for government or public use;

19 (7) "public facility" or "public work" means a structure or
20 project constructed or maintained by the department except airports
21 and highways, and includes public buildings, boat harbors, port facil-
22 ities, dikes, jetties, and breakwaters;

23 (8) "utility" includes a corporation, company, individual,
24 or association of individuals, or a lessee, trustee, or court-appoint-
25 ed receiver, that owns, operates, manages, or controls a line, plant,
26 pipeline, or system for furnishing, producing, generating, transmit-
27 ting, or distributing power, electricity, communications, telecommu-
28 nications, water, gas, oil, petroleum products, coal or other mineral
29 slurry, steam, heat, light, chemicals, air, sewage, drainage not

1 connected with public facility drainage, irrigation, or similar prod-
2 ucts including publicly owned fire and police signal systems and
3 street lighting systems that directly or indirectly serve the public
4 or a segment of the public; "utility" also includes a corporation,
5 company, individual, or association of individuals, or a lessee,
6 trustee, or court-appointed receiver that owns, operates, manages, or
7 controls any system for furnishing transportation of goods or persons
8 by means of a railway, tramway, cableway, conveyor, flume, canal,
9 tunnel, pipeline, or a similar means;

10 (9) "utility facility" includes poles, plants, lines,
11 trenches, bridges, utilidors, tunnels, pipelines, and any other system
12 for furnishing, producing, generating, transmitting, or distributing
13 power, electricity, communications, telecommunications, water, gas,
14 oil, petroleum products, coal or other mineral slurry, steam, heat,
15 light, chemicals, air, sewage, drainage not connected with a public
16 facility drainage system, irrigation, or another substance; "utility
17 facility" also includes a system for furnishing transportation of
18 goods or persons by means of a railway, tramway, cableway, conveyor,
19 flume, canal, tunnel, pipeline, or a similar means.

20 * Sec. 8. This Act takes effect July 1, 1985.
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A M E N D M E N T

Offered in the Community &
Regional Affairs Committee

By: Gruenberg
House Bill No. 159

1. Change Title as follows:

"An Act relating to the use of State Airports, Public Facilities and Highways for Utility Encroachment, and other purposes, and providing for an effective date."

2. AS 07.15.090 is amended by adding a new subsection as follows:

(c) In its proprietary capacity acting as agent for the state with respect to any airport facility, the department or any municipality acting in a similar capacity may calculate and grant a credit against fees charged under this section to any air carrier charging passenger tariffs between that airport facility and other destinations which cost no more per mile than the average per mile passenger tariff charged by all regularly scheduled air carriers between the ten most frequently traveled domestic air routes in the contiguous continental United States.

3. Renumber all succeeding sections.

Sec. 02.15.090. Operation and use privileges. (a) State operation. In operating an airport or air navigation facility owned or controlled by the state, the department may enter into contracts, leases and other arrangements covering periods not exceeding 55 years with a person or municipality or the United States, granting the privilege of using or improving an airport or air navigation facility or a portion of it or space in it for commercial or governmental purposes; or conferring the privilege of supplying goods, commodities, services or facilities at an airport or air navigation facility. The department may establish the terms and conditions and fix the charges, rentals, and fees for the privileges or services, which are reasonable and uniform for the same class of privilege or service. These terms, conditions, charges, rentals and fees shall be established with due regard to the property and improvements used and the expense of operation to the state. In no case shall the public be deprived of its rightful, equal and uniform use of the airport, air navigation facility or portion thereof.

(b) Other operation. The department may by contract or other arrangement, upon a consideration fixed by it, grant to any qualified municipality or person for a reasonable period of time the privilege of operating, as agent of the state or otherwise, any airport owned or controlled by the state. No municipality or person granted that privilege may operate the airport other than as a public airport or enter into any contract, lease or other arrangement in connection with the operation which the department may not have undertaken under (a) of this section. (§ 5 E ch 123 SLA 1949; added by § 1 ch 117 SLA 1959)

add new
sec. (c) →

Sec. 02.15.095. Ground transportation: "Courtesy cars." Notwithstanding the provisions of AS 02.15.090(a), the department may not exclude from the streets, roads, highways, parking facilities or other portions of a state-operated airport designated for operation or parking of ground transportation vehicles, nor may the department prohibit from picking up and discharging passengers, those motor vehicles commonly known as "courtesy cars" owned or operated by hotels, motels or other similar places of public accommodation for the transportation of their guests to and from the airport at the request of the guest and for which service no charge is made to the guest. (§ 1 ch 9 SLA 1974)

Sec. 02.15.100. Liens. The department may enforce the payment of any charges for repairs, improvements, storage, or care of personal property made or furnished by the department or its agents, in connection with the operation of an airport or air navigation facility owned or operated by the state. The state has those lien rights generally allowed by law to secure payment for those services. (§ 5 E ch 123 SLA 1949; added by § 1 ch 117 SLA 1959)

COMMITTEE REPORT

HOUSE

TRANSPORTATION

(7)

FURTHER: FINANCE

2/1/85

Date: _____

The Committee on COMMUNITY & REGIONAL AFFAIRS has had HB 160

"An Act relating to relocation of utilities incident to highway projects; and providing for an effective date."

under consideration and recommends:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for NB 160 (C+RA) same title
 new title
- and recommends it do pass
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation Zero Fiscal Note Attached
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

[Signature]

[Signature]

[Signature]

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Signature]

[Signature]

[Signature]

[Signature]

CHAIRMAN

1 (6) "maintenance" means the preservation of each type of
2 facility as nearly as possible in its original condition as construct-
3 ed, or as improved;

4 (7) "public building" means a building owned or controlled
5 and held by the state for government or public use;

6 (8) "public facility" or "public work" means any structure
7 or project constructed or maintained by the department except airports
8 and highways, and includes public buildings, boat harbors, port facil-
9 ities, dikes, jetties, and breakwaters;

10 (9) "utility" includes any corporation, company, individu-
11 al, or association of individuals, or any lessee, trustee, or court-
12 appointed receiver, that owns, operates, manages, or controls any
13 line, plant, pipeline, or system for furnishing, producing, generat-
14 ing, transmitting, or distributing power, electricity, communications,
15 telecommunications, water, gas, oil, petroleum products, coal or other
16 mineral slurry, steam, heat, light, chemicals, air, sewage, drainage
17 not connected with public facility drainage, irrigation, or similar
18 products including publicly owned fire and police signal systems and
19 street lighting systems which directly or indirectly serve the public
20 or a segment of the public; "utility" also includes any corporation,
21 company, individual, or association of individuals, or any lessee,
22 trustee, or court-appointed receiver that owns, operates, manages, or
23 controls any system for furnishing transportation of goods or persons
24 by means of a railway, tramway, cableway, conveyor, flume, canal,
25 tunnel, pipeline, or a similar means;

26 (10) "utility facility" includes poles, plants, lines,
27 trenches, bridges, utilidors, tunnels, pipelines, and any other system
28 for furnishing, producing, generating, transmitting, or distributing
29 power, electricity, communications, telecommunications, water, gas,

House Bill 159

Letter of Intent:

[It is the policy of the state that the Department of Transportation shall accommodate the safe placement of utility facilities in state airport ~~rights of way~~ and public facility rights of way.

House Bill ~~159~~ 160

Letter of Intent

It is the policy of the state that the Department of Transportation shall accommodate the safe placement of utility facilities in state highway rights of way.

HB160
as follows:

by the department as a cost of highway construction if the utility facility is properly installed in accordance with a permit issued under regulations adopted by the department;

by the department or by the utility where installation is made without permit, but under departmental authorization made under regulation; or

by the utility in all other cases.

JUST
a
DRAFT

1 IN THE HOUSE

2 HOUSE BILL NO. 160

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to relocation of utilities incident
7 to highway projects; and providing for an effective
8 date."

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

10 ~~* Section 1 AS 19.25.020(c) is amended to read~~

* Section 1 AS 19.25.010 is amended to read:

Sec. 19.25.010 Use of rights-of-way for utilities. It is the policy of the Department to accomodate the safe placement of utility facilities in state highway rights-of-way.

* Section 2 AS 19.25.020(c) is amended to read:

11 (c) The cost of change, relocation, or removal necessitated by
12 highway construction is [A COST OF HIGHWAY CONSTRUCTION] to be paid
13 [BY THE STATE] in accordance with AS 19.45.001(4) as follows:

14 (1) by the department as a cost of highway construction if
15 the facility was installed before July 1, 1960 regardless of whether
16 the facility is authorized by a permit at the time the change, relo-
17 cation, or removal of the facility is required;

18 (2) by either the department as a cost of highway con-
19 struction or by the utility, depending on the terms of the utility
20 permit if the facility was installed or authorized under the authority
21 of a utility permit issued after July 1, 1960;

22 (3) by the utility if the facility was installed after July
23 1, 1960, and there is no utility permit for the facility;

24 (4) by the utility if the facility is not installed in the
25 location provided for in the utility permit, regardless of whether the
26 utility permit requires payment by the department

(1) by the Department as a cost of Highway construction, provided that the utility facility is properly installed in accordance with

a permit or in the absence of a permit was installed in accordance with Department Regulations effective July 1, 1985; 17 AAC 10 & 15;

(2) by the Utility in all other cases.

[, NOTWITHSTANDING

27 THE TERMS OR PROVISIONS OF ANY EXISTING PERMIT, AGREEMENT, REGULATION
28 OR STATUTE TO THE CONTRARY].

29 * Sec. 2. This Act takes effect July 1, 1985.

* Sec 3.

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
AMENDMENT TO UTILITY PERMIT FOR PLACEMENT
OF UTILITY FACILITIES WITHIN HIGHWAY RIGHTS-OF-WAY

This agreement between the Department of Transportation and Public Facilities (hereinafter referred to as the DEPARTMENT) and _____ (hereinafter referred to as the UTILITY) amends those provisions of all utility permit agreements between the DEPARTMENT and the UTILITY existing on the effective date of this amendment that relate to the question of who shall bear the cost of change, relocation, adjustment, or removal of utility facilities located within highway rights-of-way when such change, relocation, adjustment or removal is necessitated by highway construction. Notwithstanding any existing language to the contrary, the cost of change, relocation, adjustment, or removal of utility facilities located within highway rights-of-way shall be apportioned as follows:

If the utility facilities have been installed in accordance with the provisions of the existing permit, then the cost of change, relocation, adjustment, or removal of these facilities necessitated by highway construction is a cost of that highway construction to be paid by the State in accordance with AS 19.45.001(4).

"Cost of change, relocation, or removal" as used here means the entire cost incurred by the utility properly attributed to the change, relocation, or removal of a facility, less any costs for improvements or upgrading over and above the cost of functionally equal facility; if a facility is to be relocated and replaced with new equipment, there shall also be subtracted from the entire cost any salvage value derived from the old facility.

The intent of this Amendment is to provide assurance that the UTILITY will not be required to bear the cost of any change, relocation, adjustment or removal of its facilities as a result of highway construction provided that the facilities were installed under the authority of a valid existing permit and have been properly located according to the terms of that permit.

This amendment becomes effective as of the date of the Department representative's signature.

Approval:

UTILITY

DEPARTMENT

Authorized Representative

Authorized Representative

Position

Position

Date

Date

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 159
 Title: Utility Relocation-Airport
& Pub. Fac. Construction
 Sponsor: DOT&PF
 Requestor: Commissioner
 Date of Request: _____

FISCAL DETAIL

Agency Affected: DOT&PF
 Program Category Affected: Utilities
 BRU, Program or Subprogram(s) Affected:
N/A

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
500 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars) N/A

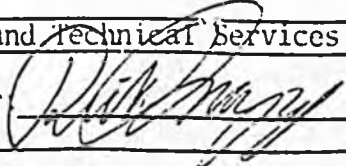
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: N/A

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSTS: Attach a separate page if necessary

See attachment.

Prepared By: Bruce R. Freitag Phone: 465-2957
 Division: Standards and Technical Services Date: 10/17/84
 Approved by Commissioner:  Date: 10/15/84
 Agency: DOT&PF

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

Utility Relocation - Airports and Public Facilities Construction

Analysis

The need for this law is to provide statutory authority for the accommodation and relocation of utility facilities within State rights-of-way for the other Department modes - airports, harbors, and public buildings - similar to what AS 19.25.010 - 19.25.020 presently allows for State highways.

We don't anticipate any Department fiscal impact because we are presently reimbursing utility facility relocation costs for these modes if they meet code and are under permit. However, no statute authority for this reimbursement presently exists. In 1981, department policy evolved to allow for this reimbursement.

We don't anticipate any opposition to this proposal.

We don't anticipate any savings/costs differences from the present situation due to this proposal for either the Department or the Utility.

This law would provide statutory authority for the Department to permit utility facility accommodation/relocation reimbursement similar to that presently allowed within highway rights-of-way. Also, this Act is necessary for consistency with highway projects, and housekeeping for the Department operations.

SUMMARY/EXPLANATION OF INTENT

This legislation would provide the State a means to require proper utility installment, and to ensure that the utility companies are financially responsible for relocating utility facilities when they were illegally placed in State right-of-ways. It would also provide the State statutory authority to issue utility permits for proper utility facility installations in airports, public buildings and harbors, and reimburse utility companies for facility relocation due to State construction projects.

Utilities And Encroachments Within State Rights-Of-Way At
Airports And Public Facilities

The need for this legislation is to provide statute authority for the accomodation and relocation of utility facilities within State Rights-Of-Way for other Departmental modes - airports, harbors, and public buildings. This addition would be similar to what AS 19.25.020 presently allows for State Highways. Statute authority presently doesn't exist to allow for relocation reimbursement.

Mailbox Permits - ANALYSIS

AS 19.25.200 requires written permits for all encroachments within the highway rights of way. Historically, no permits have been issued for mailboxes within the right-of-way. Recently the Ombudsman's office criticized the Department for not complying with statutory and regulatory laws concerning issuance of permits for encroachments, indicating a need to either issue permits for mailboxes or modify the law so permits are not required as a general rule.

If permits were to be issued in accordance with present law, substantial field and office work would be required with virtually no increase in either the safety or efficiency of our transportation system. First, a complete inventory of all rural roadways would be required to determine the location and addressee of each mailbox. Second, permits would have to be written and mailed to each mailbox owner. Based on the costs of our continuing photologging inventory, we estimate the mailbox inventory at \$200,000 over a three year period. (The photologging images alone do not provide sufficient information from which to compile a mailbox inventory). Assuming 10,000 mailboxes presently exist and each permit takes five minutes to complete, the cost of writing the initial permits equals approximately \$20,000 and the cost of mailing same equals \$2,000.00. Consequently, the total cost over a three year period to inventory and issue permits for 10,000 existing mailboxes would approximate \$222,000, or approximately \$22/box.

In addition to the initial expense there would be continuing expenses to maintain the permit system for mailboxes. Estimated cost to maintain the mailbox permit system is \$5,000/annum.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 19, 1985

SUBJECT: Alaska's Airline Industry
(Work Order No. 14-0620)

TO: Representative Gruenberg
Chairman,
Health, Education, & Social Services Committee

FROM: Michael F. Ford *M.F.*
Legislative Counsel

You have requested that I examine Alaska's airline industry to determine if there is any method by which the state could affect the prices being charged for travel between Alaska and the other States. The price of air travel is generally recognized as being higher per air mile between Alaska and points south, than between equivalent distances in the continental U.S..

Under the Airline Deregulation Act of 1978 (P.L. 95-504), the restrictions on raising or lowering fares for domestic travel were minimized. Other than a thirty day notice requirement, the airlines have been able to set fares as they wish. In some markets this has resulted in lower fares as competition has grown, in some markets such as Alaska, the deregulation has not appreciably lowered prices. The power of the state to affect interstate travel is limited by the doctrine of federal preemption. In essence the federal government's authority over this area preempts any efforts by the state to regulate or affect the prices charged by carriers for interstate travel.

This does not mean that the state cannot act at all, simply that it must act without intruding upon that area controlled by federal law. The Airline Deregulation Act (P.L. 95-504) addressed this question in section 4(a) and provided that no state could enact any law, regulation, or other provision having the force or effect of law relating to rates, routes, or services of any interstate air carrier. This prohibition

contains an exception however, as regards a State's proprietary powers and rights as the owner or operator of an airport. As an owner, the state exercises proprietary rights in charging the air carriers fees for landing, parking, terminal space and fuel. The two places in which Alaska exercises such rights are Anchorage and Fairbanks, through the Department of Transportation and Public Facilities.

It is possible that the state could use it's proprietary powers to advance a consumer interest, such as lower airfares. Assuming that the state is legitimately charging for the use of it's facilities through the use of landing, parking, space and fuel fees, the state could give a credit against those charges to those air carriers who maintain a particular airfare. This would be intended to encourage lower airfares for customers, at no cost to the air carrier. To be a permissible law, it is important that the credit be a function of the State's proprietary powers, and not an effort to require air carriers to set specific airfares. Although an air carrier could still argue that the state is attempting to regulate air fares, and hence is violating federal law, this approach would appear to have a good chance of surviving a court challenge. Assuming that the credit would be entirely optional with the air carrier, it would seem difficult to argue that the state is imposing a burden on interstate commerce, or violating federal pre-emption of the control of airfares.

It is also possible that a close examination of the charges made for the use of Alaska's airports would reveal an additional tax or fee could legitimately be charged that is not being collected at present. If so, the state would not be losing any revenues currently going into the general fund. The amount of revenue that could be collected is governed by federal law, 49 U.S.C. 1513.

I have contacted the state D.O.T.P.F. and requested further information on the calculation of the particular fees being collected for the use of airport facilities. I have also spoken to the federal D.O.T. concerning calculation of airline tariffs. I will also be receiving information on the methodology of determining costs per airline mile. Assuming that a credit system is implemented, it will be necessary to develop a method for comparing costs between particular air routes.

All of the above also assumes that the state is willing to forego revenue from airport fees in order to promote